Neutral Citation Number: [2019] EWHC 682 (Admin)

Case No: CO/3018/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Sitting at Leeds Combined Court

Judgment: 13/03/2019

Before :

MR JUSTICE KERR

- -

Between :

LEEDS CITY COUNCIL **Claimant**

- and -

THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

First Defendant

- and -

TAYLOR WIMPEY (UK) LIMITED **Interested Party**

- -
- -

Mr Juan Lopez (instructed by **Legal Services, Leeds City Council**) for the **Claimant**
Mr Robert Williams (instructed by **Government Legal Dept**) for the **First Defendant**
Mr Charles Banner (instructed by **Walker Morris LLP**) for the **Interested Party**

Hearing dates: 7th and 8th March 2019

Approved Judgment

THE HON. MR JUSTICE KERR:

Introduction

1. The claimant local planning authority (the LPA) brings this claim, under section 288 of the Town and Country Planning Act 1990 (the 1990 Act), to challenge the decision of Mr P W Clark, an inspector appointed by the Secretary of State, the first defendant, dated 18 June 2018. The inspector allowed the appeal of the second defendant (the developer) granting outline planning permission for a residential development comprising 55 dwellings together with means of access, subject to conditions, at land south of Pool Road, in Wharfedale, Leeds (the appeal site).

2. The developer was originally sued as an interested party but I directed, without opposition, that it become second defendant rather than interested party, as is, I was told, customary in a statutory review challenge under section 288 of the 1990 Act. In a 29 page, 77 paragraph skeleton argument, the LPA advanced five grounds of challenge to the inspector's decision. It was, at times, difficult to distinguish some from others.

3. What all five grounds had in common was reliance on one of the LPA's policies, called policy N34. At the heart of the case advanced by Mr Lopez, for the LPA, was the contention that the inspector had misunderstood, misinterpreted, and misapplied policy N34. It was this error of law which led the inspector, so Mr Lopez submitted, to go wrong in law in various other ways, expressed in the five grounds of challenge.

4. The inspector recognised a conflict between the proposed development and the content of policy N34. The planning application would decide the fate of three hectares of land forming part of a larger 11 hectare "Protected Area of Search" (PAS) site. Policy N34 stated that only temporary development should be permitted on such sites, until their long-term future had been decided upon, in accordance with an evolving revision to the existing development plan. The inspector found that the development would conflict with policy N34. However, he gave little weight to that conflict and found that the development accorded with the current development plan, overall.

5. For all the detail in the LPA's lengthy presentation of its case, the main issue boils down to whether the inspector was justified in attaching little weight to the conflict between the development and policy N34; and in deciding that the development was "sustainable development that largely accords with the development plan" which, as such, should be granted planning permission without delay.

Law and Guidance

6. The Planning and Compulsory Purchase Act 2004 (the 2004 Act) deals with development plans. By section 38(6), where regard is to be had to such a plan, determination of a planning permission application "must be made in accordance with the plan, unless material considerations indicate otherwise".

7. I was referred to the well-known seven familiar principles derived from *Bloor Homes (East Midlands Limited v. Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at [19]. They were restated in *St Modwen Developments Limited v. Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 at [6]-[7]. I will not set them out; they are now too well known to need repeating. I bear them well in mind and, more

generally, the proposition that excessive legalism has no place in the planning system or in proceedings before this planning court.

8. It is common ground that the inspector had to have regard to relevant considerations, that the development plan is one such and the National Planning Policy Framework ("NPPF") another. Sustainable development is the centrepiece of the NPPF. I am here concerned with the version published in March 2012, not the later version which superseded it from July 2018. References below are to the 2012 version.

9. Paragraph 14 of the NPPF states:

> "At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> For **plan-making** this means that:
>
> ● Local planning authorities should positively seek opportunities to meet the development needs of their area;
>
> ● Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless
>
> ● any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> ● specific policies in this Framework indicate development should be restricted.9
>
> For **decision-taking** this means:10
>
> ● approving development proposals that accord with the development plan without delay; and
>
> ● where the development plan is absent, silent or relevant policies are out-of-date, granting permission
> unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted.9"

10. Footnote 9, which appears twice in paragraph 14, states:

> "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."

11. Footnote 10 states: "Unless material considerations indicate otherwise", mirroring the language of section 38(6) of the 2004 Act. Paragraph 15 of the NPPF states that all local plans should be based on the presumption in favour of sustainable development. I shall return to certain other

relevant guidance when dealing with the facts and submissions of the parties.

