Neutral Citation Number: [2024] EWHC 279 (Admin)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2024

Before :

THE HON. MR. JUSTICE HOLGATE

- -

Case No: AC-2023-LON-002327

BETWEEN:

MEAD REALISATIONS LIMITED

Claimant

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) NORTH SOMERSET COUNCIL

Defendants

AC-2023-LON-002481

BETWEEN:

REDROW HOMES LIMITED

Claimant

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) HERTSMERE BOROUGH COUNCIL

Defendants

- -
- -

Charles Banner KC and **Isabella Buono** (instructed by **Clarke Willmott Solicitors**) for the **Claimant** in AC-2023-LON-002327

Zack Simons and **Isabella Buono (**instructed by **Osborne Clarke LLP)** for the **Claimant** in AC-2023-LON-002481

Hugh Flanagan and **Piers Riley-Smith** (instructed by the **Government Legal Department)** for the **First Defendant** in both claims

Emmaline Lambert (instructed by **Hertsmere Borough Council)** for the **Second Defendant** in AC-2023-LON-002481

North Somerset Council did not appear and were not represented.

Hearing dates: 17 and 18 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 February by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr. Justice Holgate:

Introduction

1. These two claims raise issues about the interpretation and application of the sequential test in national policy on flood risk.

2. In AC-2023-LON-002327 Mead Realisations Limited ("Mead") brings a challenge under s.288 of the Town and Country Planning Act 1990 ("TCPA 1990") to the decision of the Inspector on behalf of the first defendant, the Secretary of State for Levelling Up, Housing and Communities, dated 20 June 2023 dismissing its appeal against the refusal by the second defendant, North Somerset Council ("NSC"), of an application for planning permission for residential development of up to 75 dwellings at Lynchmead Farm, Ebdon Road, Wick Street, Lawrence, Weston-Super-Mare ("the Lynchmead decision").

3. In AC-2023-LON-002481 Redrow Homes Limited ("Redrow") brings a challenge under s.288 to the decision of the Inspector on behalf of the same defendant dated 19 July 2023 dismissing its appeal against a deemed refusal by the second defendant, Hertsmere Borough Council ("HBC"), of an application for planning permission for residential developments of up to 310 units and land reserved for a primary school, community facilities and a mobility hub on land at Little Bushey Lane, Bushey ("the Bushey decision").

Relevant Policies

4. The National Planning Policy Framework ("NPPF") was first published by the Secretary of State on 27 March 2012. These claims relate to the NPPF published on 20 July 2021, the version in force at the dates of the respective public inquiries and decision letters.

5. Chapter 2 of the NPPF deals with "achieving sustainable development". Paragraph 11c-d sets out the presumption in favour of sustainable development (as analysed in *Monkhill Limited v Secretary of State for Housing, Communities and Local Government* [2020] PTSR 416; [2021] PTSR 1432 and *Gladman Developments Limited v Secretary of State for Communities, Housing and Local Government* [2021] PTSR 1450). In the present cases the local planning authorities were unable to demonstrate a 5-year supply of deliverable housing sites within their respective areas and so the presumption in favour of sustainable development, otherwise known as the "tilted balance", was engaged, unless disapplied by limb (i) or limb (ii) of paragraph 11d.

6. Under limb (i) the presumption is disapplied where *inter alia* the application of the NPPF policies "that protect areas or assets of particular importance provides a clear reason for refusing the development proposed". Those policies include the policies relating to "areas at risk of flooding or coastal change" (see footnote 7). Where flood risk policy does not provide a clear reason for refusing permission, the tilted balance applies unless any adverse impacts of granting permission would "significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole" (limb (ii)).

7. Chapter 14 of the NPPF deals with the challenges posed by climate change, flooding and coastal change. Paragraphs 159 to 169 deal with flooding. The overall objectives are set out in para. 159:

> "Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere."

8. Paragraphs 160 to 161 address the preparation of strategic policies and development plans. Paragraph 161 provides:

> "All plans should apply a sequential, risk-based approach to the location of development – taking into account all sources of flood risk and the current and future impacts of climate change – so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:
>
> a) Applying the sequential test and then, if necessary, the exception test as set out below;
>
> b) …"

9. The submissions in these cases have focused on para. 162, which sets out the sequential test:

> "The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."

The sequential test applies not only to plan-making but also to development control decisions. The words "from any form of flooding" refer not only to flooding from rivers or the sea, but also surface water flooding.

10. If the sequential test is passed, that is there are no reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding, then it may be necessary to apply the "exception test" in accordance with paras. 163 to 165:

> "163. If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in Annex 3.

> 164. The application of the exception test should be informed by a strategic or site-specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. To pass the exception test it should be demonstrated that:
>
> a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and
>
> b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.
>
> 165. Both elements of the exception test should be satisfied for development to be allocated or permitted."

11. Annex 3 (referred to in para.163) classifies different types of land use, namely "essential infrastructure" (e.g. infrastructure which has to be located in a flood risk area), highly vulnerable (e.g. caravans and installations requiring hazardous substances consent), more vulnerable (e.g. hospitals, care homes, residential development), less vulnerable (shops, services, offices and industry) and water-compatible development.

12. Paragraph 164(a) allows the need for the development plus any sustainability benefits to be balanced against flood risk.

13. Paragraph 167 requires that a development proposal should not increase flood risk elsewhere. Applications should be supported by a site-specific flood risk assessment. The Environment Agency is responsible for classifying land by reference to the annual probability of flooding from a river or the sea. For zone 1 the probability is less than 0.1%, for zone 2 below 1% from rivers or below 0.5% from the sea, and for zone 3 1% or above from rivers or 0.5% or above from the sea. A flood risk assessment is required for all development in zones 2 or 3 and certain development in zone 1.

14. On 6 March 2014 the Secretary of State introduced a website containing Planning Practice Guidance ("PPG") which may be amended from time to time. The section on flood risk was amended on 25 August 2022.

15. Development plans are prepared to determine the need for different types of development and their distribution across the area of the plan. It is plain from para. 026 of the PPG that the need for development is a relevant consideration in plan-making. That need should be reviewed where the sequential test is not satisfied.

16. The PPG describes how the sequential test should be applied in determining planning applications. The test is applied to an area "defined by local circumstances relating to the catchment area for the type of development proposed", for example the catchment area of a school. The need for a certain type of development (e.g. to sustain an existing community) may limit the area of search for alternative sites to an area in flood zones 2 and 3 and so sites further afield may not be reasonable alternatives (PPG para. 027). Nationally or regionally important infrastructure may involve an area of search beyond the area of the local authority.

17. The submissions in this case have largely focused on para. 028 of the PPG:

> "**What is a "reasonably available" site?**
>
> 'Reasonably available sites' are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'.
>
> The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications."

18. Ground 1 in Mead's claim is concerned with the Inspector's treatment of the relationship between para. 162 of the NPPF, para. 028 of the PPG and policy "CS3: Environmental impacts and flood risk assessment" of the North Somerset Core Strategy 2017.

19. What the Inspector referred to as the "first part" of CS3 reads as follows:

> "…
>
> Development in zones 2 and 3 of the Environment Agency Flood Map will only be permitted where it is demonstrated that it complies with the sequential test set out in the National Planning Policy Framework and associated technical guidance and, where applicable, the Exception Test, unless it is:
>
> - development of a category for which National Planning Policy Framework and associated technical guidance makes specific alternative provision; or
>
> - development of the same or a similar character and scale as that for which the site is allocated, subject to demonstrating that it will be safe from flooding, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall."

20. So the first part of Policy CS3 requires development in zones 2 or 3 to comply with the sequential test in the NPPF and, where appropriate, the exception test. In DL 10 the Inspector noted that the "technical guidance" had been withdrawn and so he did not place any weight upon that document.[1]

[1] This was identified in 3.46 of the Core Strategy as the "Technical Guidance to the National Planning Policy Framework" issued in March 2012 alongside the 2012 version of the NPPF. Para.1 of the Guidance states that it retained key elements of earlier national planning policy documents "as an interim measure pending a wider

21. The remaining part of CS3 states:

> "For the purposes of the Sequential Test:
>
> 1. The area of search for alternative sites will be North Somerset-wide unless:
>
> - It can be demonstrated with evidence that there is a specific need within a specific area;
>
> or
>
> - The site is located within the settlement boundaries of Weston (including the new development areas), Clevedon, Nailsea and Portishead, where the area of search will be limited to the town within which the site is located.
>
> Other Local Development Documents may define more specific requirements.
>
> 2. A site is considered to be 'reasonably available' if all of the following criteria are met:
>
> - The site is within the agreed area of search.
>
> - The site can accommodate the requirements of the proposed development.
>
> - The site is either:
>
> a) owned by the applicant;
>
> b) for sale at a fair market value; or
>
> c) is publicly-owned land that has been formally declared to be surplus and available for purchase by private treaty.
>
> Sites are excluded where they have a valid planning permission for development of a similar character and scale and which is likely to be implemented."

22. The Inspector referred to these paragraphs as the "first and second sections". They are said to be "for the purposes of the sequential test." The first section states that generally the area of search will be the whole of North Somerset's area. That was common ground in the Mead case (see DL 12). However, the policy also states that the area of search may be based upon a different area in which there is shown to be a specific need. The second section of CS3 states that a site is considered to be "reasonably available" if all

---

review of guidance to support planning policy." The Government's website states that this Guidance was withdrawn on 7 March 2014, having been replaced by the PPG issued on the previous day.

of the criteria set out are met. The argument in ground 1 of the Mead case focused on this second section of CS3.

