Neutral Citation Number: [2022] EWCA Civ 1417

Case Nos: CA-2022-000432
CA-2022-000435

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Timothy Mould QC (sitting as a Deputy High Court Judge)
[2022] EWHC 352 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 October 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE SINGH
and
LADY JUSTICE WHIPPLE

- -

Between :

The King (on the application of Thurston Parish Council)	**Claimant/ Respondent**
- and –	
Mid Suffolk District Council	**Defendant/ Appellant**
- and -	
Bloor Homes Limited	**Interested Party/ Appellant**

- -
- -

Tom Cosgrove KC and Ruchi Parekh (instructed by **West Suffolk Shared Legal Services**) for the **First Appellant**
Paul G Tucker KC and Kate Olley (instructed by **Gowling WLG (UK) LLP**) for the **Second Appellant**
Meyric Lewis (instructed by **Ashtons Legal**) for the **Respondent**

Hearing date: 18th October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10 a.m. on 28 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

Lord Justice Singh:

Introduction

1. The main issue in these two conjoined appeals is whether the local planning authority, Mid Suffolk District Council, was misled by its planning officers as to the correct interpretation of Policy 1 of the Thurston Neighbourhood Development Plan ("the Neighbourhood Plan").

2. Thurston Parish Council (now the Respondent) brought a claim for judicial review of the grant of planning permission for the development at Beyton Road, Thurston, Suffolk, ("the Development"). The First Appellant, Mid Suffolk District Council, appeals against the order of Mr Timothy Mould QC, sitting as a Deputy High Court Judge ("the Judge"), dated 21 February 2022, quashing the planning permission. The Interested Parties, Bloor Homes Limited ("Bloor") and Sir George Agnew, made the application for planning permission. Bloor is now the Second Appellant.

3. At the hearing we heard submissions from Mr Tom Cosgrove KC, who appeared with Ms Ruchi Parekh for the First Appellant; from Mr Paul Tucker KC, who appeared for the Second Appellant; and from Mr Meyric Lewis, who appeared for the Respondent. I express the Court's gratitude to them all.

Factual Background

4. On 22 July 2019 Bloor and Sir George Agnew made an application for outline planning permission for the Development of up to 210 dwellings, means of access, open space and associated infrastructure, including junction improvements. The Development site lies between the administrative areas of both Mid Suffolk District Council and West Suffolk District Council. The Development is predominantly located within Mid Suffolk District with the exception of the proposed highway improvements, which would take place within West Suffolk District. Importantly, the Development site is outside the settlement boundary of Thurston, although it lies within the area of the parish.

5. On 29 January 2020 Mid Suffolk District Council's Planning Referrals Committee ("the Committee") considered the application in light of an extensive report by the planning case officer ("the Report"), which recommended that authority be delegated to the Chief Planning Officer to grant permission, subject to conditions and the satisfactory prior completion of an agreement under section 106 of the Town and Country Planning Act 1990.

6. The Report, which was about 90 pages long, provided a detailed assessment of the planning merits of the proposal, which can be outlined for now as follows:-

   (1) The Report outlined the constituent elements of the statutory Development Plan, which included the Mid Suffolk Local Plan 1998, the Mid Suffolk Core Strategy 2008, the Mid Suffolk Focused Review Core Strategy 2012 and the Neighbourhood Plan, which was made in October 2019 after a referendum in September. The planning officer advised that, following recent planning

appeal decisions, certain relevant policies were out-of-date on the basis that planning Inspectors had declared them to be inconsistent with the National Planning Policy Framework ("NPPF"), in particular policies CS1 (Settlement Hierarchy), CS2 (Development in the Countryside and Countryside Villages) in the Core Strategy; and Policy H7 (Restricting housing development unrelated to needs of countryside) in the Mid Suffolk Local Plan 1998. For that reason the "tilted balance" in para. 11 of the NPPF would come into play, in favour of sustainable development such as that under consideration in the present case.

(2) The Neighbourhood Plan had "statutory weight" and was identified as "the starting point for decision-taking purposes".

(3) In the Neighbourhood Plan the Report identified Policies 1 (Thurston Spatial Strategy), 2 (Meeting Thurston's Housing Needs), 4 (Retaining and Enhancing Thurston's Character Through Residential Design), 5 (Community Facilities), 6 (Key Movement Routes), 7 (Highway Capacity at Key Road Junctions), 8 (Parking Provision), 9 (Landscaping and Environmental Features) and 11 (Provision for Wildlife in New Development) as being of particular relevance to consideration of the merits of the Development.

(4) The Report recognised the "tension" between the Neighbourhood Plan and the emerging Draft Joint Local Plan (being prepared by Mid Suffolk District Council and Babergh District Council) because there was a shortfall of the housing sites allocated in the Neighbourhood Plan when compared to the need for dwellings identified in the Thurston area by the emerging Draft Local Plan.

(5) The Report concluded that, although the proposed Development conflicted with certain aspects of the housing settlement policies in the Development Plan, planning permission should nevertheless be granted because of other material considerations.

