Neutral Citation Number: [2020] EWCA Civ 1175

Case No: C1/2019/2149 and 2151

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PLANNING COURT IN THE ADMINISTRATIVE COURT
The Hon. Mr Justice Dove
CO/5073/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 September 2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BAKER
and
SIR STEPHEN RICHARDS

- -

Between :

PEEL INVESTMENTS (NORTH) LIMITED	**Appellant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT (1)	**Respondent**
SALFORD CITY COUNCIL (2)	

- -
- -

Rupert Warren QC and James Corbet Burcher (instructed by **Shoosmiths LLP**) for the **Appellant**
Richard Honey (instructed by **Government Legal Department**) for the **First Respondent**
Christopher Katkowski QC and Matthew Fraser (instructed by **Manchester City Council Legal Services**) for the **Second Respondent**

Hearing date: 1 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Thursday 3rd September 2020.

LORD JUSTICE BAKER:

1. These proceedings concern two applications for outline planning permission by the appellant for the construction of up to 600 and 165 homes respectively on land in West Salford known as the Worsley Greenway which lies within the area of Salford City Council.

2. The first application was refused by the Council in November 2013 and the second application was refused by the Council in July 2017. Appeals against the refusals were dismissed by the Secretary of State for Housing, Communities and Local Government in November 2018. The appellant brought a claim under s.288 of the Town and Country Planning Act 1990 to quash the Secretary of State's decision. On 2 August 2019, Dove J, sitting in the Planning Court, dismissed the appellant's claim. The appellant now appeals against that dismissal, permission to appeal having been granted by Lewison LJ on 16 December 2019.

3. The two issues arising on the appeal, as summarised by the appellant, are (1) the correct interpretation of the term "out-of-date" in paragraph 11d of the National Planning Policy Framework ("NPPF"), and (2) the proper application of policies contained within development plan documents which are time-expired and/or lack policy in respect of the strategic issue of housing supply.

Background

4. On 21 June 2006, the Council adopted the Salford Unitary Development Plan 2004-2016 ("SUDP"). The "Plan Strategy" included (in paragraph 2.1):

> "directing development to the most appropriate locations; encouraging new development, infrastructure and facilities where they are required; and protecting key environmental assets."

The aims of the Strategy included (under Aim 1) "to meet the city's housing needs" with "a particular emphasis on providing the type of accommodation and appropriate neighbourhood settings and facilities that will help to attract families to live in Salford" and (under Aim 6) "to protect and enhance natural and historic environmental assets".

5. Chapter 3 of the SUDP translated the Plan Strategy into a "Spatial Framework" which included an area known as "Urban Fringe and Countryside", which in turn included an area of 195 hectares within the Green Belt known as "the Worsley Greenway". Paragraph 3.14 provided:

> "the policies and proposals of the UDP are designed to secure the implementation of the vision and priorities set out in the Spatial Framework."

6. Within chapter 4, entitled "Strategic Policies", Policy ST2 "Housing Supply" set out the Council's proposal for housing land supply up to March 2016, stating:

> "an adequate supply of housing will be secured through the … achievement of an average annual rate of housing provision, net of clearance, of 530 dwellings per year during the period up to 2016."

7. In chapter 12, entitled "Environmental Protection and Improvement", Policy EN2 dealt with Worsley Greenway. The policy provided:

> "Development will not be permitted where it would fragment or detract from the openness and continuity of the Greenway, or would cause unacceptable harm to its character or its value as an amenity, wildlife, agricultural or open recreation resource."

The supporting text stated:

> "The Worsley Greenway is a strategically important 'green wedge' within the Worsley area …. The protection and enhancement of Worsley Greenway, in its entirety, is therefore of great strategic and local importance."

8. Within chapter 14, entitled "Recreation", Policy R4, headed "Key Recreation Areas", provided that planning permission would only be granted for development within, adjoining or directly affecting a key recreation area where it would be consistent with specified objectives, including *inter alia* the protection and enhancement of the existing and potential recreational use, and amenity, of the area and the protection of existing trees, woodland and other landscape features. The key recreation areas identified in the plan included the Worsley Greenway.

9. The effect of the Planning and Compulsory Purchase Act 2004 was that the policies of the SUDP expired in June 2009 unless saved by a direction under Schedule 8 of the Act. On 21 February 2009 the Secretary of State issued a direction under Schedule 8 saving various policies in the SUDP, including policies EN2 and R4 but not policy ST2. The latter policy has never been replaced by any other housing supply policy for the Council's area, although work on a new development plan document has been ongoing for a number of years.

