Neutral Citation Number: [2016] EWCA Civ 1146

Case No: C1/2015/4315

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH)
THE HON. MRS JUSTICE LANG
CO/3447/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2016

Before:

LORD JUSTICE PATTEN
LORD JUSTICE SALES
and
LORD JUSTICE DAVID RICHARDS

- -

Between:

Gladman Developments Limited	**Appellant**
- and -	
Daventry District Council	**Respondent**
-and-	
The Secretary of State for Communities and Local Government	**Interested Party**

- -

Richard Kimblin QC (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Thomas Hill QC and Christiaan Zwart (instructed by **District Law**) for the **Respondent**

Hearing date: 10 November 2016

- -

Approved Judgment

Lord Justice Sales:

1. This case concerns an application by Daventry District Council ("the Council") under section 288 of the Town and Country Planning Act 1990 to quash the decision of a Planning Inspector (David Nicholson RIBA IHBC) on behalf of the Secretary of State dated 12 June 2015, in which the Inspector allowed an appeal by the appellant developers ("Gladman") against refusal by the Council of planning permission for construction of 121 dwellings on an open field site adjoining the village of Weedon Bec in Northamptonshire. Lang J upheld the Council's application and quashed the Inspector's decision. The effect of Lang J's order is that Gladman's appeal against refusal of planning permission will have to be reheard before a different inspector. Gladman, however, appeals to this court against Lang J's decision, with permission granted by Lindblom LJ.

2. At the hearing before Lang J, the Secretary of State conceded that the Inspector's decision ought to be quashed and did not attend. Gladman, however, appeared by counsel to resist the Council's application. On this appeal the Secretary of State has again not appeared by counsel, but did put in some written submissions to explain his position in relation to certain issues in the case.

Statutory and policy context

3. The determination of an application for planning permission is to be made in accordance with the development plan unless material considerations indicate otherwise. Section 70(2) of the 1990 Act provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 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."

4. The development plan in this case included a range of policies which were saved, on the direction of the Secretary of State dated 21 September 2007, from the Council's Local Plan which had been adopted in 1997. The Local Plan had been prepared by reference to an evidence base compiled in the 1990s. The period for which the Local Plan had been prepared was 1991-2006. By the time of the decision by the Inspector in 2015, the saved policies were old and the evidence base which underlay them had been established well in the past.

5. Nonetheless, in 2007 the Secretary of State had chosen a set of policies in the Local Plan which he considered should be preserved as having continuing suitability to be included in the current development plan for the Council's area. In the covering letter dated 21 September 2007 which accompanied the formal direction to preserve the chosen policies as saved policies in the development plan, the Secretary of State explained that the extension of the saved policies was "intended to ensure continuity in the plan-led system and a stable planning framework locally, and in particular, a continual supply of land for development."

6. The priority given to the plan-led system of planning control is a familiar and longstanding feature of English planning law, as reflected in both section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Its importance is also emphasised in the National Planning Policy Framework 2012 ("NPPF"). For example, para. 150 of the NPPF states, "Local Plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities." A plan-led system of planning control promotes the coherent development of a planning authority's area, allowing for development to be directed to the most appropriate places within that area, and enables land-owners, developers and the general public to have notice of the policies to be applied by the planning authority to achieve those objectives. It is not in the public interest that planning control should be the product of an unstructured free-for-all based on piecemeal consideration of individual applications for planning permission.

7. The Council's Local Plan was originally adopted in 1997 in the context of an overall planning regime rather different from the one which applies now. In 1997 there was a requirement that the Local Plan should be compatible with the strategy set out in the Northamptonshire County Structure Plan, which related to the period 1983 to 2001 and was adopted in February 1989 ("the Structure Plan"). Paragraph 1.22 of the Local Plan explained that the Structure Plan contained no specific requirements in respect of residential development at Daventry, and that

> "[The Council] has therefore developed its own policy in respect of the general location of development in the Daventry District. In line with current government advice, this policy is urban oriented and the continuing expansion of Daventry Town is provided for in this Local Plan."

8. The Local Plan also sought to focus other residential development on four designated villages. At the same time, residential development at other villages in the Council's area was to be restricted to infilling within existing village perimeters. These were called Restricted Infill Villages. Weedon Bec is listed as one of them. In addition, and as part of the general planning co-ordination for residential development in the Council's area focused on Daventry Town and the four designated villages, in the saved parts of the Local Plan there was to be policy protection for the open countryside in the Council's area.