23. The claimant's argument in the Redrow case does not rely upon any part of the statutory development plan for Hertsmere. It appears that policy SADM14 of the Site Allocations and Development Management Policies Plan (adopted in November 2016) essentially replicates policy in the NPPF. In the subsequent draft Hertsmere Local Plan, policy H10 allocated an area which included the Bushey appeal site, for up to 350 homes, community facilities, local retail, flexible workspace, a primary school and public open space. However, on 27 April 2022 HBC decided to withdraw that draft plan.

A summary of the decision letters

The Lynchmead decision

24. Mead's application was for an outline planning permission with all matters reserved except access (DL 2).

25. The Inspector defined the main issue in the appeal as the effect on the development of flood risk, in particular the sequential test (DL 6). The benefits of the scheme and housing land supply were considered as part of the overall planning balance (DL 7).

26. The site lies within flood zone 3 with a "high probability" of flooding from the sea (DL 8).

27. The Inspector found at DL 12 to DL 22 that the proposal met the sequential test in the second part of policy CS3 of the Core Strategy because (a) the area of search had been borough-wide and (b) there were no alternative sites meeting the criteria for "reasonable availability" set out in the "second section" of CS3.The Inspector decided that two other sites owned by Mead were not reasonable alternatives because they could only accommodate 70 or 74 dwellings rather than the 75 dwellings proposed for the appeal site (DL 16), indicating his strict application of the criterion in CS3 that a site should accommodate "the requirements of the proposed development."

28. The Inspector dealt with national flood risk policy at DL 23 to 40. Here he concluded that the sequential test in national policy was not met because there were reasonably available sites for residential development appropriate for the proposal with a lower flood risk than the appeal site. In reaching this conclusion he applied the NPPF read together with the PPG.

29. The Inspector addressed the overall planning balance at DL 50 to 60. He treated the provision of 75 dwellings as the most important benefit, given that the Council could only demonstrate a supply of housing land of 3.5 years. The provision of 30% of the housing as affordable dwellings was a significant benefit. There were also some economic, bio-diversity and community benefits.

30. The Inspector said that set against the benefits of the proposal there was the harm that would arise if the development were to be flooded. He dealt with flood risk at DL 55 to 56:

> "55. Set against those benefits is the harm that would arise if the development were to flood. Evidence provided by the Council indicates that tidal flood waters could be deep. Such flooding would enter dwellings and surcharge drains. Standing water would be likely to be present for some time before water levels returned to normal. Such flooding would cause extensive damage both to buildings and their contents, requiring significant repair or replacement. There may also be adverse health and environmental impacts. The risk of this harm occurring weighs significantly against the proposal.
>
> 56. Irrespective of the degree of risk of flooding occurring or measures that could be taken to make the development resilient to flooding during its lifetime, the Framework is clear that development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. I have found that there are such sequentially preferable sites available. This weighs heavily against the proposal."

31. At DL 58 the Inspector found that national policy on flood risk provided a clear reason for refusal and therefore disapplied the presumption in favour of sustainable development (para. 11d(i) of the NPPF).

32. Accordingly, the Inspector struck a "non-tilted" balance. He decided that the benefits of the proposal were outweighed by the failure to meet the sequential test and the significant harm that would occur if the development were to be flooded (DL 59). In those circumstances, the Inspector said that there was no need for the exception test to be applied and he dismissed Mead's appeal.

The Bushey decision

33. Redrow's application was for an outline planning permission for up to 310 residential units and land for a primary school, community facilities and mobility hub, with all matters reserved other than access. The site comprised 18ha of fields used for grazing by horses (DL 13).

34. The site lies in the Green Belt and therefore in policy terms the proposal was for "inappropriate development". The main issues were the effect of the proposed development on the openness and purposes of the Green Belt and on the character and appearance of the area, whether the location was suitable with regard to policies on flood risk and whether any harm to the Green Belt and other harm was clearly outweighed by very special circumstances. The only area of disagreement on flood risk related to the application of the sequential test (DL 9 and DL 12).

35. It was common ground between Redrow and HBC that the site does not make an important strategic contribution to the Green Belt (DL 33).

36. The Inspector assessed the effects of the proposal on the openness of the Green Belt at DL 38 to DL 44. The proposal would significantly reduce spatial openness (DL 39 to DL 40). There would be a significant and long-term localised effect on visual openness

(DL 41). There would be a significant reduction in visual openness for viewpoints outside and within the site (DL 42 to DL 43). Overall there would be significant harm to both the visual and spatial openness of the Green Belt (DL 44). There would be respectively modest, very limited and no harm to the three purposes of this part of the Green Belt (DL 45 to DL 52).

37. The proposed development would have a significant, harmful effect on the character and appearance of the area (DL 53 to DL 66).

38. A "main river" and some other watercourses run through the site. There are two reservoirs within respectively 350m and 1.5km of the site. Although much of the site lies within flood zone 1, the course of the main river falls within zones 2 and 3 and 10% of the overall site is affected by reservoir flood risk (DL 67 to DL 68). Parts of the site are subject to varying degrees of surface water risk (DL 69). Although Redrow had sought to locate built development within zone 1 for fluvial flood risk, the Inspector said that it was necessary to consider all the development proposed and all sources of flood risk affecting the site. Consequently, the sequential test had to be applied to the whole site (DL 75).

39. The Inspector found that Redrow had taken a reasonable and pragmatic approach by defining the area of search as the whole borough (DL 78 to DL 84).

40. The Inspector found that, on the evidence, there were 13 sites which potentially would be reasonably available and it had not been shown that the proposed development could not be located elsewhere on land at a lower risk of flooding. Accordingly, the proposal did not satisfy the sequential test and conflicted with para. 162 of the NPPF. The inspector gave very substantial weight to this factor (DL 85 to DL 100).

41. At DL 103 to DL 124 the Inspector assessed all the matters upon which Redrow relied as very special circumstances for the purposes of Green Belt policy. HBC has a housing supply of only 1.23 to 2.25 years and the shortfall in meeting the requirement for a 5-year supply of housing land is between 2,104 and 2,875 dwellings. The Inspector described this supply as "woeful" and symptomatic of a chronic failure by HBC to deliver housing. The council is amongst the worst performing authorities on housing land supply in the country (DL 109). The Inspector gave "very substantial weight" to Redrow's proposal to develop up to 310 residential units and the provision of 40% affordable housing (DL 110 to DL 113).

42. But the Inspector concluded that the benefits of the proposal did not amount to very special circumstances clearly outweighing the harm it would cause, including harm to policy on flood risk (DL 126 to DL 130).

43. The presumption in favour of sustainable development was disapplied by the clear reasons for refusal based on Green Belt and flood risk policies (para. 11d(i) of the NPPF) (DL 131 to DL 132).

The issues

44. There are a number of points of principle which are common to both claims, as well as specific points in relation to the decision letters in each case. The parties helpfully

agreed a list of issues. I summarise that list so as to reflect the way in which the oral argument proceeded.

45. In relation to both claims:

(i) The claimants submit that on a true interpretation of para. 162 of the NPPF the Inspector was required to consider whether there were alternative sites which could accommodate the development in fact proposed in its various particulars, including form, quantum and intended timescales for delivery, and not some other hypothetical development. The claimants submit that in each decision letter the Inspector failed to adhere to that interpretation;

(ii) The claimants submit that the PPG is incapable of imposing a more stringent set of requirements than the NPPF. They say that in each case the Inspector wrongly treated para. 028 as requiring a different approach to that required by para. 162 of the NPPF.

(iii) The claimants submit that, properly interpreted, para. 028 of the PPG provides that to be sequentially preferable to the proposal, alternative sites must be capable of accommodating identified needs for the type of development at issue. They say that in each decision letter the Inspector failed to adhere to that interpretation;

(iv) The claimants submit that need for the proposed development is relevant to the application of the sequential test. They submit that the Inspector in each case either wrongly excluded or disregarded that need.

46. In summary, Mr. Charles Banner KC submitted on behalf of Mead that:

(i) PPG must be subservient to policy in the NPPF. It cannot alter or override the NPPF;

(ii) PPG cannot be treated as a mandatory requirement, either in relation to the application of tests or the identification of considerations which are or are not material;

(iii) PPG may be an aid to the interpretation of the NPPF, but only where it corresponds to a NPPF policy or falls within the four corners of that policy;

(iv) Considerable caution is required in interpreting PPG;

(v) PPG is not a binding code.

47. In his reply Mr. Banner accepted that if either Inspector had treated the PPG as elucidating the NPPF in "a non-binding manner," that would not in itself be legally objectionable. I did not understand Mr. Zack Simons (appearing for Redrow) to disagree. But they submit that both Inspectors had erred by treating para. 028 of the PPG as a binding code.

48. Mr. Simons adopted Mr. Banner's overall analysis.

49. It should be noted that there has been no challenge to the lawfulness of para. 028 of the PPG.

50. Counsel treated the remarks of Dove J in *R (Menston Action Group) v City of Bradford Metropolitan District Council* [2016] PTSR 466 at [41] as laying down a general principle that PPG is subservient to the policy in the NPPF for which it provides practice guidance. It cannot override the NPPF.

51. They submitted that PPG is not policy but guidance, relying on the following passage from the judgment of Lieven J in *Solo Retail Limited v Torridge District Council* [2019] EWHC 489 at [33]:

> "In my view the NPPG has to be treated with considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set out therein, under para 18 of *Tesco v Dundee*. As is well known the NPPG is not consulted upon, unlike the NPPF and Development Plan policies. It is subject to no external scrutiny, again unlike the NPPF, let alone a Development Plan. It can, and sometimes does, change without any forewarning. The NPPG is not drafted for or by lawyers, and there is no public system for checking for inconsistencies or tensions between paragraphs. It is intended, as its name suggests, to be guidance not policy and it must therefore be considered by the Courts in that light. It will thus, in my view, rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in *Tesco v Dundee* applied to the Development Policy there in issue."