10. On 9 April 2013, the appellant applied for outline planning permission for a development, later called Appeal A, for the construction within the Worsley Greenway of up to 600 dwellings, together with other facilities including a marina and other recreation provision and associated infrastructure and landscaping. On 14 November 2013, the application was refused by the Council on the grounds that:

> "the proposal will be contrary to the provision of saved policy EN2 of the SUDP in that the development would fragment the openness and continuity of the Greenway."

11. The appellant appealed against the decision. Following an inquiry by an inspector, the appeal was dismissed by the Secretary of State in March 2015. The appellant applied under s.288 of the Town and Country Planning Act 1990 to quash the decision and on 20 July 2016, the Secretary of State and the Council submitted to judgment on the application. The Secretary of State subsequently decided to reconvene an inquiry in respect of the appeal.

12. On 4 April 2017, the appellant submitted a second planning application (subsequently referred to as Appeal B) for a residential scheme for up to 165 dwellings with associated infrastructure and landscaping. In July 2017, the Council refused the application for permission stating *inter alia* that:

> "the proposal will be contrary to the provision of saved Policy EN2 of the SUDP in that the development would fragment the openness and continuity of the Worsley Greenway and would result in unacceptable harm to its character and its value as an amenity and open recreation resource. The proposal would be contrary to saved policy R4 of the SUDP in that the development would not result in the protection and enhancement of the existing and potential recreational use of the area, or the protection and improvement of the amenity of the area."

13. Appeals A and B were consolidated for determination at the same inquiry. A "Statement of Common Ground" between the appellant and the Council included an agreement that the Council did not have "an up-to-date policy on housing need" and that the SUDP did not contain any saved policies in respect of housing supply. It was further agreed, however, that the Council was able to demonstrate a mathematical housing land supply in excess of five years for the agreed period April 2017 to March 2022, although the supply consisted largely of apartments rather than houses and was principally concentrated in the centre of the city. It was further agreed that there was a demonstrable need for affordable housing within the Council's administrative area. It was the appellant's case that the agreed "mathematical" five-year housing supply did not comply with national planning policy on a "qualitative" basis in that the Council was unable to provide an adequate supply of affordable housing, or of housing suitable to meet the needs of families.

14. The inquiry took place before an inspector over a month in February/March 2018. On 11 July 2018, the inspector issued a report recommending that both appeals be dismissed. On 24 July 2018, the Secretary of State published a revised National Planning Policy Framework ("the 2018 NPPF"), replacing the earlier Framework published in March 2012 ("the 2012 NPPF"). On 12 November 2018, the Secretary of State issued his Decision Letter ("DL") dismissing the appeals, in accordance with the inspector's recommendations.

15. The appellant again applied under s.288 to quash the decision. On 11 February 2019, permission to apply was granted on five of the grounds advanced but refused on all other grounds. The appellant sought to renew the application for permission on three further grounds. The matter was listed for hearing before Dove J in May 2019. For reasons set out in a reserved judgment delivered on 2 August 2019, the judge dismissed the appellant's claim on the grounds for which permission had been granted and refused permission on the other grounds. On 23 August 2019, the appellant filed a notice of appeal under CPR 52.10 seeking permission to appeal to this court against the refusal of permission in respect of one of the other grounds ("ground 7"). On 27 August, the appellant filed a second notice of appeal under CPR 52.6 seeking permission to appeal against Dove J's judgment. On 16 December 2019, Lewison LJ granted permission to appeal.

The Law

16. When determining an application for planning permission, a decision-maker must have regard to the material provisions of the local development plan and any other material consideration: s.70 of the 1990 Act. S.38(6) of the 2004 Act provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be

made in accordance with the plan unless material considerations indicate otherwise."

17. When preparing the development plan, the local authority must comply with the statutory provisions under the 2004 Act. S.19 of that Act (amended in 2017) provides *inter alia*:

> "(1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.
>
> (1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole)."

Under section 17(7)(za) of the 2004 Act, the Secretary of State has power to make regulations in relation to the form and content of local development documents. Regulation 5(1)(a) of the Town and Country Planning (Local Planning) (England) Regulations 2012, headed "Local development documents", provides *inter alia* that the categories of "local development documents" include *inter alia*:

> "any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities which contain statements regarding … (i) the development and use of land which the local planning authority wish to encourage during any specified period…."

