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| **From:** | Victoria Lane (Brodies Solicitors) |
| **To:** | Hornsea Project Three |
| **Cc:** | Karen Hamilton (Brodies Solicitors) |
| **Subject:** | Spirit Energy"s comments on the Applicant"s responses to the ExA"s questions [BRO-D.FID4510105] |
| **Date:** | 23 January 2019 20:31:46 |
| **Attachments:** | image002.png<br>image004.png<br>image006.png<br>image008.png<br>image010.png<br>image012.png<br>Spirit Energy_s comments on the Applicant_s response dated 15 Jan 2019 - dated 23 Jan 2019_44532017_1.PDF<br>[2017] EWCA Civ 787_44531729_1.PDF<br>[2012] UKSC 13_44531741_1.PDF<br>[2017] UKSC 37_44531751_1.PDF |

**CONFIDENTIAL MESSAGE - INTENDED RECIPIENT ONLY**

Dear Sirs

Please find attached Spirit Energy's comments on the Applicant's responses to the Examining Authority's questions of 19th December 2018. I also attach copies of the three appendices referred to within Spirit Energy's comments.

Kind regards,

Victoria

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# SPIRIT ENERGY


# COMMENTS ON THE APPLICANT'S RESPONSES TO EXAMINING AUTHORITY'S QUESTIONS OF 19TH DECEMBER 2018 – 23rd JANUARY 2019

**INTRODUCTION**

**1 This document forms Spirit Energy's response to various key points raised in response to the Applicant's Responses to the Examining Authority's questions of 19th December 2018 ("the Questions").**

**2 Spirit Energy's principal position in response to the Questions remains as set out in its own Responses of 15th January 2019.**

**3 Within this document silence on any matter should not be taken to imply agreement with any aspect of the Applicant's Responses.**

| **Examining Authority Question / paragraph reference from the Applicant's response** | **Issue or assertion identified by Spirit Energy in the Applicant's response** | **Spirit Energy's comments** |
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| Para 1.5.1.2 | The Applicant's offer of protective zone around C6 and C7 | Spirit Energy confirms that it received a without prejudice proposal from the Applicant which is receiving consideration. Spirit Energy welcomes the fact that the Applicant is considering alternative solutions – as Spirit Energy has also been doing. |

| Examining Authority Question / paragraph reference from the Applicant's response | Issue or assertion identified by Spirit Energy in the Applicant's response | Spirit Energy's comments |
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| Para 1.5.1.6<br><br>Q2.5.13 | EN-1 part 5.4, EN-3 part, section 2.6, and CAP 764 and the Applicant's case that these policies do not impose an "additional test" on the Applicant to undertake an "ALARP assessment":<br><br>• Applicant's interpretation of Spirit Energy ALARP process – approach "too | Introduction<br><br>In summary -<br><br>• on a plain reading (and adopting orthodox reading of policy), the relevant national policy statement terms engender an expectation of a requirement on the Applicant (not on Spirit Energy) to reduce risks potentially affecting Spirit Energy's assets and activities to as low as reasonably practicable (ALARP). The Applicant has not discharged its obligation;<br><br>• there is, however, information (evidence of fact and not EIA opinions) available to the Examining Authority and Secretary of State (as well as to the Applicant) and already contained within the ES which allows the potential affects and resulting risks to be reasonably identified;<br><br>• on the basis of that same material the Applicant has not excluded wind turbines from within 7.5nm of Spirit Energy's assets and so cannot have discharged national policy statement |

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| | contractual" (p82)<br><br>• Tests met if project does not impose a change to aviation risk for each flight (p84)<br><br>• Potential for operational effect (whether flight can proceed) is relevant effect to be assessed (p84)<br><br>• Applicant not in a | expectations upon the Application to ALARP;<br><br>• on the evidence of fact in the ES and as acknowledged by the Applicant, the development of WTGs within the "aviation zone" [Figure 7.10 of ES Annex 8.1] leads to a reduction in the available days on which helicopters may access Spirit Energy's assets;<br><br>• this reduction necessarily changes (by an increase in risk) the currently approved ALARP thresholds for Spirit Energy's assets and activities, and so, by definition, the change cannot be ALARP;<br><br>• the relevant national policy, therefore, continues to require the Applicant to have already reduced this risk to ALARP by siting and design, which the Applicant has the flexibility to do within the Rochdale Envelope approach but has not yet done;<br><br>• DCO terms ensuring no WTGs in the aviation exclusion zone reduces the risk to the current |

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| | position to make ALARP assessment – economic assessment (p83)<br><br>• Air Regulations ensure risk is ALARP for each flight (p84) | ALARP level;<br><br>• In the absence of the Applicant unilaterally providing the same in its DCO (to ensure ALARP) Spirit Energy's currently proposed protective provisions allow this to be achieved and the Application granted; and<br><br>• Nonetheless Spirit Energy is continuing to work with the Applicant to identify whether refined protective provisions may be acceptable.<br><br>The same position applies in relation to Spirit Energy's concerns on marine activity (requirement for a 2nm exclusion zone) and the proposed wells, C6 and C7.<br><br>These matters are discussed in more detail below. |

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| | | **Early Notice of Concerns**<br><br>Spirit Energy drew the attention of the Applicant to Spirit Energy's concerns over flight practicalities; future exploration; maximising securing of petroleum for strata (e.g. for C6 and C7), and of risk assessment methodology as early as September 2016 and 2017 (see ES Vol 2, Chapter 11, row 2 of page 6 and row 1 of page 12, in Table 11.4) and highlighted that "what is considered intolerable from a safety perspective are incorrectly evaluated as not posing a significant impact".<br><br>It is not for Spirit Energy to instruct the Applicant how to prepare its Application. EN-3, paragraph 2.6.184 itself deems Spirit Energy's concerns as "adverse [likely significant] effects" required to be attributed "substantial weight" and the Applicant is not entitled to rewrite by its ES that deeming provision to read "minor adverse". Nevertheless, the Applicant's response (set out in Table 11.4 on page 12 in relation to shipping, vessel displacement, and aviation), is exclusively concerned with EIA and shows no ALARP consideration nor actual consideration of EN-3, paragraph 2.6.183. By so |

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| | | bypassing 2.6.183, the Applicant's approach, and its failure to identify itself the 7nm diameter green areas in Figure 7.10 as "exclusion zones", shows a failure to comply with its obligations under EN-3, paragraph 2.6.180 to "aim to resolve as many issues as possible prior to submission of an application to the [Examining Authority]" and also 2.6.184 to design its scheme to "avoid or minimise disruption or economic loss or any adverse effect on safety". The Applicant is therefore in breach of the EN-3 provisions.<br><br>**<u>Current Envisaged Measures</u>**<br><br>The Applicant's proposed mitigation measures in relation to the acknowledged constraints to air space and flights are unilateral changes to orthodox CAA authorised operational procedures. It is not known whether such changes would be approved by the CAA, and furthermore whether the resulting changes to Spirit Energy's safety cases would be approved by the Health & Safety Executive.<br><br>In these circumstances, EN-3, paragraph 2.6.184 requires the Examining Authority to "not consent" the |

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| | | Application.<br><br>**<u>Proposed Air and Sea Exclusion Zones</u>**<br><br>Spirit Energy continues to refine its proposed protective provisions to ensure that the expectation upon the Applicant is discharged and that the Examining Authority is in a position where it can recommend a grant of the Application, at the same time as ensuring successful co-existence pursuant to EN-3, paragraph 2.6.181.<br><br>**<u>Detailed Reply</u>**<br><br>In more detail, contrary to the Applicant's position that Spirit Energy has read EN-3 in a contractual manner, Spirit Energy has not. Spirit Energy has read the plain words of EN-1, paragraphs 4.2.11 and EN-3 2.6.182 to 186 as policy and adopted the objective approach to reading and to the interpretation of policy. See *R (oao Scarisbrook) v SoSCLG* [2017] EWCA Civ 787 [Appendix 1] at paragraphs 19 and 60, applying [2012] UKSC 13 [Appendix 2] and [2017] UKSC 37 [Appendix 3] to the reading of a |

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| | | National Policy Statement for the purposes of the Planning Act 2008.<br><br>Contrary to the contention that EN-3 paragraph 2.6.183 can be met if there is no change to aviation risk for each flight, EN-3 does not say that and the Applicant appears to apply a contractual approach to subvert or avoid the plain words of 2.6.183.<br><br>Contrary to the assertion that the "relevant effect" to assess is the "operational effect", the terms of EN-3 are not confined to "operational effects" of flights but instead paragraph 2.6.183 addresses (broadly) situations where a wind farm "potentially affects other offshore infrastructure or activity" and resulting "risks". The relevant criteria to address are "potential affects" and "risks".<br><br>By its responses, the Applicant appears to accept that it has not satisfied the terms of EN-3, paragraph 2.6.183 because it is taking issue with what they mean. The Applicant contends that it is not "expected" by the Examining Authority and Secretary of State "to reduce risks to as low as reasonably practicable". Spirit Energy responds that: a) the plain wording of EN-3 paragraph 2.6.183 states: "In such |

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| | | circumstances the [Examining Authority] should expect the applicant to minimise negative [likely significant impacts] and reduce risks to as low as reasonably practicable". The "and" shows that an additional criteria must be satisfied; b) the "circumstances" are those where a "potential affect" arises (not a "likely significant effect").<br><br>The evidence before the Examining Authority and Secretary of State shows such "potential affects" (see ES, Annex 8.1 paragraph 7.4.1.4; 7.4.3.1; 7.4.4.11; & Tables 7.3; 7.4; 7.6 & 7.9; & Figure 7.10 (Cumulative constrained approach). The scope of "potential affects" in EN-3 paragraph 2.6.183 is not limited by EN-1 paragraph 4.2.11 to only those "likely significant effects". The evidence also before the Examining Authority shows these "potential affects" satisfy the ordinary meaning of "risks" (whose ordinary meaning includes "a situation involving exposure to danger; exposure to the possibility of loss, injury, or other adverse circumstance".) See e.g. ES Annex 8.1, paragraphs 7.4.4.14 & 7.4.4.17 & Figure 7.7; ES Vol 2, Chapter 8, paragraphs 8.7.4.13; 8.11.2.34 ("safety implications include a potential impact upon the integrity of offshore platform Safety Cases that are based on the use of helicopters to facilitate evacuation procedures"); ES, Annex 8.1, paragraphs 7.4.1.4 ("combined effects within a 9nm |

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| | | consultation zone of an offshore installation may impair the safety of air operations to that installation and affect the installation operators' regulatory requirements with regard to safety of operation"); 7.4.3.1 ("airspace that is required to fly a MAP [is] not available due to the presence of turbines… For obvious safety reasons, a MAP involving a climb from the minimum descent height needs to be conducted in an area free of obstacles"); 7.4.1.4 ("Wind turbines are considered as physical obstacles and infringe the minimum obstacle clearance criteria of 1,000ft").<br><br>Further, in its CAP 764, paragraph 1.4(1), the Government's independent regulator and civil aviation advisor policy in wind energy is that: "Wind turbine developments and aviation need to co-exist in order for the UK to achieve its binding European target to achieve a 15% renewable energy commitment by 2020, and enhance energy security, whilst meeting national and international transport policies. However, safety in the air is paramount and will not be compromised." This policy aligns with paragraph 3.3.1(1) ("Basic Requirement") to ensure an obstacle free volume of airspace. See also CAP 764, paragraph 3.32 CAA advice: "Obstacles within 9 NM of an offshore destination would potentially impact upon the feasibility to conduct some helicopter operations (namely, low visibility or missed approach |

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| | | procedures) at the associated site…. Owing to the obstruction avoidance criteria, inappropriately located wind turbines could delay the descent of a helicopter on approach such that the required rate of descent (at low level) would be excessive and impair the ability of a pilot to safely descend to 200/300 ft by the appropriate point of the approach (2 NM). If the zone is compromised by an obstruction, it should be appreciated that routine low visibility flight operations to an installation may be impaired with subsequent consequences for the platform operator or drilling unit charterer. One such consequence could be that the integrity of offshore platform or drilling unit safety cases, where emergency procedures are predicated on the use of helicopters to evacuate the installation, is threatened. Additionally, helicopter operations to wind farms may impact on oil and gas operations."<br><br>Spirit Energy agrees with the CAA advice.<br><br>In those circumstances, the Applicant is reasonably able to discharge Parliament's "expectation" by limiting the easterly extent of turbine presence so as to not situate any turbines within the green coloured areas identified in ES Annex 8.1, Figure 7.10, being "7nm" (in fact, 7.5nm) from Chiswick, |

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| | | Grove, and J6A. C6 and C7 should be similarly protected.<br><br>In that way, the Applicant will have reduced the risk to as low as reasonably practicable and so discharged the "expectation" of the Examining Authority and Secretary of State cast upon it by EN-3, paragraph 2.6.183. That remains the available case today.<br><br>Instead, the Applicant expects Spirit Energy to change its subsisting practices or that other environmental regimes (e.g. Air Regulations) operate as a proxy to entitle the Applicant to avoid EN-3 paragraph 2.6.183. However, it is trite law that the Applicant is not entitled to rewrite EN-3, paragraph 2.6.183 to suit its case, nor is it entitled to make that paragraph mean something that it wants it to mean, nor can a different regime for different purposes be used by the Applicant to avoid or subvert paragraph 2.6.183 expectation upon it.<br><br>The Examining Authority cannot, therefore, be satisfied that the Applicant "has" approached site design "with a view to avoiding or minimising disruption or economic loss or any adverse effect on safety to |

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| | | other offshore industries". See EN-3, paragraph 2.6.184.<br><br>The Applicant's recent proposal to confine the available airspace volume and unilaterally restrict otherwise available operational procedures to flights serving Chiswick, Grove and J6A itself evidences that without such proposals, the Application (in Rochdale envelope form) would "pose an unacceptable risk to safety after mitigation measures have been considered".<br><br>It is important to distinguish between risk during flights and risks to personnel on installations that rely upon the availability of flights to minimise risks. Spirit Energy will only permit flights to take place when it is safe to do so. The risk to personnel during a flight would therefore remain ALARP. The effect of the windfarm would be to reduce the occasions on which such safe flights could be conducted.<br><br>On a NUI the main impact is that once people are on platform, the greater the restrictions to helicopter operations, the greater the chance that it may not be possible to collect them. The longer people stay on a NUI, the greater the risk to them. Thus reduced weather windows for helicopters results in an |

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| | | increased risk to personnel from the current ALARP level.<br><br>On a manned installation (which includes drilling rigs, crane barges, accommodation vessels and dive support vessels), helicopters provide the primary means of evacuation. Alternative methods of evacuation expose personnel to greater risk of injury. Therefore a reduction in the availability of helicopter flights results in an increase in risk to personnel on installations above the current level which is ALARP (the specific risks to personnel are as outlined above in this comment). |
| Q2.5.13 | Chiswick and Grove platforms are not presently operating to ALARP. | The Applicant's suggestion that Chiswick and Grove are not ALARP is incorrect and misplaced.<br><br>Spirit Energy complies with and operates within the parameters set out by relevant legislation and the installation Safety Cases – the latter being approved by the Health and Safety Executive. Where, from time to time, regulatory changes or operational requirements dictate, equipment is upgraded. For this reason circle and H lighting has been installed on both Chiswick and Grove as has an upgrade to semi-automated firefighting and foam equipment. |

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| Para 1.5.1.11 – 1.5.1.12<br><br>Q2.5.17 | Spirit Energy's comments on progress made since 17 December 2018<br><br>• Relevance/significance of tables referred to (p99)<br><br>• What was agreed re approach to helicopter providers (p99) | The meeting on 17th December allowed Spirit Energy and the Applicant to each better understand the basis of their respective positions. In the interests of promoting a creative approach to finding common ground, it was agreed that notes would not be taken and no minutes issued. A number of actions were agreed in the meeting although the Applicant's narrative and the appendices included with the Applicant's Deadline 4 submission are the Applicant's interpretation of how to fulfil these actions and are not recognised by Spirit Energy as representative of matters agreed at the meeting.<br><br>The main action agreed was to jointly (and not as stated by the Applicant, for the Applicant to) consult with the helicopter industry serving the North Sea as to the extent to which current standard operating procedures (which are more demanding than legal minima) could be modified and still ensure safe and legal flying practices. Tabulations of current operating minima were to be prepared in support of this dialogue. Spirit Energy prepared a draft letter to the helicopter operators and this draft was commented on by the Applicant. A revised draft taking into consideration the Applicant's comments has been returned to the Applicant. Spirit Energy is also pursuing other work arising from the meeting. One such action which has been completed was for Spirit Energy's marine consultant to meet with the Applicant's |

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| | | marine consultant to review the data, assumptions and modelling of future vessel routes (see further comments on Q2.5.8 below).<br><br>The meeting also provided clarifications which form the basis of some of Spirit Energy's Deadline 4 submission in respect of Q2.5.14. |
| Q2.5.8<br><br>Q2.5.9 | Re-routing of vessels on north-south commercial routes | A meeting took place between Anatec (the Applicant's marine consultants) and Spirit Energy's marine consultants on 16 January 2019 to discuss Anatec's methodology and data regarding the levels of vessel traffic to be expected in the vicinity of Spirit Energy's installations following installation of the Hornsea 1, 2 and 3 turbine arrays. Spirit Energy is considering the matters discussed at this meeting and is pursuing some additional enquiries by way of follow up in order to inform any future discussions with the Applicant. |
| Q2.5.11 | Drifting vessels and allision risk | Spirit Energy is aware of the Oil Companies International Marine Forum study. This study along with |

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| Q2.5.12 | • Ref to study by Oil Companies International Marine Forum – theory of drift speeds<br><br>• No reference to allision risk by Spirit Energy at Hazard Workshop in Feb 2017 (p82) | other published work forms the basis of Spirit Energy's marine operations which we believe are consistent with practices used by other Operators. On the bases of these:<br><br>a. Estimated drift speeds for laden tankers can be expected to be almost four knots;<br><br>b. Estimated drift speeds for tankers in ballast can be expected to be almost five and a half knots;<br><br>c. These figures take no account of tidal streams.<br><br>Spirit Energy observes that many windfarm related vessels, e.g. jack up installation vessels with legs in raised condition, barges with tripod foundations/transition pieces etc are of shallow draft with high windage and are therefore prone to higher drift speeds (see photo example previously submitted in Spirit Energy's Deadline 4 submission in respect of Q2.5.11 of barge and tripod foundations). It should also be noted that, even where a tug is nearby, the time required to secure and tow a drifting vessel to safety increases with wind speed and can be up to 1 hour. |