52. Mr. Banner and Mr. Simons also said that the PPG must not be elevated into a binding code which prescribes the steps required to be taken when determining a planning application. The PPG is merely practice guidance which is only intended to support the policies in the NPPF (*R (White Waltham Airfield Limited) v Royal Borough of Windsor and Maidenhead* [2021] EWHC 3408 (Admin) at [78]-[79] and *Bramley Solar Farm Residents Group v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2842 (Admin) at [165] to [166], [174] and [177] to [180]).

53. By contrast, in *R (Kinsey) v London Borough of Lewisham* [2021] EWHC 1286 (Admin), a decision cited by both Mr. Banner and Mr. Hugh Flanagan (for the first defendant), Lang J took a different approach to part of the PPG dealing with harm to heritage assets. The judge quashed the decision to grant planning permission because of a failure to identify the degree of harm to heritage assets within the "less than substantial harm" category in accordance with the PPG. She decided that that part of the PPG should not be treated with the "considerable caution" indicated in *Solo Retail* at [53] and that if a decision-maker was going to depart from such national guidance, he should give reasons for doing so (see [66], [73]-[74] and [88]-[89]). In effect, the court treated that part of the PPG as policy.

54. The decisions cited in argument raise the question whether there is a sharp legal divide between the NPPF and the PPG which treats the former as policy and the latter as not?

The legal status of national planning policy

55. It is necessary to go back to first principles. In *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [69] and [74], Lord Hoffman explained that development control does not involve deciding between the rights or interests of particular persons. "It is the exercise of a power delegated by the people as whole to decide what the public interest requires." That is a "policy decision."

56. Lord Clyde added at [139] that "planning is a matter of the formation and application of policy". Planning and the development of land concerns the community as a whole, not just the locality where the particular case arises, but wider social and economic considerations which are properly subject to central supervision. By means of a central authority, the Secretary of State, some degree of coherence and consistency in the development of land can be achieved. National policy is part of the framework for consistent, predictable and prompt decision-making [140]. Consistent with the democratic principle, responsibility for that national policy lies with the Secretary of State accountable to Parliament [141]. The formulation of national policy is an essential element of securing coherent and consistent decision-making, but is subject to the principle that the exercise of discretion must not be fettered [143].

57. In *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923 the Court of Appeal reiterated the importance of the Secretary of State's democratic accountability for national policy. That applies not only to the NPPF but also to written ministerial statements ("WMS") and PPG [25].

58. In *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 Lord Carnwath JSC clarified the legal source of the Secretary of State's power to make national policy at [19] to [21]. It is not a prerogative power. Instead, it derives expressly or by implication from the planning legislation which gives him overall responsibility for the oversight of the planning system. Inspectors determining statutory appeals on behalf of the Secretary of State are required to exercise their own judgment within the framework of national policy set by government.

59. However, Lord Carnwath added at [24] to [26] that the scope of the NPPF should not be overstated. In the determination of planning applications it is no more than "guidance" and as such, one of the "other material considerations" to which the decision-maker must have regard (s.70(2) of the TCPA 1990). It does not displace the primacy given by s.38(6) of the Planning and Compulsory Purchase Act 2004 to the statutory development plan. The weight to be given to conflict or compliance with the NPPF is a matter of judgment for the decision-maker, a decision with which the court may only intervene on public law grounds (*Gladman Developments Limited v Secretary of State for Communities and Local Government* [2021] PTSR 1450 at [33(3)]).

60. In my judgment, that analysis applies also to WMS and the PPG. Mr. Banner agreed.

61. In dealing with national policy, it is helpful to recall this general statement by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 about the role played by policies at [39]:

> "They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy …"

62. I do not think that it is accurate or helpful to say that PPG is only guidance, as if to suggest that it has a different *legal*, as opposed to *policy*, status from the NPPF, or that fundamental legal principles on policy do not apply to both. In *Hopkins* Lord Carnwath referred to the NPPF as "guidance". Neither the NPPF nor the PPG has the force of statute. Neither has a binding legal effect. The ability of the Secretary of State to adopt either derives from the same legal source of power as the central planning authority. The NPPF does not have some special legal status, the effect of which is to restrict the ability of the Secretary of State to change such national policy (or the role of the courts in interpreting any such change) to an amendment made to the NPPF itself.

63. PPG was introduced in 2014 following the "External Review of Government Planning Practice Guidance" carried out by Lord Taylor of Goss Moor in December 2012, following the introduction of the NPPF. The Review recommended the replacement of the then hotchpotch of circulars, statements, guides and letters from the Department's Chief Planner by "formal Government Planning Practice Guidance" to support the NPPF. "Formal planning guidance should be recognised as such through being clearly identified, referenced, dated and accessible in one place as a coherent and understandable suite" (p.7). A few examples help to illustrate how the NPPF and PPG relate to each other in practice.

64. For many years the three legal tests for the validity of conditions attached to a planning permission (*Newbury District Council v Secretary of State for the Environment* [1981] AC 578) were elaborated by six policy tests contained in DoE circular 1/85 and then 11/95. As Lindblom LJ stated at [16] in *R (Menston Action Group) v City of Bradford Metropolitan District Council* [2016] EWCA Civ 796 (a separate claim for judicial review from that considered by Dove J), the policy in the now revoked Circular 11/95 is contained in both the NPPF and the PPG. Paragraph 57 of the current NPPF simply lays down the six policy tests. The PPG explains the application of those tests. I do not see why the PPG should not be treated as a statement of planning policy.

65. Where a proposed development would have an impact upon a heritage asset, paras. 201 to 202 of the current NPPF require a decision-maker to decide whether that development would cause "substantial" or "less than substantial" harm to the significance of that asset. The answer to that question determines which policy test is to be applied. "Substantial" is not defined in the NPPF. Paragraph 018 of the section of the PPG dealing with the historic environment states:

> "In general terms, substantial harm is a high test, so it may not arise in many cases. For example, in determining whether works to a listed building constitute substantial harm, an important consideration would be whether the adverse impact seriously affects a key element of its special architectural or historic

> interest. It is the degree of harm to the asset's significance rather than the scale of the development that is to be assessed. The harm may arise from works to the asset or from development within its setting."

This passage sets out a general test or approach for applying the NPPF. The PPG is planning policy which provides more specific guidance.

66. In *City & Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5761 the Court of Appeal considered "public benefits" which in paras. 201 to 202 of the NPPF are to be weighed against harm to a heritage asset. Although the NPPF does not define the term, the PPG explains what may qualify as a public benefit (para. 020) (see [75] to [77]). Again the PPG is operating here as a policy.

67. The policies in the NPPF vary in style. Some, like Green Belt policy, are relatively detailed and prescriptive (as policies). Other parts of the NPPF set a framework and the PPG provides more specific or detailed policy guidance on, for example, conditions in planning permissions, development affecting heritage assets and, as we shall see, the sequential test for flood risk cases.

68. In *Bushell v Secretary of State for the Environment* [1981] AC 75 Lord Diplock stated at p.98 that "policy" is a protean word covering a wide spectrum. At a national level it may relate to matters of strategy or high policy, typically the subject of debate in Parliament. But it can also cover technical matters, such as a decision to adopt a uniform method for assessing the need for different road schemes in different parts of the country competing for finite public resources. A statement that a particular technical method or guidance should normally be followed in decision-making can properly be described as policy. Indeed, such statements may be found in the policies of development plans.

69. I do not accept that guidance for decision-making should or should not be treated as policy according to whether it is the subject of prior consultation. Generally, the NPPF and amendments to that document have been consulted upon. But that has not always been the case. In *R (Richborough Estates Limited) v Secretary of State* [2018] PTSR 1168 Dove J referred to evidence of several substantial changes being made to the NPPF without consultation. He rejected the contention that there is a legitimate expectation that the making of changes to the NPPF must be subject to consultation [67] to [75]. On the other hand, there are examples of public consultation being carried out before national policy (including NPPF) has been changed by WMS and PPG. *West Berkshire* dealt with a major change to the policy requirement for housing development to provide affordable housing by the introduction of an exemption for small sites through a WMS and PPG. In March 2018 the Secretary of State consulted on draft amendments to the NPPF alongside more detailed guidance set out in draft changes to the PPG.

70. As a matter of *policy*, PPG is intended to support the NPPF. Ordinarily, therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF. However, I see no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF. Mr. Banner was unable to point to any legal principle by which the court could treat such a PPG as unlawful. *West Berkshire* is one example of the Secretary of State introducing a new

national policy through WMS and PPG which amended, and was inconsistent with, the pre-existing national policy as set out in the NPPF. In addition, Annex A to the Department's consultation in March 2018 on draft amendments to the 2012 NPPF identified amendments to that document which had already been made through WMSs (see also *R (Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2209 at [18]).

71. Similarly, I am unimpressed by the claimants' argument that PPG cannot be adopted which is "restrictive" of policy in the NPPF. Where a policy in the NPPF is expressed in very broad or open terms, more detailed guidance in the underlying PPG may be rather more focused as to the approach to be taken. To describe that PPG as restrictive, and therefore inappropriate, is likely to be one-sided and unhelpful. Additions to, or changes in, policy may produce winners and losers. Parties affected by policy will have different points of view. In *West Berkshire* the change of affordable housing policy was favourable to the developers of small housing sites. For them it was not restrictive. But many local planning authorities criticised the change as making it more difficult for them to meet their local requirements for affordable housing. For them the change was restrictive. This simply reflects the fact that planning policy has to address competing interests and views in the overall public interest.