18. The Government's policy for planning in England is set out in the NPPF. The first edition was published in March 2012, the second in July 2018. The NPPF is "a statement of policy, not a statutory text, and must be read in that light" (per Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another* [2017] UKSC 37 para 25). But, like any statement of planning policy, the interpretation of the terms of the policy is a question of law for the court: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

19. Chapter 2 of the 2018 NPPF is entitled "Achieving sustainable development". Paragraph 7 provides:

> "The purpose of the planning system is to contribute to the achievement of sustainable development. At a very high level, the objective of sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs."

Paragraph 11 contains "the presumption in favour of sustainable development" and provides:

> "Plans and decisions should apply a presumption in favour of sustainable development.
>
> For **plan-making** this means that
>
> (a) plans should positively seek opportunities to meet the development needs of the area, and be sufficiently flexible to adapt to rapid change;

(b) strategic policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless

(i) the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area, or

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

For **decision-making** this means

(c) approving development proposals that accord with an up-to-date development plan without delay; or

(d) where there are no relevant development planning policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

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

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

A footnote, numbered 7, inserted after the word "out-of-date" in paragraph 11d provides *inter alia*:

"This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites …."

Section 3 of the Framework headed "Plan-making", includes, at paragraph 17:

"The development plan must include strategic policies to address each local planning authority's priorities for the development and use of land in its area."

Paragraph 20 provides:

"Strategic policies should set out an overall strategy for the pattern, scale and quality of development and make sufficient provision for

(a) housing (including affordable housing), employment, retail, leisure and other commercial development;

(b) infrastructure ….

(c) community facilities …. and

(d) conservation and enhancement of the natural, built and historic environment ….”

20. Section 13 of the 2018 NPPF is headed “Protecting Green Belt land”. Paragraph 133 provides:

> “The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.”

21. Annex 1 of the 2018 NPPF, headed “Implementation”, includes the following provisions under paragraph 212 to 213:

> “212. The policies in this Framework are material considerations which should be taken into account in dealing with applications from the day of its publication. Plans may also need to be revised to reflect policy changes which this replacement Framework has made. This should be progressed as quickly as possible, either through a partial revision or by preparing a new plan.
>
> 213. However, existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).”

22. In the 2012 edition of the NPPF, the presumption in favour of sustainable development was set out in paragraph 14. The corresponding provision to paragraph 11d in the 2018 edition provided that, for decision-taking, the presumption meant:

> “where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless
>
> > any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
> >
> > specific policies in this Framework indicate development should be restricted.”

The statement in footnote 7 to paragraph 11d of the 2018 NPPF was set out in Paragraph 49 of the 2012 NPPF:

> “Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.”

23. The provisions of that part of paragraph 14 of the 2012 NPPF which was subsequently replaced by paragraph 11d of the 2018 NPPF were considered by Lindblom J (as he

then was) in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government and another* [2014] EWHC 754 (Admin) at paragraphs 44 to 46:

> "44. In the context of decision-taking paragraph 14 identifies three possible shortcomings in the development plan, any one of which would require the authority to grant planning permission unless it is clear in the light of the policies of the NPPF that the benefits of doing so would be "significantly and demonstrably" outweighed by "any adverse impacts", or there are specific policies in the NPPF indicating that "development should be restricted". The three possible shortcomings are the absence of the plan, its silence, and its relevant policies having become out-of-date.
>
> 45. These are three distinct concepts. A development plan will be "absent" if none has been adopted for the relevant area and the relevant period. If there is such a plan, it may be "silent" because it lacks policy relevant to the project under consideration. And if the plan does have relevant policies these may have been overtaken by things that have happened since it was adopted, either on the ground or in some change in national policy, or for some other reason, so that they are now "out-of-date". Absence will be a matter of fact. Silence will be either a matter of fact or a matter of construction, or both. And the question of whether relevant policies are no longer up to date will be either a matter of fact or perhaps a matter of both fact and judgment.
>
> 46. All of this, one has to remember, sits within the statutory framework for the making of decisions on applications for planning permission, in which those decisions must be made in accordance with the development plan unless material considerations indicate otherwise. Government policy in the NPPF does not, and could not, modify that statutory framework, but operates within it – as paragraph 12 of the NPPF acknowledges. The Government has taken the opportunity in the NPPF to confirm its commitment to a system of development control decision-making that is "genuinely plan-led" (paragraph 17). But in any event, within the statutory framework, the status of policy in the NPPF, including the policy for decision-making in paragraph 14, is that of a material consideration outside the development plan. It is for the decision-maker to decide what weight should be given to the policy in paragraph 14 if it applies to the case in hand. Because it is government policy it is likely to command significant weight when it has to be taken into account. But the court will not intervene unless the weight given to it can be said to be unreasonable in the *Wednesbury* sense …"

24. In *Trustees of the Barker Mills Estates v Test Valley Borough Council* [2016] EWHC 3018 (Admin), Holgate J (at paragraph 105) agreed that the phrase "out-of-date" in the NPPF was concerned with whether relevant policies have been overtaken by events subsequent to the adoption of the plan and only involves matters of fact and/or judgment.