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| | | Overall therefore Spirit Energy contends that the speeds quoted of anywhere between four knots and the speeds achieved by the Saga Sky exemplar are comfortably within the range which should be considered as worst case scenarios.<br><br>At the hazard workshop held in February 2017 as part of the pre-application consultation in relation to the Application, Spirit Energy (or Centrica Energy as was then) was in data gathering mode and its understanding of the potential risks and hazards created by the wind farm was developing and has been developed since that time. At each stage of the pre-consultation and then Examination processes, Spirit Energy has sought to accurately convey its understanding of the potential risks and hazards to its operations and work to the Applicant in order to resolve them. That a matter was not raised at such an early consultation meeting cannot be deemed to infer that Spirit Energy had or has no concerns. |
| Q2.5.14 | Impacts on instrument approaches and reasons for differences between the | The Applicant has proposed a number of helicopter operating practices that, whilst meeting minimum legal requirements, do not comply with recognised guidelines used by the oil and gas industry. The oil & gas industry places a very strong emphasis on safety and therefore adopts practices in a number of |

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| | Applicant's and Spirit Energy's assessments<br><br>• Emphasise further why IOGP guidance is relevant – why they have chosen to opt for (mainly) more stringent criteria/rules (p89)<br><br>• | areas that go beyond legal requirements. For example, most oil & gas companies prohibit anyone driving on behalf of the company to make or receive mobile phone calls even if the car is equipped with a hands-free system. The IOGP Aviation Guidance represents industry best-practice borne out of experience in the field, including incidents involving injury or loss of life to personnel or damage to assets. Many oil & gas operators apply even more stringent criteria than contained in the IOGP Aviation Guidance. The Applicant's unilaterally proposed practices need to be reviewed by the helicopter operators, industry bodies such as IOGP and Helioffshore and the implications of adopting these practices discussed with CAA and the Health and Safety Executive (who ultimately decide whether Spirit Energy's Safety Cases are approved).<br><br>This approach is supported by key CAA guidance. CAP 764, paragraphs 1.4; 1.20; 1.22(1)-(5), and at 2.32 provides that: "Any new hazards [here, envisaged wind turbines] should be identified and assessed to determine if mitigations are adequate to reduce risks to an acceptable level; this should be in accordance with the service provider's Safety Management System (SMS) Risk Assessment and Mitigation process. Ultimately, failure to address such issues may result in withdrawal or variation of the |

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| | | article 169/ 205 Approval/Designation thereby preventing the provision of the air navigation service."<br><br>See also paragraphs 2.40-41 and Chapter 3. Paragraph 2.40 states:<br><br>"Wind energy developments (including anemometer masts) within a 9 NM radius of an offshore helicopter installation could introduce obstructions that would have an impact on the ability to safely conduct essential instrument flight procedures to such facilities in low visibility conditions. Consequently, any such restrictions have the potential to affect not only normal helicopter operations but could also threaten the integrity of offshore installation safety cases where emergency procedures are predicated on the use of helicopters to evacuate the installation."<br><br>And the CAA's independent advice to Government remains at CAP 764, paragraph 1.4(1): "Wind turbine developments and aviation need to co-exist … However, safety in the air is paramount and will not be compromised." |

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| | | Until the CAA and these other parties accept the proposals, it is not reasonable for the Applicant to make its assessment based on such unilateral practices and to ignore the CAA's standing independent advice to Government: recognising the need for co-existence between wind turbine developments and the aviation industry but recognising that safety in the air cannot be compromised.<br><br>It should be noted that, contrary to the Applicant's contentions using its own EIA methodology in the ES, the use of these revised helicopter procedures such as en-route descent and shuttle flights would in itself still have a significant impact upon helicopter operations to Spirit Energy's assets. See EN-3, paragraph 2.6.185 which (with EN-1, paragraph 4.2.11) deems likely effects on safety to be an "adverse [likely significant] effect".<br><br>In relation to the underlying evidence before the Examining Authority and the Secretary of State of risk and potential effects on safe operation, further analysis of Spirit Energy's met-ocean data shows that:<br><br>- Currently (with no windfarm) people can be flown to Chiswick and collected ~9hrs later: 85% of the time. (Note: This is lower than may have previously been stated as Spirit Energy has been |

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| | | reviewing and refining its analysis and recognised that in addition to windspeed and sea-state limitations there are also minimum cloud base and visibility requirements in order to fly.)<br>- With the windfarm in place (assuming the worst case in terms of turbine height), and assuming all of the changes in helicopter procedures proposed by the Applicant, it would only be possible to fly people to Chiswick and collect them ~9hrs later: 68% of the time.<br>- The windfarm results in a loss of flying opportunities equivalent to 62 days/year. This contrasts with the Applicant's statement: "The outcome of the assessments carried out by the Applicant (Paragraph 8.11.2.43 of Volume 2, Chapter 8: Aviation Military and Communication of the Environmental Statement) indicate that there would be no restrictions to the Chiswick platform in visual meteorological conditions (VMC) and restriction in instrument meteorological conditions (IMC) on approximately 0.17 to 0.40 days per month (up to 3.49 days per year) with the greatest impact seen in April when 1.35% of flights may be precluded and the lowest impact seen in August when 0.56% of flights may be precluded."<br><br>This reduction in currently available candidate days for flights has both an operational effect and |

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| | | adversely affects the ability to ensure the risks to personnel on installations remain ALARP. |
| Q2.5.22 | Comments on protective provisions<br><br>• Why protection for C6 and C7 should not be left to future proximity agreement (p103)<br><br>• Comment that access is by vessel (para. 1.5.1.29) – so why is aviation | A Proximity Agreement will limit liability for the party carrying out the work and in return the other party gains access to and will approve proposed workplans relating to the work that impacts their assets. Once wind turbine generators are in place, Spirit Energy would not be able to fly to a rig at these locations and a Proximity Agreement would not be able to change that, hence need for Protective Provisions. In any event there is no guarantee that a Proximity Agreement will be concluded.<br><br>The vessels referred to are drilling rigs, dive support vessels etc) all of which are serviced by helicopters. |

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| | relevant | |

## APPENDICES

1. *R (oao Scarisbrook) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787
2. *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13
3. *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another Cheshire East Borough Council v Secretary of State for Communities and Local Government and another* [2017] UKSC 37

# R. (on the application of Arthur Scarisbrick) v Secretary of State for Communities and Local Government v Whitemoss Landfill Ltd.

Case No: C1/2016/0761

Court of Appeal (Civil Division)

23 June 2017

**[2017] EWCA Civ 787**

**2017 WL 02672245**

Before: The Senior President of Tribunals Lord Justice Lindblom and Lord Justice Irwin

Date: 23 June 2017

On Appeal from the Administrative Court

Planning Court

Mr Justice Cranston

CO/3070/2015

Hearing date: 2 March 2017

## Representation

Mr David Wolfe Q.C. (instructed by Leigh Day Solicitors) for the Claimant.

Ms Nathalie Lieven Q.C. (instructed by the Government Legal Department ) for the Defendant.

Mr James Pereira Q.C. (instructed by Nabarro LLP ) for the Interested Party.

## Judgment

Lord Justice Lindblom:

## Introduction

1 In this claim for judicial review we must decide whether the Government's policy for "nationally significant hazardous waste infrastructure" was properly interpreted and lawfully applied in the making of a development consent order under section 114 of the Planning Act 2008 .

2 The claimant, Mr Arthur Scarisbrick, has permission to apply for judicial review of the decision of the defendant, the Secretary of State for Communities and Local Government, on 19 May 2015, to make the White Moss Landfill Order. The order granted consent for the construction of a hazardous waste landfill facility with a capacity of 150,000 tonnes per annum, and the continuation of filling with hazardous waste of the adjacent landfill site, known as Whitemoss Landfill, at White Moss Lane South in Skelmersdale. When making it, the Secretary of State confirmed the requisite powers for the compulsory acquisition of land under sections 122 and 123 of the 2008 Act. The applicant for the order was the interested party, Whitemoss Landfill Ltd., the operator of the existing landfill site. The Secretary of State's decision to make it was in accordance with the recommendation made to him in the report, dated 21 February 2015, of the Examining Authority (Ms Wendy Burden, Mr Philip Asquith and Mr Robert Macey), after an

examination undertaken between 21 May and 21 November 2014.

3 Mr Scarisbrick owns land next to the site of the proposed development, and lives nearby. With a number of other local residents, who had formed a group called Action to Reduce and Recycle Our Waste ("ARROW"), he objected to the draft order and took part in the examination. His claim challenging the development consent order was issued on 30 June 2015. Permission to apply for judicial review was initially refused in the Planning Court. But at a hearing on 5 October 2016 I granted permission, on a single ground. Because of the possible wider importance of the issue raised, which concerns government policy in the "National Policy Statement for Hazardous Waste: A framework document for planning decisions on nationally significant hazardous waste infrastructure" ("the NPS"), published by the Department for Environment, Food and Rural Affairs in June 2013, I ordered that the claim was to be heard in this court.

## The issue in the claim

4 The issue raised in the single ground on which Mr Scarisbrick has permission to apply for judicial review is whether, in making the development consent order, the Secretary of State erred in his approach to the assessment of the need for the project by misconstruing and misapplying the policy in section 3.1 of the NPS, which says that relevant applications will be assessed "on the basis that need has been demonstrated".

## The 2008 Act

5 In Parts 3, 4 and 5 of the 2008 Act, provision is made for the granting of development consent for a "nationally significant infrastructure project" – defined in section 14 as including "the construction or alteration of a hazardous waste facility" (subsection (1)(p)). Under section 30 a "hazardous waste facility" is within section 14(1)(p) only if it will be in England (subsection (1)(a)), and, "in the case of the disposal of hazardous waste by landfill or in a deep storage facility", its capacity is "more than 100,000 tonnes per year" (subsections (1)(c) and (2)(a)).Section 37 provides for the making of an application for a development consent order.

6 Section 5 , "National Policy Statements", provides that the Secretary of State may issue a national policy statement that "sets out national policy in relation to one or more specified descriptions of development" (subsection (1)(b)).Section 5(5) provides that a national policy statement may, among other things, "set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area" ( subsection (5)(a) ); "set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development" ( subsection (5)(b) ); "identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development" ( subsection (5)(d) ).Section 5(7) provides that "[a] national policy statement must give reasons for the policy set out in the statement". Section 6(1) requires the Secretary of State to "review each national policy statement whenever [he] thinks it appropriate to do so", and, if there has been "a significant change in any circumstances …" ( section 6(3)(d) ).Section 9 requires a proposed national policy statement to be laid before Parliament before it is designated and takes effect. Section 13 , "Legal challenges relating to national policy statements", provides for "proceedings for questioning a national policy statement …" to be brought by a claim for judicial review within six weeks of its designation or, if later, its publication (subsection (1)).

7 In Part 6 , "Deciding Applications for Orders Granting Development Consent", section 103 provides that the Secretary of State "has the function of deciding an application for an order granting development consent".Section 104 , "Decisions in cases where national policy statement has effect", applies to "an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates" (subsection (1)). It provides, in subsection (2), that "[in] deciding the application the Secretary of State must have regard to "(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement") …". Subsection (3) states that "[the] Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies". Subsection (7) applies "if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits".

Under section 114(1) the Secretary of State must either make the order granting development consent or refuse it. Section 118 requires a challenge to a development consent order to be made by a claim for judicial review.

8 In Part 7 , "Orders Granting Development Consent", section 122 , "Purpose for which compulsory acquisition may be authorised", provides that an order granting development consent "may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met" ( subsection (1) ). The conditions in subsections (2) and (3) are that the land "(a) is required for the development to which the development consent relates", "(b) is required to facilitate or is incidental to that development", or "(c) is replacement land which is to be given in exchange for the order land …" ( subsection (2) ), and "… that there is a compelling case in the public interest for the land to be acquired compulsorily" (subsection (3)). Under section 123(1) and (2) an order granting development consent may include provision authorizing compulsory acquisition of land if the Secretary of State is satisfied that the application for the order included a request for compulsory acquisition of that land.

## The application for a development consent order

9 Whitemoss Landfill is in the Green Belt, beside the M58 motorway on the southern side of Skelmersdale. A planning permission granted in October 2011 approved the disposal of hazardous waste on the site until 31 December 2018. The environmental permit restricts the disposal of hazardous waste to 149,500 tonnes per annum. But the annual throughput of waste has always been much less than that – at its highest 76,000 tonnes in 2013, and as low as 22,654 tonnes in 2011.

10 In June 2013 the inspector who conducted the examination into the Lancashire Site Allocation and Development Management Policies Local Plan – for the administrative areas of Lancashire County Council, Blackburn with Darwen Council and Blackpool Council – concluded that "there will be a continuing need to find a location for the disposal of perhaps up to 17,000 tonnes per annum throughout the plan period" (paragraph 155 of his report). The three authorities had concluded that there was "no need to specifically identify a new site or an extension to an existing site in this [local plan]", and that the originally proposed allocation for a hazardous waste landfill at Whitemoss Landfill should be deleted (paragraph 156). Instead, they now proposed "to include a criteria-based policy which would support permission for a new site, or an extension to an existing site, where there is a demonstrable need" (paragraph 157).

11 The application for the development consent order was submitted by Whitemoss Landfill Ltd. on 20 December 2013. The application site extends to about 25 hectares, comprising the existing landfill site of about 8.5 hectares and additional land, some 16 hectares, for its extension to the west and north-west. The application was accepted for examination on 17 January 2014.

## The Nps

12 Part 1 of the NPS is its "Introduction". In section 1.1, "Background", paragraph 1.1.4 says the NPS "will be kept under review by the Secretary of State, in accordance with the requirements of [the 2008 Act], in order to ensure it remains appropriate for decision making", and that "[it] is expected that the Secretary of State would review the NPS approximately every five years …". In section 1.2, "Infrastructure covered by this NPS", paragraph 1.2.1 confirms that the scope of the NPS includes the construction of facilities in England where the main purpose of the facility is expected to be the final disposal or recovery of hazardous waste and the capacity is expected to be "in the case of the disposal of hazardous waste by landfill …, more than 100,000 tonnes per year". In section 1.4, "The Appraisal of Sustainability", paragraph 1.4.1 says the NPS "has been subject to Appraisal of Sustainability …, incorporating the requirements for Strategic Environmental Assessment …". Paragraph 1.4.5 acknowledges, however, that "[it] will be for project applicants to set out in detail how they will meet the policy and requirements set out in the NPS".

13 Part 2 sets out "Government Policy on Hazardous Waste". Section 2.1, "Summary of Government Policy", identifies the four "main objectives of Government policy on hazardous waste", one of which is "(c) Self-sufficiency and proximity – to ensure that sufficient disposal

facilities are provided in the country as a whole to match expected arisings of all hazardous wastes, … and to enable hazardous waste to be disposed of in one of the nearest appropriate installations". It goes on to refer to "A Strategy for Hazardous Waste Management in England", published by the Department for Environment Food and Rural Affairs in March 2010, which was "based on six high level principles intended to drive the management of hazardous waste up the waste hierarchy". One of these principles, it says, is "that the Government looks to the market to provide the infrastructure needed to implement the Strategy as it is industry that has the expertise required to consider where facilities are needed and the appropriate technologies to use". It adds that "Government believes its role is to provide a clear steer on the types of new facility that are needed and provide the framework (including legislative safeguards on human health and the environment) within which the infrastructure is to be provided".

14 Under the heading "Implementation of the waste hierarchy", paragraph 2.3.2 refers to the "waste hierarchy" in the Waste Framework Directive, and the "five steps which must be applied in waste prevention and management legislation and policy". The fifth step is "Disposal (of which landfill is considered to be at the bottom)". Paragraph 2.3.3 emphasizes that "[of] the disposal options available, landfilling of hazardous waste should only be used as a last resort". In section 2.4, "Government strategy for hazardous waste management", paragraph 2.4.1 refers to the five principles in the March 2010 strategy which are "of particular relevance to the need for new infrastructure". The second of these five principles, it says, "requires a reduction in reliance on landfill, with landfill only being used where, overall, there is no better recovery or disposal option". Paragraph 2.4.2 emphasizes that, under Principle 2 in the 2010 strategy, "Government looks to the market to provide the infrastructure to implement the Strategy", and "Government's role is to provide the right framework and encouragement to the private sector to bring the necessary infrastructure forward". Under the heading "Identification of suitable or unsuitable locations for infrastructure", paragraph 2.5.6 confirms that it is "not … Government policy to prescribe exactly where new hazardous waste infrastructure should be provided".

15 Part 3 of the NPS deals with the "Need for Large Scale Hazardous Waste Infrastructure". The policy of particular relevance in this case is in section 3.1, which states:

> **"3.1 Summary of Need**
>
> Hazardous waste management infrastructure is essential for public health and a clean environment. There will be a demand for new and improved large scale hazardous waste infrastructure, because of the following main drivers:
>
> Trends in hazardous waste arisings:
>
> • Measures have been implemented to prevent and minimize the production of hazardous waste. Nevertheless, arisings have remained significant despite the economic downturn. This is because the introduction of measures to further improve the environmentally sound management of waste has increased the types of waste that must be removed from the municipal waste stream and be managed separately as hazardous waste.
>
> • Changes to the list of hazardous properties in the revised Waste Framework Directive and forthcoming changes to the European Waste List, are expected to lead to further increases in the amount of waste that must be managed as "hazardous".
>
> • There is a need to substantially reduce the relatively large amounts of hazardous waste continuing to be sent to landfill and increase that sent for recycling and reuse.
>
> The need to meet legislative requirements:
>
> • To apply the waste hierarchy – as set out in the revised Waste Framework Directive. New improved facilities will be required to optimise the extent to which the management of hazardous waste can be moved up the waste hierarchy.
>
> • To treat hazardous waste that can no longer be sent to landfill following the phase out of the practice of relying on higher Landfill Directive Waste acceptance criteria.

> • To comply with the "proximity principle" of adequate provision of hazardous waste facilities within each EU Member State.
>
> ' *A Strategy of Hazardous Waste Management in England (2010)* ' established the need for new hazardous waste facilities and set out the types of facility required. Of the facilities identified, the Strategy determined that the following generic types would be likely to include nationally significant infrastructure facilities:
>
> • Waste electrical and electronic equipment plants
>
> • Oil regeneration plant
>
> • Treatment plant for air pollution control residues
>
> • Facilities to treat oily wastes and oily sludges
>
> • Bioremediation / soil washing to treat contaminated soil diverted from landfill
>
> • Hazardous waste landfill
>
> The UK Ship Recycling Strategy encourages the development of Ship Recycling Facilities, some of which will need to be nationally significant infrastructure.
>
> The Secretary of State will assess applications for infrastructure covered by this NPS on the basis that need has been demonstrated."