12. In *Cheshire East Borough Council v. Secretary of State for Communities and Local Government* [2016] EWHC 571 (Admin), [2016] JPL 909, Jay J refused an application for statutory review under section 288 of the 1990 Act, brought by the local authority, following a successful appeal by the developer. He made certain observations about the NPPF paragraph 14. At [19], Jay J referred to the three aspects of sustainable development identified in paragraph 7 of the NPPF: the economic, social, and environmental roles it fulfils. He noted that there will be "somewhat of a trade-off between competing *desiderata*". Later, still at [19], he said:

> "Where the second bullet point applies, because the development plan is absent, silent, or relevant policies are out-of-date, the proposal under scrutiny will be sustainable development, and therefore should be approved unless any adverse impacts significantly and demonstrably outweigh the benefits".

13. Later at paragraphs [23]-[24] he said this:

> "23. In my judgment, this is not, and cannot be, a question of assessing whether the proposal amounts to sustainable development before applying the presumption within para.14. This is not what para.14 says and, in my view, would be unworkable. Rather, para.14 teaches decision makers how to decide whether the proposal, if approved, would constitute sustainable development.
>
> 24. …. The whole point of para.14 is to lead decision makers along a tightly defined and constrained path, at the end of which the decision must be: is this sustainable development or not? If what is being said in these authorities is that decisions about the weight to be given to each of the NPPF para.7 dimensions should be made before para.14 is considered and applied, then I would have no difficulty at all, because these are logically prior planning judgments which fall to be made on all the evidence."

14. He then referred at [25] to what he called the "para. 14 algorithm" and observed that a decision maker "will only know if the proposal is sustainable or not by obeying the processes mandated by the paragraph". Thus, he said at [26], paragraph 14 "is about process not outcome" and later, in the same paragraph, he rejected the suggestion that the concept of sustainable development could be applied outside the scope of paragraph 14 of the NPPF; that would be "a freewheeling exercise of discretion without parameters".

15. He then commented on some prior first instance decisions, which I need not do here. The suggestion that there is a presumption in favour of sustainable development, outside the ambit of paragraph 14 of the NPPF, has now been laid to rest; see Holgate J's judgment in *Trustees of Barker Mill Estates v. Test Valley Borough Council* [2016] EWHC 2038 at [139]-[143]. At the end of [143] he said:

> "… practitioners should cease to confuse policies of the SSCLG (or LPA's) which *describe* what qualifies as sustainable development with policies which *define particular circumstances in which a presumption* in favour of sustainable development applies. Difficulties caused in recent decision making in litigation would not have occurred if that distinction had been respected".

16. In *East Staffordshire Borough Council v. Secretary of State for Communities and Local Government* [2017] EWCA Civ 893, Lindblom LJ explained at [9] the approach of the court to an application for review under section 288 of the 1990 Act; in particular in the light of the Supreme Court's decision in *Hopkins Homes Limited v. Secretary of State for Communities and Local Government* [2017] PTSR 623. He noted that the Supreme Court had emphasised:

"the distinction between the interpretation of planning policy and its application. The interpretation of policy will be suitable in principle, for legal analysis - though only to a degree that depends on the context and content on the policy in question. The role of the court must not be overstated. The application of policy, however, involves an exercise of planning judgment by the planning decision-maker which is, of course, not for the court…".

17. Later at [35] he explained the presumption in favour of sustainable development, in paragraph 14 of the NPPF, thus:

> "(1) The "presumption in favour of sustainable development" in the NPPF, unlike the presumption in favour of the development plan in section 38(6) of the 2004 Act, is not a statutory presumption. It is only a presumption of planning policy, which requires of a planning decision-maker an exercise of planning judgment within the balancing exercise mandated under section 38(6) and undertaken in accordance with the principles in the relevant case law (see para 13 above).
>
> (2) Paragraph 14 of the NPPF describes what the "presumption in favour of sustainable development" means, explaining in clear and complete terms the circumstances in which, and the way in which, it is intended to operate. The presumption, as described in paragraph 14, is the so-called "golden thread running through both plan-making and decision-taking". There is no other "presumption in favour of sustainable development" in the NPPF, either explicit or implicit, and no other "golden thread".
>
> (3) When the section 38(6) duty is lawfully performed, a development which does not earn the "presumption in favour of sustainable development" – and does not, therefore, have the benefit of the "tilted balance" in its favour – may still merit the grant of planning permission. On the other hand, a development which does have the benefit of the "tilted balance" may still be found unacceptable, and planning permission for it refused (see para 22 above). This is the territory of planning judgment, where the court will not go except to apply the relevant principles of public law: see para 8 and 9 above). The "presumption in favour of sustainable development" is not irrebuttable. Thus, in a case where a proposal for the development of housing is in conflict with a local plan whose policies for the supply of housing are out of date, the decision-maker is left to judge, in the particular circumstances of the case in hand, how much weight should be given to that conflict. The absence of a five-year supply of housing land will not necessarily be conclusive in favour of the grant of planning permission. This is not a matter of law, it is a matter of planning judgment, see *Crane's* case [2015] EWHC 425 at [70]-[74]".

