Neutral Citation Number: [2021] EWCA Civ 104

Case No: C1/2020/0542/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING COURT)
THE HONOURABLE MR JUSTICE HOLGATE
[2020] EWHC 518 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2021

Before:

SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
LADY JUSTICE SIMLER
and
SIR GARY HICKINBOTTOM

- -

Between:

Gladman Developments Limited	**Appellant**
- and -	
(1) Secretary of State for Housing, Communities and Local Government	**Respondents**
- and -	
(2) Corby Borough Council	
- and -	
(3) Uttlesford District Council	

- -
- -

Richard Kimblin Q.C. and **Thea Osmund-Smith** (instructed by **Addleshaw Goddard LLP**) for the **Appellant**
Richard Honey (instructed by the **Government Legal Department**) for the **First Respondent**

Hearing dates: 9 and 10 November 2020

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Approved Judgment

The Senior President of Tribunals:

Introduction

1. At the heart of this case is a question of policy interpretation. Such questions have become familiar work for the Planning Court, and this court too, since the publication of the National Planning Policy Framework ("the NPPF") in March 2012. This case concerns the policy for the "presumption in favour of sustainable development" in paragraph 11 of the revised versions of the NPPF published in July 2018 and February 2019 – as have two other recent appeals to this court (*Monkhill Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 74, and *Paul Newman New Homes Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 15). The original version of the policy, in somewhat different terms, had itself been considered in several appeals, including, in the Supreme Court, *Hopkins Homes Ltd. v Secretary of State for Housing, Communities and Local Government* [2017] 1 W.L.R. 1865, and in this court, *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2018] P.T.S.R. 88, and *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808.

2. Permission to apply for planning statutory review, under section 288 of the Town and Country Planning Act 1990, was granted by Lewison L.J. on 22 May 2020. The appellant, Gladman Developments Ltd., had appealed against the order of Holgate J., dated 6 March 2020, refusing permission to apply for planning statutory review of the decisions of inspectors appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government, each dismissing an appeal under section 78 of the 1990 Act against a local planning authority's refusal of planning permission for housing development. One of the challenges was to a decision dismissing an appeal against the refusal of planning permission by the second respondent, Corby Borough Council, for a development of up to 129 dwellings on land at Southfield, Gretton. The other was to a decision dismissing an appeal against the refusal of planning permission by the third respondent, Uttlesford District Council, for a development of up to 240 dwellings on land off Station Road, Flitch Green.

3. In both section 78 appeals the policy for the so-called "tilted balance" under paragraph 11d)ii of the NPPF applied because, in either case, the local planning authority was unable to demonstrate a five-year supply of deliverable housing sites, so that the policies most important for determining the application were deemed "out-of-date".

The issues in the case

4. The case raises two main issues: first, whether a decision-maker, when applying the "tilted balance" under paragraph 11d)ii, is required not to take into account relevant policies of the development plan; and second, as a connected issue, whether it is necessary for the "tilted balance" and the duty in section 38(6) of the Planning and Compulsory Purchase Act 2004 to be performed as separate and sequential steps in a two-stage approach. There is a further issue: whether the "tilted balance" under paragraph 11d)ii excludes the exercise indicated in paragraph 213 of the NPPF, which requires that policies in plans adopted before its publication should be given due weight, "according to their degree of consistency with [it]".

The policy in paragraph 11 of the NPPF

5. In chapter 1, "Introduction", paragraph 2 of the 2019 version of the NPPF acknowledges that "[planning] law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise[3]", and that "[the NPPF] must be taken into account in preparing the development plan, and is a material consideration in planning decisions". Footnote 3 refers to section 38(6) of the 2004 Act and section 70(2) of the 1990 Act.

6. In chapter 2, "Achieving sustainable development", paragraph 7 says that "[the] purpose of the planning system is to contribute to the achievement of sustainable development". Paragraph 10 says this:

> "10. So that sustainable development is pursued in a positive way, at the heart of the Framework is a presumption in favour of sustainable development (paragraph 11)."

7. Paragraph 11, under the heading "The presumption in favour of sustainable development", states:

> "11. Plans and decisions should apply a presumption in favour of sustainable development.
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> For plan-making this means that:
>
> a) plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change;
>
> b) strategic policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area[6]; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
>
> For decision-taking this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

Footnote 6 states:

> "[6]The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change."

Footnote 7 states:

> "[7]This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1."

8. Paragraph 12 confirms that "[the] presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making".

9. Paragraph 14 says that "[in] situations where the presumption (at paragraph 11d) applies to applications involving the provision of housing, the adverse impact of allowing development that conflicts with the neighbourhood plan is likely to significantly and demonstrably outweigh the benefits, provided all of the following apply". Four considerations are then set out, including "b) the neighbourhood plan contains policies and allocations to meet its identified housing requirement" and "c) the local planning authority has at least a three year supply of deliverable housing sites …".

10. In Annex 1 to the NPPF, "Implementation", paragraph 213 states:

> "213. … [Existing] policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

11. In paragraph 14 of the NPPF published in 2012 the policy for the "presumption in favour of sustainable development", as it related to "decision-taking", was in these terms:

"14. …

For decision-taking this means:

- approving development proposals that accord with the development plan without delay; and

- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

  – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  – specific policies in this Framework indicate development should be restricted.[9]"

Footnote 9 stated:

"[9]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."

12. The Government's consultation document containing its proposals on the draft revised text of the NPPF, issued in March 2018, said the draft had "incorporated … the effect of caselaw on the interpretation of planning policy since 2012". Introducing the revised policy for the "presumption in favour of sustainable development" in paragraph 11, it said that "[the] current Framework includes examples of policies which provide a specific reason for restricting development", and that this was "proposed to be changed to a defined list, which is set out at footnote 7 …", adding that "[this] approach does not preclude other policies being used to limit development where the presumption applies, if the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits".