7. At Part 4 of the Report the planning officer set out his conclusions as follows:

> "4.1 Where the proposed development conflicts with the housing settlement policies of the Council it does not accord with the development plan taken as a whole. However, officers consider that there are other material considerations which direct that planning permission should nevertheless be granted, not least through acknowledging that such policies are inconsistent with the NPPF and where the underlying aims of those policies would be otherwise met. It is acknowledged that the proposal does cause some tension between what is expected in terms of a constraint on future development within Thurston as envisaged in the Thurston Neighbourhood Plan and what is clearly a sustainable development proposal in line with the NPPF.
>
> 4.2 Whilst the Neighbourhood Plan includes expansion of the village envelope this is to embrace sites that have already been granted planning permission. The Neighbourhood Plan does

> not identify [allocate] sites for future expansion and this conflicts with the direction of travel in the Draft Joint Local Plan. The District Council as local plan making authority has indicated a requirement to allocate the application site [and others] for residential development. This application conforms with that objective and will help to meet the identified requirement for Thurston during the Plan period up to 2036.
>
> 4.3 This proposal delivers a raft of benefits chief of which is a package of highway improvements south of Thurston Railway Bridge that will have village wide [and beyond] benefits in terms of highway safety and ease of access. These works are identified in the Thurston neighbourhood Plan as being key to future development. This proposal represents the best way of securing the improvements because no other applicant has controlled sufficient land to make them possible [including the Thurston Five]. Suffolk County Council as local highway authority has indicated that it is not in a position to deliver the package of improvements. Consequently when exercising the tilted balance these highway works alone significantly tip the balance in favour of supporting the proposal. When all the benefits are taken into account the adverse impact of permitting another 210 dwellings in Thurston is outweighed.
>
> 4.4 On that basis the Committee is recommended to GRANT planning permission subject to a S106 Agreement to secure the matters identified earlier and conditions."

8. On 22 December 2020, the section 106 agreement was concluded and outline planning permission was duly granted by Mid Suffolk District Council on 23 December 2020.

The Development Plan

Adopted Local Plan

9. Policy H7 in the Adopted Local Plan, which had the heading 'Restricting Housing Development Unrelated to the Needs of the Countryside', provided:

> "In the interests of protecting the existing character and appearance of the countryside, outside settlement boundaries there will be strict control over proposals for new housing. The provision of new housing will normally form part of existing settlements."

Core Strategy

10. In the Core Strategy, Policy CS2, which had the heading 'Development in the Countryside and Countryside Villages', provided that:

> "In the countryside development will be restricted to defined categories in accordance with other Core Strategy policies."

An inclusive list was then set out but it is common ground this did not include development of the kind proposed in the present case.

11. Policy CS1 provided, under the heading 'Settlement Hierarchy', that the majority of new development (including housing allocations) will be directed to towns and 'key service centres'. One of those key service centres listed is Thurston. As para. 2.30 states, key service centres are to be the main focus for development outside the towns. Key service centres are, according to para. 2.28, some larger villages with potential to accommodate development which is sympathetic to local character and of an appropriate scale and nature in relation to local housing and employment needs.

Neighbourhood Plan

12. Policy 1, entitled 'Thurston Spatial Strategy', which lies at the heart of these appeals, states as follows:

> "A. New development in Thurston parish shall be focused within the settlement boundary of Thurston village as defined on the Policies Maps (pages 75-76).
>
> B. Development proposals within the settlement boundary (as defined on the Policies Maps pages 75-76) will be supported subject to compliance with the other policies in the Neighbourhood Plan.
>
> C. All new housing proposals will be expected to address the following key matters:
>
> a. Ensure they address the evidence-based needs of the Thurston Neighbourhood area in accordance with Policy 2; and
>
> b. In accordance with the statutory tests in the Community Infrastructure Levy Regulations 2010, contribute towards education infrastructure and other key infrastructure which shall include health, transport and movement, community facilities, utilities and public realm improvements, through direct provision and/or developer contributions (including Community Infrastructure Levy and/or Section 106).

> c. Design high quality buildings and deliver them in layouts with high quality natural landscaping in order to retain the rural character and physical structure of Thurston.
>
> D. Development proposals to meet specialist housing and care needs on sites that are outside the settlement boundary will be permitted where it can be demonstrated that no available and deliverable site exists within the settlement boundary.
>
> E. Where development uses best and most versatile agricultural land, it must be clearly demonstrated that the remaining parts of any fields remain economically viable for commercial farming."

13. The objectives of the Spatial Strategy can be found at p. 30 of the Neighbourhood Plan. This begins with the stated objective at S1:

> "To develop and sustain the key service centre status of Thurston by ensuring any future development is sustainable and supports a range of employment, services and housing."

14. Earlier, in para. 1.6, under the heading 'Policy Context', the Neighbourhood Plan noted that it sought to reflect as far as possible the emerging Joint Local Plan but, given its early stage of preparation, this had been "limited."

15. At para. 1.15 it was noted that the Parish Council would be responsible for maintaining and periodically revisiting the Neighbourhood Plan to ensure relevance and to monitor delivery. The ongoing development of the Joint Local Plan meant that the Neighbourhood Plan was likely to be reviewed within five years of being made.