9. Saved Local Plan policy HS 22 applies in relation to Restricted Infill Villages. It provides:

> "RESTRICTED INFILL VILLAGES
>
> POLICY HS22
>
> PLANNING PERMISSION WILL NORMALLY BE GRANTED FOR RESIDENTIAL DEVELOPMENT IN THE RESTRICTED INFILL VILLAGES PROVIDED THAT:
>
> A. IT IS ON A SMALL SCALE, AND

> B. IT IS WITHIN THE EXISTING CONFINES OF THE VILLAGE, AND
>
> C. IT DOES NOT AFFECT OPEN LAND WHICH IS OF PARTICULAR SIGNIFICANCE TO THE FORM AND CHARACTER OF THE VILLAGE, OR
>
> D. IT COMPRISES THE RENOVATION OR CONVERSION OF EXISTING BUILDINGS FOR RESIDENTIAL PURPOSES PROVIDED THAT THE PROPOSAL IS IN KEEPING WITH THE CHARACTER AND QUALITY OF THE VILLAGE ENVIRONMENT."

10. The accompanying explanatory text in the Local Plan includes the following:

> "4.88. The objectives of the District Council's planning policies in respect of these villages are as follows:
>
> a. to ensure that new development does not bring about the extension of the village into open countryside,
>
> b. to ensure that existing buildings are retained as far as possible,
>
> c. to ensure that the scale, character, design and density of new development and redevelopment within the village is sympathetic to the existing built environment, and
>
> d. to ensure that such important open spaces as now remain in these villages do not become the subject of unsuitable infill development.
>
> Small Scale
>
> 4.89. In determining what constitutes "small scale" for the purposes of this policy, the District Council will not attempt to impose arbitrary upper limits on the number of dwelling units included in any application but will rather judge each case on its merits with particular regard to:
>
> a. the scale of the proposal in relation to the character of the immediately adjoining area,
>
> b. the scale of the proposal in relation to the size of the village as a whole, bearing in mind the need to maintain a balanced housing stock and assist in the social integration of new residents.
>
> c. the scale of the proposal relative to other current and recent infill proposals, bearing in mind the need to ensure that the cumulative effects of successive developments do not damage the character and amenity of established residential areas.

> d. the impact of the proposal on local services.
>
> The Existing Confines
>
> 4.90. For the purposes of this policy, "existing confines of the village" will be taken to mean that area of the village defined by the existing main built-up area but excluding those peripheral buildings such as free-standing individual or groups of dwellings, nearby farm buildings or other structures which are not closely related thereto. Gardens, or former gardens, within the curtilages of dwelling houses, will not necessarily be assumed to fall within the existing confines of the village. The construction of a bypass around a Restricted Infill Village will not be regarded as an extension to the confines of the village and land between the existing built up area and the new Road will be considered as open countryside.
>
> Important Open Land
>
> 4.91. Such sites will normally comprise large open frontages whose contribution to the character of the village is of acknowledged importance. However, private gardens and orchards can also make significant contributions to the local environment, both within and on the edge of the village, and the development of these will be resisted under this policy where appropriate. The development of private gardens which do not make an immediate contribution to the character of the local environment will also be resisted where they form important settings for listed buildings or other buildings of quality."

11. Saved Local Plan policy HS24 applies in relation to proposals for residential development in the open countryside. It provides:

> "OPEN COUNTRYSIDE
>
> POLICY HS24
>
> PLANNING PERMISSION WILL NOT BE GRANTED FOR RESIDENTIAL DEVELOPMENT IN THE OPEN COUNTRYSIDE OTHER THAN:
>
> A. DEVELOPMENT, INCLUDING THE RE-USE OR CONVERSION OF EXISTING BUILDINGS, ESSENTIAL FOR THE PURPOSES OF AGRICULTURE OR FORESTRY
>
> B. THE REPLACEMENT OF AN EXISTING DWELLING PROVIDED IT RETAINS ITS LAWFUL EXISTING USE AS A DWELLING HOUSE PROVIDED THAT THE DWELLING IS NORMALLY OF THE SAME GENERAL SIZE, MASSING AND BULK AS THE ORIGINAL

> DWELLING SITED ON THE SAME FOOTPRINT AND RESPECTS THE DISTINCTIVE NATURE OF ITS RURAL SURROUNDINGS."