The section 78 appeal decision in the Gretton case

13. The inspector in the Gretton appeal identified two main issues: first, "[whether] the proposed development would be appropriately located …"; and second, "[whether] the [borough council] can demonstrate a 5-year supply of deliverable housing sites" (paragraph 5 of the decision letter).

14. On the first main issue, under the heading "Development Plan Strategy", the inspector found the proposal in conflict with Policy 11 of the North Northamptonshire Joint Core Strategy. The site had not been identified in a local plan or a neighbourhood plan (paragraph 6). It lay in the countryside "outside of any settlement". The proposal was contrary to the spatial strategy seeking to concentrate growth in Corby, which, in Policy 29, envisaged "only 120 dwellings proposed in the rural areas as a whole" (paragraph 7). In a section headed

"Accessibility", the inspector said this was "not a location which is, or is likely to be, adequately served by sustainable transport modes for the scale of development proposed …". In his view, "[the] number of … trips generated from 120 such dwellings would be substantial", and "would result in environmental harm from greenhouse gas emissions …" (paragraph 18). Under the heading "Appropriately located?", he found there would be "harm to the character and appearance of the area" (paragraph 30). He said "[these] issues are central planks to realizing the over-arching spatial vision of sustainable development which the plan as a whole is seeking to deliver" (paragraph 31).

15. On the second main issue, under the heading "Conclusion on 5 year housing land supply", he concluded that the supply of housing land in the borough council's area was "somewhere between" 4.6 and 4.8 years (paragraph 42).

16. In the final section of the decision letter, headed "Planning balance and overall conclusion", the inspector found the proposal conflicted with the development plan "read as a whole", and it was "therefore necessary to consider whether there [were] material considerations [indicating] that permission should be granted …". The NPPF was, he said, "a significant material consideration and as the Council has not demonstrated in this appeal that they have a 5 year housing land supply, the policies which are the most important for determining this appeal are out-of-date", and "[consequently], paragraph 11(d)(ii) requires that permission be granted unless any adverse impacts would significantly and demonstrably outweigh the benefits when assessed [against] the policies in the Framework, taken as a whole" (paragraph 46).

17. Having determined the weight to be given to the benefits of the development as "moderate" (in paragraphs 47 to 51), he concluded (in paragraphs 52 to 56):

> "52. Set against these benefits the appeal scheme would be situated beyond the settlement boundary of Gretton and in the countryside. It would conflict with the development plan's overarching locational strategy, perpetuate unsustainable travel from a relatively poorly served and inaccessible village and would cause harm to the character and appearance of the area. Having regard to the lack of a 5 year housing land supply in the borough the weight to be afforded to this conflict is necessarily reduced. However, having regard to established caselaw, the shortfall in supply is not significant and the Council are, despite a number of setbacks, delays and matters outside of their control actively working and progressing towards its delivery, including a Neighbourhood Plan for Gretton.
>
> 53. The appellant contends that the [joint core strategy] is also out-of-date because of its reliance on projections for West Corby in the housing land supply and that the strategy is not being delivered as envisaged. However, this does not take matters any further because the [sustainable urban extension to Corby] provides housing so there is no reason why it should be discounted from the supply figure. I have also preferred the appellant's assessment of housing supply and the acid test of weight to a policy and any conflicts in such circumstances is the degree of consistency with the Framework. The policies before me are consistent with the Framework for the reasons given by the examining Inspector only 3 years ago and this position has not been altered by the changes to the Framework in 2019.

> 54. The policies ultimately seek to promote a plan-led approach to site selection and none of the relevant policies or the strategy support ad-hoc developments on unallocated sites outside of settlement boundaries of anything like the scale proposed. The figure of 120 for the rural areas is a minimum but the degree to which it has already been exceeded is likely, in my judgement, to lead towards a distortion of the plan-led strategy. A distortion that would be exacerbated by the appeal proposal which would result in a more dispersed and unsustainable pattern of growth.
>
> 55. Drawing my conclusions together, the need to boost the supply of housing is not the be all and end all. Although there are clearly a number of benefits that weigh in favour of the proposal, at this point the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework, taken as a whole. As such the proposal would not be the sustainable development for which Paragraph 11 of the Framework indicates a presumption in favour.
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> 56. For the reasons given above, the proposal would conflict with the development plan, when read as a whole. Material considerations, including the Framework do not indicate that a decision should be made other than in accordance with the development plan. Having considered all other matters raised, I therefore conclude the appeal should be dismissed."

The section 78 appeal decision in the Flitch Green case

18. The inspector in the Flitch Green appeal noted that the district council could not demonstrate a five-year supply of housing land, and that paragraph 11d) was engaged (paragraph 6 of the decision letter). He identified four main issues in the appeal: first, "the effect [of the proposed development] on the character and appearance of the area"; second, "whether [it] would harm the setting of nearby heritage assets"; third, "the effect on protected species"; and fourth, "whether the policies of the Framework provide a clear reason for refusing the development proposed, or whether any adverse effects of granting planning permission would significantly and demonstrably outweigh the benefits" (paragraph 8).

19. On the first main issue, the inspector concluded that the development would have a "significant adverse effect on the character and appearance of the area", and that the proposal was in conflict with Policy S7 of the Uttlesford Local Plan (paragraph 22).