16. Part 2 of the Neighbourhood Plan was headed 'Vision and Objectives' and included 'Challenges for Thurston'. At para. 2.2, those challenges were said to include a shortage of certain types of housing in Thurston, particularly for young people (who currently often move out of the village to find suitable provision). It was also noted that roads leading to surrounding villages were winding and narrow for the traffic carried and that the narrow road underneath the railway bridge had inadequate pavements but was a main route used in the village. We were informed at the hearing before this Court that that road underneath the railway bridge is one of those which will be improved by the package of highway improvements which are part of the proposed Development.

17. The reference in the Core Strategy to a 'key service centre' finds an echo in the proposal in the Draft Joint Local Plan that Thurston should be a 'core village'. This was picked up in para. 4.1 of the Neighbourhood Plan, where it was said that:

> "The Babergh and Mid Suffolk emerging Joint Local Plan is required to provide for significant levels of housing growth in order to address the identified needs of the two districts over

> the Plan period to 2036. … Thurston's status as a proposed 'core village' means that it will play a key role in addressing that."

18. Para. 4.2 stated:

> "The granting of planning permission for a series of large sites in late 2017 has meant that there are over 1,000 dwellings in the planning pipeline for Thurston, i.e. with planning permission but not yet built or occupied. It is for the Joint Local Plan to ultimately address the objectively assessed housing need of the two districts over the period to 2036 and also to determine Thurston's contribution to that. Given (i) the levels of growth in the planning pipeline; (ii) the fundamental concerns of the Suffolk County Council Highways Team about highway capacity; and (iii) the need to deliver major new education infrastructure in the form of a larger primary school on a new site, it is not expected that significant additional growth will need to be planned for in Thurston to support the emerging Joint Local Plan. In light of this, the spatial strategy seeks to be more restrictive as to the types of development which can be brought forward outside the settlement boundary, in line with Mid Suffolk Core Strategy Policies CS1 and CS2. In order to reflect a positive approach however, it is considered appropriate to provide some flexibility to address particularly significant needs identified in Thurston. Specifically, this relates to the needs of the ageing population which is discussed in more detail in Section 5 and reflected in Policy 2(B) and Policy 3. The provision of bungalows, sheltered housing and care facilities outside the settlement boundary will be viewed favourably (with more weight being given to proposals that are adjacent to the boundary as opposed to being clearly separate from it). Such proposals would have to demonstrate that there are no other suitable sites within the settlement boundary that are available or deliverable."

19. Para. 4.5 stated:

> "Therefore, the general approach in the Thurston Neighbourhood Plan is that growth will be focused on the sites with planning permission (which are located within the amended settlement boundary) and on small scale infill sites within the settlement boundary."

20. Para. 4.6 stated that the Neighbourhood Plan identifies the sites (at pages 75-76) in the planning pipeline which are expected to deliver housing along with a range of specific infrastructure and community facilities. In these proceedings these have been described as the "Thurston Five", referring to five sites for which planning permission has been granted. The settlement boundary of Thurston in the Neighbourhood Plan has accordingly been extended to include those sites. More generally, these sites "and other developments" are expected to provide high quality schemes which generally enhance the public realm and improve accessibility for pedestrians and cyclists. Before this Court Mr Cosgrove emphasised the phrase "and other developments", because it indicates that it was not only the Thurston Five that could in principle be relevant developments. He submits that, contrary to the conclusion of the Judge, the Neighbourhood Plan does not create a "barrier" to general housing development outside the settlement boundary, although it does envisage that it will be "focused" within that boundary.

21. Para. 5.7 of the Neighbourhood Plan stated:

> "… the Neighbourhood Plan's policies identify the issues that future development should address and provide criteria to ensure these are achieved. These policies shall also apply, where relevant, to the sites recently granted outline planning permission but without reserved matters approval. Over the lifetime of the Neighbourhood Plan, and providing infrastructure limitations can be overcome, housing growth could potentially be accommodated in a sensitive way within the parish. Such development would be tailored to address the housing needs of each sector of the population and would help meet the housing objectives identified in the BMSDC's Joint Local Plan."

The National Planning Policy Framework 2019 (NPPF)

22. Para. 11 of the NPPF outlines the presumption in favour of sustainable development where it applies. Para. 11(d) states that:

> "where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, 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; 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."

23. Para. 14 of the NPPF states that:

> "where the presumption (at paragraph 11d) applies 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:
>
> (a) The neighbourhood plan became part of the development plan two years or less before the date on which the decision is made;
>
> (b) The neighbourhood plan contains policies and allocations to meet its identified housing requirement;
>
> (c) The local planning authority has at least a three year supply of deliverable housing sites (against its five year housing supply requirement, including the appropriate buffer as set out in paragraph 74); and
>
> (d) The local planning authority's housing delivery was at least 45% of that required over the previous three years."

The judgment of the High Court

24. I will return to consider the Judge's reasoning in more detail later when I address the grounds of appeal but, for now, his judgment can be summarised as follows. There were three grounds of challenge before the Judge, the third of which he rejected and which does not arise on these appeals.