Legal principles on the interpretation and application of planning policy

72. The interpretation of a planning policy is an objective question of law for the court to determine, read in accordance with the language used and its proper context. But the application of policy, properly interpreted, is a matter for the decision-maker, subject only to review by the courts on *Wednesbury* principles. Many policies are framed in language the application of which requires the exercise of judgment, which may only be challenged if irrational or perverse (see *Tesco Stores Limited v Dundee City Council* [2012] PTSR 983 at [18] to [20]). But a genuine issue about the interpretation of a policy is logically a prior question to the application of that policy [21].

73. In *Hopkins* Lord Carnwath stated that the same principles apply both to national and development plan policy [23]. He emphasised a point made by Lord Reed in *Tesco* at [19], that some policies may be expressed in broader terms, so as not to require, or lend themselves to, the same level of legal analysis as a more specific policy. It is necessary for the courts to guard against over-legalisation of the planning process. Practitioners must not elide the important distinction between issues of interpretation appropriate for judicial analysis and issues of judgment in the application of policy [23] to [26].

74. *R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] PTSR 221 illustrates the distinction. Lord Carnwath, giving the judgment of the Supreme Court, referred to the warning given in *Hopkins* against the danger of "over-legalisation" of the planning process. He noted the contrast between the "relatively specific" policy considered in *Tesco* and policies expressed in much broader terms not susceptible to the same level of legal analysis [21]. He held that "openness" in national Green Belt policy is an example of the latter. The court interpreted the policy as far it was necessary and possible to go. Openness is the counterpart of urban sprawl and linked to the purposes of Green Belt policy. It is open-textured and a number of factors are capable of being relevant when it is applied to the particular facts of a specific case. Visual considerations *may*, not *must*, be taken into account. But whether they are taken into account and, if so, how that is done, are matters of planning judgment for the

decision-maker. Openness is not limited to visual matters. It may include how built up the Green Belt is at the time of the decision and how built up it would become if a proposed development were to go ahead [22] to [26].

75. The decision of the Court of Appeal in *Bramshill* provides a further example of the distinction drawn by the Supreme Court. The NPPF states that, in general, the development of "isolated homes in the countryside" is to be avoided. This is a concept of planning policy, not law. It is not defined in the NPPF and does not lend itself to rigorous judicial analysis. As a broadly framed policy, its application depends upon the facts of each case and requires the application of planning judgment in a wide variety of circumstances. The court's function, both in interpreting the policy and in reviewing its application, is therefore limited [30]. The court decided that the policy refers to remoteness from a settlement but not remoteness from other dwellings [31] to [33]. That was the reach of the court's interpretive role for that policy. In that instance we soon arrive at the decision-maker's role to apply the policy using judgment.

76. In *R (Asda Stores Limited) v Leeds City Council* [2021] PTSR 1382 Sir Keith Lindblom SPT stated at [35]:

> "National planning policy is not the work of those who draft statutes or contracts, and does not always attain perfection. The language of policy is usually less precise, and interpretation relies less on linguistic rigour. When called upon – as often it is nowadays – to interpret a policy of the NPPF, the court should not have to engage in a painstaking construction of the relevant text. It will seek to draw from the words used the true, practical meaning and effect of the policy in its context. Bearing in mind that the purpose of planning policy is to achieve "reasonably predictable decision-making, consistent with the aims of the policy-maker", it will look for an interpretation that is "straightforward, without undue or elaborate exposition" (see *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at para. 41). Often it will be entitled to say that the policy simply means what it says, and that it is the job of the decision-maker to apply it with realism and good sense in the circumstances as they arise – which is what local planning authorities are well used to doing when making the decisions entrusted to them (see *R (on the application of Corbett) v Cornwall Council* [2020] JPL 1277, paras. 65 and 66)."

77. I also bear in mind the following additional points made by Sir Keith Lindblom SPT in *R (Corbett) v Cornwall Council* [2023] JPL 126:

> "(2) In seeking to establish the meaning of a development plan policy, the court must not allow itself to be drawn into the exercise of construing and parsing the policy exhaustively. Unduly complex or strict interpretations should be avoided. One must remember that development plan policy is not an end in itself but a means to the end of coherent and reasonably predictable decision-making in the public interest, and the product of the local planning authority's own work as author of

> the plan. Policies are often not rigid, but flexible enough to allow for, and require, the exercise of planning judgment in the various circumstances to which the policy in question applies. The court should have in mind the underlying aims of the policy. Context, as ever, is important (see *Gladman Developments Ltd. v Canterbury City Council* [2019] EWCA Civ 699, at [22], and *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610, at [16], [17] and [39]).
>
> (3) The words of a policy should be understood as they are stated, rather than through gloss or substitution. The court must consider the language of the policy itself, and avoid the seduction of paraphrase. Often it will be entitled to say that the policy means what it says and needs little exposition. As Lord Justice Laws said in *Persimmon Homes (Thames Valley) Ltd. v Stevenage Borough Council* [2005] EWCA Civ 1365 at [24], albeit in the context of statutory interpretation, attempts to elicit the exact meaning of a term can 'founder on what may be called the rock of substitution – that is, one would simply be offering an alternative form of words which in its turn would call for further elucidation'."

78. As the courts have often said, some policies simply mean what they say. The words used may be incapable of, or not susceptible to, further elaboration. But where a court is engaged in interpreting the words of a policy, it may have to decide whether a particular consideration is or is not relevant to the application of that policy (see e.g. *Bramshill* at [75] above). According to the language used and context, a policy may *require* a decision-maker to take a consideration into account, not as a matter of law, but as a matter of policy which, of course, is not binding.

79. In other cases a policy may be expressed so as to *allow* a decision-maker to take a consideration into account. So a court may say that a factor is capable of being taken into account by a planning authority. Whether the authority does so, and if so to what extent, will involve its use of judgment, particularly where the policy is set out in broad terms.

80. The interpretation of a policy is generally based upon the express language used, its context and purpose. But when the court is looking at those matters it may decide that a particular meaning is *necessarily* implicit in a policy (see e.g. the analysis by the Supreme Court in the *Tesco* case of the sequential approach in retail policy generally, set out in [94] below). But the court will be cautious about entertaining an argument of this kind. Its role is to interpret, not make, policy. An implicit meaning would at least have to be necessary, clear and consistent with the language used in the policy and appropriate, having regard to the range of circumstances in which the policy may fall to be applied.

81. Often, where a policy is silent on a subject, the court will not be able to arrive at an implicit meaning. In *Tewkesbury Borough Council v Secretary of State for Housing, Communities and Local Government* [2022] PTSR Dove J rejected the authority's argument that national policy required an oversupply of housing land in previous years

in a district to be taken into account as part of a current assessment of that area's land supply for the next 5 years. At [43] he said:

> "In the absence of any specific provision within the Framework there is no text falling for interpretation, and it is not the task of the court to seek to fill in gaps in the policy of the Framework. It is far from uncommon for there to be gaps in the coverage of relevant planning policies: they will seldom be able to be designed to cover every conceivable situation which may arise for consideration. Again, that is perhaps unsurprising given the breadth of the potential scenarios which may arise in the context of a planning application on any particular topic, especially where it is a high level policy with a broad scope like the Framework which is being considered. When it arises that there is no policy covering the situation under consideration then it calls for the exercise of planning judgment by the decision-maker to make the necessary assessment of the issue to determine the weight to be placed within the planning balance in respect of it. In the absence of policy within the Framework on the question of whether or not to take account of oversupply of housing prior to the five-year period being assessed in the calculation of the five-year housing land supply the question of whether or not to do so will be a matter of planning judgment for the decision-maker, bearing in mind the particular circumstances of the case being considered."

82. Dove J considered whether PPG filled the "gap", or silence, in the NPPF, but concluded that the PPG did not assist in that instance [44]. It followed that it was a matter of judgment for the decision-maker as to whether to take a previous oversupply of housing into account when dealing with the 5 year land supply issue and, if so, how ([44]-[47]).

83. In *Braintree District Council v Secretary of State for Communities and Local Government* [2018] 2 P & CR 9 Lindblom LJ said *obiter* at [36] that he doubted that it would be right to exclude guidance in PPG as a possible aid to understanding the policy to which it corresponds in the NPPF. But it was held that in that case the relevant policy in the NPPF was clear and there was no need to refer to other statements of policy, whether in the NPPF or elsewhere.

84. In *R (Bent) v Cambridgeshire County Council* [2018] PTSR 70 Mr. David Elvin QC sitting as a Deputy High Court judge stated that the general principles on the interpretation and application of planning policy apply also to PPG (see [36] to [37]). I agree. But I would add that parts of the PPG contain practical guidance or statements of good practice which depend upon the application of judgment by the decision-maker and may not be not susceptible to judicial interpretation.

85. In *Hopkins* Lord Carnwath said that the courts should respect the expertise of planning inspectors and start with the presumption that they will have understood the policy framework correctly. Their position is analogous to that of expert tribunals and so the courts should avoid undue intervention in policy judgments within their areas of specialist competence [26].

86. Similarly, Sir Geoffrey Vos C (as he then was) stated in *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 that the courts should give local authority planning committees advised by their officers the space to exercise their own planning judgment (see [62]-[64]).

87. I should mention that the passages cited by the parties from *Solo Retail*, *White Waltham*, *Bramley* and *Menston* do not help to resolve the grounds of challenge in this case. It is necessary to read those passages in the context of what the issues were in those cases and what was really decided by the court, as well as wider legal principles on planning policy, its interpretation and application summarised above.

88. In *Solo Retail* the claimant unsuccessfully relied upon guidance in PPG on retail impact analysis to argue that full impact analysis should have been carried out for a small amount of convenience floorspace in a proposal for a comparison goods store. As Lieven J said at [30] that was really an argument about the *application* of policy, not its *interpretation*. The PPG did not set out mandatory requirements [12], [30] and [34] to [35].