18. Lindblom LJ endorsed at [47] the approach of Jay J in *Cheshire East Borough Council v. Secretary of State for Communities and Local Government* and of Holgate J in *Trustees of Barker Mill Estates v. Test Valley Borough Council*; and at [50], cautioning against excessive legalism, endorsed the observations in Holgate J at [140]-[143] in the latter case. I am therefore careful to approach paragraph 14 of the NPPF in the same manner.

19. In relation to the adequacy of reasons, I was referred in the usual way to the speech of Lord Brown at [36] in *South Bucks District Council v. Porter (No 2)* [2004] 1 WLR 1953, which I need not set out, as it is too well known. In relation to consistency of decision making, I was referred to *North Wiltshire District Council v. Secretary of State for the Environment* (1993) 65 P&CR 137. In that well-known case, Mann LJ said this at page 145:

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in

argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

20. I was also referred to the more recent examination of the law on this subject by Dove J in *Gladman Developments Limited v. Secretary of State for Housing, Communities and Local Government* [2019] EWHC 127. After citing from Mann LJ's judgment in the *North Wiltshire* case, Dove J referred at [17] to the judgment of Lindblom LJ in *DLA Delivery Limited v. Baroness Cumberlege of Newick* [2018] EWCA Civ 1305: where a previous decision of an inspector is indistinguishable on an issue of critical importance, any departure from it would have to be explained because "[t]he interests of consistency in appellate decision making required it" (per Lindblom LJ at [56] in *DLA Delivery Limited v. Baroness Cumberlege of Newick*).

21. At [28] in his judgment, Dove J made the simple and compelling observation that a previous decision of an inspector on the same issue as one arising for decision in a subsequent case is obviously a material consideration to which regard must be had. In the case before him, the decision was flawed because the inspector had failed to provide adequate reasons for departing from a previous decision on that same point; see his judgment at [33].

The Facts

22. The appeal site lies to the north west of Leeds city centre. It forms part of a larger area which has the status of a "Protected Area of Search ("PAS"), under the Leeds Unitary Development Plan ("UDP"). The LPA is required by statute to prepare a unitary development plan. The Leeds UDP was adopted on 1 August 2001. It was then reviewed and a new plan, the Leeds UDP Review, or UDPR, was adopted on 19 July 2006. That plan is being reviewed but is still extant.

23. Within the Leeds UDPR, in the fifth section, headed, "Environment" policy N34 appears in the following context:

"Under the heading "Protected Areas of Search for Long Term Development" the following appears.

5.4.9:

"To ensure the necessary long-term endurance of the green belt, definitions of its boundaries was accompanied by designation of protected areas of search to provide land for longer-term development needs. Given the emphasis in the UDP on providing for new development within urban areas it is not currently envisaged that there will be a need to use any such safeguarded land during the review period. However, it is retained both to maintain the permanence of green belt boundaries and to provide some flexibility for the city's long-term development. The suitability of the protected sites for development will be comprehensively reviewed as part of the preparation of the local development framework and in the light of the next regional spatial strategy. Meanwhile it is intended that no development should be permitted on this land that would prejudice the possibility of longer-term development, and any proposals for such development will be treated as departures from the plan.

N34: WITHIN THOSE AREAS SHOWN ON THE PROPOSALS MAP UNDER THIS POLICY, DEVELOPMENT WILL BE RESTRICTED TO THAT WHICH IS NECESSARY FOR THE OPERATION OF EXISTING USES TOGETHER WITH SUCH TEMPORARY USES AS WOULD NOT PREJUDICE THE POSSIBILITY OF LONG TERM DEVELOPMENT.

5.4.10:

The following sites are protected under Policy N34 as protected areas of search:

…

23 West of Pool in Wharfedale…".

24. The latter site is the 11 hectare site of which the appeal site forms part. Later in the Leeds UDPR there is a section on Otley and Mid Wharfedale, which includes the appeal site. Paragraph 19.1.5 states:

"An area of approximately 11 ha. is designated under policy N34 as a protected are of search for possible long term development beyond the plan period at the western edge of Pool. This area includes that required for a possible West of Pool bypass, which would be funded from the possible housing development. The precise alignment of the bypass and hence the extent of the housing contained by it, will [be] determined if and when this land is brought forward through a review of the plan".

25. Later in the same part paragraph 19.2.8 states:

"WEST OF POOL IN WHARFEDALE

11.0 ha. of land west of Pool has been allocated as a protected area of search under policy N34, in association with a future west of Pool bypass".