25. Under Ground 1, which was the principal ground before him, the Judge found that the Committee members were materially misled by the planning officers' advice that Bloor's proposals were not in conflict with Policy 1 of the Neighbourhood Plan. The Judge accepted the Claimant's submissions, finding that the planning officers had misdirected the Committee as to the correct interpretation of Policy 1 and failed to draw attention to the fundamental conflict between the proposed Development of the site for general housing and the key spatial objectives of the Neighbourhood Plan. The Judge found that the planning officers had failed to consider the key policy of the up-to-date component of the statutory Development Plan in a legal error which was fatal to the grant of permission, applying *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] EWCA Civ 669; [2019] PTSR 1714.

26. Under Ground 2, the Judge found that the application of the "tilted balance" in para. 11(d) of the NPPF was legally flawed as it would only be engaged if the policies which are most important for determining the application are out of date. Policy 1 in the Neighbourhood Plan was manifestly a relevant policy and could not be described as being "out of date", having been made in October 2019. The Judge concluded that, since the local planning authority had fallen into error under Ground 1, that error

infected the "tilted balance". Accordingly, he found that Ground 2 had been made out as well.

27. The Judge also found that the local planning authority had fallen into error in its approach to para. 14 of the NPPF in one respect, although this was not strictly necessary for his decision. I will return to this issue later when I consider Ground 3 in the District Council's appeal before this Court.

Grounds of Appeal

28. The Appellants both appeal on the following two grounds:

Ground 1: The Judge erred in law in his construction of Policy 1 in the Neighbourhood Plan.

Ground 2: The Judge erred in law in his conclusion on the "tilted balance" under para. 11(d) of the NPPF.

In addition, the First Appellant appeals on the following ground:

Ground 3: The Judge erred in law in his conclusion on the application of para.14 of the NPPF.

Material legislation

29. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") provides:

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

30. Section 38(3) of the 2004 Act provides that in England, outside Greater London:

> "… the development plan is–
>
> (a) the regional strategy for the region in which the area is situated (if there is a regional strategy for that region), ...
>
> (b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area, and
>
> (c) the neighbourhood development plans which have been made in relation to that area."

31. Section 38A of the 2004 Act was introduced by the Localism Act 2011. Subsection (2) provides:

> "A 'neighbourhood development plan' is a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan."

32. Section 37(3) of the 2004 Act provides:

> "A development plan document is a local development document which is specified as a development plan document in the local development scheme."

33. On the interaction of policies, section 38(5) of the 2004 Act provides:

> "If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan."

Relevant legal principles

34. The general legal principles governing judicial review of a decision by a local planning authority to grant planning permission were recently summarised by Holgate J, by reference to earlier authority from this Court, in *R (Ewans) v Mid Suffolk District Council* [2021] EWHC 511 (Admin), at paras. 15-16, as follows:

> "15. The general principles governing judicial review of a decision by a local planning authority to grant planning permission were summarised by Lindblom LJ in *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at [42]. He held that an officer's report to committee is not to be read with undue rigour, but with reasonable benevolence, bearing in mind that it is addressed to an informed readership, a planning committee, with substantial background and local knowledge (see also *R (Palmer) v Herefordshire Council* [2017] 1 WLR 411 at [8]). …
>
> 16. In *R v Mendip District Council ex parte Fabre* [2017] PTSR 1112 Sullivan J (as he then was) stated at [81] that, unlike a decision letter by a planning inspector, the purpose of an officer's report is not to decide the issues but to inform the members of relevant considerations relating to an application for permission. Part of a planning officer's expert function is to

> make a judgment about how much information needs to be included in his or her report. In *R (Heath & Hampstead Society) v Camden London Borough Council* [2007] 2 P & CR 19, Sullivan J stated that the well-known passage in the judgment of Hoffman LJ (as he then was) in *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80, to the effect that a planning inspector should not be treated as writing an examination paper when he produces his decision letter, applies with even greater force to an officer's report to a planning committee. I would add that it is, of course, necessary to read the passage or passages criticised in an officer's report in the context of the document as a whole."

35. In *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at para. 42(2), Lindblom LJ said the following:

> "The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017 1 WLR 411, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

36. At the end of para. 42(3) Lindblom LJ added that, unless there is some "distinct and material defect" in the officer's advice, the court will not interfere. In similar vein, at para. 63, Sir Geoffrey Vos C said:

> "… Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports

> utilising that local knowledge and much common sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied."