20. On the second main issue, he found there would be harm to the significance of the grade I listed Church of the Holy Cross in Felsted, the grade II listed Bourchiers, and the Felsted Conservation Area "through development within their settings" (paragraph 42). Under the policy in paragraph 196 of the NPPF, this was "less than substantial harm". But because the development would adversely affect the setting of listed buildings, the proposal "would conflict with Policy ENV2" of the local plan (paragraph 43).

21. On the third main issue, the inspector concluded that the effect of the proposed development on protected species would be acceptable (paragraph 49).

22. He found the supply of housing land in the district was only 3.29 years, which was a "significant shortfall" (paragraph 50). The provision of up to 96 affordable homes was in accordance with Policy H9 of the local plan, and "significant" (paragraph 56). The development would "boost the supply of homes" (paragraph 57). The "new housing would have significant economic benefits and substantial social benefits" (paragraph 58).

23. On the fourth main issue, under the heading "Planning Balance and Conclusions", the inspector gave "substantial weight" to the "significant adverse effect" the development would cause to the character and appearance of the area, and also to the "harm" it would cause to the significance of three designated heritage assets (paragraph 63). He gave "substantial weight" to the economic and social benefits of the proposed new housing, and "limited weight to the benefits for sustainable travel" through the provision of off-site routes (paragraph 64).

24. In his view, Policy S7 and Policy ENV2 of the local plan, with which the proposal was in conflict, were the "most important" development plan policies for determining the appeal, and the proposal "[conflicted] with the development plan overall" (paragraph 66). When assessing the weight to give to those two policies, he considered their consistency with the NPPF (paragraphs 67, 70 and 71). Policy S7 was "predicated on settlement boundaries that are out-of-date" and would inevitably "need to be breached to provide sufficient housing land until [the emerging local plan] is adopted with redrawn boundaries". Whether such a breach would be acceptable in any individual case would "depend on the level of harm and whether those adverse impacts would significantly and demonstrably outweigh the particular benefits …" (paragraph 68). Policy S7 was "partly consistent" with the NPPF, and "should be afforded moderate weight" (paragraph 70). In the light of the statutory duty in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and the NPPF's policies on heritage assets, Policy ENV2 should also have "moderate weight" (paragraph 71).

25. The inspector then turned to paragraph 11d) of the NPPF (in paragraphs 72 to 74):

> "72. However, notwithstanding the weight that I give these policies, the most important policies for determining the application are deemed to be out-of-date because the Council cannot demonstrate a five-year supply of deliverable housing sites. In considering the first leg of paragraph 11d) of the Framework, the policies that provide a clear reason for refusing permission include those that relate to designated heritage assets. However, the less than substantial harm to the heritage assets in this case would be outweighed by the substantial weight that I give to the social and economic public benefits derived from up to 240 homes. Therefore, the policies of the Framework in respect of heritage assets would not provide a clear reason for refusing permission.
>
> 73. Moving onto the second leg of paragraph 11d), the adverse impacts of the proposed development and the conflict with the development plan that arises from these adverse impacts would significantly and demonstrably outweigh the benefits. Material considerations, including the reduced weight that I give to the most important policies for deciding the appeal, do not indicate that the proposal should be determined other than in accordance with the development plan. Although the development of countryside beyond existing settlement boundaries in Uttlesford is inevitable to meet housing needs in both the short-term and longer-term, the harm in this case would be unacceptable.

74. For the above reasons the proposal would not constitute sustainable development and the appeal should be dismissed."

The judgment of Holgate J.

26. Holgate J. concluded that the NPPF "does not exclude development plan policies from the tilted balance; they are relevant considerations" (paragraph 112). This issue "essentially involved the same argument as had previously been rejected by the courts" – by the Supreme Court in *Hopkins Homes Ltd.* (at paragraphs 55 and 56), by the Court of Appeal in *Hallam Land Management Ltd.* (at paragraph 46), and at first instance in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) (at paragraphs 57 and 74) and *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) (at paragraphs 108 to 115). It was "not arguable that the language of [the 2019 version of the NPPF] differs from the 2012 version so as to displace that body of case law in relation to paragraph 11(d)(ii)" (paragraph 128).

27. In coming to that conclusion, Holgate J. observed that when the policy in paragraph 11d)ii is "triggered" because a five-year supply of housing land cannot be demonstrated, "the decision-maker will still need to assess the weight to be given to development plan policies, including whether or not they are in substance out-of-date and if so for what reasons". In these circumstances "the NPPF does not prescribe the weight which should be given to development plan policies". The decision-maker "may also take into account, for example, the nature and extent of any housing shortfall, the reasons therefor, and the prospects of that shortfall being reduced (see e.g. [*Crane*])" (paragraph 82).

28. In *Crane* (at paragraph 74), the court had "explicitly rejected the contention that development plan policies should be disregarded and only NPPF policies taken into account in the tilted balance assessment required by paragraph 14 of [the original version of the NPPF]", and the same approach was taken in *Woodcock Holdings Ltd.*, at paragraphs 87, 105, and 108 to 115 (paragraph 83). Those passages were approved by the Court of Appeal in *Hallam Land Management Ltd.*, at paragraph 46 (paragraph 84). And this case law was "reinforced by Lord Carnwath's explanation of the operation of paragraph 14 of [the 2012 version of the NPPF] in [*Hopkins Homes Ltd.*, at paragraphs 54 to 56], in which he "agreed with the Court of Appeal that the weight to be given to development [plan] policies *under paragraph 14* (i.e. in the tilted balance) was a matter of judgment for the decision-maker ([paragraphs 55 and 56)])" (paragraph 85). Therefore, "although paragraph 14 required the tilted balance to be "assessed against the policies in this Framework as a whole" without referring explicitly to development plan policies, the courts have made it plain that the weight to be attached to development [plan] policies, whether telling in favour of or against a proposal, was a matter to be assessed in that balance". This was "wholly unsurprising given that paragraph 14 had to be understood in the context of the development plan led system, established by the presumption in [section] 38(6)" (paragraph 86).