16 In a passage headed "The total amounts of hazardous waste remain significant and are expected to increase", paragraph 3.2.2 says that "[despite] measures to prevent and minimise hazardous waste and the economic downturn, arisings have not declined particularly significantly with around 3.3m tonnes of hazardous waste being consigned in England in 2010", and "[arisings] are expected to increase as the economy improves". In section 3.4, "What types of NSIP [nationally significant infrastructure project] will be needed?", paragraph 3.4.1 says "[the] need for new facilities to manage hazardous waste was established" in the March 2010 strategy, which identified seven "generic categories of nationally significant infrastructure projects … likely to be needed", one of which was "[hazardous] waste landfill". Paragraph 3.4.13 confirms that "[landfill] is at the bottom of the waste hierarchy", but goes on to acknowledge that "there will remain some waste streams for which landfill is the best overall environmental outcome" and that "there may be future applications for development consent for nationally significant hazardous waste landfill". Paragraph 3.4.14 states:

> "Government has therefore concluded that there is a need for these hazardous waste infrastructure facilities. The Examining Authority should examine applications for infrastructure covered by this NPS on the basis that need has been demonstrated."

17 In Part 4, "Assessment Principles", paragraph 4.1.2 states:

> "4.1.2 Subject to any more detailed policies set out in the Hazardous Waste NPSs and the legal constraints set out in [the 2008 Act], there should be a presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in this NPS."

Paragraph 4.1.3 says this:

> "4.1.3 In considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State (as decision maker) should take into account:
>
> • its potential benefits including its contribution to meeting the need for hazardous waste infrastructure, job creation and any long-term or wider benefits; and

> • its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

Paragraph 4.4.3 says that "[whilst] this NPS and supporting [Appraisal of Sustainability] have shown that there is no alternative, at a strategic level, to meeting the need for new hazardous waste infrastructure, it must not be assumed that there will be no alternatives for individual projects".

18 Part 5, "Generic Impacts", acknowledges in paragraph 5.1.1 that "[some] impacts will be relevant to any hazardous waste infrastructure, whatever the type". It indicates the approach to decision-making in cases where such impacts are relevant – specifically, for example, in section 5.2, "Air Quality and Emissions"; in section 5.3, "Biodiversity and Geological Conservation"; in section 5.7, "Flood Risk"; in section 5.8, "The Historic Environment"; in section 5.9, "Landscape and Visual Impacts"; and in section 5.10, "Land Use Including Open Space, Green Infrastructure and Green Belt". The policy for decision-making on proposals for hazardous waste infrastructure in the Green Belt is set out, in familiar terms, in paragraph 5.10.15:

> "5.10.15 When located in the Green Belt hazardous waste infrastructure projects may comprise inappropriate development. Inappropriate development [Here a footnote refers to the policies in paragraphs 79 to 92 of the National Planning Policy Framework ("the NPPF")] is by definition harmful to the Green Belt and there is a presumption against it except in very special circumstances. The Secretary of State will need to assess whether there are very special circumstances to justify inappropriate development. Very special circumstances will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt, when considering any application for such development."

## What does the policy in section 3.1 of the NPS mean?

19 The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13* , in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* . and *Richborough Estates Partnership LLP v Cheshire East Borough Council [2017] UKSC 37* , at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council* ). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council* ). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council* ). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making.

20 It is common ground that the policy section 3.1 of the NPS is policy of a general kind, in the sense that it is not specific to any particular site or location or for a particular type of development. This is not the kind of policy contemplated in section 5(5)(d) of the 2008 Act. Nor does it set out any criteria to be applied in deciding whether a particular location or locations are suitable, or might be suitable, for development of the type to which it relates. It is not, therefore, the kind of policy contemplated in section 5(5)(b) .

21 Mr David Wolfe Q.C., for Mr Scarisbrick, submitted that the policy in section 3.1 merely requires it to be assumed that there is a "strategic" need, or a need in principle, for some large hazardous waste landfill facilities in England. So it is not appropriate for an Examining Authority, or the Secretary of State, when dealing with an application for a development consent order, to discuss the broad principle of having hazardous waste landfill as part of the mix of facilities. The policy means no more than that there is, in principle, a need for developments of this kind, and that the decision-maker should not debate whether hazardous waste landfill proposals should be rejected outright. But – as Mr Wolfe put it in his skeleton argument (at paragraph 35) – the policy "should not be understood as prescribing a need for any (i.e. each and every) proposed hazardous waste facility however large (the sky seems to be the limit) at any location in England …". It cannot mean, he submitted, that in making a decision on an application for a development consent order the Secretary of State must, or may, act on the unquestionable assumption that there is a need for the facility the developer has proposed – of whatever scale and capacity, in whichever location, and no matter whether the site is in the Green Belt or powers are being sought for the compulsory acquisition of third party land.

22 For the Secretary of State, Ms Nathalie Lieven Q.C. submitted that the policy in section 3.1 of the NPS makes it clear that the starting point in the making of a decision on a relevant project is that need is established, and that the applicant for a development consent order does not have to prove need for the type of development proposed. If the site on which the development is proposed is subject to constraints of the kind referred to in Part 5 of the NPS ("Generic Impacts"), such as being in the Green Belt or in an area at risk of flooding, the Secretary of State will have to carry out the appropriate planning balance. The approach indicated in the NPS, is in this sense perfectly conventional. The NPS establishes a national need for hazardous waste infrastructure of the relevant types, confirms that it is in the public interest that such need is met by the provision of new facilities and that there is a presumption in favour of consent being granted for such facilities, but recognizes that, inevitably, in the determination of particular applications, the meeting of the need, in the public interest, must be set against other material planning considerations. This will necessarily involve considering the weight to be attached to the need for the development. The NPS accepts that the market is likely to assess the level of need, and the most appropriate locations for development. But it also accepts, for example, that if the site is in the Green Belt, the Secretary of State will have to consider whether there are "very special circumstances" to justify the project in hand, and this will require him to evaluate the need for it, including any regional or local need that may be demonstrated.

23 On behalf of Whitemoss Landfill Ltd., Mr James Pereira Q.C. made submissions similar to Ms Lieven's. He argued that the NPS clearly does identify a need for hazardous waste infrastructure of the specified types. It is wrong, he submitted, to use such concepts as "strategic need" and "need in principle", in contradistinction to concepts such as "specific need" and the "need for a particular project", to qualify the policy in section 3.1. The policy identifies a need for hazardous waste landfill infrastructure with a capacity sufficient to make it a nationally significant infrastructure project. As paragraph 3.4.14 makes plain, the need relates to a "application for infrastructure …", and must be taken into account in decision-making on particular projects. Because the NPS does not identify particular locations for the infrastructure it deals with, the need identified in the policy applies to relevant infrastructure wherever it is proposed. This does not mean, however, that the identified need will automatically determine the outcome of an application for a development consent order. The location of the proposed development, and its design, must be appropriate in environmental terms when judged against relevant policy. And any need for powers of compulsory acquisition must be justified with a compelling case, to which the policy need may be relevant but, again, not necessarily decisive.

24 In my view, the policy in the final sentence of section 3.1 of the NPS, read in its proper context, identifies and establishes the need for nationally significant infrastructure facilities of the "generic types" to which section 3.1 refers, which include facilities for "Hazardous waste landfill". It applies to all nationally significant infrastructure projects falling within those "generic types", not just to some. The need it identifies is a general need. It establishes what might be described as a "qualitative" need for hazardous waste infrastructure of the relevant types. It does not define a "quantitative" need for such development, by setting for each relevant type of infrastructure an upper limit to the number or capacity of the facilities required. It does not descend at all into the question of capacity, in the sense of the requirement for a given level of throughput of hazardous waste in infrastructure of the relevant types. It creates, at the level of national policy, a general assumption of need for such facilities. The need is not explicitly for an individual project of any

particular scale or capacity or in any particular location. But the policy does not exclude any project of a relevant type. It applies to every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed. An applicant for a development consent order is entitled to proceed on that basis.

25 In framing the policy in section 3.1, the Government chose not to identify particular locations suitable or unsuitable for such development, and not to set down criteria as to suitable or potentially suitable locations. It leaves with "the market" the initiative in bringing forward development (section 2.1 and paragraph 2.4.2 of the NPS). And it is not limited in time, save to the extent that it must be read together with the statutory requirement, in section 6 of the 2008 Act, that a national policy statement be kept under review, and the indication in paragraph 1.1.4 that the NPS is expected to be reviewed "approximately every five years".

26 The comprehensive nature of the need is confirmed in paragraph 3.4.1 of the NPS, which refers to the 2010 strategy as having identified certain "generic categories" of nationally significant infrastructure projects that were "likely to be needed", and in paragraph 3.4.14, which records the Government's conclusion that "there is a need for these hazardous waste infrastructure facilities". Paragraph 3.4.13 does not deny the need for "hazardous waste landfill", but it does provide the specific context for the application of the policy in section 3.1 in cases where the Secretary of State has before him a proposal for a facility of this particular kind.

27 It is also clear that the policy in section 3.1 was deliberately included in the NPS not merely to identify the relevant national need, but also to guide the assessment of applications for development consent orders. Its explicit purpose is to ensure that when "applications for infrastructure covered by this NPS" come to be determined, the Secretary of State "will assess" such proposals on the basis that need has been demonstrated. To implement the policy selectively in relevant decision-making – by applying it to some of the projects embraced within it but not to others – would be to ignore its plain meaning and purpose as a policy intended to influence decisions on all proposals properly within its scope. The policy enables an Examining Authority, and the Secretary of State, to start with the assumption that a national need for such projects is established.

28 The policy in section 3.1 must be read together with the related passages in Part 4, "Assessment Principles" and Part 5, "Generic Impact". These include the "presumption" stated in paragraph 4.1.2 – the presumption in favour of granting consent to applications "for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in this NPS". This "presumption" is applicable to all such projects within the "generic types" referred to in the policy in section 3.1, including "Hazardous waste landfill". It is, however, only a "presumption". It is not automatically conclusive of the outcome of a particular application for a development consent order. This is confirmed by the policy in paragraph 4.1.3, which envisages a balancing exercise for a particular proposal, "weighing its adverse impacts against its benefits", one potential benefit being the proposal's "contribution to meeting the need for hazardous waste infrastructure, …".

29 Likewise, the policies for the treatment of "Generic Impacts" in Part 5, including the policy for the consideration of proposals for development in the Green Belt in section 5.10, require a project-specific and site-specific evaluation of the factors for and against a particular proposal in a particular location, applying the relevant policy principles. It follows for example, as Ms Lieven submitted, that the policy for development in the Green Belt, in paragraph 5.10.15, must be applied in the way described. Whether the "harm by reason of inappropriateness, and any other harm" is outweighed by the "need" for relevant hazardous waste infrastructure identified in section 3.1 and the "presumption" in favour of relevant proposals in paragraph 4.1.2, together with any other considerations weighing in favour of the project, so that "very special circumstances" exist, will be a matter for the Secretary of State to consider. In such a case the "need" identified in section 3.1 of the NPS may prove to be an important consideration in establishing "very special circumstances"; or it may not.

30 When determining an application for a development consent order, the Secretary of State must proceed as section 104 of the 2008 Act requires. The considerations bearing on his decision will include the policy need established in the NPS, any specific regional or local need for the development, any planning benefits, and the likely effects of the development on the environment. Where the development is proposed in the Green Belt, as in this case, the making of the decision must be approached as the relevant policy in the NPS requires.

31 Implicit in all this is that the weight to be given to particular considerations, including the need identified in the policy in section 3.1 of the NPS, will always be a matter for the exercise of the Secretary of State's planning judgment in the particular circumstances of the case. The need identified and established in the policy must be given appropriate weight in the making of a decision on an application for a development consent order, but it will not necessarily carry decisive or even significant weight when the planning balance is struck. The weight to be given to that need, case by case, is not prescribed, either in the policy in section 3.1 or elsewhere in the NPS. It will not necessarily increase with the scale or capacity of a particular proposal. The policy does not place a "trump card" or a "blank cheque" in the hands of a developer. Nor does it provide the Secretary of State with "carte blanche" to grant consent, without carrying out a proper balancing exercise in which the need identified and established in the policy is given the weight it is due in the decision on the project in hand, no more and no less. The need identified in section 3.1 will always be a material factor in a case where the policy applies. It will only be met, and can only be met, by individual developments of the relevant types. In this sense it is truly a need for an individual project of a relevant type, and will count in favour of any such project when the decision is made. But the policy does not mean that the bigger the project, the greater is the need for it – or, as Mr Wolfe put it (in paragraph 35 of his skeleton argument), "the sky seems to be the limit". That is not what the policy says, and not how it should be understood.

## The Examining Authority's report

32 The Examining Authority held a preliminary meeting on 21 May 2014. On 30 May 2014 they sent a letter to the parties, setting out their procedural decisions (in Annex A to their letter). On "the issue of need for a facility of the scale proposed", which had been raised by Lancashire County Council and CPRE Lancashire, they said they would be "inviting debate" during the examination as to "whether the need identified in the NPS (para 3.1) constitutes need at a strategic level, or whether it prescribes a need for any proposed hazardous waste facility, including a landfill facility of the scale and in the location of the Whitemoss proposal". In their observations on "Policy matters" in Annex A to their letter, they "[put] forward the view that the strategic need for hazardous waste infrastructure identified in the NPS should not be interpreted as an accepted need for a hazardous waste landfill facility at the application site", and that "[not] all applications for hazardous waste NSIPs will necessarily "clearly meet the need for infrastructure established in the NPS" (para 4.1.2) having regard to the policy objectives set out in the NPS in 2.1 and 2.3". They invited "[submissions] on the issue of whether or not there is a need for this particular facility in the location proposed …". However, they also said that they did "not consider that such submissions would relate to the merits of Government policy set out in the NPS, which is not a topic for debate during the examination".

33 The examination was conducted on the basis of written evidence and evidence given at hearings held between 17 July and 23 October 2014.

34 In paragraph 4.3 of their report of 21 February 2015, the Examining Authority identified the "issues of importance to interested parties". One of these was "(i) [whether] National Policy should be interpreted as stating that the need for nationally significant hazardous waste landfill sites has been demonstrated". ARROW, together with Lancashire County Council, West Lancashire Borough Council, CPRE Lancashire and others, had "questioned the need for the application scheme", pointing out that the existing landfill facility had an environmental permit to deposit approximately 150,000 tonnes per annum of hazardous waste, but that since 2006, less than 100,000 tonnes per annum of waste had been taken for disposal (paragraph 4.13, in a section of the report headed "Conformity with NPSs and other key policy statements").

35 Having acknowledged that "[the] issue of need is addressed in the NPS and summarised in [section] 3.1" (paragraph 4.14), the Examining Authority went on to say (in paragraph 4.16):

> "4.16 It is stated in NPS [section] 3.1 that the [Secretary of State] *"will assess applications for infrastructure covered by this NPS on the basis that need has been demonstrated"* . Need is therefore to be taken as established for the application project regardless of the past history of the existing landfill site."

and (in paragraph 4.18):

> "4.18 In view of the importance of hazardous waste infrastructure to support economic activities and public services, and the requirement for England to be self-sufficient in disposal facilities, we give considerable weight to the need for the application project."

36 They also considered whether there was, specifically, a need for hazardous waste facilities in the North West region. They acknowledged that "the North West is itself a major generator of hazardous waste"; that "[the] existing provision for hazardous waste landfill in the region includes Minosus in Cheshire, the Ineos Chlor Randle Island Landfill in Runcorn, and the current Whitemoss Landfill site" (paragraph 4.26); but that there were "limitations as to the types of waste which can be deposited at Minosus, and evidence was submitted to the effect that the Ineos site had no remaining constructed void space available", and that "[in] these circumstances, there is a realistic prospect that the application project would provide for regionally-generated hazardous waste arisings" (paragraph 4.27).

37 Dealing with the relationship of the application project to policy for development in the Green Belt in the NPPF, the Examining Authority concluded that "… [during] its construction and its operational phase the project would … be inappropriate development in the [Green Belt]" (paragraph 4.52); that "by raising the ground level of a significant area [of generally open and relatively low-lying countryside south of the motorway] there would be an intrusion into the openness of the wider countryside which … would interfere with and have an impact on the openness of the [Green Belt]" (paragraph 4.56); but that, "… the overall impact on openness in the long term would be mitigated to some degree through the proposals for the restoration of the site" (paragraph 4.57).

38 When dealing with the policies of the development plan, they noted that the inspector in the MWLP [the Joint Lancashire Minerals and Waste Local Plan Site Allocation and Development Management Policies] process "considered there would be a continuing need for a location that would provide capacity for the landfilling of hazardous waste of up to 17,000 tpa generated from within the plan area only" (paragraph 4.68). They repeated their conclusion that "the need for the application project is established in the NPS" (paragraph 4.70), and reminded themselves that "the NPS takes priority over the development plan in the determination of this application", and that "[as] a result there is no requirement for [Whitemoss Landfill Ltd.] to demonstrate a specific local or regional need for the proposal" (paragraph 4.76). They concluded that "the application project would clearly meet the need identified in the MWLP", and that although it "would provide well in excess of the capacity identified in the MWLP, … it is not the intention of the NPS to limit provision to that which would meet the locally-generated demand" (paragraph 4.77). The project "would contribute to self-sufficiency as required by the MWCS [the Joint Lancashire Minerals and Waste Local Development Framework Core Strategy], and fulfil the need identified in the MWLP". Though there "may be some areas of conflict with other development plan policies", these were "not so significant as to weigh heavily against the application project" (paragraph 4.78).

39 The Examining Authority also noted that there had been "a relatively recent review of potential hazardous waste sites through the Development Plan process, where no alternatives to Whitemoss Landfill were identified", and that "no alternative site was put forward as a result of the consultation process on the [environmental statement]" (in paragraph 4.85).

40 In their "Conclusions on the main issues and whether very special circumstances exist", the Examining Authority directed themselves that under section 104(3) of the 2008 Act "the application must be decided in accordance with the NPS, subject to certain exceptions", and concluded that it "[did] not fall within any of the exceptions" (paragraph 4.316). They said it was "[fundamental] to [their] consideration of the White Moss project" that "the location of the application site [is] within the Green Belt" (paragraph 4.317).