25. The interpretation of paragraph 14 of the 2012 NPPF was further considered by Lord Carnwath in *Hopkins Homes*. At paragraph 54 to 55 he observed:

> "54. The general effect is reasonably clear. In the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission, except where the benefits are 'significantly and demonstrably' outweighed by the adverse effects or where 'specific policies' indicate otherwise. (See also the helpful discussion by Lindblom J in *Bloor Homes* ….).
>
> 55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgment, unrelated of course to paragraph 49 which deals only with housing supply. This may in turn have an effect on other related policies, for example for transport. The pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgment, not dependent on issues of legal interpretation."

26. Later in his judgment in *Hopkins Homes*, when considering one of the specific appeals before the Court, Lord Carnwath made an observation at paragraph 63 on which the appellant in the appeal before us seeks to rely:

> "On any view, quite apart from paragraph 49, the current statutory development plan was out-of-date, in that its period extended only to 2011."

He then proceeded to decide, on the facts of that case, that the inspector had been entitled to conclude that the weight to be given to the specific policies under consideration in that case should be reduced to the extent that they reflected out-of-date housing requirements so that his final conclusion had properly reflected the language of the "tilted balance" in paragraph 14 of the 2012 NPPF.

27. We were referred to a number of other cases in which judges have made observations about the significance of a policy becoming "out-of-date".

28. In this Court, in *Gladman Developments Limited v Daventry District Council and SSCLG* [2016] EWCA Civ 1146, Sales LJ (as he then was) at paragraph 40 observed:

> "Since old policies of the kind illustrated by policies HS22 and HS24 in this case are part of the development plan, the starting point, for the purposes of decision-making, remains section 38(6) of the 2004 Act. This requires the decisions must be made in accordance with the development plan – and therefore, in accordance with those policies and any others contained in the plan – unless material considerations indicate otherwise. The mere age of a policy does not cause it to cease to be part of the development plan …. The fact that a particular development plan policy may be chronologically old is, in itself, irrelevant for the purposes of assessing its consistency with policies in the NPPF…."

29. Very recently in this court, in *Oxton Farm and another v D Noble Ltd* [2020] EWCA Civ 805, my Lord, Lewison LJ, made the following observations under the heading "When is the tilted balance engaged?"

> "31. Paragraph 11d of the NPPF provides that the tilted balance is engaged where (a) there are no relevant development planning policies, or (b) the policies which are most important for determining the application are out-of-date. The lack of a five year supply of housing land is a policy that is deemed to be out-of-date by virtue of footnote 7.
>
> 32. It is common ground that whether the tilted balance is engaged because of a shortfall in the supply of deliverable sites for housing is a binary question, to be answered yes or no. Either there is a five year supply of housing land, or there is not. If there is a five year supply then the tilted balance is not engaged on that basis ….
>
> 33. But the lack of a five year supply of housing land is not exhaustive of policies that may be out-of-date. Other policies which bear on the decision may also be out-of-date, with the consequence that the tilted balance is triggered on a different basis: *Hopkins Homes* …. A policy may be out-of-date because of a change in national policy or because of things that have happened on the ground, or for some other reasons: *Bloor Homes* …. Whether a policy is out-of-date is a matter of planning judgment: *Hopkins Homes* at [55]."

30. At first instance, in *Paul Newman New Homes Ltd v SSHCLG* [2019] EWHC 2367 (Admin), Sir Duncan Ouseley sitting as a High Court judge specifically considered the phrase "out-of-date" in paragraph 11d of the 2018 NPPF. At paragraph 34, he concluded:

> "In my judgment, the key part of the second trigger, the phrase 'where the policies which are most important for determining the application are out-of-date', is reasonably clear. A policy is not out-of-date simply because it is in a time-expired plan …. If the 2018 Framework had intended to treat as out-of-date all saved but time-expired policies, it would not have used the phrase 'out-of-date', which has different or wider connotations, and would have used instead the language of time-expired policies or policies in a time-expired plan. The inspector's comment in [the decision letter] is apposite in that context. Although the earlier jurisprudence in *Bloor Homes* … and *Hopkins Homes* … related to that same phrase in the 2012 Framework, I see no reason to discount it here where its role is not materially different."