12. The explanatory text in the Local Plan for this policy includes para. 4.97, as follows:

> "The County Structure Plan seeks to restrain development in the open Countryside and this policy seeks to prevent residential development unless there is there is a requirement for accommodation for agriculture or forestry workers or the dwelling is direct replacement."

13. By the time policy HS24 was saved pursuant to the direction of the Secretary of State in 2007 the Structure Plan referred to had ceased to be a relevant planning document.

14. For the purposes of the discussion which follows, it is also relevant to note two other saved Local Plan Policies: policy EN1, for the protection of Special Landscape Areas, and policy GN2, which also includes express protection for Special Landscape Areas. Special Landscape Areas were concepts created by the now defunct Structure Plan.

15. In 2012 national planning policies were gathered together in the NPPF as a single comprehensive statement.

16. Paragraph 14 of the NPPF sets out a presumption in favour of sustainable development applicable in the context of plan-making and also in the context of decision-taking (i.e. when decisions are made whether to grant applications for planning permission). It provides in the relevant part in relation to decision-taking as follows:

> "14. 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 **decision-taking** this means:
>
> ● approving development proposals that accord with the development plan without delay; and
>
> ● where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> – specific policies in this Framework indicate development should be restricted."

17. Certain policies regarding implementation of national policy are set out in Annex 1 to the NPPF. Paragraphs 209 to 215 in Annex 1 provide as follows:

> "209. The National Planning Policy Framework aims to strengthen local decision making and reinforce the importance of up-to-date plans.
>
> 210. Planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.
>
> 211. For the purposes of decision-taking, the policies in the Local Plan (and the London Plan) should not be considered out-of-date simply because they were adopted prior to the publication of this Framework.
>
> 212. However, the policies contained in this Framework are material considerations which local planning authorities should take into account from the day of its publication. The Framework must also be taken into account in the preparation of plans.
>
> 213. Plans may, therefore, need to be revised to take into account the policies in this Framework. This should be progressed as quickly as possible, either through a partial review or by preparing a new plan.
>
> 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)."

18. The NPPF contains a range of policies with a variety of objectives, including promoting sustainable transport and conserving and enhancing the natural environment.

19. Paragraphs 47 and 49 of the NPPF, in the section entitled "Delivering a wide choice of high quality homes", are also relevant in this case:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> • use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with

> the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
>
> • identify and update annually a supply of specific deliverable [footnote 11] sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
>
> • identify a supply of specific, developable [footnote 12] sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;
>
> • for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
>
> • set out their own approach to housing density to reflect local circumstances.
>
> [Footnote 11 To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans.
>
> Footnote 12 To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged.
>
> …
>
> 49. Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

Factual background and the Inspector's decision

20. This case concerns an application by Gladman in May 2014 for planning permission for residential development of up to 121 dwellings on two open fields adjoining Weedon Bec village. This was not in-fill development of the village. The application was directly in conflict with saved Local Plan policies HS22 and HS24.

21. The Council refused planning permission, relying in particular on those saved policies. The reasons it gave included the following:

> "1. The proposed development would be contrary to saved local plan policies GN1 (b and f), HS22, HS24 and GN2(g) and policy S1 of the emerging JCS [Joint Core Strategy], by reason of it being large scale development outside the confines of the restricted infill village, affecting open land of significance of the character and form of the village, within the open countryside and adjacent to the SLA. Therefore applying paragraph 12 of the NPPF, permission should be refused unless other material considerations indicate otherwise. Applying the fall-back position within paragraph 14 of the NPPF, it is considered that the adverse impacts of the proposed development would significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole. Specifically, the proposal would not constitute sustainable development due to the following elements of conflict with the NPPF and local policies:
>
> a) The development would be a peripheral cul-de-sac estate that suburbanise this rural village location, would erode the local, character and historic form of the settlement, would not integrate well with the existing village and would facilitate social interaction or health, inclusive communities (contrary to paragraphs 55, 58, 61 and 69 of NPPF and saved policy GN2(a) of the Daventry Local Plan).
>
> b) The development would not be well connected to local facilities (both within and outside Weedon) and accessibility by means other than the private car would be limited in terms of both practicality and attractiveness (contrary to paragraphs 35, 36, 58, 61 and 69 of NPPF and policy S10 of the emerging JCS).
>
> c) The development would result in loss and harm to a valued local landscape, and would diminish the recreational value of the rural right of way that runs adjacent to and through the site … (contrary to paragraphs 69 and 110 of NPPF).
>
> d) The development would cause harm to the setting of designated heritage assets …"