41 Under the heading "Considerations which weigh in favour of the application", they said (in paragraphs 4.331 to 4.337):

> "4.331 There is no target level of provision, or limit to the capacity or location of new facilities set within the NPS. It is left for operators to use their judgement as to the location and capacity of new facilities [4.23]. The importance of providing for all types of hazardous waste infrastructure, including landfill, is clear from the wide range of activities which rely on the availability of such infrastructure [4.17]. With growth in the

> economy, the level of arisings is expected to increase [4.15]. The availability of suitable facilities within England to meet the demands resulting from economic growth is essential to comply with the principles of self-sufficiency and proximity in the revised Waste Framework Directive [4.17].
>
> 4.332 Hazardous waste infrastructure of national significance is necessary to meet a national rather than a regional or local need [4.28]. Nevertheless, in this case the project would be located in the North West region which is a national hub for treating and processing hazardous waste, and with its industrial legacy and the regeneration of the Liverpool/Merseyside and Manchester conurbations, the region is itself a major generator of hazardous waste [4.26]. The application project would be well located to serve this market.
>
> 4.333 Existing provision for hazardous waste landfill in the North West is limited [4.27]; the examination into the … MWCS identified a need for some 17,000 tpa of hazardous waste generated from within its plan area; and Policy LF3 provides support for new provision subject to certain criteria.
>
> 4.334 We have noted the arguments as to whether there is a need for a facility of the capacity proposed at White Moss. In view of the provisions of the NPS, we do not question the level of need. We do, however, recognise that there could be environmental consequences if the rate of deposits is not sufficient to fill the capacity of the voids, and address this through [requirement] 32 in the recommended [development consent order] [4.140].
>
> 4.335 We find that in addition to the national need for hazardous waste landfill identified in the NPS, the application project would be well located to meet a regional need for such a facility. Without the application project, the existing Whitemoss Landfill would have no capacity beyond 2015, and the need identified in the examination of the MWCS would not be met [4.68].
>
> …
>
> 4.337 … No alternative site has been put forward for hazardous waste landfill and the relatively recent review of hazardous waste sites through the Development Plan process did not identify any alternatives [4.85].
>
> … ."

42 In their "Balance and conclusions", having acknowledged again (in paragraph 4.341) that the "application project would constitute inappropriate development which in itself is harmful to the [Green Belt]", they said this:

> "4.341 … In summary, we find the harm to the [Green Belt] and any other harm to comprise:
>
> • During the 20 years of construction and operation, an adverse impact on openness and conflict with a purpose of the [Green Belt] to protect the countryside from encroachment.
>
> • Following restoration, there would be some impact on openness but the restoration proposals would restore the rural character of the site such that there would no longer be encroachment.
>
> • A limited degree of harm to the character and appearance of the countryside during the 20 years of construction and operation.
>
> • The perception of a risk to health within the local community to which we attribute limited weight."

As for the considerations on the other side of the balance, they said (in paragraph 4.342):

"4.342 In relation to the "other considerations" which fall to be weighed against harm to the [Green Belt] and any other harm, in summary we find as follows:

• The presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS. The application project would meet that need.

• As a project which accords with the policy and requirements of the NPS, it would constitute sustainable development which attracts the presumption in favour of sustainable development set out in the NPPF.

• The project would contribute towards meeting the principles of national self-sufficiency and of proximity in the revised Waste Framework Directive.

• The importance of the facility to meet the need for hazardous waste disposal within the North-West of England.

• The locational benefits of the landfill facility at White Moss, reflecting its proximity to the national motorway network, with consequently no significant adverse transport impacts and being easy to reach by businesses looking to manage waste.

• The ability to make use of current infrastructure, reducing the environmental footprint of creating new facilities.

• The limited life-span of the landfill operations and its consequent impacts.

• The long-term benefits to biodiversity from the restoration proposals, replace an ecologically poor site with a more habitat and species-rich environment.

• The other long-term benefits in terms of restoration of Grade 2 agricultural land, visual amenity and recreation."

Their "overall conclusion" (in paragraph 4.343) was that "these "other considerations" are of such importance that they clearly outweigh the harm to the [Green Belt] and the limited other harm that [they had] identified". And "[looking] at the case as a whole", they concluded that "very special circumstances exist which justify the making of the White Moss Landfill [development consent order]."

43 In section 6 of their report, which dealt with the request for powers of compulsory acquisition, the Examining Authority directed themselves on the requirements of sections 122 and 123 of the 2008 Act (paragraphs 6.1 to 6.15) and a number of "general considerations", including the need for the decision-maker to explore "[all] reasonable alternatives to compulsory acquisition", and to "be satisfied that the purposes stated for the acquisition are legitimate and sufficient to justify the inevitable interference with the human rights of those affected" (paragraph 6.15). They concluded (in paragraph 6.38):

"6.38 In Section 4 we concluded that there are very special circumstances which clearly outweigh the harm to the [Green Belt] and any other harm from the application project. On the basis of this conclusion we find that there is a compelling case in the public interest for the development as a whole and there is a compelling case in the public interest for the acquisition of Plot 18B. Compulsory acquisition would therefore be compliant with [section] 122 of [the 2008 Act] as a whole."

44 They addressed " Human Rights Act 1998 considerations" (in paragraphs 6.52 to 6.56), concluding (in paragraph 6.52):

"6.52 In the event that [compulsory acquisition] rights are granted, Article 1 of the First Protocol [to the Human Rights Convention] is engaged. Article 8 is also engaged in relation to Plots 4 and 8A … . … [Development] could not take place in the manner proposed without this land. The other land to be acquired is necessary for the development to proceed in the manner intended. No objections have been raised by

> affected persons other than in respect of the WLBC-owned land, Plot 18B. Those affected would be entitled to compensation and … there is, in principle, the ability for this to be available. Interference with private rights in order to carry out the development would be both proportionate and justified in the public interest."

45 In their conclusions on the request for compulsory acquisition powers, they said "the case for [compulsory acquisition] must be dependent on and consistent with the view that the [development consent order] as a whole should be made" (paragraph 6.58), and (in paragraph 6.59):

> "6.59 The [Examining Authority] has shown in the conclusions to Section 4 that it has reached the view that development consent should be granted. Having regard to all the particular circumstances in this case for compulsory acquisition, in the event that the Secretary of State decides to give consent and make the Order, there would be a compelling case in the public interest for acquisition. There is no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998 ."

46 In their "Overall conclusion and recommendation on the DCO", the Examining Authority said "that the recommended DCO provides the appropriate balance between the need to facilitate the development with the requirements necessary to mitigate potentially adverse consequences" (paragraph 7.22). And they confirmed their conclusion "that the potential harm to the [Green Belt] together with the limited other harm is clearly outweighed by the need for national hazardous waste infrastructure set out in the NPS, combined with the other benefits of the project including its location, the use of existing infrastructure, and the benefits following restoration", and that "[as] a result the very special circumstances exist to justify making the White Moss DCO" (paragraph 8.11).

## The Secretary of State's decision letter

47 The Secretary of State's conclusions in his decision letter mirror the Examining Authority's in their report. In considering "Conformity with National Policy Statements and other key policy statements", he said (in paragraph 12):

> "12. The Secretary of State agrees with the ExA that, in accordance with [section] 104(3) of the 2008 Act, the Application falls to be considered against the National Policy Statement for Hazardous Waste June 2013 (NPS) (ER 4.9), and that the NPS is the primary basis for decision-making on nationally significant infrastructure projects (NSIP) for hazardous waste (ER 4.12). He notes that, for the reasons set out in paragraph 3.1 of the NPS, need is to be taken as established for the Application regardless of the past history of the existing landfill site (ER 4.16). In view of the importance of hazardous waste infrastructure to support economic activities and public services, and the requirement for England to be self-sufficient in disposal facilities, the Secretary of State, like the ExA, gives considerable weight to the need for the Application (ER 4.18)."

48 As for "Development Plan Policies", he said (in paragraph 15):

> "15. … Whilst he agrees with the ExA that there is no requirement for the Applicant to demonstrate a specific local or regional need for the proposal (ER 4.76), he notes that the development plan includes a number of policies against which it is appropriate to assess the project, and that many of the matters covered are also raised in the NPS (ER 4.76). Overall, he agrees with the ExA that the Development would contribute to self-sufficiency as required by the MWCS, and fulfill the need identified in the MWLP, and that while there may be some areas of conflict with other development plan policies, these are not so significant as to weigh heavily against the Development (ER 4.78)."

49 When considering the "Green Belt balance", the Secretary of State agreed (in paragraphs 58 to 62) with the relevant conclusions of the Examining Authority, including their assessment, in paragraphs 4.330 to 4.340 of their report, of the "other considerations" weighing in favour of the development, to be set against the harm to the Green Belt and any other harm (paragraph 61). He specifically agreed (also in paragraph 61) with the Examining Authority's summary in paragraph 4.342 of their report. Of the nine considerations to which he referred in the corresponding summary of his own, the first and fourth were these:

> "
>
> • the presumption in favour of granting consent to applications for hazardous waste NSIPs which clearly meet the need for such infrastructure is established in the NPS; and the Development would meet that need;
>
> …
>
> • the importance of the facility to meet the need for hazardous waste disposal within the North-West of England;
>
> …".

He agreed with the Examining Authority's conclusion in paragraph 4.343 of their report that, as he put it (in paragraph 62), "the other considerations are of such importance that they clearly outweigh the harm to the Green Belt and the limited other harm that has been identified …", and that "very special circumstances exist which justify the making of the Order".

50 The Secretary of State also agreed with the Examining Authority, in paragraph 6.59 of their report, that there was "a compelling case in the public interest for [compulsory acquisition]" and "no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998 ". He concluded too that there was a "compelling case in the public interest for the creation and acquisition of … new rights", and that "granting this power would also not give rise to any disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998 " (paragraph 77 of the decision letter).

51 Drawing his conclusions together, he said that he considered "the harm to the Green Belt together with the limited other harm he [had] identified" was "clearly outweighed by the need for national hazardous waste infrastructure set out in the NPS, together with the other benefits of the project … ; and that as a result very special circumstances exist to justify making the [development consent order]" (paragraph 88); and that "the requests for compulsory acquisition powers meet the tests in [sections] 122 and 123 of the 2008 Act, with a compelling case in the public interest for the land to be acquired compulsorily" (paragraph 89).

52 The development consent order included, in Schedule 2, a number of conditions, one of which provided for the "Review of void consumption", as recommended in the Examining Authority's requirement 32, to which they had referred in paragraph 4.334 of their report.

## Did the Secretary of State misinterpret or misapply policy in the NPs?

53 Mr Wolfe submitted that the Secretary of State misdirected himself in his understanding and application of the policy in section 3.1 of the NPS – as had the Examining Authority in their report. He thought – wrongly – that the policy required him to assume a need for a hazardous waste landfill facility on the application site with a capacity of 150,000 tonnes per annum. He thought – again, wrongly – that the policy compelled him to assume a need for a facility of whatever size a developer might choose to propose, and therefore that he must not evaluate competing evidence and submissions as to the extent of the real need, if any. He prevented himself from considering whether a facility of the particular size proposed was actually needed. This made it impossible for him to deal as he should with at least three basic issues: first, whether there truly was a need for this proposed development, and "very special circumstances" justifying its approval as "inappropriate development" in the Green Belt; secondly, whether there was a "compelling case in the public interest" for Whitemoss Landfill Ltd. to be given powers of

compulsory acquisition over third party land; and thirdly, whether the development itself, and the compulsory acquisition of land, would be a proportionate interference with the landowners' human rights under the European Convention on Human Rights , including their right to property under Article 1 of the First Protocol – and, in particular, whether a less intrusive measure could have been used and whether a fair balance had been struck between Convention rights and the public interest (see the judgment of Lord Sumption in *Bank Mellat v Her Majesty's Treasury (No. 2) [2014] A.C. 700* , at paragraph 20). If a hazardous waste landfill facility was shown to be needed, but not of the size proposed, should development consent be granted, and powers of compulsory acquisition given, for a facility as large as this? The answer, Mr Wolfe submitted, must be "No". And if the need for a facility of a capacity of more than 100,000 tonnes per annum was not demonstrated, the Secretary of State would have had no power to make a development consent order for the scheme required.

54 I cannot accept that argument. On a fair reading of the Examining Authority's report and the Secretary of State's decision letter, I do not think it can be said that either betrays any misunderstanding or a misapplication of the relevant policies in the NPS – including the policy in section 3.1.

55 These proceedings do not – and could not – attack the NPS itself as unlawful. Such a challenge could only have been brought under section 13 of the 2008 Act. There has been none. Nor can it be said that the Secretary of State's decision is invalidated by his reliance on a policy which exceeded his power to issue a national policy statement under section 5 of the 2008 Act. Such an argument would be misconceived. The issue for us is not whether the NPS is lawful, but whether, in this case, it was lawfully construed and applied.

56 Neither the Examining Authority nor the Secretary of State misled themselves as to what the policy in section 3.1 says. The Examining Authority quoted it, accurately, in paragraph 4.16 of their report – which the Secretary of State noted in paragraph 12 of his decision letter. They also referred to some of the salient passages in the text of the NPS, which explain the policy in section 3.1.

57 What did the Examining Authority mean when they said in paragraph 4.16 of their report that "[need] is … taken to be established for the application project …", and when they referred in paragraph 4.18 to "the need for the application project" – with the Secretary of State's agreement in paragraph 12 of his decision letter? In my view, they were doing what the policy in section 3.1 required of them. They were acknowledging that the application project, because it fell within the scope of the policy in section 3.1 of the NPS and would contribute to the meeting of that need, was one of those projects for which a national need was established by the policy. Like any other infrastructure project of a relevant type and of the requisite scale, this one engaged the policy in the final sentence of section 3.1. Under that policy, therefore, there was a need for "the application project". As the policy is explicitly intended to guide decision-making on applications for development consent, this proposed development, like any other relevant proposal, had therefore to be assessed "on the basis that need had been demonstrated". In this sense, and to this extent, need was established for it by national policy.

58 The Examining Authority did not read more into the policy than is actually there. They were not saying that the need established by the policy in section 3.1 of the NPS was a specific requirement for a facility of a particular capacity – whether 150,000 tonnes per annum or any other capacity above 100,000 tonnes per annum – or in a particular location – whether on this application site or any other. Rather, they were acknowledging, rightly, that this particular project was one to which the general policy in the final sentence of section 3.1 of the NPS applied, and for which, therefore, a national need was deemed by government policy to exist – and that the existence of this need for the project did not depend on the scale, capacity and location of the development proposed, or on the planning history of the existing landfill site. They clearly understood that. And so did the Secretary of State.

59 The Examining Authority's other conclusions referring to NPS policy as it relates to the need for the project are all consistent with the correct interpretation of that policy. In paragraph 4.77 of their report they recognized, rightly, that national policy in the NPS does not intend to limit the provision of new hazardous waste facilities to the meeting of "locally-generated demand"; in paragraph 4.331, that the NPS does not set any "target level of provision, or limit to the capacity or location of new facilities", leaving it to "operators to use their judgement as to the location and capacity of new facilities"; in paragraph 4.332, that hazardous waste infrastructure "of national

significance" is necessary to meet "a national rather than a regional or local need"; in paragraph 4.334, that, in view of the provisions of the NPS, "the level of need" was not to be questioned; in paragraph 4.342, that there is a "presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS", and that the "application project would meet that need". All of this shows a sound understanding of NPS policy, including the policy in section 3.1. The same may be said of the Secretary of State's relevant conclusions, in paragraph 61 of his decision letter.

60 In view of the requirement in section 104(2) of the 2008 Act that the Secretary of State "must have regard to" any relevant national policy statement, and the requirement in section 104(3) that he must decide the application "in accordance with" any such national policy statement unless one of the relevant exceptions apply, he would have been at fault if he had not taken into account the national need established in section 3.1 of the NPS, and the presumption in paragraph 4.1.2.

61 In this case the Secretary of State found himself able to make his decision in accordance with the NPS, and did.

62 In paragraph 4.18 the Examining Authority said they gave "considerable weight" to the need for the application project – by which, as is clear from the context, they meant the national need for such projects established in the NPS. In paragraph 12 of his decision letter the Secretary of State agreed. He was entitled to give that need the weight he did. This was a matter of planning judgment for him, subject only to challenge on public law grounds (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 W.L.R. 759* , at p.780). To assess the weight to be given to the need for the project under the policy in section 3.1 of the NPS as "considerable" was not irrational. To give "considerable" weight to a need established in a statement of national planning policy is not, on the face of it, a surprising planning judgment, let alone an unreasonable one. Indeed, it was consistent with the policy "presumption" in paragraph 4.1.2 of the NPS, the "presumption in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure in this NPS".

63 Neither the Examining Authority nor the Secretary of State concluded that the need for the project under NPS policy was itself greater, or the weight to be given to it increased, by the fact that the proposed facility would have a capacity of 150,000 tonnes per annum, rather than, say, 100,001 tonnes per annum, or some other level of capacity in between. The Secretary of State simply gave the need "considerable weight". But he did not leap from that to the conclusion that the development must be approved. Important as it was, he did not treat the policy need for the development as the single decisive factor in his assessment of the planning merits.

64 Mr Wolfe criticized the Examining Authority's observation in paragraph 4.334 of their report that "[in] view of the provisions of the NPS", they did "not question the level of need". I do not think that criticism is justified. Contrary to Mr Wolfe's submission, the Examining Authority were not, without scrutiny or question, equating "the level of need" under NPS policy with the capacity of the facility proposed in Whitemoss Landfill Ltd.'s application. They were simply acknowledging, correctly, that the policy in section 3.1 of the NPS does not set any maximum or minimum "level of need" for the facilities to which it relates, or make the need for any particular proposal depend on its scale or capacity. And in paragraph 61 of his decision letter the Secretary of State agreed. The Examining Authority were alive to the possibility that the "rate of deposits" might not turn out to be "sufficient to fill the capacity of the voids", and dealt with this possibility by providing for the "Review of void consumption" in requirement 32, which was incorporated in Schedule 2 to the development consent order.

65 There were, it should be remembered, two further needs to be considered in this case, both of which played an important part in the Examining Authority's assessment of the project. As well as the national need for the project arising from the NPS, they found both a regional need – a need for additional hazardous waste infrastructure in the North-West region, and also a local need – for additional capacity in the MWLP area.