37. In *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] EWCA Civ 669; [2019] PTSR 1714 (also referred to as *Gladman Developments Ltd*, as it was by the Judge), at paras. 21-22, Lindblom LJ set out the principles on the application of section 38(6) of the 2004 Act as follows:

> "21. The correct approach to determining an application for planning permission has been considered several times at the highest level, and this court has amplified the principles involved. Section 38(6) of the 2004 Act requires the determination to be made 'in accordance with the [development] plan unless material considerations indicate otherwise'. The development plan thus has statutory primacy, and a statutory presumption in its favour—which government policy in the NPPF does not. Under the statutory scheme, the policies of the plan operate to ensure consistency in decision-making. If the section 38(6) duty is to be performed properly, the decision-maker must identify and understand the relevant policies, and must establish whether or not the proposal accords with the plan, read as a whole. A failure to comprehend the relevant policies is liable to be fatal to the decision: …
>
> 22. If the relevant policies of the plan have been properly understood in the making of the decision, the application of those policies is a matter for the decision-maker, whose reasonable exercise of planning judgment on the relevant considerations the court will not disturb: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780. The interpretation of development plan policy, however, is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to discern from the language used in formulating the plan the sensible meaning of the policies in question, in their full context, and thus their true effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text. The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making, in the public interest: …"

38. In *Chichester District Council v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640; [2020] 1 P&CR 9, at para. 32, Lindblom LJ said that:

> "32. As the authorities show, the circumstances in which those basic principles are applied will vary widely. Reading the analysis in one case across into another can be mistaken. No two plans are the same. The policies of each are unique, crafted for the area or neighbourhood to which they relate, not to fit some wider pattern or prescription. Often there will be more than a single component of the development plan relevant to the proposal. In many cases—and this is one—there will be both an adopted local plan and a 'made' neighbourhood plan. In such cases the court must keep in mind that the 'development plan' to which s.38(6) applies is the statutory plan in its totality, its constituent parts taken together. Relevant polices may be found both in a local plan and in a neighbourhood plan. But the statutory presumption applies to the entire plan—the local plan and the neighbourhood plan together."

39. In similar vein, in *Wavendon Properties Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1524 (Admin); [2019] PTSR 2077, at para. 58, Dove J said that the question of consistency with a development plan "is to be determined against the policies of the development plan taken as a whole." He referred to this as a "holistic approach". He said this in the context of the application of the "tilted balance" in para. 11 of the NPPF.

40. In *Hopkins Homes Ltd v Secretary of State for Community and Local Government* [2017] UKSC 37; [2017] 1 WLR 1865, at para. 26, Lord Carnwath JSC emphasised the distinction between the interpretation of a planning policy and its application as follows:

> "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."

Analysis

41. It is common ground that Ground 1 lies at the heart of this appeal. Grounds 2 and 3 are, as Mr Cosgrove put it before this Court, "parasitic" upon Ground 1. If Ground 1 succeeds, Grounds 2 and 3 are strictly unnecessary. If, however, Ground 1 fails, Grounds 2 and 3 could not lead to a successful appeal. I will therefore concentrate on Ground 1.

Ground 1

42. The submission for the Parish Council which succeeded before the Judge was that the District Council had fallen into legal error because it had misinterpreted Policy 1 in the Neighbourhood Plan. I am not convinced that that was the correct way of looking at the issue. It is well established that, while the interpretation of a planning policy is a question of law and is one therefore for the court to determine, the application of a policy is not a question of law and is entrusted to the relevant decision-maker, subject to review only on the ground of irrationality. The Judge accepted the main submission for the Parish Council, that the District Council had misinterpreted Policy 1. Mr Lewis submitted to this Court that the Judge was correct in reaching that conclusion for the reasons he gave at paras. 62-75 of his judgment.

43. The Judge began his discussion of this issue, at para. 62, in the following way:

> "In my view, the question which I have to address under Ground 1 is whether it was in accordance with Policy 1 of the Neighbourhood Plan to release the Site for a general housing development."

In my respectful view, that was not entirely accurate. This is because the question of whether proposed development is "in accordance with" a planning policy may raise both questions of interpretation of that policy and questions of its application. As the authorities make clear, it is important to keep that distinction well in mind. This is because it is only the interpretation of the policy which is a pure question of law for the court to determine. To take a hypothetical example, if the local planning authority had directed itself that the phrase "settlement boundary" in the neighbourhood plan meant the same thing as the boundary of the parish, that would be a misinterpretation of the policy and would constitute an error of law for the court to correct. The present case was not of that type. In my view, this was a case which concerned the proper application of Policy 1 in the circumstances of the proposed development rather than its interpretation.

44. Having set out his analysis of the text of Policy 1 and its wider context in the Neighbourhood Plan, the Judge set out his essential reasoning on Ground 1 in the following way, at paras. 72-73:

> "72. … On the correct interpretation of Policy 1 and of the underlying spatial strategy and objectives of the Neighbourhood Plan, the release of the Site for the Development is not in accordance with the Neighbourhood