22. Gladman appealed to the Secretary of State, who appointed the Inspector. The Inspector conducted a planning inquiry lasting five days in May 2015 and set out his decision in a decision letter dated 12 June 2015 ("the DL"). He allowed the appeal and granted outline planning permission for the development.

23. At the planning inquiry Gladman contended that reduced or no weight should be given to policies HS22 and HS24 on the grounds that they were out of date. Gladman put forward two principal arguments for this conclusion: (i) the Local Plan related to

the period 1991-2006, and reflected an evidence base prepared in respect of that period, which was now long out of date, and the Structure Plan, which has been superseded and no longer has status as a statement of current planning policy; and (ii) these policies relate to housing supply and the Council could not show that it had a five year supply of deliverable sites for residential development, so they were deemed to be out of date by virtue of para. 49 of the NPPF.

24. The Council, on the other hand, submitted that it could show that it had a five year supply of deliverable sites for residential development and also that policies HS22 and HS24 reflected a high degree of consistency with a range of policies in the NPPF, not just housing policies, and therefore they should be given considerable weight despite the length of time they had been in place.

25. The Inspector upheld the Council's submission that it could show the requisite five year supply of deliverable sites for residential development and accordingly rejected Gladman's case that it was entitled to rely on para. 49 of the NPPF to say that policies HS22 and HS24 should be deemed to be out of date. That left for consideration the wider contentions of Gladman and the Council regarding the weight to be given the policies in light of their age.

26. The Inspector dealt with this in a very short passage at DL 68:

> "68. The Council acknowledged, as it must, that saved LP policies HS22 and HS24 are both policies for the supply of housing. However, given that the Council can demonstrate a 5 year [Housing Land Supply], albeit only just, these policies are not excluded by NPPF 49. Nevertheless, given the age of the policies and their lack of consistency with the thrust of NPPF 47 towards boosting significantly the supply of housing, I give the conflict with these policies and GN1(E) and (F), reduced weight."

At DL71 he said this:

> "71. For the above reasons, I find that only moderate weight should be given to the conflict with some policies in the LP and JCS. Conversely, substantial weight should be given to the scheme's contribution to meet housing targets and provide AH in particular. Taken together, I find that the proposals would accord with the development plan as a whole. Moreover, the fact that the proposals would amount to sustainable development, as defined in the NPPF, amounts to a material consideration of substantial weight which outweighs any conflict with the development plan in any event."

27. Although in the end nothing turns on this, I should mention that I find DL71 rather confusing. It is opaque how the Inspector can say that the proposals would accord with the development plan as a whole, when they conflict directly with policies HS22 and HS24. My confusion deepens when I read the Inspector's overall conclusion at DL86 to the effect that "as the Council can demonstrate a 5 year [Housing Land Supply] the weighted presumption in favour of sustainable development (NPPF 14

[i.e. the second bullet point in relation to decision-making in para. 14 of the NPPF, as set out above]) does not apply and the appeal should be determined on the normal planning balance." If it were really true that the proposals accord with the development plan, however, the Inspector should have applied the first bullet point in relation to decision-making in para. 14 of the NPPF and approved the development proposals "without delay". I do not think that Mr Kimblin QC, for Gladman, was able to provide any convincing explanation for this.

28. But it does not matter, because it is clear that even if the Inspector did find that the proposals were in accordance with the development plan as a whole, that was on the basis that any conflict with policies HS22 and HS24 ought to be given reduced weight as explained by him at DL68. The point therefore adds nothing to the main submission made by Mr Kimblin, that the Inspector was entitled to find that those policies were out of date and, in the exercise called for by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, should be treated as outweighed by statements in the NPPF, particularly in para. 47 of the NPPF.