66 The regional need arose from the "limitations as to the types of waste that can be deposited at [the] Minosus [landfill site]" and the lack of further "void space" at the Ineos site (paragraph 4.27 of the report). The existing provision for hazardous waste landfill in the region was "limited" (paragraph 4.333). The Examining Authority concluded that this development could meet that regional need (paragraphs 4.26 and 4.27), and that it "would be well located" to do so

(paragraphs 4.332 and 4.335). They attached "importance" to this consideration (paragraph 4.342). And the Secretary of State agreed (in paragraph 12 of his decision letter).

67 The local need was identified in the MWLP. At that tier of planning for the provision of hazardous waste infrastructure, as the Examining Authority acknowledged, the application site had itself been "identified in an early iteration of the MWLP as suitable for hazardous waste landfill". The "need identified in the MWLP for additional capacity [had] not been fulfilled in the development of any other site". This project "would clearly meet the need identified in the MWLP" (paragraph 4.77). It would "contribute to self-sufficiency as required by the MWCS", and would "fulfil the need identified in the MWLP" (paragraph 4.78). The Secretary of State agreed (in paragraph 15 of his decision letter). Without it, "the need identified in the examination of the MWCS would not be met" (paragraph 4.335). The fact that the proposed development would provide "well in excess of the capacity identified in the MWLP" did not negate those conclusions on the ability of the development to meet a local need, because – as the Examining Authority said – it was "not the intention of the NPS to limit provision to that which would meet the locally-generated demand" (paragraph 4.77).

68 This was not a case in which the Secretary of State had to determine, at the same time, two or more applications for development in a particular area, each promoted as nationally significant infrastructure projects under the 2008 Act, each capable of meeting an identified regional or local need for new hazardous waste facilities of a particular type within the scope of the policy in section 3.1 of the NPS. When that happens, the Secretary of State may find it necessary to assess the comparative merits of the proposals as competing or alternative schemes, or to consider their potential cumulative effects, and perhaps to grant development consent only for one. He may find, in the circumstances, that the weight to be given to the national need under NPS policy is not enough to outbalance the planning objections to one or more of the proposals before him.

69 The task facing the Secretary of State here was more straightforward. Only one application had to be determined. There was no rival scheme to compare with Whitemoss Landfill Ltd.'s project. To discharge the requirements of section 104 of the 2008 Act, the Secretary of State had to undertake an appropriate balance of considerations weighing for and against this particular proposal, giving NPS policy the statutory priority it was due. He also had to be satisfied, under the provisions of sections 122 and 123 , that there was a compelling case in the public interest for the compulsory acquisition of land, and that both the development itself and that compulsory acquisition of land would be a proportionate interference with the landowners' human rights.

70 In my view, in all these respects the Secretary of State determined the application lawfully, complying with the requirements of the statutory scheme. Whether the outcome would have been different if the proposal for the site had been a hazardous waste landfill facility of greater capacity than 150,000 tonnes per annum, or less, is immaterial.

71 I do not accept that the Secretary of State went wrong in his approach to the justification for the project as inappropriate development in the Green Belt. He did exactly what paragraph 5.10.15 of the NPS says he should. In paragraph 4.341 of their report the Examining Authority referred to the four main considerations constituting "harm to the [Green Belt] and any other harm". In paragraph 4.342 they referred to the considerations, nine in all, which in their view had to be weighed against the harm. Two of those nine considerations related to the need for the project: the fact that it enjoyed "the presumption [in the NPS] in favour of granting consent to applications for hazardous waste NSIPs, which clearly meet the need for such infrastructure established in the NPS", and "[the] importance of the facility to meet the need for hazardous waste disposal within the North-West of England". The other seven were particular attributes and benefits of the proposal: its compliance with the "the policy and requirements of the NPS" and the finding that it was "sustainable development"; its contribution to "meeting the principles of national self-sufficiency and … proximity in the … Waste Framework Directive"; its "locational benefits … reflecting its proximity to the national motorway network …"; its "ability to make use of current infrastructure …"; the "limited life-span of the landfill operations and its consequent impacts"; the "long-term benefits to biodiversity from the restoration proposals …"; and "[the] other long-term benefits in terms of restoration of Grade 2 agricultural land, visual amenity and recreation". The Examining Authority were able to conclude, in paragraph 4.343, that these "other considerations", taken together, "clearly [outweighed] the harm to the [Green Belt] and the limited other harm", and that "very special circumstances" existed to justify the making of the development consent order. They repeated that conclusion at the end of their report, in

paragraph 8.11. And the Secretary of State agreed with it (in paragraph 62 of his decision letter).

72 It is plain therefore that neither the Examining Authority nor the Secretary of State regarded the national need under the policy in section 3.1 of the NPS as an automatically overriding factor in the planning balance that had to be struck for this particular project. They did not treat it as decisive, on its own, of the Green Belt issues, or of any other issue. It did not displace any other relevant factor, on either side of the balance. It was only one of several considerations, which, in combination, were found to be sufficiently strong to enable consent for the project to be granted. The ability of the development to address the regional need was a separate and additional factor. So were each of the attributes and benefits to which the Examining Authority referred to in paragraph 4.342 of their report. The weight given to those considerations, both individually and together, was ultimately for the Secretary of State's planning judgment, which in my view he exercised lawfully. The "considerable" weight he gave to the national need for the project under NPS policy was, as I have said, within the range of reasonable planning judgment. It does not indicate any misinterpretation or misapplication of NPS policy.

73 Similar conclusions apply to the Secretary of State's consideration of the evidence and arguments on the need for the development consent order to include provision authorizing the compulsory acquisition of land under sections 122 and 123 of the 2008 Act, and on the question of whether the development itself, and the compulsory acquisition of land, would be a proportionate interference with the landowners' human rights. Again, I do not accept that either the Examining Authority or the Secretary of State fell into error.

74 As one would expect, the Examining Authority based their conclusions on the need for powers of compulsory acquisition squarely upon their assessment of and conclusions on the planning merits of the proposed development. Having concluded that the case for approving the project was secure – on the basis that the "other considerations" they had identified were "of such importance that they clearly outweigh the harm to the [Green Belt] and the limited other harm", so that there were "very special circumstances … which justify the making of the [development consent order]" (paragraph 4.343 of their report) – they went on to consider the evidence and representations for and against the granting of the powers of compulsory acquisition required to enable the project to go ahead. As they said, the case for compulsory acquisition depended on the view that the development consent order "as a whole" should be made (paragraph 6.58). Their conclusion that if the development consent order were made there would be a "compelling case in the public interest for acquisition" was founded on the conclusion in section 4 of their report that development consent should be granted (paragraph 6.59) – and the Secretary of State agreed (in paragraph 77 of his decision letter). Underpinning that conclusion were the nine "other considerations" set out in paragraph 4.342 of the report.

75 Two things follow. First, if, as I have concluded, the Examining Authority and the Secretary of State neither misinterpreted nor misapplied NPS policy in their assessment of the planning merits, they made no such error in concluding that powers of compulsory acquisition ought to be included in the development consent order under sections 122 and 123 . And second, the national need for the project under the policy in section 3.1 of the NPS did not play any greater role than it lawfully could in the assessment of the factors weighing in favour of compulsory acquisition powers being granted. It was, again, only one of several considerations in that assessment.

76 The same goes for the Examining Authority's and the Secretary of State's consideration of the landowners' human rights, under article 1 of the First Protocol and article 8. The conclusion again was clear, and based on a proper consideration of the planning merits and of the need for powers of compulsory acquisition to be included in the development consent order. Both the Examining Authority and the Secretary of State were satisfied that "[interference] with private rights in order to carry out the development would be both proportionate and justified in the public interest" (paragraph 6.52 of the Examining Authority's report and paragraph 77 of the Secretary of State's decision letter). And in the light of their view that development consent for the project should be granted, and that, if it were granted, "there would be a compelling case in the public interest for acquisition", they were also satisfied that there was "no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998 " (paragraph 6.59 of the report and paragraph 77 of the decision letter). I do not think that conclusion can be faulted. It discloses no misinterpretation or misapplication of national policy in the NPS. It is both lawful and sound.

77 In my view, therefore, the Secretary of State neither misinterpreted nor misapplied any policy of the NPS in making the development consent order – nor did he otherwise err in law.

## Conclusion

78 For those reasons I would dismiss the claim for judicial review.

Lord Justice Irwin

79 I agree.

The Senior President of Tribunals

80 I also agree.

Status: Positive or Neutral Judicial Treatment

# *278 Tesco Stores Ltd v Dundee City Council

No 11

Supreme Court

Court of Session, Inner House, Second Division

21 March 2012

**[2012] UKSC 13**

**2012 S.C. (U.K.S.C.) 278**

Lord Hope of Craighead DPSC Lord Brown of Eaton-under-Heywood Lord Kerr of Tonaghmore Lord Dyson Lord Reed

Lord Justice-Clerk (Gill) Lord Emslie Lady Smith

21 March 2012

11 February 2011

## Representation

Tesco Stores Ltd, Appellants— Kingston QC (of the English Bar), Munro Semple Fraser LLP

Dundee City Council, Respondents— RD Armstrong QC, Findlay QC Gillespie Macandrew LLP

Asda Stores Ltd and Macdonald Estates Group plc, Interveners— MG Thomson QC, McBrearty Brodies LLP

*Town and country planning—Planning permission—Development plan—Grant of planning permission where proposal not in accordance with development plan but justified by other material considerations—Whether planning authority misinterpreted "suitable" in structure plan and local plan—Whether interpretation of policy a matter for planning authority subject only to review if perverse or irrational—Whether misinterpretation affected decision—* *Town and Country Planning (Scotland) Act 1997 (cap 8), secs 25, 37(2)*

Section 25 of the Town and Country Planning (Scotland) Act 1997 (cap 8) provides, "Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise– (a) to be made in accordance with that plan".Section 37(2) provides, "In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Retailing policy 4 of the structure plan provided, "In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 sq m gross will only be acceptable where it can be established that: no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres". Policy 45 of the local plan provided, "The City Centre and District Centres will be the locations of first choice for new or expanded retail developments not already identified in the Local Plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that: a) no suitable site is available, in the first instance, within and thereafter on the edge of the City Centre or District Centres". The development plan included both the structure plan and the local plan.

The interveners applied for planning permission to develop a superstore on a large out-of-centre industrial site. The respondents concluded that a decision to grant planning permission would not be in accordance with the development plan, but was nevertheless justified by other material considerations. The appellants presented a petition for judicial review challenging the respondents' decision to grant the application on the basis that the respondents proceeded on a misunderstanding of one of the policies in the development plan and that misunderstanding vitiated their assessment of whether a departure from the plan was justified. The Lord Ordinary dismissed the petition and the Second Division refused the appellants' reclaiming motion. The appellants appealed to the Supreme Court. The appellants argued that the respondents had misinterpreted "suitable" in the first criterion in retailing policy 4 and of the equivalent criterion in policy 45 as meaning "suitable for the development proposed by the applicant" rather than "suitable for meeting identified deficiencies in retail provision in the area". They argued that the respondents had failed to identify correctly the extent of the conflict between the proposal and the development plan and in consequence their assessment of whether other material considerations justified a departure from the plan was flawed. They argued that the respondents had erred by treating the proposed development as definitive, and that there was a site available in Lochee which was sequentially preferable to the application site. The respondents argued that the court had no role in ***279** determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. They argued that they had proceeded on the basis that the proposal failed to accord with the second and third criteria and that it was immaterial how it had been assessed against the first criterion. They argued that the interveners' retail statement reflected a degree of flexibility, and the respondents had accepted that the Lochee site was not suitable for the reasons given by the interveners.

*Held* that: (1) the meaning of the development plan is not a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality; on the contrary policy statements in a development plan should be interpreted objectively in accordance with the language used, although such statements did not require to be construed as if they were statutory or contractual provisions (paras 18–20, 35, 39); (2) the respondents were correct to proceed on the basis that "suitable" in the first criterion of retailing policy 4 of the structure plan and the corresponding policy 45 of the local plan meant "suitable for the development proposed by the applicant", subject to the qualification that flexibility and realism were required from developers, retailers and planning authorities (paras 24–29, 36–39); (3) the interveners did not confine their assessment to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing, but even taking that approach they did not regard the Lochee site as being suitable for their needs; in accepting that assessment, the respondents exercised their judgment as to how the policy should be applied to the facts and did not proceed on an erroneous understanding of the policy (paras 30, 39); and appeal *dismissed* .

*Observed* (per Lord Reed) whether there has in fact been a misunderstanding of the policy, and whether any such misunderstanding may have led to a flawed decision, requires to be considered, but an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different and in the circumstances there was no such possibility (paras 22, 23, 31).

*City of Edinburgh Council v Secretary of State for Scotland 1998 SC (HL) 33 considered* .

*R v Derbyshire County Council, ex p Woods [1997] JPL 958 discussed* .

Lidl UK GmbH v Scottish Ministers [2006] CSOH 165 approved .

Tesco Stores ltd presented a petition under the judicial review procedure in the Court of Session seeking review of a decision by the development quality committee of Dundee City Council to grant outline planning permission to Asda Stores Ltd and MacDonald Estates Group plc. The petition and answers called before the Lord Ordinary (Brailsford) for a first hearing on 26 May 2010. On 15 September 2010, the Lord Ordinary dismissed the petition ([2010] CSOH 128).

The appellants reclaimed. The cause called before the Second Division, comprising the Lord Justice-Clerk (Gill), Lord Emslie and Lady Smith, for a hearing on the summar roll, on 16 November 2010. On 11 February 2011, the court refused the reclaiming motion ([2011] CSIH 9; 2011 SC 457).

The appellants appealed to the Supreme Court.

## Cases referred to:

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*Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680; 63 TLR 623*

*Edinburgh Council (City of) v Scottish Ministers 2001 SC 957; 2002 SLT 85; 2001 SCCR 891*

*Edinburgh Council (City of) v Secretary of State for Scotland 1998 SC (HL) 33; 1998 SLT 120; 1997 SCLR 1112; [1997] 1 WLR 1447; [1998] 1 All ER 174*

*Gransden (EC) & Co Ltd v Secretary of State for the Environment (1987) 54 P & CR 86; [1986] JPL 519 and (1987) 54 P & CR 361; [1987] JPL 365*

*Horsham District Council v Secretary of State for the Environment (1992) 63 P & CR 219; [1992] 1 PLR 81; [1992] JPL 334; [1992] COD 84*

Lidl UK GmbH v Scottish Ministers [2006] CSOH 165; 2006 GWD 34-706 ***280**

*Northavon District Council v Secretary of State for the Environment [1993] JPL 761*

*R v Derbyshire County Council, ex p Woods [1998] Env LR 277; [1997] JPL 958*

*R v Rochdale Metropolitan Borough Council, ex p Milne [2001] Env LR 22; [2001] 81 P & CR 27; [2001] JPL 470*

*R v Teesside Development Corporation, ex p William Morrison Supermarkets plc and Redcar and Cleveland Borough Council [1998] JPL 23; [1997] NPC 78*

*R (on the application of Heath and Hampstead Society) v Vlachos and ors sub nom R (on the application of Heath and Hampstead Society) v Camden London Borough Council [2008] EWCA Civ 193; [2008] 3 All ER 80; [2008] 2 P & CR 233; [2008] JPL 1504*

*R (on the application of Raissi) v Secretary of State for the Home Department [2008] EWCA Civ 72; [2008] QB 836; [2008] 3 WLR 375; [2008] 2 All ER 1023; [2008] Extradition LR 109*

*Tesco Stores Ltd v Secretary of State for the Environment and ors [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403; 70 P & CR 184*

## Textbooks etc referred to:

Scottish Executive Development Department, *Scottish Planning Policy* (B62809) (Scottish Government, Edinburgh, 2010) (Online: http://www.scotland.gov.uk/Resource/Doc/300760/0093908.pdf (27 March 2012))

> Scottish Office Development Department, *Town Centres and Retailing* (NPPG 8) (TSO, Edinburgh, 1998), paras 12–15
>
> Scottish Executive Development Department, *Town Centres and Retailing* (SPP 8) (Scottish Executive, Edinburgh, 2006)

The appeal was heard in the Supreme Court before Lord Hope of Craighead DPSC, Lord Brown of Eaton-under-Heywood, Lord Kerr of Tonaghmore, Lord Dyson and Lord Reed, on 15 and 16 February 2012.

At delivering judgment, on 21 March 2012—

Lord Reed (with whom Lord Brown, Lord Kerr and Lord Dyson agree)—

1 [1] If you drive into Dundee from the west along the A90 (T), you will pass on your left a large industrial site. It was formerly occupied by NCR Corporation, one of Dundee's largest employers, but its factory complex closed some years ago and the site has lain derelict ever since. In 2009 Asda Stores Ltd and MacDonald Estates Group plc, the interveners in the present appeal, applied for planning permission to develop a superstore there. Dundee City Council, the respondents, concluded that a decision to grant planning permission would not be in accordance with the development plan, but was nevertheless justified by other material considerations. Their decision to grant the application is challenged in these proceedings by Tesco Stores Ltd, the appellants, on the basis that the respondents proceeded on a misunderstanding of one of the policies in the development plan: a misunderstanding which, it is argued, vitiated their assessment of whether a departure from the plan was justified. In particular, it is argued that the respondents misunderstood a requirement, in the policies concerned with out-of-centre retailing, that it must be established that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres.

## Legislation

2 [2] Section 37(2) of the Town and Country Planning (Scotland) Act 1997 (cap 8), as in force at the time of the relevant decision, provides:

> 'In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.'

***281** Section 25 provides:

> 'Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise–
>
> (a) to be made in accordance with that plan'.

## Development plan

3 [3] The development plan in the present case is an 'old development plan' within the meaning of para 1 of sch 1 to the 1997 Act. As such, it is defined by sec 24 of the 1997 Act, as that section applied before the coming into force of sec 2 of the Planning etc (Scotland) Act 2006 (asp 17), as including the approved structure plan and the adopted or approved local plan. The relevant structure plan in the present case is the Dundee and Angus Structure Plan, which became operative in 2002, at a time when the NCR plant remained in operation. As is explained in the introduction to the structure plan, its purpose is to provide a long-term vision for the area and to set out the broad land use planning strategy guiding development and change. It includes a number of strategic planning policies. It sets the context for local plans, which translate the

strategy into greater detail. Its preparation took account of national planning policy guidelines.