> Plan. On the contrary, development of the Site for general housing is properly to be seen as being in conflict with the principal, relevant policy of the Neighbourhood Plan. That conclusion is unaffected by the fact that the Development may be able both to fulfil the qualitative requirements of Policy 2 and to fulfil the requirements of Policy 7 to address its impacts on the road junctions identified in that policy. Neither of those factors affect the fundamental locational objection to the development of the Site for general housing that arises on the correct interpretation of Policy 1 of the Neighbourhood Plan.
>
> 73. It follows that I must conclude that the Defendant's Committee was misled both by the advice that it received in the Report and the oral advice of planning officers at the meeting on 29 January 2020. The Committee was advised that the Neighbourhood Plan was not to be understood as treating the defined settlement boundary as a barrier to housing development on a site which lay outside that boundary. For the reasons I have given, that advice was a misinterpretation of Policy 1 of the Plan. Contrary to the submissions advanced on behalf of both the Defendant and the Interested Party, that advice is not vindicated by consideration of the Plan as a whole, its context, strategy and objectives. On the contrary, consideration of those matters only serves to reinforce the terms of Policy 1 itself, that there is, and is intended to be, no policy support for general housing development on land outside the defined settlement boundary. Planning officers' advice that there was a tension between the Neighbourhood Plan and the emerging Draft Local Plan was confusing and begged the question whether the Development was properly to be seen as in accordance with the Neighbourhood Plan. For the reasons I have given, that question was never properly answered by the planning officers."

45. The Judge then set out his conclusion on Ground 1 as follows, at para. 74:

> "74. I have approached the dispute which arises under Ground 1 by applying the approach stated by Lindblom LJ at [31]-[32] in *Chichester District Council*. In my judgment, the Defendant's Committee was materially misled by the failure correctly to interpret and to advise on the question whether the Development was in accordance with or in conflict with the Neighbourhood Plan. Planning officers acknowledged that the Neighbourhood Plan was up-to-date. Indeed it was, on the advice given both in the Report and orally, the only component of the statutory development plan which contained up-to-date, relevant policies going to the principle of development of the Site for general housing purposes. Yet there was no acknowledgement of the true position, that the Development

> did not accord with those up-to-date, relevant policies, in the planning officer's conclusions on the principle of the Development in paragraph 3.12.1 of the Report. Indeed that critical paragraph simply did not address the spatial strategy and locational policy of the Neighbourhood Plan. The same error vitiates the paragraphs 4.1 to 4.3 of the Report. As a result of the misleading advice given both in the Report and orally, the Defendant failed to understand those policies and to establish, on a correct understanding of those policies, whether or not the Development was in accordance with the development plan. It is evident from the transcript of the Committee's deliberations that Members were particularly concerned to understand whether or not the Development should properly be regarded as being in accordance with the relevant policies of the Neighbourhood Plan. This was a material error (see *Mansell* at [41]-[42]) and one which was liable to be fatal to the decision to grant planning permission (*Gladman Developments Limited* at [21]).”

46. The planning officer's Report was very long (approximately 90 pages), thorough and wide-ranging. It correctly identified the elements of the statutory Development Plan: see in particular para. 3.1. It dealt in detail with the Neighbourhood Plan at para. 3.5. At para. 3.5.1 it said that the Neighbourhood Plan was up-to-date and benefits from the statutory presumption in section 38(6) of the 2004 Act. The Report said that:

> “It must be the starting point for decision taking. The weight to be attributed to that document must however, as always, be balanced with and against all other material planning considerations.”

47. The Report set out the terms of Policy 1, in particular Criterion A, at para. 3.5.7. The Report recognised that Criterion B did not apply because the development site lies outside the settlement boundary shown in the Neighbourhood Plan. The planning officer's comments informed the Committee of the following matters. First, it was to be noted that the Neighbourhood Plan does not allocate new sites for development but rather reflects the likely status quo arising from extant planning permissions. The Plan appears not to make any reference to the number of dwellings that are considered to be required within the Plan period (up to 2036) nor does it suggest how the extended settlement boundary to include sites with extant permissions will or will not meet a predicted requirement up to 2036. Next, it was made clear that there was a critical difference of opinion between the Parish Council and the District Council based on evidence as to how much development is required to be accommodated in Thurston during the Plan period 2018-2036. It was said that it is this fundamental difference that sits at the heart of discussion around the merits of the proposal. The report advised that:

> "Ultimately Members will need to pick their way through the evidence and apply their own judgement."

48. The Report said that of relevance to that debate is the fact that whilst the site is not allocated for development in the Neighbourhood Plan it is allocated for residential development in the Joint Local Plan Preferred Options document of July 2019. As an expression of the District Council's intended strategic direction that document was agreed by the full Council and to that extent the proposed allocations needed to be seen as that Council's latest advancing expression of identified housing requirement and preferred strategic distribution for that requirement. Later, at para. 3.6.2, the Report described the draft JLP Preferred Options document as highlighting "an agreed direction of travel".

49. The view of the District Council is that the identified housing need for Thurston in the Plan period is 1468 dwellings: see para. 3.6.1 of the Report. The number represented by the "Thurston Five" is 818 dwellings. There is therefore a shortfall of around 650 dwellings in the Plan period in the Thurston Parish area: see para. 3.8.2. The Neighbourhood Plan does not say how that need is to be met. At para. 3.8.3 the Report said that this shortfall was not negligible or even modest; it was "significant." At para. 3.8.4 it said that this was a fundamental point which could not be dismissed.

50. The Report made clear that the status of the JLP Preferred Options document was not the same as the Neighbourhood Plan, since it was not part of the statutory Development Plan. Nevertheless it was a material planning consideration and it needed to be acknowledged that the development site is allocated within that draft document for residential development under the reference LA087.