29. In view of its relevance to some of the submissions in the case I should also set out DL15, under the heading "Special landscape area (SLA)", where the Inspector said this:

> "15. Much of Daventry district lies within a SLA defined in saved LP Policy EN1 and sets criteria for development in these areas. Policy GN2(G) normally grants permission for development providing that it would not adversely affect a SLA. Two points arise. First, the appeal site adjoins the SLA, but is not itself within it, and so Policy EN1 does not apply and Policy GN2(G) does not apply directly. Secondly, these are very old policies being based on a Structure Plan which pre-dated the 1990 Act. Under the [NPPF] paragraph 215 … policies relating to landscape areas should be criteria based whereas Policy GN2(g) is not. This policy should therefore be given limited weight."

It is common ground that the reference to para. 215 of the NPPF here is a slip: the reference is really to para. 113 of the NPPF.

The judgment

30. The judge allowed the application by the Council under section 288 of the 1990 Act and quashed the Inspector's grant of planning permission. The principal reason given by the judge was that the Inspector had been required by para. 215 of the NPPF to analyse in what way and to what extent policies HS22 and HS24 were or were not consistent with the policies set out in the NPPF, but he had failed to do this: [39]-[52].

31. This meant that the Inspector's analysis at DL68 could be criticised in various respects. The judge accepted the Council's submission that policies HS22 and HS24 were not necessarily inconsistent with the NPPF, just because they were adopted years earlier against the background of a now superseded Structure Plan, and its submission that there were important points of consistency between those policies (and the general approach in the saved parts of the Local Plan, of which those policies

formed an important part, to guiding the location of residential development in a coherent way in the Council's area) and policies in the NPPF, at [42]-[45], as follows:

> "42. The LP policy was to locate housing allocation in urban areas, particularly Daventry, as it was the major employer and service centre in the district, and Government policy in 1997 advised that new development should be guided to locations which reduced the need for travel, especially by car. In rural areas, the LP policy was to identify specific villages suitable for development – the four Limited Development Villages. Elsewhere in rural areas, development would be restricted to within the confines of the existing settlements – the Restricted Infill Villages. Lastly, the LP protected the open countryside by restraining non-essential new housing development.
>
> 43. I accept Mr Zwart's submission [for the Council] that policies such as these are not necessarily inconsistent with the NPPF, just because they were adopted years earlier, against the background of a Structure Plan which has been superseded. The reason is that some planning policies by their very nature continue and are not "time-limited", as they are re-stated in each iteration of planning policy, at both national and local levels.
>
> 44. For example, the NPPF promotes development in locations where travel can be minimised and the use of sustainable transport modes maximised (NPPF 34). It encourages the use of existing buildings for housing development (NPPF 51). In rural areas, it advises that new housing should be located in existing settlements, avoiding open countryside save in special circumstances such as housing needs for rural workers and using heritage assets or redundant buildings (NPPF 55). Section 11 is dedicated to "Conserving and enhancing the natural environment" and provides that valued landscapes should be protected and enhanced and brownfield land and land with the least environmental or amenity value should be allocated to meet development needs (NPPF 109, 110, 111). The saved housing policies in the Local Plan are consistent with many of these NPPF policies.
>
> 45. At local level, it is pertinent to note that the very recently examined and adopted JCS, based upon the NPPF, also favours development in the towns, as sustainable locations. Whilst recognising the need for limited development in rural areas, to meet local needs, the JCS expressly protects rural areas which are prized for their tranquillity, and recreational and amenity value."

32. The judge also held that the Inspector in DL68 improperly concentrated exclusively on paras. 47 and 49 of the NPPF and failed to take into account the broader ambit of the inquiry required under para. 215 of the NPPF, "which requires assessment of the

extent to which the saved policies are consistent with all NPPF policies, including policies for the protection of the natural environment and policies favouring development in settlements, brownfield sites, sustainable locations etc and not in the countryside": [47]-[49].

33. The judge then made a subsidiary ruling at [51]:

> "51. I accept Mr Zwart's submission that NPPF 47 sets out policy for a local authority's plan-making, not decision-taking. The two functions are clearly distinguished throughout the NPPF, and appear to have been confused by the Inspector in DL 68, when he referred to the "*lack of consistency with the thrust of NPPF [47] towards boosting significantly the supply of housing*". I also accept Mr Zwart's point that use of the inapt word "thrust" perhaps reflects the Inspector's lack of clarity about the way in which NPPF 215 was to be applied. However, I consider that older policies which restrict housing supply can in principle be inconsistent with the key NPPF objective of "*providing the supply of housing required to meet the needs of present and future generations*" which is identified in NPPF 7 as a function of the social dimension of sustainable development. This applies to both plan-making and decision-taking, and so falls to be considered under NPPF 215."