4 [4] The structure plan includes a chapter on town centres and retailing. The introduction explains that the relevant government guidance is contained in *National Planning Policy Guidance 8: Town Centres and Retailing* . I note that that document (NPPG 8) was replaced in 2006 by *Scottish Planning Policy: Town Centres and Retailing* (SPP 8), which was in force at the time of the decision under challenge, and which was itself replaced in 2010 by *Scottish Planning Policy* (SPP). The relevant sections of all three documents are in generally similar terms. The structure plan continues (para 5.2):

> 'A fundamental principle of NPPG 8 is that of the sequential approach to site selection for new retail developments … On this basis, town centres should be the first choice for such developments, followed by edge of centre sites and, only after this, out of centre sites which are currently or potentially accessible by different means of transport.'

In relation to out-of-centre developments, that approach is reflected in Town Centres and Retailing Policy 4: *Out of Centre Retailing* :

> 'In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 sq m gross will only be acceptable where it can be established that:
>
> • no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres;
>
> • individually or cumulatively it would not prejudice the vitality and viability of existing city, town or district centres;
>
> • the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of the above centres;
>
> • the site is readily accessible by modes of transport other than the car;
>
> • the proposal is consistent with other Structure Plan policies.'

5 [5] The relevant local plan is the Dundee Local Plan, which came into operation in 2005, prior to the closure of the NCR plant. Like the structure plan, it notes that national planning policy guidance emphasises the need to protect and enhance the vitality and viability of town centres. It continues (para 52.2): ****282***

> 'As part of this approach planning authorities should adopt a sequential approach to new shopping developments with first preference being town centres, which in Dundee's case are the City centre and the District Centres.'

That approach is reflected in Policy 45: *Location of New Retail Developments* :

> 'The City Centre and District Centres will be the locations of first choice for new or expanded retail developments not already identified in the Local Plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that:
>
> a) no suitable site is available, in the first instance, within and thereafter on the edge of the City Centre or District Centres; and
>
> b) individually or cumulatively it would not prejudice the vitality and viability of the City

Centre or District Centres; and

c) the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of these centres; and

d) the site is readily accessible by modes of transport other than the car; and

e) the proposal is consistent with other Local Plan policies.'

6 [6] It is also relevant to note the guidance given in NPPG 8, as revised in 1998, to which the retailing sections of the structure plan and the local plan referred. Under the heading 'Sequential Approach', the guidance stated:

'12. Planning authorities and developers should adopt a sequential approach to selecting sites for new retail, commercial leisure developments and other key town centre uses …. First preference should be for town centre sites, where sites or buildings suitable for conversion are available, followed by edge-of-centre sites, and only then by out-of-centre sites in locations that are, or can be made easily accessible by a choice of means of transport. …

13. In support of town centres as the first choice, the Government recognises that the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. In preparing their proposals developers and retailers should have regard to the format, design, scale of the development, and the amount of car parking in relation to the circumstances of the particular town centre. In addition they should also address the need to identify and assemble sites which can meet not only their requirements, but in a manner sympathetic to the town setting. As part of such an approach, they should consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale might offer a better fit with existing development in the town centre. …

14. Planning authorities should also be responsive to the needs of retailers and other town centre businesses. In consultation with the private sector, they should assist in identifying sites in the town centre which could be suitable and viable, for example, in terms of size and siting for the proposed use, and are likely to become available in a reasonable time …

15. Only if it can be demonstrated that all town centre options have been thoroughly addressed and a view taken on availability, should less central sites in out-of-centre locations be considered for key town centre uses. Where development proposals in such locations fall outwith the development plan framework, it is for developers to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. Even where a developer, as part of a sequential approach, demonstrates an out-of-centre location to be the most appropriate, the impact on the vitality and viability of existing centres still has to be shown to be acceptable.'

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## Consideration of the application

7 [7] The interveners' application was for planning permission to develop a foodstore, café and petrol filling station, with associated car parking, landscaping and infrastructure, including access roads. The proposals also involved improvements to the junction with the A90 (T), the upgrading of a pedestrian underpass, the provision of footpaths and cycle ways, and improvements to adjacent roadways. A significant proportion of the former NCR site lay outside the application site. It was envisaged that vehicular access to this land could be achieved using one of the proposed access roads.

8 [8] In his report to the respondents, the director of city development advised that the application was contrary to certain aspects of the employment and retailing policies of the development plan.

In relation to the employment policies, in particular, the proposal was contrary to policies which required the respondents to safeguard the NCR site for business use. The director considered however that the application site was unlikely to be redeveloped for business uses in the short term, and that its redevelopment as proposed would improve the development prospects of the remainder of the NCR site. In addition, the infrastructure improvements would provide improved access which would benefit all businesses in an adjacent industrial estate.

9 [9] In relation to the retailing policies, the director considered the application in the light of the criteria in retailing policy 4 of the structure plan. In relation to the first criterion he stated:

> 'It must be demonstrated, in the first instance, that no suitable site is available for the development either within the city/district centres or, thereafter on the edge of these centres … While noting that the Lochee District Centre lies within the primary catchment area for the proposal, [the retail statement submitted on behalf of the interveners] examines the potential site opportunities in and on the edge of that centre and also at the Hilltown and Perth Road District Centres. The applicants conclude that there are no sites or premises available in or on the edge of existing centres capable of accommodating the development under consideration. Taking account of the applicant's argument it is accepted that at present there is no suitable site available to accommodate the proposed development.'

In relation to the remaining criteria, the director concluded that the proposed development was likely to have a detrimental effect on the vitality and viability of Lochee district centre, and was therefore in conflict with the second criterion. The potential impact on Lochee could, however, be minimised by attaching conditions to any permission granted so as to restrict the size of the store, limit the type of goods for sale and prohibit the provision of concessionary units. The proposal was also considered to be in conflict with the third criterion: there was no deficiency in shopping provision which the proposal would address. The fourth criterion, concerned with accessibility by modes of transport other than the car, was considered to be met. Similar conclusions were reached in relation to the corresponding criteria in policy 45 of the local plan.

10 [10] In view of the conflict with the employment and retailing policies, the director considered that the proposal did not fully comply with the provisions of the development plan. He identified however two other material considerations of particular significance. First, the proposed development would bring economic benefits to the city. The closure of the NCR factory had been a major blow to the ***284*** economy, but the redevelopment of the application site would create more jobs than had been lost when the factory finally closed. The creation of additional employment opportunities within the city was considered to be a strong material consideration. Secondly, the development would also provide a number of planning benefits. There would be improvements to the strategic road network which would assist in the free flow of traffic along the A90 (T). The development would also assist in the re-development of the whole of the former NCR site through the provision of enhanced road access and the clearance of buildings from the site. The access improvements would also assist in the development of an economic development area to the west. These benefits were considered to be another strong material consideration.

11 [11] The director concluded that the proposal was not in accordance with the development plan, particularly with regard to the employment and retailing policies. There were, however, other material considerations of sufficient weight to justify setting aside those policies and offering support for the development, subject to suitable conditions. He accordingly recommended that consent should be granted, subject to specified conditions.

12 [12] The application was considered by the respondents' entire council sitting as the respondents' development quality committee. After hearing submissions on behalf of the interveners and also on behalf of the appellants, the respondents decided to follow the director's recommendation. The reasons which they gave for their decision repeated the director's conclusions:

> 'It is concluded that the proposal does not undermine the core land use and environmental strategies of the development plan. The planning and economic benefits that would accrue from the proposed development would be important to the future development and viability of the city as a regional centre. These benefits are considered

to be of a significant weight and sufficient to set aside the relevant provisions of the development plan.'

## Present proceedings

13 [13] The submissions on behalf of the appellants focused primarily upon an alleged error of interpretation of the first criterion in retailing policy 4 of the structure plan, and of the equivalent criterion in policy 45 of the local plan. If there was a dispute about the meaning of a development plan policy which the planning authority was bound to take into account, it was for the court to determine what the words were capable of meaning. If the planning authority attached a meaning to the words which they were not properly capable of bearing, then it made an error of law, and failed properly to understand the policy. In the present case, the director had interpreted 'suitable' as meaning 'suitable for the development proposed by the applicant'; and the respondents had proceeded on the same basis. That was not however a tenable meaning. Properly interpreted, 'suitable' meant 'suitable for meeting identified deficiencies in retail provision in the area'. Since no such deficiency had been identified, it followed on a proper interpretation of the plan that the first criterion did not require to be considered: it was inappropriate to undertake the sequential approach. The director's report had however implied that the first criterion was satisfied, and that the proposal was to that extent in conformity with the sequential approach. The respondents had proceeded on that erroneous basis. They had thus failed to identify correctly the extent of the conflict between the proposal and the development plan. In consequence, their assessment ***285*** of whether other material considerations justified a departure from the plan was inherently flawed.

14 [14] The respondents had compounded their error, it was submitted, by treating the proposed development as definitive when assessing whether a 'suitable' site was available. That approach permitted developers to drive a coach and horses through the sequential approach: they could render the policy nugatory by the simple expedient of putting forward proposals which were so large that they could only be accommodated outside town and district centres. In the present case, there was a site available in Lochee which was suitable for food retailing and which was sequentially preferable to the application site. The Lochee site had been considered as part of the assessment of the proposal, but had been found to be unsuitable because it could not accommodate the scale of development to which the interveners aspired.

15 [15] In response, counsel for the respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. Counsel accepted that, if there was a dispute about the meaning of the words in a policy document, it was for the court to determine as a matter of law what the words were capable of meaning. The planning authority would only make an error of law if it attached a meaning to the words which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The respondents had proceeded on the basis that the proposal failed to accord with the second and third criteria. In those circumstances, the respondents had correctly concluded that the proposal was contrary to the policies in question. How the proposal had been assessed against the first criterion was immaterial.

16 [16] So far as concerned the assessment of 'suitable' sites, the interveners' retail statement reflected a degree of flexibility. There had been a consideration of all sites of at least 2.5 hectares, whereas the application site extended to 6.68 hectares. The interveners had also examined sites which could accommodate only food retailing, whereas their application had been for both food and non-food retailing. The Lochee site extended to only 1.45 hectares, and could accommodate a store of only half the size proposed. It also had inadequate car parking. The director, and the respondents, had accepted that it was not a suitable site for these reasons.

## Discussion

17 [17] It has long been established that a planning authority must proceed upon a proper understanding of the development plan (see, eg EC Gransden & Co Ltd v Secretary of State for the Environment , per Woolf J, p 94; Horsham District Council v Secretary of State for the Environment , per Nolan LJ, pp 225, 226). The need for a proper understanding follows, in the

first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by sec 25 of the 1997 Act. The effect of the predecessor of sec 25 , namely sec 18A of the Town and Country (Planning) Scotland Act 1972 (cap 52) (as inserted by sec 58 of the Planning and Compensation Act 1991 (cap 34)), was considered by the House of Lords in City of Edinburgh Council v Secretary of State for Scotland . It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. His Lordship observed (p 44): ***286**

> 'In the practical application of sec 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.'

18 [18] In the present case, the planning authority was required by sec 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as 'a proper interpretation' of the relevant provisions of the plan. We were however referred by counsel to a number of judicial *dicta* which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive secs 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a 'proper interpretation' of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in R (Raissi) v Secretary of State for the Home Department ), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19 [19] That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse ( Tesco Stores Ltd v Secretary of State for the Environment and ors , per Lord Hoffmann, p 780). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20 [20] The principal authority referred to in relation to this matter was the judgment of Brooke LJ in R v Derbyshire County Council, ex p Woods (p 290). Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated: ***287**

> 'If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision

> maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy.'

By way of illustration, Brooke LJ referred to the earlier case of Northavon District Council v Secretary of State for the Environment which concerned a policy applicable to 'institutions standing in extensive grounds'. As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with R (Heath and Hampstead Society) v Vlachos where a planning authority's decision that a replacement dwelling was not 'materially larger' than its predecessor, within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase 'materially larger' referred to the size of the new building compared with its predecessor, rather than requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in City of Edinburgh Council v Scottish Ministers the reporter's decision that a licensed restaurant constituted 'similar licensed premises' to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

21 [21] A provision in the development plan which requires an assessment of whether a site is 'suitable' for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word 'suitable', in the policies in question, means 'suitable for the development proposed by the applicant', or 'suitable for meeting identified deficiencies in retail provision in the area', is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.

22 [22] It is of course true, as counsel for the respondents submitted, that a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion, on the question whether the proposal was in accordance with the policy, as it would have reached if it had construed the policy correctly. That is not however a complete answer to a challenge to the planning authority's decision. An error in relation to one part of a policy might affect the overall conclusion as to whether a proposal was in accordance with the development plan even if the question whether the proposal was in conformity with the policy would have been answered in the same way. The policy criteria with which the proposal was considered to be incompatible might, for example, be of less weight than the criteria which were mistakenly thought to be fulfilled. Equally, a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion as it would otherwise have reached on the question whether the proposal was in accordance with the development plan. Again, however, that is not a complete answer. Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the ****288*** departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.

23 [23] In the present case, the Lord Ordinary rejected the appellants' submissions on the basis that the interpretation of planning policy was always primarily a matter for the planning authority, whose assessment could be challenged only on the basis of unreasonableness: there was, in particular, more than one way in which the sequential approach could reasonably be applied (para 23). For the reasons I have explained, that approach does not correctly reflect the role which the court has to play in the determination of the meaning of the development plan. A different approach was adopted by the Second Division: since, it was said, the proposal was in head-on conflict with the retail and employment policies of the development plan, and the sequential approach offered no justification for it, a challenge based upon an alleged misapplication of the sequential approach was entirely beside the point (para 38). For the reasons I have explained, however, even where a proposal is plainly in breach of policy and contrary to the development plan, a failure properly to understand the policy in question may result in a failure to appreciate the full extent or significance of the departure from the development plan which the grant of consent would involve, and may consequently vitiate the planning authority's determination. Whether there has in fact been a misunderstanding of the

policy, and whether any such misunderstanding may have led to a flawed decision, has therefore to be considered.

24 [24] I turn then to the question whether the respondents misconstrued the policies in question in the present case. As I have explained, the appellants' primary contention is that the word ‘suitable’, in the first criterion of retailing policy 4 of the structure plan and the corresponding policy 45 of the local plan, means ‘suitable for meeting identified deficiencies in retail provision in the area’, whereas the respondents proceeded on the basis of the construction placed upon the word by the director of city development, namely ‘suitable for the development proposed by the applicant’. I accept, subject to a qualification which I shall shortly explain, that the director and the respondents proceeded on the latter basis. Subject to that qualification, it appears to me that they were correct to do so, for the following reasons.

25 [25] First, that interpretation appears to me to be the natural reading of the policies in question. They have been set out above (paras 4, 5). Read short, retailing policy 4 of the structure plan states that proposals for new or expanded out-of-centre retail developments will only be acceptable where it can be established that a number of criteria are satisfied, the first of which is that ‘no suitable site is available’ in a sequentially preferable location. Policy 45 of the local plan is expressed in slightly different language, but it was not suggested that the differences were of any significance in the present context. The natural reading of each policy is that the word ‘suitable’, in the first criterion, refers to the suitability of sites for the proposed development: it is the proposed development which will only be acceptable at an out-of-centre location if no suitable site is available more centrally. That first reason for accepting the respondents' interpretation of the policy does not permit of further elaboration.

26 [26] Secondly, the interpretation favoured by the appellants appears to me to conflate the first and third criteria of the policies in question. The first criterion concerns the availability of a ‘suitable’ site in a sequentially preferable location. The third criterion is that the proposal would address a deficiency in shopping ***289*** provision which cannot be met in a sequentially preferable location. If ‘suitable’ meant ‘suitable for meeting identified deficiencies in retail provision’, as the appellants contend, then there would be no distinction between those two criteria, and no purpose in their both being included.

27 [27] Thirdly, since it is apparent from the structure and local plans that the policies in question were intended to implement the guidance given in NPPG 8 in relation to the sequential approach, that guidance forms part of the relevant context to which regard can be had when interpreting the policies. The material parts of the guidance are set out above (para 6). They provide further support for the respondents' interpretation of the policies. Paragraph 13 refers to the need to identify sites which can meet the requirements of developers and retailers, and to the scope for accommodating the proposed development. Paragraph 14 advises planning authorities to assist the private sector in identifying sites which could be suitable for the proposed use. Throughout the relevant section of the guidance, the focus is upon the availability of sites which might accommodate the proposed development and the requirements of the developer, rather than upon addressing an identified deficiency in shopping provision. The latter is of course also relevant to retailing policy, but it is not the issue with which the specific question of the suitability of sites is concerned.

28 [28] I said earlier that it was necessary to qualify the statement that the director and the respondents proceeded, and were correct to proceed, on the basis that ‘suitable’ meant ‘suitable for the development proposed by the applicant’. As para 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in R v Teesside Development Corporation, ex p William Morrison Supermarkets plc and Redcar and Cleveland Borough Council (p 43) to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale

may fit better with existing development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

29 [29] It follows from the foregoing that it would be an over-simplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to ***290*** have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in Lidl UK GmbH v Scottish Ministers (para 14), whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site.

30 [30] In the present case, it is apparent that a flexible approach was adopted. The interveners did not confine their assessment to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing. Even taking that approach, however, they did not regard the Lochee site vacated by the appellants as being suitable for their needs: it was far smaller than they required, and its car parking facilities were inadequate. In accepting that assessment, the respondents exercised their judgment as to how the policy should be applied to the facts: they did not proceed on an erroneous understanding of the policy.

31 [31] Finally, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different. In the particular circumstances of the present case, I am not persuaded that there was any such possibility. The considerations in favour of the proposed development were very powerful. They were also specific to the particular development proposed: on the information before the respondents, there was no prospect of any other development of the application site, or of any development elsewhere which could deliver equivalent planning and economic benefits. Against that background, the argument that a different decision might have been taken if the respondents had been advised that the first criterion in the policies in question did not arise, rather than that criterion had been met, appears to me to be implausible.

## Conclusion

32 [32] For these reasons, and those given by Lord Hope, with which I am in entire agreement, I would dismiss the appeal.

Lord Hope DPSC—

33 [33] The question that lies at the heart of this case is whether the respondents acted unlawfully in their interpretation of the sequential approach which both the structure plan and the relevant local plan required them to adopt to new retail developments within their area. According to that approach, proposals for new or expanded out-of-centre developments of this kind are acceptable only where it can be established, among other things, that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres. Is the test as to whether no suitable site is available in these locations, when looked at sequentially, to be addressed by asking whether there is a site in each of them in turn which is suitable for the proposed development? Or does it direct attention to the question whether the proposed development could be altered or reduced so as to fit into a site which is available there as a location for this kind of development?