29. As the judge went on to say, paragraph 11d)ii of the 2019 version of the NPPF repeats the language of paragraph 14 of the 2012 version – "when assessed against the policies in this Framework as a whole" (paragraph 88). Footnote 6 in the 2019 version differs from footnote 9 in the 2012 version, "in that development plan policies are not to be taken into account

under paragraph 11(d)(i)". But this alteration has been "confined to paragraphs 11(b)(i) and 11(d)(i)", and "does not apply to paragraph 11(d)(ii)" (paragraph 89). Therefore, on the straightforward approach to interpretation laid down by the case law, "paragraph 11(d)(ii) of [the 2019 version of the NPPF] does not require any development plan policies to be excluded from the tilted balance", and "[the] position remains the same as under paragraph 14 of [the 2012 version]" (paragraph 90). This conclusion gained support from paragraph 14 of the 2019 version, which "assumes that development plans, which include neighbourhood plans, are relevant considerations in the tilted balance under paragraph 11(d)(ii)" (paragraph 91).

30. The "two stage approach" contended for by Gladman, "would enable some applicants to satisfy the test in paragraph 11(d)(ii) (and gain the benefit of the presumption in favour of sustainable development) without any assessment being made of the weight to be given to relevant development plan policies, even where those policies justifiably attract substantial or full weight" (paragraph 105). There was "no legal justification for the court to prescribe that the tilted balance in paragraph 11(d)(ii) … and the presumption in [section] 38(6) must be applied in two separate stages in sequence" (paragraph 107). It is "permissible for the decision-maker to assemble all the relevant material and to apply the two balances together or separately" (paragraph 108). This does not involve "any legal error based on so-called double-counting", but the "same factors [being] assessed against two different criteria or tests to see whether both are satisfied", and an "overall judgment" being reached on "all relevant considerations", which "applies both the tilted balance in paragraph 11(d)(ii) and [section] 38(6)" (paragraph 110).

31. The judge also rejected the argument that the policy in paragraph 213 of the NPPF was relevant only in the application of section 38(6) of the 2004 Act, and not paragraph 11d)ii. The wording of the policy provided no support for this contention (paragraph 117).

Must development plan policies be left out of account when the "tilted balance" under paragraph 11d)ii is applied?

32. The court's approach to the interpretation of planning policy is well established. It does not need to be enlarged or refined here. I would emphasise two basic and well-known principles:

    (1) Policy is not statute, and ought not to be construed as if it were. As Lord Carnwath observed in *Hopkins Homes Ltd.* (at paragraph 24), not all planning policies lend themselves to a rigorous judicial analysis. Where they do require interpretation, this should be done objectively in accordance with the language used, read in its proper context (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 19, 21 and 35). A sensible approach should be adopted in seeking the true sense of the policy in question. The courts should not encourage unmeritorious claims based on intricate arguments about the meaning of policy. They should resist the over-complication of concepts that are basically simple (see *East Staffordshire Borough Council*, at paragraph 50).

    (2) The interpretation of policy is a quite different exercise from judging its lawful application (see *Hopkins Homes Ltd.*, at paragraph 26). Construing policy is, in the end, a task for the court, but the application of policy is for the decision-maker

and may be challenged only on public law principles, and not on the planning merits (see *East Staffordshire Borough Council*, at paragraph 9). Subject to the limits of rationality, it is for the decision-maker to judge the matters to be taken into account in applying planning policy (see the judgment of Lord Carnwath in *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] P.T.S.R. 221, at paragraphs 30 to 32, and 39).

33. The status of national planning policy within the statutory arrangements for decision-making is also well established. Three points should be kept in mind:

(1) The NPPF is one of the "other material considerations" to which the decision-maker must have regard in performing the statutory duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act (see *Hopkins Homes Ltd.*, at paragraphs 21 and 75).

(2) The policies in the NPPF are predicated on the primacy of the development plan in the "plan-led" system. It was pointed out by the Supreme Court in *Hopkins Homes Ltd.* (at paragraph 21), and by this court in *East Staffordshire Borough Council* (at paragraph 13), that the NPPF must be interpreted and applied – as it recognises itself – consistently with the statutory scheme, within which it takes its place as a material consideration.

(3) The weight to be given to conflict or compliance with the policies of the NPPF is a matter for the decision-maker, and the court will not interfere except on public law grounds (see *St Modwen Developments v Secretary of State for Communities and Local Government* [2018] P.T.S.R. 746, at paragraph 6(3)).

34. As I have said, the meaning of NPPF policy for the "presumption in favour of sustainable development" has already been the subject of ample case law. Although the terms of the policy have changed since it was introduced nine years ago in the first version of the NPPF, published in 2012, much of the judicial comment on that original form of the policy remains valid and relevant. Without trying to capture everything, I would take three main points from it:

(1) The "presumption in favour of sustainable development", now in paragraph 11 of the 2019 version of the NPPF, is not a statutory presumption. It is a presumption of national planning policy (see *East Staffordshire Borough Council*, at paragraph 35(1)).

(2) The presumption itself is not irrebuttable, and is not automatically decisive of any particular outcome for an application for planning permission. The policy in paragraph 11c) and d) provides guidance on decision-making, under the statutory duties in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, in specified circumstances. It does not purport to be prescriptive (see *East Staffordshire Borough Council*, at paragraph 35(3)).