89. In *White Waltham* Lang J rejected the challenge under ground 1 to the adequacy of the noise assessment which had been carried out, including the impact on occupants of the proposed dwellings of the existing airfield and its permitted use [56] and [60] to [66]. In those circumstances, the claimant's reliance under ground 2 upon PPG guidance added nothing of substance [77].

90. In *Bramley* Lang J decided that the relevant part of the PPG on the use of agricultural land for solar farms did not mandate that a sequential search be made for alternative sites with a poorer land quality. The PPG did not create a binding code [177] to [180].

91. In *Menston* the claimant relied upon a passage in the PPG to argue that national policy required an authority determining a planning application to assess not only whether the development would be in an area at risk of flooding, or whether existing flood risk would be exacerbated, but also whether the proposal took the opportunity to *reduce existing flood risk* [36]. Dove J decided that the 2012 NPPF laid down that requirement for plan-making but not for development control [40]. I agree with the second reason given by Dove J in [41] for rejecting the claimant's complaint that the local authority had failed to address opportunities for improvement of flood risk. On a fair reading, the passage in the PPG (cited at [22]) did not seek to contradict the difference in approach set out by the NPPF for plan-making and development control [41].

92. The PPG referred *inter alia* to the designing of off-site works "to protect and support development in ways that benefit the area more generally". In my judgment, works of that nature would generally not have a sufficient connection with a proposed development to be a material consideration in deciding whether it should receive planning permission (*R (Wright) v Forest of Dean District Council* [2019] 1 WLR 6562; *DB Symmetry Limited v Swindon Borough Council* [2023] 1 WLR 198). Given that planning policy should if possible be read compatibly with principles of planning law, the PPG did not purport to give guidance on development control, contrary to the submission of the claimant in *Menston.* Accordingly, this was an example of PPG which was not an aid to the interpretation of NPPF policy for dealing with planning applications. It illustrates the need for care and caution in the use of such material.

The interpretation of the sequential test in the NPPF and the PPG.

93. I return to the *Tesco* case. The Supreme Court had to resolve an issue about the meaning of the sequential approach to the location of new retail development and other town centre uses. The policy preference was for new development to be located on "suitable sites" first in town centres, followed by edge of centre locations and, only then, in out of centre locations accessible by a choice of means of transport. The issue before the House of Lords was whether "suitable" meant suitable for meeting identified deficiencies in retail provision in the area, or suitable for the development proposed by the party applying for planning permission [13]. The court decided that the latter was the correct meaning. But that was based not only on the sequence of preferences, but also additional text which referred to meeting the requirements of developers and retailers and the scope for accommodating the proposed development. There was nothing in the policy to support the alternative construction that suitability for the purposes of the sequential test was limited to meeting deficiencies in the retail provision of an area [27].

94. However, the Supreme Court added that suitability for the proposed development was qualified by a specific policy requirement for "flexibility and realism" from retailers, developers and planning authorities [28]:

> "…. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Ex p William Morrison Supermarket plc* [1998] JPL 23, 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. *That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable*." (emphasis added)

The need for flexibility and realism was necessarily implicit in those policies which did not refer expressly to those requirements.

95. Turning to retail policy in the NPPF, in *R (Aldergate Properties Limited) v Mansfield District Council* [2016] EWHC 1670 (Admin) Ouseley J decided that "suitable" and "available" referred to the broad type of development proposed in a planning application by approximate size, type of retailing and range of goods, incorporating flexibility, but excluding the corporate attributes of an individual retailer [35] to [38].

96. Where flood risk is in issue, para.162 of the NPPF sets out the sequential preference as follows:

> "… reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding."

97. This is a broad, open-textured policy. There is no additional language indicating how the issue of "appropriateness" should be approached or assessed. There is nothing to suggest that the object is *restricted* to meeting the requirements of the developer or applicant for planning permission, or of his particular proposal on the application site he has selected. On the face of it, the question of appropriateness is left open as a matter of judgment for the decision-maker.

98. This takes us back to the "inbuilt difficulty" of a sequential approach referred to in *Tesco* at [28]. The policy to steer new development to areas with the lowest risk of flooding would be defeated if any examination of alternative sites is restricted by inflexible requirements set by developers. But a broad, non-specific approach by planning authorities to sequential assessments which generally disregards development requirements could lead to inappropriate business decisions being imposed on developers or the market. There is a need for realism and flexibility on all sides.

99. It is not difficult to see why para. 162 of the NPPF has been expressed so broadly as compared, for example, with the retail policies considered in the *Tesco* case. Paragraph 162 applies to all types of development. Some development may be of a specialised or highly specific nature with particular or intrinsic requirements as to the site, form and scale of development, access, and catchment. Examples could include a power station, transport infrastructure, a school or waste disposal facilities. Other forms of development, such as residential, may have no, or fewer, specific requirements for the purposes of a sequential assessment.

100. There is nothing in the language of the NPPF which could justify the court adopting the highly specific interpretation contended for by the claimants, namely alternative sites which could accommodate the development in fact proposed in its various particulars, including form, quantum (both as to site area and amount of development) and intended timescales for delivery. That interpretation would tend to exclude any consideration of other planning considerations which could be considered to affect appropriateness. It would render the sequential test ineffective.

101. It is common ground that when a development plan is being prepared, the sequential test is applied in the context of policies aimed at meeting the housing, employment and other development needs of the local authority's area, or other relevant "catchment" (see also para. 026 of the PPG). Paragraph 166 of the NPPF states that where an application is made for development on a site allocated in a development plan which satisfied the sequential test, that test does not have to be applied again. Where in other cases a sequential test is being carried out for the first time in relation to an application

site, I see no logical reason why the issue of need should be treated as wholly irrelevant to that assessment as Mr. Flanagan suggested. In addition, para. 027 of the PPG suggests that the relevant catchment area or area of search for some types of development will be affected by need considerations. On that basis, I do not see why *all* considerations of need must be excluded when considering the "appropriateness" of alternatives.

102. A developer may put forward a case that the specific type of development he proposes is necessary in planning terms and/or meets a market demand. It then becomes a matter of judgment for the decision-maker to assess the merits of that case and to decide whether it justifies carrying out the sequential assessment for that specific type or for some other, perhaps broader, description of development. Paragraph 162 of the NPPF does not exclude either approach, but leaves to the decision-maker the selection of the approach to be taken. For example, a decision-maker may consider in the circumstances of a particular case that more weight should be given to the objective of steering development towards areas with a lower flood risk.

103. A need and/or market demand case could be based on a range of factors, such as location, the mix of land uses proposed and any interdependence between them, the size of the site needed, the scale of the development, density and so on. But the decision-maker may also assess whether flexibility has been appropriately considered by the developer and by the local planning authority.

104. So far, I have been dealing with an applicant's case on a *specific* need for the type of development proposed. Depending on the merits of the case put forward, this may be relevant to deciding the appropriate area of search and whether other sites in lower flood risk zones have characteristics making them "appropriate" alternatives.

105. By contrast, I do not consider that a *general* need for a type of land use across the local authority's area, e.g. for housing or employment, or a shortfall in a 5 year supply of housing land, is relevant when deciding whether other sites are sequentially preferable and reasonably available alternatives. That general need or shortfall does not help a decision-maker to determine whether a particular site (with its relevant characteristics) qualifies as an "appropriate" alternative to the site selected by the applicant for his proposed development. General need may influence the scope of an area of search, but that is a different issue in a sequential assessment.

106. Paragraph 162 of the NPPF also stipulates that an alternative site be "reasonably available" for the proposed development. That raises issues of judgment for the decision-maker as regards ownership, or the ability to become an owner, so that the site may be developed. "Reasonably available" also has a temporal dimension. The start date and duration of the proposed development may be relevant considerations. But para. 162 of the NPPF does not require the that the availability of an alternative site should always align closely with the trajectory for the developer's proposal. Here again, flexibility on all sides is a relevant consideration, together with any material aspects of need and/or market demand.

107. To summarise, I have rejected the claimants' highly prescriptive interpretation of para. 162 of the NPPF. Instead, applying the approach in *Tesco* at [28] and on a straightforward reading of the NPPF, I have identified factors which are capable of being relevant considerations which a decision-maker may assess as a matter of judgment.

108. It follows that para. 028 of the PPG does not conflict with para. 162 of the NPPF. The PPG performs the legitimate role of elucidating the open-textured policy in the NPPF. The PPG describes "reasonably available sites" as sites "in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development." The PPG provides for issues as to suitability of location, development type, and temporal availability to be assessed by the decision-maker as a matter of judgment in accordance with the principles set out above. In this context, the PPG correctly states that "lower-risk sites" do not need to be owned by the applicant to be considered "reasonably available." That is consistent with the need for flexibility on all sides.

109. The PPG also states that reasonably available sites *may* include "a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development." Whether such an arrangement is so capable depends on the judgments to be made by the decision-maker on such matters as the type and size of development, location, ownership issues, timing and flexibility. Taking into account his assessment of any case advanced by the developer on need and/or market demand, the decision-maker may consider smaller sites (or disaggregation) if appropriate for accommodating the proposed development.

110. I note that the PPG refers to a "series of smaller sites." The word "series" connotes a relationship between sites appropriate for accommodating the type of development which the decision-maker judges should form the basis for the sequential assessment. This addresses the concern that a proposal should not automatically fail the sequential test because of the availability of multiple, disconnected sites across a local authority's area. The issue is whether they have a relationship which makes them suitable in combination to accommodate any need or demand to which the decision-maker decides to attach weight.