34 [34] The sequential approach is described in *National Planning Policy Guidance 8: Town Centres and Retailing* (para 5.2), as a fundamental principle of NPPG 8. In R v Rochdale Metropolitan Borough Council, ex p Milne (paras 48-49) Sullivan J said that it ***291*** was not unusual for development plan polices to pull in different directions and, having regard to what

Lord Clyde said about the practical application of the statutory rule in City of Edinburgh Council v Secretary of State for Scotland (p 44), that he regarded as untenable the proposition that if there was a breach of any one policy in a development plan a proposed development could not be said to be ‘in accordance with the plan’. In para 52 he said that the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided.

35 [35] I see no reason to question these propositions, to which senior counsel for the appellants drew our attention in his reply to senior counsel for the respondents' submissions. But I do not think that they are in point in this case. We are concerned here with a particular provision in the planning documents to which the respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion (para 23), is the interpretation of the policy which it sets out primarily a matter for the decision-maker. As senior counsel for the interveners pointed out, the challenge to the respondents' decision to follow the director's recommendation and approve the proposed development is not that it was Wednesbury unreasonable but that it was unlawful. I agree with Lord Reed that the issue is one of law, reading the words used objectively in their proper context.

36 [36] In Lidl UK GmbH v Scottish Ministers the appellants appealed against a decision of the Scottish Ministers to refuse planning permission for a retail unit to be developed on a site outwith Irvine town centre. The relevant provision in the local plan required the sequential approach to be adopted to proposals for new retail development out with the town centre boundaries. Among the criteria that had to be satisfied was the requirement that no suitable sites were available, or could reasonably be made available, in or on the edge of existing town centres. In other words, town centre sites were to be considered first before edge-of-centre or out-of-town sites. The reporter held that the existing but soon to be vacated Lidl town centre site was suitable for the proposed development, although it was clear as a matter of fact that this site could not accommodate it. In para 13 Lord Glennie noted that counsel for the Scottish Ministers accepted that a site would be ‘suitable’ in terms of the policy only if it was suitable for, or could accommodate, the development as proposed by the developer. In para 14 he said that the question was whether the alternative town centre site was suitable for the proposed development, not whether the proposed development could be altered or reduced so that it could fit in to it.

37 [37] Senior counsel for the appellants submitted that Lord Glennie's approach would rob the sequential approach of all its force, and in the Inner House it was submitted that his decision proceeded on a concession by counsel which ought not to have been made (para 31). But I think that Lord Glennie's interpretation of the phrase was sound and that counsel was right to accept that it had the meaning which she was prepared to give to it. The wording of the relevant provision in the local plan in that case differed slightly from that with which we are concerned in this case, as it included the phrase ‘or can reasonably be made available’. But the question to which it directs attention is the same. It is the proposal for which the developer seeks permission that has to be considered when the question is asked whether no suitable site is available within or on the edge of the town centre.

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38 [38] The context in which the word ‘suitable’ appears supports this interpretation. It is identified by the opening words of the policy, which refer to ‘proposals for new or expanded out of centre retail developments’ and then sets out the only circumstances in which developments outwith the specified locations will be acceptable. The words ‘the proposal’ which appear in the third and fifth of the list of the criteria which must be satisfied serve to reinforce the point that the whole exercise is directed to what the developer is proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer. It is worth noting too that the phrase ‘no suitable site is available’ appears in policy 46 of the local plan relating to commercial developments. Here too the context indicates that the issue of suitability is directed to the developer's proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers, in para 28, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some

artificial world in which they have no interest doing so.

39 [39] For these reasons which I add merely as a footnote I agree with Lord Reed, for all the reasons he gives, that this appeal should be dismissed. I would affirm the Second Division's interlocutor.

*The Court dismissed the appeal.*

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Status: Positive or Neutral Judicial Treatment

# *1865 Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another

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

Supreme Court

10 May 2017

**[2017] UKSC 37**

**[2017] 1 W.L.R. 1865**

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

2017 Feb 22; 23; May 10

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

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

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In the first case the district council refused the developer planning permission for 26 dwellings on land at Yoxford, Suffolk. The inspector appointed by the Secretary of State to hear the developer's appeal upheld the district council's decision. On the developer's application under section 288 of the Town and Country Planning Act 1990 the judge quashed the inspector's decision. The district council appealed to the Court of Appeal. In the second case the developer applied to the borough council for planning permission for up to 170 dwellings on land at Willaston, Cheshire. When the borough council failed to determine the developer's application in time the developer applied to the Secretary of State. The inspector appointed allowed the developer's appeal and granted planning permission for up to 146 dwellings. The judge granted the borough council's application under section 288 of the 1990 Act to quash the inspector's decision and the developer appealed to the Court of Appeal. In each case the inspector had to establish whether particular policies of the relevant development plans were considered not "up-to-date" under paragraph 49 of the National Planning Policy Framework ("NPPF"), and, if so, what the consequences for his decision should be. Paragraph 14 of the NPPF set out how the general presumption in favour of sustainable development should be applied including whether relevant policies were "out-of-date". Paragraph 49 of the NPPF provided, *1866 inter alia, that "[relevant] policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites". The Court of Appeal, concluding that "policies for the supply of housing" in paragraph 49 included policies "affecting" the supply of housing, dismissed the appeal in the first case on the ground that, since the inspector had erred in the interpretation and application of the policy in paragraph 49 of the NPPF so as to vitiate his decision, the judge had been correct to quash his decision. The Court of Appeal allowed the appeal in the second case on the basis that, since the inspector had correctly interpreted paragraph 49 of the NPPF and had correctly applied the relevant development plan

policies, he had made no error of law and the judge had been wrong to quash his decision.

On appeal by the local authority in each case—

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

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

Dicta of Laws LJ in *R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] 1 WLR 3923* , para 12, CA disapproved.

(2) That, in the determination of a planning application, a framework such as the NPPF was no more than “guidance”, and therefore “a material consideration” in that process; but that it did not provide a statutory test and did not displace, or distort, the primacy given by statute to the statutory development plan; that the NPPF was to be interpreted in its overall context and, where the guidance related to decision-making in planning applications, it had to be interpreted in all cases in the context of section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004 , to which the guidance was subordinate; that, while recourse to the court was necessary for the resolution of distinct issues of law or for consistency of interpretation in relation to specific policies, the court's role was not to be overstated and courts should respect the expertise of the specialist planning inspectors and start with the presumption that they would have correctly understood the policy framework; that the inspectors had primary responsibility for resolving disputes between planning authorities and developers in individual cases over the practical application of policies, at national or local level, and their position was in part analogous with that of expert tribunals; and that, accordingly, courts were to exercise caution against intervening unduly in policy judgments falling within the inspectors' areas of special competence (post, paras 21–25, 72–75).

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

(3) That the primary purpose of paragraph 49 of the NPPF was to act as a trigger to the operation of “the tilted balance” in favour of permission under paragraph 14, which, unlike paragraph 49, was not solely concerned with housing policy but operated in respect of other forms of development covered by the development plan; that paragraph 49 came within a group of paragraphs dealing with the delivery of housing in the context provided by paragraph 47 which set objectives for boosting the supply of housing; that the words “policies for the supply of housing” indicated the category of policies concerned, namely, housing supply policies; that the word “for” simply indicated the purpose of the policies in question to distinguish them from other categories and the substitution by the Court of Appeal of the word “affecting” bore a different emphasis and was unjustified; that while other groups of policies, positive or restrictive, might interact with the housing policies and so affect ***1867*** their operation, that did not make them policies for the supply of housing in the ordinary sense of that expression; that although paragraph 49 was to be construed narrowly it did not require a legalistic exercise to decide whether individual policies fell within the expression in question; and that the central issue was not how to define the individual policies but whether the result was a demonstrable five-year supply of housing meeting the objectives set by paragraph 47 (post, paras 54–59, 76, 80, 82).

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

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

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

The following cases are referred to in the judgments:

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*AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening) [2007] UKHL 49; [2008] AC 678; [2007] 3 WLR 832; [2008] 4 All ER 190* , HL(E)

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

*Cotswold District Council v Secretary of State for Communities and Local Government [2013] EWHC 3719 (Admin)*

*Crane v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin)*

*Edinburgh (City of) Council v Secretary of State for Scotland [1997] 1 WLR 1447; [1998] 1 All ER 174* , HL(Sc)

*Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358; 82 LGR 488* , HL(E)

*Proclamations, Case of (1610) 12 Co Rep 74*

*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929* , HL(E)

*R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government [2011] EWHC 97 (Admin); [2011] 1 P & CR 22*

*R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening) [2017] UKSC 5; [2017] 2 WLR 583; [2017] 1 All ER 593* , SC(E)

*R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441; [2016] 1 WLR 3923; [2016] PTSR 982* , CA

*South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Land [2014] EWHC 573 (Admin)*

*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13;*

*[2012] PTSR 983; 2012 SLT 739* , SC(Sc)

*William Davis Ltd v Secretary of State for Communities and Local Government [2013] EWHC 3058 (Admin)* ****1868***

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

The following additional cases were cited in argument:

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*Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680* , CA

*Barker Mill Estates (Trustees of the) v Secretary of State for Communities and Local Government [2016] EWHC 3028 (Admin); [2017] PTSR 408*

*Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P &CR 263* , CA

*Daventry District Council v Secretary of State for Communities and Local Government [2016] EWCA Civ 1146* , CA

*Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 825; [2014] PTSR 1471* , CA

*Findlay, In re [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801* , HL(E)

*Loup v Secretary of State for the Environment (1995) 71 P &CR 175* , CA

*McFarland, In re [2004] UKHL 17; [2004] 1 WLR 1289* , HL(NI)

*Mordue v Secretary of State for Communities and Local Government [2015] EWCA Civ 1243; [2016] 1 WLR 2682* , CA

*North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P &CR 137* , CA

*Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government [2016] EWCA Civ 1040* , CA

*Obar Camden Ltd v Camden London Borough Council [2015] EWHC 2475 (Admin); [2015] LLR 782*

*Oxted Residential Ltd v Tandridge District Council [2016] EWCA Civ 414* , CA

*R (Friends of the Earth Ltd) v North Yorkshire County Council [2016] EWHC 3303 (Admin)*

*R (Hampton Bishop Parish Council) v Herefordshire Council [2014] EWCA Civ 878; [2015] 1 WLR 2367* , CA

*R (Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417; [2004] LGR 696* , CA

*R (Lee Valley Regional Park Authority) v Epping Forest District Council [2016] EWCA Civ 404; [2016] JPL 1009* , CA

*R (Raissi) v Secretary of State for the Home Department [2008] EWCA Civ 72; [2008] QB 836; [2008] 3 WLR 375; [2008] 2 All ER 1023* , CA

*R (Save Britain's Heritage) v Liverpool City Council [2016] EWCA Civ 806; [2017] JPL 39* , CA

*R (TW Logistics Ltd) v Tendring District Council [2013] EWCA Civ 9; [2013] 2 P & CR 9* , CA

*R (Timmins) v Gedling Borough Council [2015] EWCA Civ 10; [2015] PTSR 837; [2016] 1 All ER 895* , CA

*Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 1386; [2015] PTSR 274* , CA

*Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665; 75 LGR 190* , HL(E)

*Simplex GE (Holdings) v Secretary of State for the Environment (1988) 57 P &CR 306* , CA

*Solihull Metropolitan Borough Council v Gallagher Estates Ltd [2014] EWCA Civ 1610; [2015] JPL 713* , CA

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

West v First Secretary of State [2005] EWHC 729 (Admin); [2005] NPC 58

*Woodcock Holdings Ltd v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin); [2015] JPL 1151* ****1869***

**APPEAL** from the Court of Appeal

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

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

By an appellant's notice dated 20 February 2015, and pursuant to permission granted by the Court of Appeal (Sullivan LJ), the local planning authority appealed on the grounds that the judge had erred in holding that (1) policy SP29 of the Suffolk Coastal Local Plan was a policy for the supply of housing within the meaning of paragraph 49 of the National Planning Policy Framework ("NPPF"); (2) policies directed at protecting the environment, which had the effect of restricting land available for residential development, should be treated as policies for the supply of housing within the meaning of paragraph 49; (3) the inspector had wrongly considered that the physical limits boundaries were identified in the recently adopted local plan; (4) the application of the physical limits boundaries should have been given less weight by the inspector because they had been carried over from an earlier plan; (5) the inspector had misinterpreted paragraph 135 of the NPPF and the definition of "significance" in Annex 2 of the NPPF; and (6) the inspector had failed to carry put a separate assessment of the heritage asset and the scale of any harm or loss to it. On 17 March 2016 the Court of Appeal (Jackson, Vos and Lindblom LJJ) [2016] PTSR 1315 dismissed the local planning authority's appeal.

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

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

By an appellant's notice filed on 18 March 2015 and pursuant to permission granted by the Court of Appeal (Sullivan LJ) the developer appealed on grounds that the judge had erred (1) in her interpretation of paragraph 49 of the NPPF; (2) in recognising the inspector's assessment of policy NE4 of the Crewe and Nantwich Replacement Local Plan; and (3) ought to have concluded that the decision would have been the same regardless of the approach taken to the weight given to policy NE4. The ***1870*** appeal was conjoined with that of Hopkins Homes Ltd v Secretary of State for Communities and Local Government in recognition of the wider importance to local planning authorities, developers and local communities in the outcome. On 17 March 2016 the Court of Appeal (Jackson, Vos and Lindblom LJJ) [2016] PTSR 1315 allowed the developer's appeal.

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

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

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

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

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

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

The court took time for consideration.

10 May 2017. The following judgments were handed down.

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

## Introduction

1 The appeals relate to the proper interpretation of paragraph 49 of the National Planning Policy Framework (2012) ("NPPF"), which is in these terms:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

2 The Court of Appeal [2016] PTSR 1315 observed that the interpretation of this paragraph had been considered by the Administrative ***1871*** Court on seven separate occasions between October 2013 and April 2015 with varying results. The court had been urged by all counsel "to bring much needed clarity to the meaning of the policy". Notwithstanding the clarification provided by the impressive judgment of the court (given by Lindblom LJ), controversy remains. The appeals provide the opportunity for this court not only to consider the narrow issues of interpretation of paragraph 49, but to look more broadly at issues concerning the legal status of the NPPF and its relationship with the statutory development plan.

3 Both appeals relate to applications for housing development, one at Yoxford in the administrative area of the Suffolk Coastal District Council ("the Yoxford site"), and the other near Willaston in the area of Cheshire East Borough Council ("the Willaston site"). In the first the council's refusal of permission was upheld by the inspector on appeal, but his refusal was quashed in the High Court [2015] EWHC 132 (Admin) (Supperstone J), and that decision was confirmed by the Court of Appeal. In the second, the council failed to determine the application, and the appeal was allowed by the inspector. The council's challenge succeeded in the High Court [2015] EWHC 410 (Admin) (Lang J), but that decision was reversed by the Court of Appeal, the judgment of the court being given by Lindblom LJ. Both councils appeal to this court.

## The statutory provisions

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

### *Plan-making*

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

6 In preparing such documents, the authority must have regard (inter alia) to "national policies and advice contained in guidance issued by the Secretary of State": section 19(2) . Every development plan document must be submitted to the Secretary of State for "independent examination", one of the purposes being to determine whether it complies with the relevant statutory requirements, including

section 19 : section 20(1)(5)(a) . The ***1872*** Secretary of State may, if he thinks that a local development document is "unsatisfactory", direct the local planning authority to modify the document: section 21 . Section 39 gives statutory force to the concept of "sustainable development" (undefined). Any person or body exercising any function under Part 2 in relation to local development documents must exercise it "with the objective of contributing to the achievement of sustainable development", and for that purpose must have regard to "national policies and advice contained in guidance issued by … the Secretary of State". An adopted plan may be challenged on legal grounds by application to the High Court made within six weeks of the date of adoption, but not otherwise: section 113 . Schedule 8 contained transitional provisions providing generally for a transitional period of three years, after which the plans produced under the previous system ceased to have effect subject to the power of the Secretary of State to "save" specified policies by direction.

*Planning applications*

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

1990 Act, section 70(2) , as amended:

> "In dealing with such an application the authority shall have regard to— (a) the provisions of the development plan, so far as material to the application, (b) any local finance considerations, so far as material to the application, and (c) any other material considerations."

2004 Act, section 38(6) :

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

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

8 The principle that the decision-maker should have regard to the development plan so far as material and "any other material considerations" has been part of the planning law since the Town and Country Planning Act 1947 . The additional weight given to the development plan by section 38(6) of the 1990 Act reproduces the effect of a provision first seen in the Planning and Compensation Act 1991, section 26 (inserting section 54A into the 1990 Act). In *City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447* , the equivalent provision ( section 18A of the Town and Country Planning (Scotland) Act 1972 ) was described by Lord Hope of Craighead, at p 1450B, as designed to "enhance the status" of the development plan in the exercise of the planning authority's judgment. Lord Clyde spoke of it as creating "a presumption" that the development plan is to govern the decision, subject to "material considerations", as for example where "a particular policy in the plan can be seen to be outdated and superseded by more recent guidance". However, the section had not ***1873*** touched the well established distinction between the respective roles of the decision-maker and the court (p 1458):

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

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

## The National Planning Policy Framework

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

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

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

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

> " *For plan-making* this means that:
>
> "• local planning authorities should positively seek opportunities to meet the development needs of their area;
>
> "• local plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
>
> ***1874**
>
> "—any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> "—specific policies in this Framework indicate development should be restricted [footnote 9].
>
> "For *decision-taking* this means [footnote 10]:
>
> "• approving development proposals that accord with the development plan without delay; and
>
> "• where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> "—any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> "—specific policies in this Framework indicate development should be restricted [footnote 9]."

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

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

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

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

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

> "To boost significantly the supply of housing, local planning authorities should:
>
> "• use their evidence base to ensure that their local plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in [the NPPF], including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
>
> ***1875**
>
> "• identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements with an additional buffer of 5% … to ensure choice and competition in the market for land …
>
> "• identify a supply of specific, developable sites or broad locations for growth, for years six to ten and, where possible, for years 11–15;
>
> "• for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
>
> "• set out their own approach to housing density to reflect local circumstances."