26. Those parts of the UDPR reflected national guidance at the time. There was then a document called, "Planning Policy Guidance 2: Green belts". It was among the guidance documents that were superseded and replaced from March 2012 by the NPPF and included in a list in Annex 3 to the NPPF. From 2006 to early 2013, that guidance stated, among other things, as follows:

"*Safeguarded Land*

2.12: When local planning authorities prepare new or revised structure and local plans, any proposals

affecting green belts should be related to a time-scale which is longer than that normally adopted for other aspects of the plan. They should satisfy themselves that green belt boundaries will not need to be altered at the end of the plan period. In order to ensure protection of green belts within this longer timescale, this will in some cases mean safeguarding land between theurban area and the green belt which may be required to meet longer-term development needs…

2.13: Annex B, gives further advice on safeguarded land, which is sometimes known as "white land"…".

"Annex B

Safeguarded Land

…

B3: Safeguarded land should be located where future development would be an efficient use of land, well integrated with the existing development, and well related to public transport and other existing and planned infrastructure, so promoting sustained development.

Development Control Policies

B5 Development plans should state clearly the policies applying to safeguarded land over the period covered by the plan. They should make clear that the land is not allocated for development at the present time and keep it free to fulfil its purpose of meeting possible longer-term development needs. No development which would prejudice later comprehensive development should be permitted (though temporary developments may assist in ensuring that the land is properly looked after). Valuable landscape and wildlife features and existing access for recreation should be protected.

B6 Development plan policies should provide that planning permission for the permanent development of safeguarded land should only be granted following a local plan or UDP review which proposes the development of particular areas of safeguarded land. Making safeguarded land available for permanent development in other circumstances would thus be a departure from the plan".

27. In March 2012, the NPPF was finalised and became effective. Apart from the paragraphs on sustainable development, which I have already mentioned, it also included paragraph 85 in the part of the NPPF headed "Protecting the Greenbelt". Paragraph 83 requires planning authorities to establish greenbelt boundaries. Paragraph 84 is about channelling development away from the green parts of the greenbelt itself, but rather in urban areas, towns, or villages within it or in areas beyond its outer boundaries.

28. Paragraph 85 then states:

"When defining boundaries local planning authorities should:

- ensure consistency with the Local Plan strategy for meeting identified requirements for sustainable development;
- not include land which it is unnecessary to keep permanently open;
- where necessary, identify in their plans areas of 'safeguarded land' between the urban area and the green belt, in order to meet longer-term development needs stretching well beyond the plan period;

- make clear that the safeguarded land is not allocated for development at the present time. Planning permission for the permanent development of safeguarded land should only be granted following a Local Plan review which proposes the development;

- satisfy themselves that Green Belt boundaries will not need to be altered at the end of the development plan period; and

- define boundaries clearly, using physical features that are readily recognisable and likely to be permanent".

29. It is agreed by all parties, that policy N34 is in line with the guidance in that paragraph of the NPPF. Paragraph 215 of the NPPF forms part of Annex 1 on implementation. That annex is about questions of timing in relation to the policies in the NPPF. Paragraph 208 states that those policies apply from the date of its publication. Paragraphs 214 and 215 then state:

> "214 For 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004, even if there is a limited degree of conflict with this Framework.
>
> 215 In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)".

30. In November 2014, the LPA adopted its "Core Strategy" document. It included among the "strategic themes and policies" the policy H2(ii) as follows: "[f]or developments of 5 or more dwellings the location should accord with the accessibility standards in Table 2 of Appendix 3". It is unnecessary to state what those standards were and are.

31. As at the time when planning permission was applied for by the developer in this case, in 2017, and up to the inspector's decision in mid-2018, a review of the Leeds UDPR was ongoing, it still is. A copy of the relevant part of what is called the "emerging draft plan" or the "emerging SAP" ("Site Allocation Policy"), was before the inspector at the inquiry in this case. It is a 602-page draft plan of which I have short extracts. It states in similar vein to the still extant UDPR:

> "Policy HG3 – Safeguarded Land
>
> The site allocations plan designates sites to be safeguarded from development for the plan period (to 2028) to provide a reserve of potential sites for longer term development post 2028 and protect the Green Belt. These are shown on the policies map and detailed within section 3 for each housing market characteristic area".

32. Within the emerging SAP there is a later section dealing with the Outer North West area of Leeds. Within that section "Policy HG3" on safeguarded land, is repeated beneath that, it is made clear, that the same 11 hectare site, of which the appeal site forms part, is included in the emerging SAP as safeguarded land.