34. At paras. [54]-[55] the judge rejected a submission by Mr Kimblin that the Inspector's observations at DL15 showed that he had in fact adopted the proper approach to application of para. 215 of the NPPF in the critical paragraph of his reasoning, at DL68. In particular, she observed that DL15 was dealing with a different issue (effect on landscape) and different policies and it was not clear how the reasoning in relation to reduction of the weight to be given to policies EN1 and GH2(G) set out in DL15 could be carried across to the discussion of policies HS22 and HS24 at DL68.

Discussion

35. In my view, the judge was correct in her reasoning as highlighted above. Even reading the DL benevolently, as is appropriate for planning decisions of this kind; adopting the proper approach of avoiding nit-picking analysis of a decision letter with a view to trying to identify errors when in substance there are none; and also bearing in mind the expertise of the Inspector and his likely familiarity with the NPPF, it is clear that the Inspector has failed to grapple as he should have done with the issue posed by para. 215 of the NPPF.

36. This is not just a matter of a failure to give reasons. It is clear from the DL read as a whole that the Inspector has not sought to assess the issue of the weight to be accorded to policies HS22 and HS24 under the approach mandated by para. 215 at all. As the judge correctly identified, this appears from the deficiencies of the Inspector's reasoning at DL68 and his excessively narrow focus on paras. 47 and 49 of the NPPF, to the exclusion of other relevant policies in the NPPF which ought to have been brought into account in any proper analysis of the consistency of policies HS22 and HS24 with the policies in the NPPF. I add that it is a notable feature of the DL that, after making the necessary correction for the Inspector's slip in DL15 in referring to

para. 215 of the NPPF when he meant para. 113, the DL makes no reference at all to para. 215, even though that was the provision in the NPPF which set out the approach which the Inspector ought to have followed.

37. I agree with the judge that, contrary to the submission of Mr Kimblin, this criticism of the Inspector's reasoning cannot be met by reference to DL15. The topic dealt with there – the special landscape area – and the policies referred to were very different from the subject matter and policies dealt with at DL68. Moreover, the reasoning in DL15 is not applicable in relation to policies HS22 and HS24, which are dealt with in DL68. The first reason given in DL15 clearly has no application at all in the context of DL68. Nor does the second, which is a composite of two points: (a) saved policies EN1 and GN2(G) referred to in DL15 cross-refer to the SLA which was only of planning relevance because used as a concept in the Structure Plan, which has now fallen away, and (b) the new policy approach set out in para. 113 of the NPPF is in conflict with the approach adopted in those saved policies. Point (b) has no application in relation to policies HS22 and HS24, and point (a) is very different from anything which could be said about those policies. Clearly, the fact that policies EN1 and GN2(G) referred to a SLA concept which had effectively disappeared now that the Structure Plan had been superseded substantially undermined them in a way which does not apply in relation to policies HS22 and HS24. Put shortly, DL15 in no way indicates that the Inspector in fact had para. 215 of the NPPF in mind when he considered those policies in DL68.

38. This is sufficient to indicate that the appeal must be dismissed. However, Mr Kimblin made some additional points which I think I should address, since the case is to be remitted to another planning inspector.

39. There was a measure of agreement between the parties regarding the general approach to be adopted to consideration of development plan policies which are old, as policies HS22 and HS24 are here. Both sides referred to written submissions helpfully put in by the Secretary of State for consideration on the appeal.