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

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

> "The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications

> that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

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

18 Annex 1 ("Implementation") states that policies in the Framework "are material considerations which local planning authorities should take into account from the day of its publication" (paragraph 212); and that, where necessary, plans, should be revised as quickly as possible to take account of the policies "through a partial review or by preparing a new plan" (paragraph 213). However, it also provides that for a transitional period of a year decision-takers "may continue to give full weight to relevant policies adopted since 2004, even if there is a limited degree of conflict with this Framework" (paragraph 214); but that thereafter (paragraph 215):

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

***1876**

## NPPF—Legal status and interpretation

19 The court heard some discussion about the source of the Secretary of State's power to issue national policy guidance of this kind. The agreed statement of facts quoted without comment a statement by Laws LJ ( *R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] 1 WLR 3923* , para 12) that the Secretary of State's power to formulate and adopt national planning policy is not given by statute, but is "an exercise of the Crown's common law powers conferred by the royal prerogative". In the event, following a query from the court, this explanation was not supported by any of the parties at the hearing. Instead it was suggested that his powers derived, expressly or by implication, from the planning Acts which give him overall responsibility for oversight of the planning system: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295* , paras 140–143, per Lord Clyde. This is reflected both in specific requirements (such as in section 19(2) of the 2004 Act relating to plan preparation) and more generally in his power to intervene in many aspects of the planning process, including (by way of call-in) the determination of appeals.

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

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

## Law and policy

22 The correct approach to the interpretation of a statutory development plan was discussed by this court in *Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening) [2012] PTSR 983* . Lord ***1877*** Reed JSC rejected a submission that the meaning of the development plan was a matter to be determined solely by the planning authority, subject to rationality. He said, at para 18:

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."

He added, however, at para 19, that such statements should not be construed as if they were statutory or contractual provisions:

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

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

24 In the first place, it is important that the role of the court is not overstated. Lord Reed JSC's application of the principles in the particular case (para 18) needs to be read in the context of the relatively specific policy there under consideration. Policy 45 of the local plan provided that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any "suitable site" within or linked to the existing centres (para 5). The short point was the meaning of the word "suitable" (para 13): suitable for the development proposed by the ***1878*** applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed JSC identified as one of textual interpretation, "logically prior" to the exercise of planning judgment (para 21). As he recognised (para 19), some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis.

25 It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the planning

inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal ( *Wychavon District Council v Secretary of State for Communities and Local Government [2009] PTSR 19* , para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence: see AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening) [2008] AC 678 , para 30, per Baroness Hale of Richmond.

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

## The two appeals

### *Evolving judicial guidance*

27 To understand the reasoning of the two inspectors in the instant cases, it is necessary to set it in the context of the evolving High Court jurisprudence. The decisions in the two appeals were given in July and August 2014 respectively, after inquiries which ended in both cases in June. It is not entirely clear what information was available to the inspectors as to the current state of the High Court jurisprudence on this topic. The Yoxford inspector referred only to *William Davis Ltd v Secretary of State for Communities and Local Government [2013] EWHC 3058 (Admin)* (Lang J). This seems to have been the first case in which this issue had arisen. One of the grounds of refusal was based on a policy E20 the effect of which was generally to exclude development in a so-called “green wedge” area defined on the proposals map. Lang J recorded an argument for the developer that the policy should have been regarded as a “relevant policy for the supply of housing” under paragraph 49 because “the restriction on development ***1879*** potentially affects housing development”. The judge rejected this argument summarily, saying: “policy E20 does not relate to the *supply* of housing and therefore is not covered by paragraph 49.” (Original emphasis.)

28 By the time the two inquiries in the present case ended (June 2014), and at the time of the decisions, it seems that the most recent judicial guidance then available on the interpretation of paragraph 49 was that of Ouseley J in *South Northamptonshire Council v Secretary of State for Communities and Local Government [2014] EWHC 573 (Admin)* (“the *Barwood Land* case”). Ouseley J, at para 46, favoured a wider reading which “examines the degree to which a particular policy generally affects housing numbers, distribution and location in a significant manner”. He thought, at para 47, that the language could not sensibly be given a very narrow meaning because:

> “This would mean that policies for the provision of housing which were regarded as out of date, none the less would be given weight, indirectly but effectively through the operation of their counterpart provisions in policies restrictive of where development should go …”

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

29 At that time, it seems to have been assumed that if a policy were deemed to be “out-of-date” under paragraph 49, it was in practice to be given minimal weight, in effect “disapplied”: see eg *Cotswold District Council v Secretary of State for Communities and Local Government [2013] EWHC 3719 (Admin)* at [72], per Lewis J. In other words, it was treated for the purposes of paragraph 14 as non-policy, in the same way as if the development plan were “absent” or “silent”. On that view, it was clearly important to establish which policies were or were not to be treated as out-of-date in that sense. Later cases (after the date of the present decisions) introduced a greater degree of flexibility, by suggesting that paragraph 14 did not take away the ordinary discretion of the decision-maker to

determine the weight to be given even to an "out-of-date" policy; depending, for example, on the extent of the shortfall and the prospect of development coming forward to make it up: see eg *Crane v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin)* at [71], per Lindblom J. As will be seen, this idea was further developed in Lindblom LJ's judgment in the present case.

*The Yoxford site*

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

31 The statutory development plan for the area comprised the Suffolk Coastal District Local Plan ("SCDLP") adopted in July 2013, and certain "saved" policies from the previous local plan ("the old Local Plan") adopted ***1880*** in December 1994. Chapter 3 of the SCDLP set out a number of "strategic policies", including:

> (i) Under the heading "Housing", policy SP2 ("Housing numbers and Distribution") proposed as its "core strategy" to make provision for 7,900 new homes across the district in the period 2010–2027. In addition, "an early review" to be commenced by 2015 was to identify "the full, objectively assessed housing needs" for the district, with proposals to ensure that these were met so far as consistent with the NPPF. A table showed the proposed locations across the district to make up the total of 7,900 homes.
>
> (ii) Under the heading "The Spatial Strategy", policy SP19 ("Settlement Policy") identified Yoxford as one of a number of Key Service Centres, which provide "an extensive range of specified facilities", and where "modest estate-scale development" may be appropriate "within the defined physical limits" (under policy SP27: "Key and Local Service Centres"). Outside these settlements (under policy SP29: "The Countryside") there was to be "no development other than in special circumstances".
>
> (iii) The commentary to SP19 (para 4.05) explained that "physical limits boundaries" or "village envelopes" would be drawn up for the larger settlements, but that these limits are "a policy tool" and that where allocations are proposed outside the envelopes, the envelopes would be redrawn to include them.

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

33 The "saved" policies from the old plan included: AP4 ("Parks and gardens of historic or landscape interest"):

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

AP13 ("Special Landscape Areas"):

> "The valleys and tributaries of (named rivers) and the Parks and Gardens of Historic or Landscape Interest are designated as Special Landscape Areas and shown on the Proposals Map. The District Council will ensure that no development will take place

> which would be to the material detriment of, or materially detract from, the special landscape quality."

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

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

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

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

37 In relation to the proposal for development outside the defined village limits, he observed that the appeal site was outside the physical limits boundary "as defined in the very recently adopted local plan". He regarded the policy directing development to within the physical limits of the settlement to be "in accordance with one of the core principles of the Framework, recognising the intrinsic character and beauty of the countryside". On this aspect he concluded, at paras 13–14:

> "I consider that the appeal site occupies an important position adjacent to the settlement, where Old High Road marks the end of the village and the start to the open countryside. The proposed development would be unacceptable in principle, contrary to the provisions of policies SP27 and SP29 and contrary to one of the core principles of the Framework."

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

> "20. In relation to the built character and layout of Yoxford and its setting, Old High Road forms a strong and definite boundary to the built development of the village here. I do not agree that the proposal forms an ***1882** appropriate development site in this respect, but would be seen as an ad hoc expansion across what would otherwise be seen as the village/countryside boundary and the development site would not be contained to the west by any existing logical boundary.
>
> "21. In respect of these matters, the historic parkland forms a non-designated heritage asset, as defined in the Framework and I conclude that the proposal would have an

> unacceptable effect on the significance of this asset. In relation to local policies, I find that the proposal would be in conflict with the aims of policies AP4 and AP13 of the old Local Plan …"

39 Finally, under the heading "The planning balance", he acknowledged the advantage that the proposal would bring "additional homes, including some affordable, within a District where the supply of homes is a concern", but said, at paras 31–32:

> "However, I have found significant conflict with policies in the recently adopted local plan. I have also found conflict with some saved policies of the old Local Plan and I have sought to balance these negative aspects of the proposal against its benefits. In doing so, I consider that the unacceptable effects of the development are not outweighed by any benefits and means that it cannot be considered as a sustainable form of development, taking account of its three dimensions as set out at paragraph 7 of the Framework. Therefore, the proposal conflicts with the aims of the Framework."

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

*The Willaston site*

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

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

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

> (i) Policy NE.2 ("Open Countryside") seeks to protect the open countryside from new build development for its own sake, permitting only a very limited amount of small scale development mainly for agricultural, forestry or recreational purposes.
>
> (ii) Policy NE.4 ("Green Gap") relates to areas of open land around Crewe (including the area of the appeal site) identified as needing additional protection "in order to maintain the

> definition and separation of existing communities". The policy provides that permission will not be granted for new development, including housing, save for limited exceptions. It has the same inner boundary as NE.2.
>
> (iii) Policy RES.5 ("Housing in the open countryside") permits only very limited forms of residential development in the open countryside, such as agricultural workers' dwellings.

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

45 He concluded on this aspect, at para 94:

> "I have concluded that there is not a demonstrable five-year supply of deliverable housing sites (issue (i)). In the light of that, the weight of policies in the extant RLP relevant to the supply of housing is reduced (issue (ii)). That applies in particular to policies NE.2, NE.4 and RES.5 in so far as their extent derives from settlement boundaries that in turn reflect out-of-date housing requirements, though policy NE.4 also has a wider purpose in maintaining gaps between settlements."

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46 He considered the application of the green gap policy, concluding that there would be "no significant harm to the wider functions of the gap in maintaining the definition and separation of these two settlements": para 95. His overall conclusion was as follows, at para 101:

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

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

## The Court of Appeal's interpretation

48 Giving the judgment of the court, *Lindblom LJ [2016] PTSR 1315* referred to the relevant parts of the NPPF and (at para 21) the three competing interpretations of paragraph 49:

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

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

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

49 He discussed the connection between paragraph 49 and the presumption in favour of sustainable development in paragraph 14, which lay in the concept of relevant policies being not "up-to-date" under paragraph 49, and therefore "out-of-date" for the purposes of paragraph 14: para 30. He explained the court's reasons for preferring the wider view of paragraph 49. He read the words "for the supply of housing" as meaning "affecting the supply of housing", which he regarded as not only the "literal interpretation" of the policy, but "the only interpretation consistent with the obvious purpose of the policy when read in its context". He continued, at para 33:

> "Our interpretation of the policy does not confine the concept of 'policies for the supply of housing' merely to policies in the development ***1885*** plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognises that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed—including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another by preventing or limiting development. It reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it—that policies of both kinds make the supply what it is."

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

> "It is both unrealistic and inconsistent with the context in which the policy takes its place. It ignores the fact that in every development plan there will be policies that complement or support each other. Some will promote development of one type or another in a particular location, or by allocating sites for particular land uses, including the development of housing. Others will reinforce the policies of promotion or the site allocations by restricting development in parts of the plan area, either in a general way—for example, by preventing development in the countryside or outside defined settlement boundaries—or with a more specific planning purpose—such as protecting the character of the landscape or maintaining the separation between settlements."

51 Whether a particular policy of a plan was a relevant policy in that sense was a matter for the decision-maker, not the court: para 45. Furthermore, at para 46:

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

52 In relation to the Yoxford site, the court agreed with Supperstone J that the inspector had wrongly applied the erroneous "narrow" interpretation. Policies SP19, SP27 and SP29, were all relevant

policies in that they all "affect the supply of housing land in a real way by restraining it": paras 51–52. The court also agreed with the judge that the inspector had been mistaken in assuming that the physical limits of the village had been established in the 2013 plan (para 58); and also that he had misapplied paragraph 135 relating to heritage assets: para 65. In that respect there could be no criticism of his treatment of the impact of the development on the local landscape, but what was lacking was

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

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

## Discussion

### *Interpretation of paragraph 14*

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

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

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

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### *Paragraph 49*

57 Unaided by the legal arguments, I would have regarded the meaning of paragraph 49 itself, taken in context, as reasonably clear, and not susceptible to much legal analysis. It comes within a group of paragraphs dealing with delivery of housing. The context is given by paragraph 47 which sets the objective of boosting the supply of housing. In that context the words "policies for the supply of housing" appear to do no more than indicate the category of policies with which we are concerned, in other words "housing supply policies". The word "for" simply indicates the purpose of the policies in

question, so distinguishing them from other familiar categories, such as policies for the supply of employment land, or for the protection of the countryside. I do not see any justification for substituting the word “affecting”, which has a different emphasis. It is true that other groups of policies, positive or restrictive, may interact with the housing policies, and so *affect* their operation. But that does not make them policies *for* the supply of housing in the ordinary sense of that expression.

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

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

60 The Court of Appeal was therefore right to look for an approach which shifted the emphasis to the exercise of planning judgment under paragraph 14. However, it was wrong, with respect, to think that to do so it was necessary to adopt a reading of paragraph 49 which not only changes its language, but in doing so creates a form of non-statutory fiction. On that reading, a non-housing policy which may objectively be entirely up-to-date, in the sense of being recently adopted and in itself consistent with the Framework, may have to be treated as notionally “out-of-date” solely for the purpose of the operation of paragraph 14.

61 There is nothing in the statute which enables the Secretary of State to create such a fiction, nor to distort what would otherwise be the ordinary ***1888*** consideration of the policies in the statutory development plan; nor is there anything in the NPPF which suggests an intention to do so. Such an approach seems particularly inappropriate as applied to fundamental policies like those in relation to the Green Belt or Areas of Outstanding Natural Beauty. No one would naturally describe a recently approved Green Belt policy in a local plan as “out-of-date”, merely because the housing policies in another part of the plan fail to meet the NPPF objectives. Nor does it serve any purpose to do so, given that it is to be brought back into paragraph 14 as a specific policy under footnote 9. It is not “out of date”, but the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles.

## The two appeals

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

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

64 The Yoxford appeal provides an interesting contrast, in that there was an up-to-date development plan, adopted in the previous year; but its housing supply policies failed to meet the objectives set by paragraph 47 of the NPPF. The inspector rightly recognised that they should be regarded as "out-of-date" for the purposes of paragraph 14. At the same time, it provides a useful illustration of the unreality of attempting to distinguish between policies for the supply of housing and policies for other purposes. Had it mattered, I would have been inclined to place in the housing category policy SP2, the principal policy for housing allocations. SP19 (settlement policy) would be more difficult to place, since, though not specifically related to housing, it was seen (as the commentary indicated) as a "planning tool" designed to differentiate between developed areas and the countryside.

65 Understandably, in the light of the judicial guidance then available to him, the inspector thought it necessary to make the distinction, and to reflect it in the planning balance. He categorised both SP19 and SP27 as non-housing policies, and for that reason to be regarded as "up-to-date": see para 35 above. Under the Court of Appeal's interpretation this was an erroneous approach, because each of these policies "affected" the supply of housing, and should have been considered out-of-date for that reason. On ***1889*** my preferred approach his categorisation was not so much erroneous in itself, as inappropriate and unnecessary. It only gave rise to an error in law in so far as it may have distorted his approach to the application of paragraph 14.

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

67 I do not, however, agree with the Court of Appeal's criticisms of his treatment of the Heritage Asset policy. Para 10 of his letter (summarised at para 36 above) is in my view a faithful application of the guidance in paragraph 215 of the Framework. That does not, and could not, suggest that even "saved" development plan policies are simply replaced by the policies in the Framework. What it does is to indicate that the weight to be given to the saved policies should be assessed by reference to their degree of consistency with the Framework. That is what the inspector did. Having done so he was entitled to be guided by the policies as stated in the saved plans, and not treat them as replaced by paragraph 135.

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

## Conclusion

69 For these reasons I would dismiss both appeals.

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

70 I agree with Lord Carnwath JSC's conclusions on the decision that is appealed against and with his views as to the disposal of these appeals. I only add some comments on the approach that should be taken in the ***1890*** application of the National Planning Policy Framework ("the Framework") in planning applications for housing development.

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

72 In *Tesco Stores Ltd v Dundee City Council, (ASDA Stores Ltd intervening) [2012] PTSR 983* Lord Reed JSC considered the former question in relation to development plan policies. He expressed the view, as a general principle of administrative law, that policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context: para 18. The proper context, in my view, is provided by the overriding objectives of the development plan and the specific objectives to which the policy statement in question is directed. Taking a similar approach to that of Lord Reed JSC, I consider that it is the proper role of the courts to interpret a policy where the meaning of it is contested, while that of the planning authority is to apply the policy to the facts of the individual case.

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

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

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

76 In relation to housing, the objective of the Framework is clear. Section 6 , “Delivering a wide choice of high quality homes”, deals with the national problem of the unmet demand for housing. The purpose of paragraph 47 is “to boost significantly the supply of housing”. To that end it requires planning authorities: (a) to ensure inter alia that plans meet the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in the Framework, including the identification of key sites that are critical to the ***1891*** delivery of the housing strategy over the plan period; (b) to identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements, with an additional buffer of 5% to ensure choice and competition in the market for the land; and (c) in the longer term to identify a supply of specific, developable sites or broad locations for growth for years six to ten and, where possible, for years 11 to 15.

77 The importance that the guidance places on boosting the supply of housing is further demonstrated in the same paragraph by the requirements that for market and affordable housing planning authorities should illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing, describing how they will maintain delivery of a five years' supply of housing land to meet their housing target; and that they should set out their own approach to housing density to reflect local circumstances. The message to planning authorities is unmistakeable.

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

79 Among the obvious constraints on housing development are development plan policies for the preservation of the greenbelt, and environmental and amenity policies and designations such as those referred to in footnote 9 of paragraph 14. The rigid enforcement of such policies may prevent a

planning authority from meeting its requirement to provide a five years' supply.

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

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

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

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

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

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

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

*Appeals dismissed.*

1. Town and Country Planning Act 199, s 70(2) , as amended: “In dealing with an application for planning permission or permission in principle the authority shall have regard to— (a) the provisions of the development plan, so far as material to the application … (b) any local finance considerations, so far as material to the application, and (c) any other material considerations.”

2. Planning and Compulsory Purchase Act 2004, s 38(6) : “If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

3. National Planning Policy Framework, para 14: see post, para 12. Para 47: see post, para 15. Para 49: see post, para 1.