(3) Beyond the statutory provisions governing the making of planning decisions, the decision-maker is left with a discretion to apply the policy faithfully to its own terms, in a manner appropriate to the circumstances of the case in hand (see the

speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at p.1459D to p.1460D, and *Wynn-Williams v Secretary of State for Communities and Local Government* [2014] EWHC 3374 (Admin), at paragraphs 38 and 39).

35. In *Hopkins Homes Ltd.*, Lord Carnwath, with whom the other members of the court agreed, said this about the policy in paragraph 14 of the 2012 version of the NPPF (in paragraph 14):

> "14. … [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. …"

and, under the heading "Interpretation of paragraph 14" (in paragraphs 54 to 56):

> "54. … [Since] the primary purpose of paragraph 49 [of the 2012 version of the NPPF] 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. …
>
> 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 … that other competing policies will need to be given less weight in accordance with the tilted balance. …
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> 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".

36. Where the local planning authority has failed to demonstrate the requisite five-year supply of housing land, said Lord Carnwath, "[the] shortfall is enough to trigger the operation of the second part of paragraph 14 [of the NPPF]", and "[as] the Court of Appeal recognised, it is that paragraph … 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" (paragraph 59). A recently approved Green Belt policy in a local plan is not in those circumstances "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" (paragraph 61).

37. Lord Gill said in his judgment (at paragraph 85) that the "presumption in favour of sustainable development" could be "displaced on only two grounds both of which involve a planning judgment that is critically dependent on the facts". The second of those two grounds was that "specific policies in the Framework, such as those described in footnote 9 to the paragraph, indicate that development should be restricted". On this ground Lord Gill observed:

> "85. … 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."

38. In *East Staffordshire Borough Council*, in the light of the Supreme Court's decision in *Hopkins Homes Ltd.*, this court placed the "presumption in favour of sustainable development" in paragraph 14 of the 2012 version of the NPPF in the context of section 38(6) and the "plan-led" system of development control, emphasising (at paragraph 35(3)) that "[when] the section 38(6) duty is lawfully performed, a development which … does not … have the benefit of the "tilted balance" in its favour … may still merit the grant of planning permission", and that "in a case where a proposal for the development of housing is in conflict with a local plan whose policies for the supply of housing are out of date, the decision-maker is left to judge, in the particular circumstances of the case in hand, how much weight should be given to that conflict". As had been held in *Crane* (at paragraphs 70 to 74), this is necessarily "a matter of planning judgment".

39. Similar observations were made by this court in *Hallam Land Management Ltd.* (at paragraphs 44 to 47), again citing the first instance decision in *Crane* and also *Woodcock Holdings Ltd.*. The court accepted (at paragraph 59) that "[in] principle, [the Secretary of State] was entitled to conclude … that in the balancing exercise provided for in paragraph 14 of the NPPF, realistic conclusions could … be reached on the weight to be given to the benefits of the development and its conflict with relevant policies of the local plan".

40. In *Crane* the court rejected (at paragraph 74) "the proposition that, in a case where relevant policies for the supply of housing are out of date, the weighing of "any adverse impacts" against the "benefits" under paragraph 14 [of the 2012 version of the NPPF] should proceed … "on the basis that the development plan components have been assessed, put to one side, and the balancing act takes place purely within the text of [the NPPF] as a whole"". The court observed that paragraph 14 of the NPPF did "not say that where "relevant policies" in the development plan are out of date, the plan must therefore be ignored", and did "not prevent a decision-maker from giving as much weight as he judges to be right to a proposal's conflict with the strategy in the plan, or, in the case of a neighbourhood plan, the "vision" …".

41. For Gladman, Mr Richard Kimblin Q.C. repeated the argument that failed in the court below. Both inspectors had erred when conducting the exercise provided for in paragraph 11d)ii – in

the Gretton decision letter at paragraphs 52, 54 and 56, and in the Flitch Green decision letter at paragraph 73 – by taking into account policies of the development plan and the proposals' conflict with those policies. On a straightforward interpretation, without reading any additional words into it, the meaning of the policy is clear. When applying the "tilted balance" under paragraph 11d)ii, the decision-maker has to assess the proposal against the relevant policies of the NPPF. Local plan policies do not come into that exercise. If, in either of these cases, the inspector had applied the paragraph 11d)ii policy correctly, leaving local plan policies out of account, a different conclusion might have emerged on whether the "tilted balance" was engaged, and this in turn might have led to a different outcome under section 38(6). Mr Kimblin confirmed that, in his submission, the same analysis would have applied to the previous policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF issued in 2012. Thus Lord Carnwath's observations to the contrary in *Hopkins Homes Ltd.* – "obiter", said Mr Kimblin – were incorrect.

42. I cannot accept that argument. In my view, as Mr Richard Honey submitted for the Secretary of State, it is implicit in previous discussion of this question – not only in the Planning Court but also in this court and in the Supreme Court – that decision-makers are not legally bound to disregard policies of the development plan when applying the "tilted balance" under paragraph 11d)ii. The reasoning in the two judgments given in the Supreme Court in *Hopkins Homes Ltd.* did not doubt that development plan policies were potentially relevant to the application of the policy for the "tilted balance" in paragraph 14 of the NPPF issued in 2012. Both Lord Carnwath and Lord Gill appear to have accepted that the exercise of assessing a proposal's compliance, or otherwise, with the "policies in this Framework" could properly embrace consideration of related policies in the development plan, and sometimes this would make good sense because of the relationship between the two.