111. Lastly, para. 028 of the PPG states that the absence of a 5-year supply of housing land is not relevant to the application of the sequential test to individual proposals. That is consistent with the analysis in [105] above on how general need sits in relation to para. 162 of the NPPF. Such broader issues of need fall to be considered as part of the overall planning balance, in which flood risk considerations will be one component, rather than the sequential test.

112. I have addressed the interpretation of both para. 162 of the NPPF and para. 028 of the PPG, in so far as that falls within the court's remit, matters of judgment which are for the decision-maker and the broad division between those two areas. The interpretation I have adopted does not involve treating either the NPPF or the PPG as a "binding code." That would be impermissible. For the reasons I have given, the NPPF and the PPG can and should be read together harmoniously.

113. Paragraph 028 of the PPG is a proper aid to clarifying and understanding the meaning of the NPPF. Mr. Banner accepts that the PPG may perform that role so long as it is not treated as a binding code. However, that submission is a potential source of confusion which needs to be avoided.

114. In *West Berkshire* the Court of Appeal held that a policy-maker is entitled to express his policy in unqualified terms. In order for a policy to be lawful, there is no requirement for it to use the word "normally", or to allow explicitly for the making of exceptions,

or to prevent the fettering of discretion in some other way. This principle holds good even where a policy is expressed in mandatory terms (see [21] and [25]). The principle applies to both the NPPF and the PPG.

115. The interpretation of para. 162 of the NPPF, read together with para. 028 of the PPG, is an objective question of law for the court, not for the judgment of a decision-maker. Although the process of interpretation does not need to allow for exceptionality or discretion, that does not involve treating either policy as binding. Once the court has reached its conclusions on interpretation, it is the application of those policies which must not involve a fettering of discretion by treating them as binding. We are back to the fundamental distinction between interpretation and application of policy. The two must not be elided or confused.

116. Having dealt with these points of principle I turn to deal with the remaining criticisms of the two decision letters.

The challenge to the Lynchmead Farm decision

Ground 2

117. It is convenient to begin with ground 2. This relates to three aspects of appropriateness: timing, type of development, and size of sites and disaggregation.

118. With regard to timing, the appellant's expert gave evidence that, subject to the grant of permission, it was anticipated that development could begin on the appeal site in early 2025 and be completed within about 2 years. In his closing submissions to the Inspector, Mr. Banner said the uncontested evidence was that the two sites already in the ownership of the appellant (ST17 and ST34) were not "available to be developed at the point in time envisaged for the development" because existing infrastructure on site belonging to either National Grid or Western Power needed to be moved. But the court was not shown anything in Mead's submissions or evidence indicating what would have to be done to that infrastructure or the timescale involved (including why that could not be achieved in the period of about 2 years before the anticipated start of development).

119. At DL 30 the Inspector accepted that the start date of early 2025 was "not unreasonable" although a possibly "optimistic estimate." Nonetheless he proceeded on the basis that an alternative would need to be "available" by that time.

120. Mr. Banner criticises the paragraph which follows:

> "31. However, 'available to be developed' means just that. It does not mean that development of an alternative site would have to follow the same timescale envisaged for the appeal scheme. It is sufficient that there is a positive indication that the land is available to be developed. The start date for development and the rate of build out may be affected by many site-specific factors, such as the need to relocate infrastructure or undertake hydraulic testing, but that does not alter the fact that the land would be available to be developed."

121. Allowing for flexibility, the Inspector was entitled to say that development of an alternative site did not have to follow the *same* timescale as was envisaged for the appeal proposal. He recognised that the start date and build-out rates can be affected by many site-specific factors, including the need to relocate infrastructure, but that does not mean that an alternative is not "available to be developed." Comparison of availability between two sites involves matters of degree. It does not require precise alignment. This is a matter of judgment for the Inspector. On the material shown to the court it is impossible to say that his judgment was irrational.

122. With regard to the type of development proposed on the appeal site, the Inspector said this at DL 29:

> "29. The first relates to the meaning of the phrase 'type of development'. I consider that this means any site that is capable of accommodating residential development, the 'type' of development being 'residential'. Although the appellant may anticipate the appeal proposal to consist of lower density suburban houses, the application has been made in outline with all matters other than access reserved. The only constraint on the type of development proposed is that contained in the description, which is for '…a residential development of up to 75 dwellings…'. I have also had regard to the general approach to planning for residential development in the district, where spatial policies do not constrain the types of dwellings within allocated or windfall sites. Even where some sites require developments to be of a higher density, they would still have the effect of providing residential dwellings on sites with a lower risk of flooding than the appeal site and would therefore achieve the purpose of the sequential test."

123. Mr. Banner criticises the Inspector's decision to treat the proposal as being for residential development in general rather than lower density suburban housing. But this is an issue going to the application of policy, not interpretation and therefore a matter for the Inspector's judgment. On the material before the court, the claimant has come nowhere near demonstrating irrationality and so the criticism must be rejected.

124. I would add that at DL 38 the Inspector did consider in the alternative the claimant's approach to describing the type of development:

> "38. Even if a more restrictive definition of the type of development were to be used, taken to mean residential development of a suburban nature, and the availability of sites for development was taken to be now, in the sense that they either have extant planning permission (or a resolution to grant) for residential development or are allocated for residential development in the current development plan with delivery expected at least in part by 2025, then there are still many alternative sites that would meet the Framework definition of reasonably available[11]."

125. Mr. Banner criticised this paragraph because one of the sites relied upon by the Inspector in the final sentence was site ST17 (see footnote 11) where infrastructure would need to be relocated. But I have already rejected the criticism made of the Inspector's handling of timing, which included this infrastructure issue ([118] to [121] above).

126. The complaint about the Inspector's treatment of type of development is also linked to the size of site or disaggregation point. Under ground 2 the claimant argued that the PPG was inconsistent with the NPPF on this subject. I have rejected that argument.

Ground 5

127. Under ground 5 the claimant criticised the Inspector's construction of para. 028 of the PPG because in DL 33 he decided that need was not a relevant factor in the application of the sequential test:

> "The appellant also suggests that housing need is a relevant consideration in the sequential test. I disagree. I can see no reason for interpreting the Framework in that way. I consider that for individual applications 'the proposed development' means that sought, not the housing needs of the district. …"

128. I do not see any legal error in DL 33 as far as that paragraph goes. For the reasons set out in [105] above, neither the general housing needs of a district or a shortfall in meeting those needs, addresses the issue posed by the sequential test, namely whether an alternative site has qualities making it appropriate and available for the proposed development. But that leaves the question whether Mead advanced any specific case on need for a type of development described as 75 lower density, suburban houses over the timescale envisaged for the appeal site? If so, did the Inspector fail to address that case? Did he consider how smaller sites could form a "series" addressing that need?

129. In his closing submissions to the Inspector, Mr. Banner made a number of points on the interpretation of policy and then said this at para. 34:

> "These considerations … lead to the conclusion that the key question for the sequential test is whether sequentially preferable alternative sites can accommodate the area's needs for this type of development by the point in time envisaged for the development."

130. Mr. Banner asserted that Mead's evidence before the Inspector covered quantitative and qualitative aspects of that need. But no such material has been shown to the court to establish that the subject of need was addressed beyond the passage quoted in [129] above. The court gave the claimant an opportunity to produce any such material to Mr. Flanagan for discussion and hopefully agreement. Mr. Flanagan informed the court after the hearing was concluded that the material he had been shown did not take the matter any further. There was no specific case put quantitatively, or even qualitatively, on a need for low density suburban family housing. That has not been contradicted.

131. In these circumstances, Mead cannot possibly criticise the Inspector for the way in which he dealt with the type of development proposed and his conclusion that need was

irrelevant to the application of the sequential test, at least on the evidence placed before him. The Inspector correctly dealt with the proposal's contribution to meeting general housing need in DL 51 as part of the overall planning balance.

132. I have already addressed the other aspects of ground 5 relating to the interpretation of the PPG.

Ground 1

133. Ground 1 is concerned with the relationship between para. 162 of the NPPF, para. 028 of the PPG and policy CS3 of the Core Strategy. In DL 23 the Inspector said that the second section of policy CS3 (setting out criteria for determining whether a site is reasonably available) was now inconsistent with the NPPF because of the clarification of para. 162 of that policy by para. 028 of the PPG. He noted that there had been no material change to the text of the NPPF itself from the version current when the Core Strategy was examined and adopted.

134. In DL 24 to DL 26 the Inspector identified the respects in which policy CS3 differed from the clarification of national policy by the PPG:

> "24. In the PPG, reasonably available sites are defined as those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> 25. The PPG says that these could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. There is nothing in the PPG that requires smaller sites to be adjacent to one another, as suggested by the appellant. A series of separate small residential sites would still provide suitable alternative land for equivalent development at a lower risk of flooding.
>
> 26. The PPG also says that such lower-risk sites do not need to be owned by the applicant to be considered reasonably available. Reasonably available sites can include ones that have been identified by the planning authority in site allocations or land availability assessments. There are no exclusions in the PPG relating to sites with planning permission or that publicly owned land must be formally declared to be surplus."

135. In DL 27 the Inspector said:

> "Paragraph 219 of the Framework states that due weight should be given to development plan policies, according to their degree of consistency with the Framework. In this case, because of the inconsistency between the documents as to what is meant by reasonably available, I give lesser weight to the second section of Policy CS3 than I do to the newer and more up to date Framework as interpreted by the PPG."

136. In DL 41 the Inspector set out his overall assessment of the appeal proposal against policy CS3:

> "41. The first part of Policy CS3 requires that development will only be permitted where it is demonstrated that it complies with the sequential test set out in the Framework. As I have concluded that the Framework's sequential test would not be complied with, it follows that the proposed development is in conflict with the first part of Policy CS3. Other than for the definition of the area of search being North Somerset-wide, I consider the remainder of the second part of Policy CS3 to be out-of-date because it is inconsistent with the Framework. I therefore conclude that the proposed development conflicts with Policy CS3 overall. As Policy CS3 was agreed as being the most important policy in determining this appeal, I conclude that the proposal also conflicts with the development plan when taken as a whole."