33. It was in that context and against that background then, that on 29 March 2017, the developer made its application for planning permission for up to 70 dwellings at the appeal site. On 27 June 2017, the application was refused by the LPA. The developer appealed. The appeal

proceeded by way of an inquiry. On 14 May 2018, an informal site visit was undertaken by the inspector.

34. The hearing took place from 15-18 May and 22-23 May 2018. At the hearing, the LPA urged the inspector not to allow the appeal. Kathryn Holloway, a witness for the LPA, complained that the emerging local plan was the correct vehicle for identifying suitable sites for a re-development such as this. She complained (see paragraph 6.5 of her witness statement) "… to make ad-hoc decisions on individual sites prior to the adoption of the site allocations plan would be deeply unsatisfactory and subvert the plan led process contrary to the provisions of the core strategy and the paragraph 17 NPPF and policy under the NPPG".

35. At paragraph 17 of the NPPF is a long paragraph, which I need not set out, emphasising the importance of the plan led method of deciding on development. The reference to the "NPPG" appears to be to the National Planning Policy Guidance. The March 2014 version of that guidance deals with circumstances in which it might be justifiable to refuse planning permission on the ground of "prematurity". It states in part as follows;

> "… arguments that an application is premature are unlikely to justify a refusal of planning permission other than where it is clear that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, taking the policies in the Framework and any other material considerations into account. Such circumstances are likely, but not exclusively, to be limited to situation where both:
>
> (a) the development proposed is so substantial, or its cumulative effect would be so significant, that to
> grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging Local Plan or neighbourhood planning; and
>
> (b) the emerging plan is at an advanced stage but is not yet formally part of the development plan for the area…".

36. Mr Platten, another witness for the LPA, stated in his witness statement (paragraph 11.5):

> "The appeal proposal would prejudice the possibility of long term development at this site and is therefore straightforwardly contrary to policy N34. The only appropriate mechanism for reviewing this designation through the local plan process is through the SAP. The release of the site in advance of that process would be premature and contrary to the approach set out within the UDPR as endorsed by the core strategy and is entirely consistent with the NPPF. Overall, the arising departure from policy
> N34 would be very significant, attracting very significant weight, both for the purposes of section 38(6)
> of the 2004 Act and the overall planning balance".

37. In written closing submissions on behalf of the developer, Mr Sagar, its solicitor, accepted (paragraph 13.2 of his closing argument): "UDPR N34 is conflicted with, but is out of date and of little weight. Its use now for development is consistent with its original purpose". At paragraph 13.4 he stated as follows.

> "Paragraph 14 of the Framework is engaged and planning permission should be granted applying the tilted balance. The positive outcome of that balance determines the proposal is sustainable

development. There is no freewheeling test as to sustainability".

38. In the event, the inspector did not decide the appeal applying the analysis advanced by Mr Sagar in the passages just quoted. He considered the points made and gave his written decision on 18 June 2018. He began by recording the seven contested issues. The first was whether the proposal would prejudice the development of a wider area of land. The second that it would fulfil the economic and social roles of sustainable development in terms of provision of infrastructure and accessible local services.

39. The third was the effect of the proposal on highway safety. The fourth was its effect on air quality. The fifth its effect on housing land supply. The sixth was whether the proposal would undermine the plan making process by predetermining a decision about the scale, location or phasing of new development in an emerging local plan. The seventh and final issue was that of the balance between any adverse impact and the benefits of the proposal.

40. I will come back to the decision in more detail shortly. For present purposes I need only set out the conclusion at paragraph 97:

> "There are conflicts with elements of the development plan, UDP policy N34 and Core Strategy Policy H2(ii), but these are more formal than substantive in nature. Taking the development plan as a whole, and subject to conditions, I find this a sustainable development that largely accords with the development plan. As such, it should be approved without delay".

41. The inspector then went on to consider what conditions were appropriate. The LPA then brought the present application for statutory review under section 288 of the 1990 Act.

Issues, Reasoning and Conclusions.

42. The main submissions of Mr Lopez with the LPA can, as I understand them, be summarised in the following way, drawing on the summary of the five overlapping grounds of challenge in the his skeleton argument, which he developed in detailed oral argument.

    (1) The inspector misunderstood and/or misapplied policy N34. He made an error of fact although Mr Lopez accepted that the error was not itself fatal and misunderstood how "PAS" designation, in accordance with policy N34 operates with regard to decision making on permanent development on PAS designated sites.

    (2) The inspector misunderstood and/or misapplied paragraph 85 of the NPPF; having correctly found that policy N34 was consistent with paragraph 85, it was wrong of the inspector, applying paragraph 215, not to accord full weight to policy N34 and to dismiss as unimportant the conflict between the proposed development and that policy.