51. At para. 3.8.16, the Report said that it needed to be acknowledged that the site is not allocated for development in the current Adopted Local Plan and therefore is classified as "countryside", where the presumption is against large-scale residential development. Members were reminded of Policy CS2 in the Adopted Local Plan but told that this was out of date and does not comply with the NPPF in so far as it effectively precludes sustainable development on the edge of or adjacent to sustainable settlements and is therefore contrary to the Government's intention that sustainable development will be supported.

52. Turning to the planning benefits that would accrue from the proposed Development, at para. 3.11.3, the Report said that the proposal came with its own extensive package of mitigation measures sufficient to offset its own impacts. Moreover, it went on, it should be noted that the application included a raft of highway works south of Thurston railway station bridge that can be said to provide village-wide benefits of a nature that helps to mitigate the impact of not just existing traffic but also that to be generated by the Thurston Five:

> "It delivers the suite of highway improvements considered vital by the Parish Council and as identified in the Thurston Neighbourhood Plan. Only this developer can provide these works because of their land ownership portfolio. Securing these improvements represents a significant gain. Failure to secure these will mean the problems

> associated with traffic south of the railway bridge will continue unabated."

In the context of highway issues, the Report noted, at para. 3.15.5, that this was relevant under Policy 7 in the Neighbourhood Plan, which relates to highway capacity at key road junctions.

53. For my part I cannot see anything in the planning officer's Report which constitutes an interpretation of Policy 1 in the Neighbourhood Plan, let alone a misinterpretation of it. When pressed at the hearing before this Court by my Lord, Lewison LJ, Mr Lewis was driven to submit that it was not so much that there is a misinterpretation of Policy 1 in the Report but that there is a failure to grapple with its correct interpretation. But, as has frequently been said by the courts, the writer of a report such as this is not sitting an examination paper. They are not required to address abstract questions in every case. They must set out what they consider to be important in a practical way for the benefit of committee members, who will be familiar with their local area.

54. In my judgement, what the submission for the Parish Council in substance amounts to is not that there was a misinterpretation of Policy 1 but that its application was clearly wrong in the circumstances of this proposed Development outside the settlement boundary. But that is to fall into the error of confusing the interpretation of a planning policy with its application. Mr Lewis had to submit that, if the District Council had understood the policy correctly, it could only have come to the conclusion that there was a conflict between that policy and this proposed development since it was outside the settlement boundary. But that is predicated on an interpretation that Policy 1 is absolute in its terms. It clearly is not even as a matter of textual analysis: the word "focused" does not mean that there can never be any development of a general kind outside a settlement boundary. Further, the Neighbourhood Plan itself recognised the existence of significant housing needs going beyond the Thurston Five by its reference in section 4 to the Draft Joint Local Plan and the 'core village' status of Thurston for future development.

55. The closest that Mr Lewis was able to come to identifying where the Committee was advised as to the interpretation of Policy 1, as distinct from its application, was in the transcript of the meeting, in particular as recorded in the discussion at 3:13.27 minutes into the meeting. The Chief Planning Officer said:

> "The Policy says that growth will be focused, focused, not exclusive, focused in the Settlement Boundaries and that allows for exceptions to that curve and then we have the question of whether there is conflict and a clear recognition of the role of the District Council to plan ultimately for the amount of growth that Thurston will need to contribute to the district's supply of housing and all of that takes me to a conclusion that I do not personally and Counsel does not see a conflict with the Neighbourhood Plan. It may be intended but in this instance I don't see actually that there is a conflict in the way that is described in NPPF. That's my opinion."

56. Mr Lewis complained that in a number of other passages in the transcript the Chief Planning Officer had said that there was not a "conflict" in strict terms but that there was a "tension": see for example the transcript at 1:34.04 minutes into the meeting. In my view, however, the Chief Planning Officer was correct to say that there was not a conflict but a tension. Certainly he was entitled to say that, in the reasonable application of Policy 1 to the facts of this case. As I have said, there was no error of interpretation of Policy 1. Nor, in my view, was there any error in its application such as to permit a court to interfere with the local planning authority's exercise of judgement.

57. It is clear from the conclusions in the Report, in particular at para. 4.1, that the Committee were advised that the proposed Development did conflict with the housing settlement policies in the Adopted Local Plan and for that reason "it does not accord with the development plan taken as a whole." However, the report continued, there were other material considerations which directed that planning permission should nevertheless be granted. This was clearly a reference to the exercise which the Committee had to perform under section 38(6) of the 2004 Act.

58. At the hearing before this Court Mr Lewis submitted that this was not good enough. He submitted that it is not sufficient for the Committee to be advised merely that a proposed development does not accord with the Development Plan taken as a whole. He submitted that what is required is that the Report should identify precisely which policy or policies it does or does not accord with. He submits that the sting was taken out of the point that there was a conflict with the Development Plan taken as a whole because, elsewhere in the Report, the Committee had been advised that the relevant policies in the Development Plan (in particular CS2 and H7) were out of date.