137. In summary, Mr. Banner submitted in his skeleton that:

(i) The Inspector accepted that the appeal proposal accorded with policy CS3 of the Core Strategy;

(ii) Policy CS3 must have been found "sound" by the independent Inspector who conducted the examination of the Core Strategy, which would have necessitated a conclusion that CS3 (specifically the criteria in the second section of CS3) was consistent with national policy;

(iii) There is no material difference between the 2012 version of the NPPF current when the Core Strategy was adopted and the relevant parts of the 2021 NPPF, a point accepted by the Inspector in DL 23;

(iv) At DL 41 the Inspector concluded that (a) because the proposal conflicted with the current NPPF, it also conflicted with the first part of policy CS3 (see [19] above) and (b) the second section of CS3 (with which the proposal complied – see [27] above) was out of date because it is inconsistent with the current NPPF. On that basis the Inspector concluded that the proposal conflicted with CS3 overall and, because CS3 was the most important policy in the Core Strategy for determining the appeal, with the development plan taken as whole;

(v) The Inspector's conclusions in (iv) above depended upon his reliance upon para.028 as affecting the interpretation of the current NPPF:

(vi) The Inspector erred in law because his reasoning involved treating para.028 of the PPG as having changed the objective meaning of the NPPF and of the Core Strategy.

138. As to point (i), the key issue resolved by the Inspector was the application of the criteria in the second section of policy CS3. In DL 14 to DL 22 he found that there were no alternative sites available satisfying those criteria (see [21] and [27] above). It was just

those criteria which he found to be inconsistent with the NPPF (in DL 23 to DL 27 and DL 41).

139. As stated point (ii) is incorrect,[2] but it is not essential to Mead's argument. In his oral submissions Mr Banner also relied upon the fact that the first part of policy CS3 requires compliance with the sequential test in the NPPF, implying that the criteria in the second section of CS3 were considered to be consistent with the NPPF when the Core Strategy was adopted in 2017.

140. The main thrust of Mr. Banner's argument lies in points (v) and (vi). Point (v) is not controversial.

141. I see no possible legal error in the Inspector's conclusion that the proposal conflicted with the first part of policy CS3 because it conflicted with the sequential test in the NPPF read together with the PPG. It was not suggested by Mead that policy CS3 should be interpreted as referring solely to the 2012 version of the NPPF and ignoring any alterations to that document. So if the NPPF had been amended by including the text contained in para.028 of the PPG, Mead could have no legal complaint. I have explained that there is no legal principle which prevents national policy in the NPPF being altered by a WMS and/or PPG. In any event, para.028 of the PGG is consistent with the open-textured language of para.162 of the NPPF properly understood. The former has merely clarified the latter. The Inspector correctly treated the PPG as having elucidated the NPPF.

142. For essentially the same reasons, the Inspector did not commit any error of law when he concluded that the criteria in the second section of policy CS3 are out of date because they are inconsistent with the NPPF read together with the PPG (DL 23 to DL 27 and DL 41).

143. Mr. Banner submits that the Inspector erred because in treating the PPG as interpreting the NPPF (or defining "reasonably available" sites) he was applying the PPG as a "binding code." I have already explained why that argument is unsustainable (see [114] to [115] above).

144. For these reasons I reject all of the grounds of challenge to the Lynchmead Farm decision.

The challenge to the Bushey decision

145. Redrow's "Flood Risk Sequential Test and Exception Test" (May 2023) presented a sequential assessment covering the whole of the Borough (4.3).

---

[2] Section 20 of the Planning and Compulsory Purchase Act 2004 requires that a development plan taken *as a whole* to be "sound". The Act does not define what is meant by "sound". But para.35 of the 2021 NPPF sets out policy requirements for a *plan* to be considered sound, including consistency with the NPPF "and other statements of national policy". Consequently, it is not unlawful for a development plan not to be consistent with national policy in every respect (per Lindblom J as he then was, in *Grand Union Investments Limited v Dacorum Borough Council* [2014] EWHC 1894 (Admin) at [59]). Local circumstances may justify a departure from national policy (see e.g. *Camden London Borough Council v Secretary of State for the Environment* (1990) 59 P & CR 117 and *West Berkshire* at [19] to [21] and [25] to [26]). Mead has not shown the court any evidence on how policy CS3 was assessed in the examination of the Core Strategy.

146. Redrow sought planning permission for up to 310 dwellings and land reserved for educational and community uses on a site of 18.2ha. They followed the guidance in the PPG by applying a margin of plus or minus 25% to the site area, number of dwellings and density. So the assessment considered sites (or groupings of sites) between 13.6ha and 23.1ha in area, capable of accommodating between 232 and 388 dwellings. However, the assessment said that alternative sites, whether solus or smaller sites grouped together, needed to be capable of accommodating the appeal scheme as a whole: market housing, 40% affordable housing, 5% custom and self-build housing, land for a primary school and community hub and substantial open space (4.7 to 4.8). Redrow contended that the benefits of the proposed development, including the amount of open space, could not be spread across a number of smaller disconnected, disparate sites. A primary school and community hub required sufficient land in one location to enable delivery and be accessible to existing and proposed communities (5.3).

147. Redrow considered that only sites which were "available immediately" could be treated as "reasonably available" for the proposed scheme, given the intended timescales for development. The appellant was both the owner of the appeal site and a housebuilder committed to a reduced timescale for the submission of reserved matters. Sites larger than the appeal site would be likely to require co-ordination with other developers and owners and therefore require more time. They would be unlikely to be reasonably available to Redrow at the point in time envisaged for the development (4.9, 4.12 and 5.15).

148. In a statement of common ground Redrow and HBC agreed that residential development on the appeal site would take about 5 years to complete. Redrow said that work would commence on site in 2024 with first completions in 2025, whereas HBC said that first completions would begin in 2027.

149. Redrow said that it was looking for sites with immediate availability, partly in order to alleviate the severe inadequacy of the housing land supply in Hertsmere. Redrow assessed that HBC had a supply of only 1.23 years of land, rather than the requisite 5 years. As the owner of the appeal site, they would be able to progress development more quickly. The proposal would also contribute to meeting the acute need for affordable housing (4.12 to 4.14, 4.16, 5.13, 5.15 and 5.25).

150. In DL 84 the Inspector accepted Redrow's approach of treating the whole of Hertsmere borough as the area of search. She added that any residential scheme such as the appeal proposal would contribute to meeting housing need wherever located in that area and that the school and community facility could also be appropriate on other sites in the Borough.

151. At DL 85 to DL 100 the Inspector considered the assessment of reasonably available sites. She was not persuaded that Redrow's range of plus or minus 25% for defining site size and capacity had been justified or was consistent with the "advice" in the PPG on a "series" of smaller sites (DL 87).

152. At DL 88 she said:

> "88. With regard to the grouping of smaller sites, the proposed development would comprise around 310 homes, land for a primary school and a mobility hub, as well as green

> infrastructure. Although this represents a large, possibly even strategic scheme with non-residential elements, I see no reason why a number of smaller sites could not accommodate all these elements. As in the North Somerset appeal, smaller sites would not necessarily need to be contiguous. I agree with the Council that a series of sites would potentially indicate three or more sites. Equally, I am not convinced that part of a larger site would not represent a reasonable proposition in some circumstances, though considerably larger sites may take longer to bring forward and would not be reasonably available."

153. The Inspector concluded that completion of dwellings would begin in 2026, somewhere between the estimates provided by Redrow and HBC (DL 89 to DL 90).

154. On timing the Inspector said at DL 91 that in line with the Lynchmead Farm decision the development on an alternative site would not necessarily have to follow the appeal scheme's trajectory for start and build out dates in order to be considered "available." Nevertheless at DL 92 she said that alternative sites should "be available for development at the point in time envisaged for the proposed development," echoing the language of para. 028 of the PPG.

155. The Inspector was asked to address a list of 14 sites which HBC said were reasonably available, appropriate for the proposed development and with a lower flood risk. Redrow contended that none of those sites qualified and so there was no sequentially preferable location to the appeal site (DL 93).

156. The Inspector dealt with 4 sites larger than the appeal site at DL 94:

> "94. HEL181 Compass Park, HEL347 Land to northeast of Cowley Hill, HEL362 South of Potters Bar, and HEL379 Kemprow Farm, Radlett are larger sites with lower flood risk than the site. The appellant's evidence with regard to the reasonable availability of these larger sites is not compelling as it lacks detail on how long it might take for these sites to come forward and whether this would be outside the expected timeframe for delivering the proposed development. Despite having been reliant on timescales from the 2019 HELAA, the appellant has not contacted landowners to understand availability and likely timing of delivery. While I understand the appellant's concerns about time taken for land acquisition, there is simply not sufficient information to demonstrate to me that these sites would not be reasonably available on the basis of timescales."

157. The Inspector said that a fifth site larger than the appeal site was not "reasonably available" because its development timescale for 800 houses was 16 or more years (DL 98).

158. In relation to the 9 other sites which were smaller than the appeal site, the Inspector said at DL 95 that Redrow had ruled them out because they were smaller than the lower

end of its range for site size and dwelling numbers, an approach which she had rejected (DL 87).

159. At DL 96 the Inspector disagreed with additional reasons given by Redrow as to why 4 of the smaller sites did not qualify as reasonable alternatives.

160. At DL 97 the Inspector arrived at the following overall conclusion on the 9 smaller sites:

> "97. For all of the aforementioned smaller sites, I recognise that there are a range of different constraints affecting them, but no site is likely to be without constraints. I consider that it has not been adequately demonstrated that they are not reasonably available and that the proposed development could not be delivered through a series of smaller sites."