40. I would formulate the position in this way:

i) Since old policies of the kind illustrated by policies HS22 and HS24 in this case are part of the development plan, the starting point, for the purposes of decision-making, remains section 38(6) of the 2004 Act. This requires that decisions must be made in accordance with the development plan - and, therefore, in accordance with those policies and any others contained in the plan - unless material considerations indicate otherwise. The mere age of a policy does not cause it to cease to be part of the development plan; see also para. 211 of the NPPF, set out above. The policy continues to be entitled to have priority given to it in the manner explained by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, HL, at 1458C-1459G.

ii) The weight to be given to particular policies in a development plan, and hence the ease with which it may be possible to find that they are outweighed by other material considerations, may vary as circumstances change over time, in particular if there is a significant change in other relevant planning policies or guidance dealing with the same topic. As Lord Clyde explained:

> "If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance" (p. 1458E).

iii) The NPPF and the policies it sets out may, depending on the subject-matter and context, constitute significant material considerations. Paragraph 215 sets out the approach to be adopted in relation to old policies such as policies HS22 and HS24 in this case, and as explained above requires an assessment to be made regarding their consistency with the policies in the NPPF. The fact that a particular development plan policy may be chronologically old is, in itself, irrelevant for the purposes of assessing its consistency with policies in the NPPF.

iv) Since an important set of policies in the NPPF is to encourage plan-led decision-making in the interests of coherent and properly targeted sustainable development in a local planning authority's area (see in particular the section on Plan-making in the NPPF, at paras. 150ff), significant weight should be given to the general public interest in having plan-led planning decisions even if particular policies in a development plan might be old. There may still be a considerable benefit in directing decision-making according to a coherent set of plan policies, even though they are old, rather than having no coherent plan-led approach at all. In the present case, it is of significance that the Secretary of State himself decided to save the Local Plan policies in 2007 because he thought that continuity and coherence of approach remained important considerations pending development of appropriate up-to-date policies.

v) Paragraph 49 of the NPPF creates a special category of deemed out-of-date policies, i.e. relevant policies for the supply of housing where a local planning authority cannot demonstrate a five-year supply of deliverable housing sites. The mere fact that housing policies are not *deemed* to be out of date under para. 49 does not mean that they cannot be out of date according to the general approach referred to above.

41. In the particular circumstances of this case Mr Kimblin submitted (i) that the facts that policies HS22 and HS24 appeared in a Local Plan for the period 1991-2006, long in the past, and were tied into the Structure Plan (in particular, in relation to policy HS24, as set out in the explanatory text at para. 4.97 of the Local Plan), which is now defunct, meant that very reduced weight should be accorded to them; (ii) that the Local Plan policies in relation to housing supply, which include policies HS22 and HS24, are "broken" and so again should be accorded little weight; and (iii) that policies HS22 and HS24 have been superseded by more recent guidance, in the form of para. 47 of the NPPF, and so should be regarded as being outdated in the manner explained by Lord Clyde in *City of Edinburgh Council*. I do not accept these submissions.

42. As to (i), policies HS22 and HS24 were saved in 2007 as part of a coherent set of Local Plan policies judged to be appropriate for the Council's area pending work to develop new and up-to-date policies. There was nothing odd or new-fangled in the inclusion of those policies in the Local Plan as originally adopted in 1997. It is a

regular feature of development plans to seek to encourage residential development in appropriate centres and to preserve the openness of the countryside, and policies HS22 and HS24 were adopted to promote those objectives. Those objectives remained relevant and appropriate when the policies were saved in 2007 and in general terms one would expect that they remain relevant and appropriate today. At any rate, that is something which needs to be considered by the planning inspector when the case is remitted, along with the question of the consistency of those policies with the range of policies in the NPPF under the exercise required by para. 215 of the NPPF. The fact that the explanatory text for policy HS24 refers to the Structure Plan does not detract from this. It is likely that the Structure Plan itself was formulated to promote those underlying general objectives and the fact that it has now been superseded does not mean that those underlying objectives have suddenly ceased to exist. As the judge observed at [49], "some planning policies by their very nature continue and are not 'time-limited', as they are re-stated in each iteration of planning policy, at both national and local levels."

43. As to (ii), the metaphor of a plan being "broken" is not a helpful one. It is a distraction from examination of the issues regarding the continuing relevance of policies HS22 and HS24 and their consistency with the policies in the NPPF. As Mr Kimblin developed this submission, it emerged that what he meant was that it appears that the Council has granted planning permission for some other residential developments in open countryside, i.e. treating policy HS24 as outweighed by other material circumstances in those cases, and that it relies on those sites with planning permission, among others, in order to show that it has a five year supply of deliverable residential sites for the purposes of para. 47 (second bullet point) and para. 49 of the NPPF. Mr Kimblin says that this shows that the saved policies of the Local Plan, if applied with full rigour and without exceptions, would lead the Council to fail properly to meet housing need in its area, according to the standard laid down in paras. 47 and 49 of the NPPF. Therefore, he says, no or very reduced weight should be accorded to policies HS22 and HS24.