59. In my judgement, this question cannot be considered in the abstract. As is often the case in planning, it has to be considered in the particular context where it arises. To take a hypothetical example, if the Report had said that there was a conflict with the Development Plan in relation to an entirely unrelated policy (perhaps to do with a matter such as employment) there might be some force in Mr Lewis's submission. But the fact of the matter is that, in the present case, the fundamental point of which the members of the Committee were reminded was their own policies as to where general housing should be located, in other words that the proposed development was in the "countryside" and therefore was contrary to the Development Plan policies on that issue. The reason why the local plan policies were out of date was not to do with that fundamental point but to do with the number of dwellings which would be needed in the Plan period going forward to 2036.

60. This was a case therefore where, in my view, the Report clearly identified the issue for the Committee as being whether, notwithstanding a conflict with the Development Plan taken as a whole, other material considerations outweighed that for the purposes of section 38(6) of the 2004 Act.

61. This was, further, in my view, how members of the Committee clearly treated the issue before them, as is evident from the transcript which we have been shown, for example in the comments made by Councillor Humphreys, in the transcript at 2:58.16 minutes into the meeting.

62. I have therefore come to the conclusion, unlike the Judge, that there was no misinterpretation of planning policy by the officers to the Committee which made the relevant decisions. I note that the members of the Committee gave lengthy and detailed consideration to the planning issues before them, as is demonstrated by the transcript we have been shown. I also note that the vote at the end of the day was a narrow one, since there was a majority of only one in favour of granting permission, which again suggests that this was an "on balance" decision by the Committee.

63. Accordingly, in my judgement, the Judge was wrong to conclude that there had been a material error in the advice given by officers to the Committee. In my judgement, ultimately what this case concerns is the application of planning policy to the circumstances of this particular case on its planning merits. The Committee weighed the benefits and disadvantages of the proposed development against the background that there was a conflict with the Development Plan. In my judgement, they were entitled to reach the conclusion which they did in accordance with the terms of section 38(6) of the 2004 Act.

64. I would therefore allow these appeals on Ground 1.

Ground 2

65. At para. 77 of his judgment the Judge noted that, in para. 3.10.3 of the Report, the planning officer had advised the Committee that the tilted balance under para. 11(d) of the NPPF applied in this case. The Planning Officer gave two reasons for that advice. The first was the fact that some of the relevant adopted planning policies (Policies CS1, CS2 and H7) had been found to be out of date for the purposes of applying the policy presumption in favour of sustainable developments. Secondly, the Neighbourhood Plan could not be given significant weight in applying the tilted balance, because it did not contain policies and allocations to enable Thurston to make its contribution to meeting the housing need identified in the Draft Local Plan; and so it failed to satisfy para. 14(b) of the NPPF.

66. In my judgement, the Report was entirely accurate in those respects. The only reason why the Judge found that the analysis about the tilted balance in the NPPF was vitiated was because of the legal error which he had already found to be made out under Ground 1: see para. 88 of his judgment. Since I have concluded that there was no error of law in that respect, it follows that these appeals should be allowed on Ground 2 also.

Ground 3

67. Ground 3 arises from the way in which the Judge approached the issue arising under para. 14 of the NPPF, at paras. 89-92 of his judgment. At para. 90, the Judge accepted the submission made by Mr Cosgrove on behalf of the District Council that, if the adverse impact of allowing development that conflicts with a neighbourhood plan is to weigh significantly against the presumption in favour of sustainable development under para. 11(d) of the NPPF in a case involving the provision of

housing, *all* of the circumstances listed in para. 14(a)-(d) must be found to apply. Before this Court Mr Lewis did not take issue with that aspect of the judgment.

68. At para. 91 of his judgment, the Judge accepted Mr Lewis' argument that the report in relation to para. 14(b) of the NPPF was vitiated by his misunderstanding of Policy 1. He said that the principal reason given in the Report for the advice that para. 14(b) was not satisfied was undermined by the very misunderstanding of Policy 1 and the Neighbourhood Plan's underlying strategy and objectives which he had found to be established under Ground 1. The question raised by para. 14(b) is whether the Neighbourhood Plan has made adequate provision for the housing requirement that was identified for the purposes of its preparation. It was, in his view, difficult to see how the Neighbourhood Plan's lack of allocations to meet Thurston's housing need as later identified in the emerging draft Joint Local Plan was material to that question.

69. In my judgement, the fundamental reason why para. 14 was not relevant to the present case is that it applies to situations where development "conflicts with the Neighbourhood Plan". For the reasons I have set out earlier, under Ground 1, that was not the position in this case. The reasons given by the Judge on this aspect of the case before him were entirely predicated on the conclusion which he had earlier reached under Ground 1, that there had been a misunderstanding of Policy 1. Since I have concluded that that was wrong, it also follows that the District Council's appeal should be allowed on Ground 3 also.

Conclusion

70. For the reasons I have given I would allow these two appeals in favour of both the District Council and Bloor and would set aside the order made by the Judge, which quashed the planning permission in this case.

Lady Justice Whipple:

71. I agree.

Lord Justice Lewison:

72. I also agree.