43. That the Supreme Court in *Hopkins Homes Ltd.* accepted, in principle, the appropriateness of assessing the weight that development plan policies should have in the "tilted balance" itself, within the overall performance of the section 38(6) duty, is evident in the conclusions of Lord Carnwath in paragraphs 56 and 61 of his judgment and Lord Gill's in paragraph 85 of his. This was recognised as a legitimate part of the decision-making process. The relevant conclusions in the judgments in this court are to the same effect (see *East Staffordshire Borough Council* at paragraph 22(2) and (4), and *Hallam Land Management Ltd.*, at paragraphs 45 and 59). As Mr Honey submitted, it is inherent in the reasoning in these decisions of the Supreme Court and the Court of Appeal that, in practice, the performance of the statutory duty under section 38(6) and the performance of the exercise entailed in the NPPF policy for the "tilted balance" may be inter-related, and that, under the provision now in paragraph 11d)ii, conflict or compliance with development plan policies can bear on the assessment required by the NPPF policy itself. As was recognised by Holgate J. (in paragraph 86 of his judgment), the case law has been consistent on this point, at least since the first instance decision in *Crane*.

44. Those decisions of the court relate to the previous formulation of the policy, in paragraph 14 of the 2012 version of the NPPF. But there is no reason to think that a different analysis should apply to the revised policy, which, in its material drafting, is no different from the original. The phrase "when assessed against the policies in this Framework taken as a whole", which appeared in the original version within the first limb of paragraph 14, is repeated in the present version – though now in the second limb, paragraph 11d)ii, the order having been reversed.

45. Like the equivalent provision in the original version, paragraph 11d)ii is not qualified by the clarificatory footnote attached to the other limb – now footnote 6, then footnote 9. In the context of decision-making, that footnote applies, and only applies, to paragraph 11d)i, which contains a different concept, namely that "the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed" – a change from paragraph 14 of the NPPF as originally published.

46. The reference to "the policies in this Framework taken as a whole" in paragraph 11d)ii is not, therefore, subject to the specific exclusion of development plan policies that was inserted into footnote 6 in its opening words: "[the] policies referred to are those in this Framework (rather than those in development plans) …" (my emphasis). That parenthesis – "rather than those in development plans" – in a footnote attached only to paragraph 11d)i and paragraph 11b)i was evidently a deliberate adjustment to the policy in the light of the Supreme Court's decision in *Hopkins Homes Ltd.*. As Mr Honey submitted, the absence of such a change for the provision now in paragraph 11d)ii is significant. For the purposes of that provision, what Lord Carnwath and Lord Gill said about the concept of "policies in this Framework" is unaffected. Holgate J. came to the same conclusion (in paragraph 89 of his judgment). I should add that in my view the passages to which I have referred in the judgments in *Hopkins Homes Ltd.* are not, as Mr Kimblin suggested, "obiter". They are essential to the reasoning on which the Supreme Court's decision in that appeal was founded, and thus binding on us.

47. Leaving the previous cases to one side, I would in any event interpret paragraph 11d)ii, in accordance with the principles I have mentioned, as not excluding the taking into account and weighing of development plan policies in the "tilted balance". I agree with Holgate J.'s analysis and conclusions to the same effect.

48. In paragraph 11 two main currents running through the NPPF converge: the Government's commitment to the "plan-led" system and its support for "sustainable development". The former makes its appearance in paragraph 2, which acknowledges the primacy of the development plan in the making of planning decisions. The latter emerges in chapter 2, where paragraph 11 contains the "presumption in favour of sustainable development", but paragraph 12 states the obvious but important point that the presumption "does not change the statutory status of the development plan as the starting point for decision making". As I have said, the policy in paragraph 11 does not displace or modify the decision-maker's statutory responsibilities. Nor could it – because it is policy, not statute. It functions within the statutory arrangements for planning decision-making, not outside them.

49. The provisions on "decision-taking" in the second part of paragraph 11 set out a policy to guide decision-makers on the performance of their statutory responsibilities under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, in the specific circumstances to which they relate. Those circumstances are, first, where "development proposals … accord with an up-to-date development plan" (paragraph 11c)), and secondly, "where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date" (paragraph 11d)). The two limbs of paragraph 11d), connected by the word "or", are disjunctive. They describe two different situations in which the "presumption in favour of sustainable development" will be disapplied. The first limb, in paragraph 11d)i, is limited to the application of a small number of particular policies, namely "policies in this Framework that protect areas or assets of particular importance", and those

policies are individually identified in footnote 6. The second limb, in paragraph 11d)ii goes much wider. It replicates the equivalent provision in the original version of the NPPF. It provides for an assessment against "the policies in this Framework taken as a whole", which are not the subject of a footnote.

50. The technique with which footnotes are used in paragraph 11 is, I think, significant. The footnotes are applied directly to the provisions to which they relate. Footnote 6, which deliberately excludes policies "in development plans", has been applied to paragraph 11d)i, but not to paragraph 11d)ii. It has also been applied to paragraph 11b)i, but not to paragraph 11b)ii – which is in exactly the same terms as paragraph 11d)ii. A reasonable inference here is that, in the light of the case law, the Government saw the need to introduce this qualification to paragraph 11d)i, but no need to do so for paragraph 11d)ii. Had it wanted to exclude development plan policy from the ambit of paragraph 11d)ii, it could easily have done that. But it did not.

51. As Mr Honey submitted, it is neither a misinterpretation nor misapplication of paragraph 11d)ii, or taking into account an immaterial consideration, to have regard to development plan policies when dealing with the question posed by that provision. Nothing in its wording, or elsewhere in paragraph 11, ousts the development plan from the assessment required.