44. In my view, this argument is unsustainable. We were shown nothing by Mr Kimblin to enable us to understand why the Council had decided to grant planning permission for development of these other sites. So far as I can tell, the Council granted planning permission in these other cases in an entirely conventional way, being persuaded on the particular facts that it would be appropriate to treat material considerations as sufficiently strong to outweigh policy HS24 in those specific cases. Having done so, there is no reason why the Council should not bring the contribution from those sites into account to show that it has the requisite five year supply of sites for housing when examining whether planning permission should be granted on Gladman's application for the site in the present case. The fact that the Council is able to show that with current saved housing policies in place it has the requisite five year supply tends to show that there is no compelling pressure by reason of unmet housing need which requires those policies to be overridden in the present case; or – to use Mr Kimblin's metaphor – it tends positively to indicate that the current policies are *not* "broken" as things stand at the moment, since they can be applied in this case without jeopardising the five year housing supply objective. In any event, an assessment of the extent of the consistency of policies HS22 and HS24 with the range of policies in the NPPF is required, as set out in para. 215 of the NPPF, before any conclusion can be drawn whether those policies should be departed from in the present case.

45. Finally, as to point (iii), the judge dismissed this contention at [51] by ruling that para. 47 of the NPPF sets out policy for a planning authority's plan-making, not decision-taking. There is conflicting authority on this point at first instance, since Hickinbottom J ruled in *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 892 (Admin), at [52], that although the first bullet point of para. 47 relates to an authority's plan-making function, the rest of the paragraph is not so restricted and applies also to decision-making; and see, to similar effect, the observation in passing of Coulson J in *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] EWHC 592 (Admin), at [46].

46. In the context of the present case, nothing really turns on this point, not least because the judge also said in [51] that "older policies which restrict housing supply can in principle be inconsistent with the key NPPF objective of '*providing the supply of housing required to meet the needs of present and future generations*' which is identified in NPPF 7 as a function of the social dimension of sustainable development. This applies to both plan-making and decision-taking, and so falls to be considered under NPPF 215". I agree with this. However, we had the benefit of submissions on the significance of para. 47 and in view of the different opinions on this it is desirable that we say something about it.

47. I agree with Lindblom LJ's statement in *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040, at [34], that

> "The policy in paragraph 47 of the NPPF relates principally to the business of plan-making. The policy in paragraph 49 relates principally to applications for planning permission; it deals with the way in which "[housing] applications" should be considered. But it must of course be read in the light of the policy requirement in paragraph 47 for local planning authorities to plan for a continuous and deliverable five-year supply of housing land …"

48. Paragraph 47 of the NPPF deals with a mixture of topics. Mr Kimblin accepted that the first, fourth and fifth bullet points relate solely to plan-making and not to decision-taking. In my view, that is also true of the third bullet point: I think that the references to "years 6-10" and "years 11-15" make this clear, since these are references to the time periods to be dealt with when a development plan is prepared.

49. The second bullet point of para. 47, however, is not confined to plan-making. The fact that it imposes an obligation to "update annually" the five year housing supply means that it is looking in part at an activity of a local planning authority outside its plan-making function. The second bullet point is tied to the deeming provision in para. 49. The second bullet point of para. 47 creates a continuing obligation on a local planning authority to check that its housing supply is in fact in accordance with the standard there set out, and if it is not then I consider that the bullet point has similar force for decision-making that the judge was prepared to accord para. 7 of the NPPF. But if the standard set out in the second bullet point of para. 47 is being complied with by a local planning authority, as it was in this case, then in my view para. 47 has no implications for decision-taking by a planning authority. Thus, in the circumstances of

this case, para. 47 does not qualify as "more recent guidance" of the kind discussed by Lord Clyde in *City of Edinburgh Council*, such as might justify a planning inspector in treating policies HS22 and HS24 as being out of date or inconsistent with para. 47 of the NPPF for the purposes of the assessment required under para. 215.

50. For the reasons given above, I would dismiss this appeal.

Lord Justice David Richards:

51. I agree.

Lord Justice Patten:

52. I also agree.