    (3) The inspector failed to appreciate that policy N34 was a specific policy, indicating that development should be restricted like those cited in footnote 9 to NPPF paragraph 14, thus disapplying the "tilted balance" requiring proposals for sustainable development to be granted unless adverse impacts would significantly and demonstrably outweigh the benefits.

    (4) The above errors led the inspector to misapply both paragraph 14 of the NPPF and section 38(6) of the 2004 Act and to decide irrationally and/or supported by inadequate reasons, that

the proposed development was in accordance with the development plan, despite the conflict between the development and policy N34.

(5) The reasons given by the inspector for his decision were inadequate in relation to policy N34, NPPF paragraphs 14 and 85 and section 38(6) of the 2004 Act. The finding that the development was in accordance with the development plan, leading the inspector not to apply the tilted balance test, required an explanation because it was a departure from a clear and consistent line of decisions in other appeals.

(6) At one point Mr Lopez submitted orally that policy N34 was a "trump card" so that any conflict with it necessarily meant the development must be prevented. In reply he made clear that he was not submitting with any departure from policy N34 was necessarily a departure from the plan as a whole. Although N34 was not a "show stopper" it should be treated as one in, as he put it, nine out of ten cases.

(7) Mr Lopez engaged in a detailed critique of the inspector's decision. The gist of that critique was the contention that the inspector had characterised the appeal site, wrongly, as land that was already earmarked for development after 2016, when in fact its PAS designation meant only that it could, not would, in the future be developed.

(8) He submitted that the inspector had fallen into the error of exercising a "freewheeling exercise of discretion" (as Jay J put it in the *Cheshire East* case at [26]), unconstrained by the parameters of NPPF paragraph 14 and had concluded that the development was sustainable without regard to the tests ordained by paragraph 14.

43. For the first defendant, the Secretary of State, Mr Williams countered those argument principally by making submission that I summarise in the following way.

(1) The purpose of PAS designation is to maintain the permanence of the Green Belt boundaries. The PAS designation of the land of which the appeal site forms part, did mean that residential development on the appeal site was not excluded by policy N34, but was a possibility. The inspector understood this.

(2) The inspector understood that saved policies such as N34 are relevant, understood that permanent development of the appeal site was not inevitable and that the development would not be temporary and would therefore prejudice the possibility of further long term development at the site contrary to policy N34.

(3) Having recognised a conflict between policy N34 and residential development of the appeal site, it was for the inspector in the exercise of planning judgment to decide what weight to place on that conflict and there was no error of law involved in deciding to accord it little weight. His decision to do so was rational.

(4) The LPA's critique of the decision relies on a hypercritical approach to the language used. The inspector properly found that despite the conflict with policy N34, the development was in harmony with the development plan overall, since it is commonplace for planning considerations to pull in different directions.

(5) The development was in accord with other important aspects of the plan, not least the

provision of housing with an acknowledged shortfall in the five year supply of available housing land. The inspector was entitled to give weight to the acceptability of the development for highway safety and air quality.

(6) The inspector therefore properly found that the development was sustainable, that material considerations did not point to refusal of the application and that the development should therefore be approved without delay, without needing to consider the "tilted balance" part of paragraph 14.

(7) Nor was there any misconstruction of paragraph 85 or 125 of the NPPF, not of paragraph 14 itself. The inspector was aware of the consistency between policy N34 and paragraph 85. It was for him to decide what weight to give to policy N34 and paragraph 215 does not mandate any particular degree of weight to be given to a "saved" policy.

(8) The earlier (and in one case, later) decisions relied on by the LPA did not assist it; none was on all fours, calling into play the requirement to explain any departure from earlier decisions. There was no inconsistency between the decisions relied on and the decision of this inspector, who made clear he was aware of those earlier decisions.

44. I summarise the main points added by Mr Banner, for the developer, as follows.

(1) He adopted and agreed the points made by Mr Williams, for the defendant. He added that all the grounds turn in one way or another, on whether the inspector erred in law in concluded that the development accorded with the UDRP as a whole, for the purposes of section 38(6) and paragraph 14 of the NPPF. If that conclusion was not flawed, that was the end of the case.

(2) He remined me of the "trite law" that a development could be found to accord with the development plan as a whole without the development complying fully with every single policy in it, since it is commonplace for planning considerations to pull in different directions. The inspector had so found here.

(3) He therefore agreed with Mr Williams that the inspector decided the case on the basis of the first bullet point, under the decision making limb of NPPF paragraph 14 and not the second, which contained the text requiring a "tilted" balance to be struck or bringing into play any policies restricting development, such as those of the types mentioned in footnote 9.