52. The lack of an express reference to the policies of the development plan in paragraph 11d)ii does not mean that such policies are therefore excluded. There is no justification for reading that exclusion into paragraph 11d)ii, and to do so despite the evidently deliberate decision not to insert words, or to attach a footnote, having that particular effect. The concept of the "adverse impacts" of a proposed development "significantly and demonstrably [outweighing]" its "benefits" does not naturally suggest that one must ignore "adverse impacts" and "benefits" to the strategy or individual policies of the development plan. And the concept of the positive and negative effects of the development being "assessed against the policies in this Framework" does not naturally suggest that such an assessment must necessarily be made without taking into account the relevant policies of the plan. This would be, in my opinion, a mistaken inference. There is no reason to suggest that because this provision refers to an assessment "against the policies in this Framework", it means to say – though it does not say – "against the policies in this Framework, and leaving aside the policies of the development plan". Paragraph 11d)ii does not spell out any such qualification, and is not to be read as if it does.

53. This understanding of the meaning and effect of paragraph 11d)ii sits well with the status and role of the NPPF in the making of decisions on applications for planning permission. The decision-making to which it relates, under the statutory scheme, involves the relevant policies of the development plan being taken into account, and a decision being made in accordance with the plan unless material considerations indicate otherwise. Restricting the scope of paragraph 11d)ii to shut out the relevant policies of the development plan, as if they were automatically alien to the assessment it requires, would seem incompatible with the status and role of the NPPF. Fortunately, there is no need to construe the words of paragraph 11d)ii as having that effect. And in my view it would be wrong to do so.

54. There are, as Mr Honey submitted, several other policies in the NPPF that reinforce this understanding of paragraph 11d)ii.

55. Paragraph 14 of the NPPF makes plain the potential relevance of a proposal's conflict with a neighbourhood plan – which is part of the development plan – to the balancing exercise under paragraph 11d)ii. It refers explicitly to the "adverse impacts" of such development being approved as likely to "significantly and demonstrably outweigh the benefits" if all four of the specified considerations apply. The language here mirrors that in paragraph 11d)ii. It is clear in this policy that a conflict with a neighbourhood plan can be relevant to the paragraph 11d)ii balance, and will carry weight in it as an "adverse impact" – which, in the circumstances referred to, is "likely" to be powerful enough to tip the balance against approval. There is no suggestion that this is a unique or exceptional instance of conflict with the development plan being relevant to the exercise required under paragraph 11d)ii.

56. Paragraph 15, which opens chapter 3, "Plan-making", emphasises the Government's adherence to the "plan-led" system. The policy in paragraph 15, that "the planning system should be genuinely plan-led", underpins the whole of the NPPF. As Mr Honey argued, the question of whether granting planning permission for a proposed development is consistent with this fundamental policy of the NPPF may be judged by the proposal's compliance or lack of compliance with the relevant policies of the development plan. If the proposal is plainly in conflict with policies in the plan, granting planning permission for it might be seen as undermining the credibility of the plan, inimical to the "plan-led" system itself, and contrary therefore to a basic policy of the NPPF. This might be an "adverse [impact]" within paragraph 11d)ii. But as Mr Honey submitted, this could only be determined if the relevant policies of the development plan were taken into account in the paragraph 11d)ii assessment.

57. We were taken by Mr Honey to a number of specific policies in the NPPF, dealing with a wide range of topics, in each of which there is reference to the role and content of development plans and their policies. They included, in chapter 9, "Promoting sustainable transport", paragraph 103, which says "[the] planning system should actively manage patterns of growth" to support the identified objectives, and paragraph 104, which says what "[planning] policies" should do; in chapter 12, "Achieving well-designed places", paragraph 130, which says that "… where the design of a development accords with clear expectations in plan policies, design should not be used by the decision-maker as a valid reason to object to development"; in chapter 14, "Meeting the challenge of climate change, flooding and coastal change", including paragraph 167, which says that plans "should identify as a Coastal Change Management Area any area likely to be affected by physical changes to the coast"; in chapter 15, "Conserving and enhancing the natural environment", paragraphs 170 and 174, which indicate, respectively, the measures by which "[planning] policies … should contribute to and enhance the natural and local environment", and the measures by which "plans" should "protect and enhance biodiversity and geodiversity", including the identification of "local wildlife-rich habitats and wider ecological networks"; in chapter 16, "Conserving and enhancing the historic environment", paragraph 197, which describes the approach to proposals affecting the significance of non-designated heritage assets, such as buildings locally listed in a development plan; in chapter 17, "Facilitating the sustainable use of minerals", paragraph 204, which sets out steps for "[planning] policies" to take, including the designation of "Mineral Safeguarding Areas".

58. These are only examples. There are others. As Mr Kimblin said, some of the policies referred to by Mr Honey relate to "areas or assets of particular importance", which fall therefore within the scope of paragraph 11d)i and footnote 6. However, as Holgate J. recognised (in paragraphs 78 and 79 of his judgment), when one reads the NPPF "as a whole" – as

paragraph 11d)ii requires – one sees a variety of policies interacting with or depending upon the policies of the development plan, or requiring the plan to set a pattern of development or establish a locational strategy in a particular way, or to make allocations or designations of one kind or another, or set in place policies of protection or promotion, consistent with the Government's own priorities.

59. Thus the policies of the development plan will often inform the balancing exercise required under paragraph 11d)ii. Holgate J. came to this conclusion (in paragraph 102 of his judgment), and in my view he was right. In many cases it will facilitate the assessment of "adverse impacts" and "benefits" to consider not only the relevant policies of the NPPF but also the corresponding policies of the development plan. Sometimes the proposal's compliance with a policy of the NPPF will best be gauged by considering whether it complies with a relevant policy of the plan. Some "adverse impacts" or "benefits" may only be capable of proper evaluation if policies of the plan are considered. And there will be cases in which the weight given to the proposal's conflict with a policy of the NPPF will be the greater if it is also embodied in a policy of the development plan, or less if it is not. Mr Honey gave the example of a "valued [landscape]" given general protection under the policy in paragraph 170a) of the NPPF, but also specifically protected for its local importance by an adopted local plan.