161. At DL 99 the Inspector said:

> "99. In summary and having considered all the disputed sites, I find that some 13 sites would potentially fall within the meaning of reasonably available. It has therefore not been demonstrated that the proposed development could not be located elsewhere in an area at lower risk of flooding..."

162. I have dealt with Redrow's contentions on the interpretation of para. 162 of the NPPF and para. 028 of the PPG ([96] to [115] above). I will now deal with the remaining issues which arise under their three grounds of challenge.

163. Mr. Simons accepts that Redrow cannot obtain an order to quash the decision by succeeding on ground 1 alone. They need to succeed on ground 1 in conjunction with ground 2. Alternatively, ground 3 provides a freestanding justification for quashing the decision.

Ground 1

164. Mr. Simons submits under ground 1 that the Inspector's approach to sites smaller than the appeal site was legally flawed. He says that the Inspector has, without explanation, departed from the approach in para. 162 of the NPPF, and even para. 028 of the PPG. Instead of looking at sites of around 18.2ha, or down to 13.6ha, and capable of accommodating 310 dwellings, or down to 232 units, she has considered an alternative based on a number of smaller, unconnected sites. She did not address the case advanced by Redrow that that approach could not deliver the range of interconnected benefits which the appeal scheme would deliver and for which there was a need (see [146] above).

165. There is some force in Mr. Simons submissions. Redrow's case, as summarised above, was relevant to the application of the sequential test. The court was not shown any material from HBC challenging that case. The Inspector does not appear to have addressed the matter, despite its significance for the planning appeal. It was a matter which the Inspector should have considered.

166. At DL 97 the Inspector merely said that it had not been adequately shown that the proposed development could not be delivered through a "series" of smaller sites. There was no indication of any connection or relationship between those sites relevant to the justification for the appeal scheme put forward by Redrow.

167. However, on the issue of size Mr. Simons acknowledges that the claimant has no basis for challenging the way in which the Inspector dealt with the larger sites in DL 94. It is for this reason that he rightly accepts that the decision could not be quashed on ground 1 unless the claimant also succeeds on ground 2.

Ground 2

168. Under ground 2 Mr. Simons criticises the Inspector's approach to availability of alternatives in terms of timing. In particular he challenges the Inspector's statement in DL 91 that the development of an alternative site does not necessarily have to follow the trajectory of start and build-out dates for the appeal scheme. He submits that this did not accord with the NPPF read together with the PPG (see para. 36 of his skeleton). Here Redrow, as both the owner of the appeal site and a house builder was seeking to start and complete the development as soon as possible.

169. However, Mr. Simons was right to accept that the sequential test does not require precise alignment between the timescales for an appeal scheme and alternatives.

170. When the Inspector dealt with the larger sites she criticised Redrow's evidence as lacking in detail on how long it might take for those sites to come forward and "whether this would be outside the expected timeframe for delivering the proposed development." In other words, the Inspector did not reject the timescale put forward by Redrow. The flaw in its case was the lack of evidence to show that alternative sites would take materially longer to come forward. This was because Redrow had relied upon timescales set out in a 2019 document and had not contacted the owners of those sites to obtain *current* information on availability and timescales. The Inspector said that she understood Redrow's concerns about the time that might be needed for land acquisition. But for the reasons she gave in DL 94, there was insufficient information to show that the larger sites would not be "reasonably available" in terms of timescale.

171. Accordingly, the Inspector's error under ground 1 is not material to the lawfulness of her decision and grounds 1 and 2 must be rejected.

Ground 3

172. Under ground 3 Redrow criticises the Inspector for failing in the application of para. 162 of the NPPF to have regard to housing need and the implications of failing to meet that need. The claimant submits:

(i) The aim of the NPPF is to steer a district's development needs to areas with the lowest risk of flooding from any source;

(ii) A district's needs should be accommodated, as far as possible, in areas of lowest risk;

(iii) Accordingly, a decision-maker must take account of the level of current need in a district for the type of development proposed and whether that unmet need is capable of being met in areas of lowest flood risk (see para. 44 of skeleton).

173. I agree with Mr. Flanagan that that approach describes the type of exercise which is undertaken in the preparation and examination of a development plan (see e.g. para. 026 of the PPG). Where there remains unmet need which cannot be allocated to areas satisfying the sequential test, that factor together with any other constraints, *may* lead to a policy decision that not all of the identified need should be met. Alternatively, it *may* be decided that all or some part of that residual need should be met notwithstanding that the sequential test has not been satisfied. Either way, the treatment of unmet need is not an input to the sequential assessment for identifying reasonably available alternative sites. The sequential approach is not modified in those circumstances. Instead, the policy-maker will decide what to do with the outcome of applying the sequential test.

174. A similar analysis applies in the determination of planning applications. Where there is an unmet need, for example a substantial shortfall in demonstrating a 5-year supply of housing land, that shortfall and its implications (including the contribution which the appeal proposal would make to reducing that shortfall) are weighed in the overall planning balance against any factors pointing to refusal of permission (including any failure to satisfy the sequential test). If the total size of sequentially preferable locations is less than the unmet housing need, so that satisfying that need would require the release of land which is not sequentially preferable, that too may be taken into account in the overall planning balance. But these are not matters which affect the carrying out of the sequential test itself. Logically they do not go to the question whether an alternative site is reasonably available and appropriate (i.e. has relevant appropriate characteristics) for the development proposed on the application or appeal site. Instead, they are matters which may, for example, reduce the weight given to a failure to meet the sequential test, or alternatively increase the weight given to factors weighing against such failure.

175. In para. 36 of their statement of facts and grounds Redrow contended that if the Inspector had been entitled to treat the 13 disputed sites as sequentially preferable, they would not come close to meeting the housing needs of the Borough, because in DL 108 to 109 the Inspector had identified a shortfall of between 2,104 and 2,875 dwellings in meeting the requirement for a 5-year supply of housing land. New homes would be required on many more sites than the 13 disputed sites and therefore would necessitate the use of land where flood risk is the same as, or worse than, the risk relating to the appeal site.

176. In para. 43 of their detailed grounds of resistance HBC said that Redrow did not give particulars of this contention, which they disputed. In para. 38 of his detailed grounds of resistance the Secretary of State said that on HBC's evidence to the inquiry the 13 disputed sites had a total capacity of 4,105 dwellings, in excess of the unmet need figures in DL 109.

177. Redrow's Reply and a second witness statement by Ms. Katheryn Ventham, a planning consultant acting for Redrow, responded that the capacity of the 13 disputed sites (4,105 dwellings) could not be compared to the shortfall in the 5-year housing land supply (2,104 to 2,875) because the former represents capacity deliverable over a substantially

longer timeframe. Indeed, HBC's own land supply assessment showed that only 1 of the 13 sites was expected to deliver units during the following 5 years, amounting to only 50 dwellings.

178. I can see that if Redrow had submitted to the Inspector that there was a substantial need for housing which could not be met entirely on sequentially preferable sites (and even more so in the next 5 years), so that additional sites with a similar or worse flood risk would need to be developed, that would be a significant factor to be addressed in the overall planning balance. It could reduce the weight to be given to the failure to satisfy the sequential test. Here the Inspector gave that failure "very substantial weight" (DL 100). It would have been arguable that the flood risk implications of satisfying the unmet need for housing land was an "obviously material consideration," such that it was irrational for the Inspector not to have taken it into account (*R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] to [120]). Alternatively, it could have been said that there was a failure to comply with the duty to give reasons in relation to a "principal important controversial issue" between the parties.

179. The problem faced by Redrow is that, as Mr. Simons accepted, this argument was not put before the Inspector. Redrow did not consider it to be material, let alone obviously material. It was not raised as a substantial issue between the parties. The Inspector cannot be criticised for acting irrationally, or for failing to give reasons, in relation to an argument of this kind which the claimant did not see fit to rely upon at any stage in its appeal. Ground 3 must therefore be rejected for this reason alone.

180. There is also an objection to the raising of a new point of this kind in a statutory review in the High Court. If Redrow had raised at the public inquiry the point now advanced under ground 3, HBC and any other participant would have had an opportunity to adduce evidence if thought appropriate, or, at the very least, to make submissions. Just as important is the point that the matter could have been addressed in a single appeal process. The Inspector would have been able to make any additional findings of fact, to evaluate the weight to be given to the outcome of the sequential test and to strike the overall planning balance, taking into account Redrow's additional point as part of its entire case.

181. If the court were to quash an Inspector's decision because of a new point of this kind, it would probably be necessary for the appeal process to be repeated in its entirety or in large part. At the very least, the same Inspector, or a new Inspector, would have to receive fresh submissions and prepare a new decision letter and evaluate the various policy and planning considerations all over again. The general principle is that new evidence and/or new submissions should not be entertained as a basis for quashing an Inspector's decision if this would mean an Inspector would have to make further findings of fact and/or reach a new planning judgment (see e.g. *R (Newsmith Stainless Limited) v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126 [15]).

182. As in civil proceedings more generally, resources for planning inquiries and hearings are finite and need to be distributed efficiently between all parties seeking to have planning issues resolved. There is therefore a strong public interest in the finality of such proceedings. Parties are generally expected to bring forward their whole case when a matter is heard and determined. No proper justification has been advanced by Redrow

for the court to exercise its discretion exceptionally to entertain a new point which could have been, but was not, raised before the Inspector.

Conclusion

183. I have rejected all of the grounds of challenge raised by Mead and Redrow. Both claims for judicial review must be dismissed. I express my gratitude to counsel and the parties' legal teams for the presentation of their cases and assistance.