(4) The inspector correctly followed relevant national guidance on the issue of whether it would be premature to grant the permission sought and was justified in giving little weight to the conflict with policy N34, because the development would not conflict with the purpose of that policy, which was to provide long-term protection of the Green Belt by safeguarding certain non-Green Belt sites.

(5) There is nothing in the point that the reasoning of the inspector was inadequate. The LPA, on reading the decision, was clearly made aware of the reasons why it had lost the appeal. Nor is there any merit in the contention that prior decisions on whether policy N34 was "out of date" were overlooked. The inspector did not find that policy N34 was out of date.

45. I come then to my reasoning and conclusions. First the inspector was entitled not to mention

every point taken and I do not infer that he was unaware of arguments made or cases and decisions relied on, merely because they are not mentioned in the decision. He expressly stated in paragraph 5 that he did not propose to mention all the evidence and submissions on points on which the appeal did not turn.

46. Secondly, the error of fact made at paragraph 9 of the decision is not critical, as the LPA accepts. The inspector was dealing with whether the proposal would prejudice the development of a wider area of land. The error was to mistake by four years the projected future period comprising years "12 to 16" of the emerging SAP, during which a large area west of the appeal site is intended to be designated as a "broad location" expected to contribute to the housing land supply shortfall. The inspector thought the period was 2028-2032 whereas, in fact, it is 2024-2028.

47. Next, the inspector was correct to observe (paragraph 10) that under both the UDPR and the emerging SAP "the site forms part of a wider area of potential development". The inspector did not make the error of treating the appeal site as land already allocated for permanent development. In the next sentence he accurately described policy N34, saying it "limits development to temporary uses which would not prejudice the possibility of long-term development".

48. The inspector then noted the LPA's concern not to prejudice the construction of a "possible west of Pool bypass" and in relation to additional primary school education provision that may be needed if the development were to proceed. The inspector considered these two issues and concluded that this development would not prejudice the wider development of the area (paragraphs 11-17).

49. The inspector then moved to the second issue, that of sustainable development. He considered the proposed development in the light of the UDPR, the core strategy and the three pillars (environmental, economic, and social) of the role played by development that is sustainable. These are described in paragraph 7-10 of the NPPF. He also weighed the LPA's reasons for having refused permission. He concluded at paragraph 45: "the infrastructure and services which would be available to this development would be satisfactory".

50. I do not agree with Mr Lopez that the inspector undertook a "freewheeling" investigation of sustainability outside the rubric of NPPF paragraph 14, the exercise deprecated by Jay J in the *Cheshire East Borough Council* case. I consider that the inspector avoided that error. He had not yet got to the stage of going through the process of applying paragraph 14.

51. In the second section, the inspector avoided confusing (as Holgate J put it in the *Trustees of Barker Mill Estates* case) "policies… which *describe* what qualifies as sustainable development with policies which *define particular circumstances in which a presumption* in favour of sustainable development applies" (his italics).

52. The inspector was unobjectionably dealing with the former not the latter in the second part of the decision. Although he found a conflict with policy H2(ii) in the core strategy, in that the development would not meet the "accessibility standards" (see paragraph 44 of the decision) set by that policy, he was entitled to conclude that the development would be satisfactory.

53. The third and fourth sections of the decision dealt with highway safety and air quality. He found that the effects of the development on traffic flows, highway safety, and air quality would be

acceptable. These were aspects of the development that were not in conflict with the UDPR, to which the inspector was entitled to attribute weight.

54. He went on to discuss housing land supply. Although the figures were not agreed, it was common ground that the LPA was unable to demonstrate a five year housing land supply (see paragraph 58 of the decision). The LPA said its supply was equivalent to 4.42 years. The developer said it was about three years (see paragraph 60).

55. The inspector properly concluded that the requirement for housing was somewhere between the two and that on any view "the housing is required now, a finding which completes the assessment of the appeal proposal's contribution to the economic role of sustainable development; it would be at the right time" (paragraph 63).

56. That finding is important because it acts as a counterweight to the LPA's prematurity argument. The LPA was advocating a "wait and see" position which was undermined by the finding that the housing was required in the present and not merely that it would be required in the future.

57. The inspector then went on to consider the prematurity argument in the next section of his decision (paragraphs 75-88). I am unable to accept Mr Lopez's argument that the inspector misunderstood policy N34. I find no fault with his statement that "now is the time envisaged for its [the appeal site's] potential development" (paragraph 75). The UDPR ran from 2006 to 2016, as the inspector pointed out, but also extended "beyond the review plan period".

58. The inspector made no bones about finding that the proposed development contravened policy N34 (paragraphs 76 and 77). He also referred there to NPPF paragraph 85 and clearly understood that the policy was consistent with the exhortation in that paragraph to make clear that safeguarded land is not allocated for development during the currency of the policy.