60. It is clear, therefore, that a complete assessment under paragraph 11d)ii, in which "adverse impacts" and "benefits" are fully weighed and considered, may well be better achieved if relevant policies of the development plan are taken into account. This is not a substitute for discharging the decision-maker's duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. It is integral to that process.

61. I would therefore reject an interpretation of paragraph 11d)ii that renders the policies of the development plan irrelevant as a matter of law from the assessment required under that provision. What emerges on the true interpretation of paragraph 11d)ii, read in the broad context of the NPPF's commitment to the "plan-led" system and its support for "sustainable development", and in the immediate context of paragraph 11 itself, is that it requires of the decision-maker an assessment of the kind described, in which relevant policies of the development plan may be taken into account. Whether and how policies of the plan are taken into account in the application of the policy comprising paragraph 11d)ii will be a matter for the decision-maker's planning judgment, in the circumstances of the case in hand. This accords with the Supreme Court's understanding of paragraph 14 in the original version of the NPPF, in *Hopkins Homes Ltd.*, this court's in *East Staffordshire Borough Council* and *Hallam Land Management Ltd.*, and that to be seen in the first instance decisions in *Crane* and *Woodcock Holdings Ltd.*

Must the "tilted balance" and the duty in section 38(6) be performed separately?

62. Mr Kimblin also argued that the performance of the duty under section 38(6) and the application of the "presumption in favour of sustainable development" must be undertaken as separate and sequential stages of decision-making, in which the "tilted balance" under paragraph 11d)ii of the NPPF is carried out as a self-contained exercise.

63. Holgate J. rejected this argument (in paragraphs 107 and 108 of his judgment). I also reject it. No support for it is to be found in statute or in authority. Indeed, it seems contrary to authority.

64. In his speech in *City of Edinburgh Council* (at p.1459H to p.1460D), Lord Clyde considered a similar argument. He said this:

> "Counsel for the Secretary of State suggested … that in the practical application of [a provision in equivalent terms to that now to be found in section 38(6) of the 2004 Act] two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."

65. That reasoning has not been doubted in any subsequent decision of the House of Lords or of the Supreme Court. It recognises the realism, in many cases, of a holistic approach to the performance of the duty in section 38(6). There is no prescribed method to adopt. So long as the statutory duty is complied with, the decision-maker can go about the task in a way that seems suitable in the particular circumstances of the case. To split the performance of the duty, in every case, into two distinct stages or steps would be unduly inflexible (see *East Staffordshire Borough Council*, at paragraph 50). If, in substance, it can be properly discharged in a single, comprehensive exercise – rather than in two stages starting with the question of whether a decision to approve the proposal would be "in accordance with the development plan" and then going on to consider whether "material considerations indicate otherwise" – that will not be unlawful (see *Secretary of State for Communities and Local Government v BDW Trading Ltd.* [2016] EWCA Civ 493, at paragraph 21).

66. In my view, therefore, there is nothing to prevent an approach in which the application of the "tilted balance" under paragraph 11d)ii is incorporated into the decision-making under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act in one all-encompassing stage. The decision-maker is not obliged to combine in a single exercise the paragraph 11d)ii

assessment with the assessment required to discharge the duty in section 38(6). In principle, however, he lawfully may.

67. If this is how it is done, the maker of the decision must keep in mind the statutory primacy of the development plan and the statutory requirement to have regard to other material considerations, including the policies of the NPPF and specifically the policy for the "tilted balance" under paragraph 11d)ii, and must make the decision, as section 38(6) requires, in accordance with the development plan unless material considerations indicate otherwise. It will not then be necessary to consider twice, in separate steps, matters that arise both under the relevant policies of the development plan and under the policies of the NPPF. The realistic approach in such a case is likely to be to take into account the development plan policies of relevance to the paragraph 11d)ii assessment within that assessment, rather than outside it. As Holgate J. held (in paragraph 110 of his judgment), the mischief of "double-counting" can thus be avoided. And the integrity of the section 38(6) assessment can be assured. This is not to merge the two presumptions – the statutory presumption in favour of the development plan and the national policy "presumption in favour of sustainable development". It is to acknowledge the existence and status of both presumptions, but also to recognise that they can be lawfully applied together.

Paragraph 213

68. It follows from the analysis on the two main issues that, as Holgate J. concluded (in paragraph 117 of his judgment), the policy in paragraph 213 of the NPPF may properly be taken into account in the balancing exercise under paragraph 11d)ii, and is not, in principle, of relevance only to the weighting of development plan policies under section 38(6) (see the recent decision of this court in *Peel Investments (North) Ltd. v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 1175, at paragraph 66). Neither the wording of the policy in paragraph 11d)ii nor that of the policy in paragraph 213 itself lends any support to the contention that the latter is excluded from the operation of the "tilted balance" under paragraph 11d)ii.

Did either of the inspectors err in law?

69. I conclude, therefore, that neither of these two challenges has merit. Neither inspector erred in law. Each proceeded lawfully to a decision on the section 78 appeal, in accordance with the requirements of statute, and without lapsing into a misinterpretation of the policy in paragraph 11 of the NPPF or an unlawful application of that policy. In both cases, therefore, Holgate J. was in my view right to uphold the inspector's decision.

Conclusion

70. For the reasons I have given, I would dismiss these applications for planning statutory review.

Lady Justice Simler

71. I agree.

Sir Gary Hickinbottom

72. I also agree.