59. The inspector then commented on the timing of the review process and noted that it was taking a long time because "the proposals of the emerging SAP are a matter of current controversy" (paragraph 80). He accepted that to allow the appeal would prejudge the outcome of that controversy, at least in respect of the appeal site. He then referred to "National Guidance" which I take to mean the National Planning Policy Guidance dating from March 2014, already mentioned.

60. As I have noted, that guidance advises, in paraphrase, that a prematurity argument would be unlikely to succeed, unless applying a test in language similar to the "tilted balance" comes down on the side of "adverse impacts" demonstrably outweighing the benefits; which would be probably so only where the development is substantial enough to undermine future plan making and the emerging plan is at an advanced stage.

61. He discussed that issue on the facts of this development at some length in paragraph 82-85 and at paragraphs 86-88 and found that the LPA's arguments did not meet either criterion. The development was not substantial enough to hamper unduly future plan making and the emerging SAP was advanced, but not sufficiently advanced to justify acceptance of the prematurity argument.

62. I find no fault with that reasoning. It is in line with the National Planning Policy Guidance. The inspector was therefore entitled to reject the prematurity argument and he further explained

properly his reasons for doing so at paragraphs 87-88. He then proceeded, finally, to consider the "planning balance" using as his starting point the wording of section 38(6) of the 2004 Act, the language of which he reproduced in paragraph 89.

63. The remaining paragraphs (90-96) are really a reiterated summary of his findings, on all the issues thus far considered, to round matters up. There is, in my judgment, nothing irrational or erroneous in law about that summary. It rationally supports the conclusion at paragraph 97 that, despite the conflicts with policy N34 and core strategy policy H2(ii), "taking the development plan as a whole and subject to conditions" this was "a sustainable development that largely accords with the development plan" and "as such, it should be approved without delay".

64. It was at this stage and not earlier that the inspector applied the words of NPPF paragraph 14. I accept the submission of Mr Williams, supported by Mr Banner, that he did not need to consider the "tilted balance" test set out under the second bullet point in paragraph 14. He decided the matter under the first bullet point ("approving development proposals that accord with the development plan without delay…"). Indeed he used the words "approved without delay" in paragraph 97. Delay was what the LPA was advocating.

65. I therefore roundly reject Mr Lopez's proposition that the inspector failed to understand the difference between the effect of PAS designation and allocation of PAS designated land for permanent development. The inspector knew perfectly well that the appeal site was not allocated for permanent development.

66. Nor do I accept the submission that the inspector was obliged to give more weight than he did to the conflict between the development proposal and policy N34 because of the provisions of NPPF paragraph 85, read with paragraph 215. Those paragraphs confirmed that policy N34 qualified as a policy among those that are "relevant policies" to which "due weight" should be given. However, paragraph 215 does not, as Mr Lopez accepted, prescribe any particular amount of weight that must be accorded to a policy such as N34.

67. I also reject the LPA's argument that the inspector should have treated policy N34 as one that restricts development, of the type described in footnote 9 to paragraph 14 and that the inspector therefore erred in not disapplying the tilted balance test in the latter part of paragraph 14. This submission is difficult to understand, because the inspector did not apply the second bullet point in paragraph 14 at all. He disposed of the case applying the first bullet point.

68. In any case, the exception to the grant of planning permission where restrictive policies are in play, under the second bullet point, only arises where the development plan is absent, silent, or relevant policies in it are out of date. That was not the position here. The inspector did not find that policy N34 was out of date. He explained in a footnote in his decision, (footnote 4 to paragraph 90) that case law (i.e. the Supreme Court's decision in the *Hopkins Homes Limited v. Secretary of State for Communities and Local Government* case) had obviated the need to consider whether a policy is out of date or "time expired"; even if it is, it must still be considered.

69. The same point provides part of the answer to Mr Lopez's submission that the reasoning of the inspector was inadequate and did not deal with all the principal controversial issues, in particular the issue addressed in prior decisions of other inspectors, to which I was referred by him, as to whether policy N324 was out of date; an issue considered in some of those inspectors' decisions on the basis of the earlier case law, without the benefit of the Supreme Court's decision in

Hopkins Homes Limited.

70. I am satisfied that all those inspectors' decisions turn on their particular facts and that none of them raises the issue of consistency of decision making identified and addressed by Mann LJ in the *North Wiltshire District Council* case and more recently by Dove J in the *Gladman Developments Limited* case.

71. For all those reasons and despite the detailed way in which they were presented, which in some respects went beyond the case pleaded in the LPA's grounds of challenge, there is no substance in any of the LPA"s contentions. The decision of the inspector was lawfully and properly made. The application fails.

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This transcript has been approved by the judge.