The inspector's report and the Secretary of State's decision letter

31. In his report, the inspector at paragraph 29 to 32 identified the relevant development plan policies, including EN2 and R4. For the purposes of this appeal, the relevant section of his report is paragraph 366 to 372:

> "366. The appellant argues that the development plan is out-of-date for a number of reasons, specifically Policy EN 2. The SUDP was adopted in 2006 with a plan period expiring in 2016. It can certainly be said that it was produced in a different policy context and in light of different evidence and

circumstances to those existing today. However, this does not necessarily mean that the plan or any individual policy should be considered out-of-date as it may very well continue to be effective in delivering its original objectives and those relevant today. The fact that a policy is saved means that it remains part of the development plan and must be applied unless material considerations indicate otherwise. The question is not one of time but consistency with the Framework and, ultimately, results on the ground.

367. Policy EN 2 protects the Greenway for reasons that have already been identified. There is no reason to think that those reasons are any less relevant or important than they were within the plan period. Paragraph 157 of the Framework positively promotes that Local Plans should, amongst other things, identify land where development would be inappropriate, for instance because of its environmental or historic significance. That is exactly what Policy EN 2 seeks to do and there is nothing inconsistent with the Framework in that approach, even if the development plan does not currently fulfil all other requirements of the Framework. Whilst the first part of the policy seeks to prevent development in absolute terms this is unsurprising given its objective to protect openness and continuity and it does not alter the need to undertake a statutory balancing exercise against material considerations.

368. It was argued that the Greenway was only protected because the land was not needed to meet the housing requirement for the area at the time and that there was a greater emphasis on the use of, and availability of, brownfield land at that time. There is simply no evidence to support this proposition. To the contrary, the policy and reasoned justification are quite clear about the reasons for protection and these are not diminished by a greater need for housing.

369. The fact that part of the Greenway might be allocated for development in the emerging SLP is of little relevance given the size and peripheral location of the Lumber Lane site. Furthermore, the emerging SLP is yet to be tested at Examination, is subject to objections and might yet change. The document itself states that its policies currently attract very limited weight. In any case, there is nothing to suggest that the appeal sites might be allocated. The draft SLP in fact anticipates increased protection of the area. These are squarely matters for the Local Plan Examination. Any potential release of the Greenway envisaged as part of the Core Strategy is similarly of little relevance given that the CS was withdrawn many years ago. In addition, the fact that there is a recognised need to release greenfield land and/or Green Belt to meet future housing needs in the draft SLP and GMSF demonstrates an emerging strategy to deal with the issue. For the same reasons I have set out above, such recognition attracts little weight in the context of these proposals.

370. For all of these reasons I do not consider that Policy EN 2 is in any way out-of-date. It is an adopted development plan policy which has statutory force. I have found it to be consistent with the Framework and I attach the identified fundamental conflict with the policy full and substantial weight.

371. It is common ground that the development plan no longer contains any policies relating to the need for or distribution of housing in the area. At the previous inquiry, the Council accepted that these policies were out-of-date and this position of common ground between the parties was adopted by the Inspector and the SoS. The Council now argues, having reconsidered its position, that this cannot be so as the policies are not saved; they do not exist and therefore cannot be out-of-date. DT accepted in xx that the policies for the need and distribution of housing could not be out-of-date because they simply do not exist in the development plan.

372. In this case the development plan contains no policies for the need for and distribution of housing and the Council is not seeking to apply any such policies. Policy EN 2 relates specifically to the appeal sites in question and is unambiguous in restricting development of the type proposed. In these circumstances, it cannot be said that the development plan is absent, silent or relevant policies are out-of-date. Having regard to the cases of ***Bloor*** and ***Barker Mill Estates v SSCLG*** [2017] PTSR 408, there remains a plan in place and so it is not absent; there remains a policy for the land in question which is sufficient to establish that the developments are unacceptable in principle and so the plan is not silent; and given the forgoing, the fact that there are no policies for the need and distribution of housing bears little on the outcome where the development plan is continuing to deliver an appropriate quantity of housing, the relevant policies for these appeals are not out-of-date."

32. The inspector went on to consider the question of housing land supply.:

"373. There is clearly a higher housing need now than there was at the time the SUDP was adopted. Nevertheless, the Council can demonstrate a sufficient supply of housing to meet the latest need over the coming years. It is common ground that the Council can demonstrate a numerical five year housing land supply …."

He added, however,

"375. That is not to say that an identified deficiency in particular types of housing is not a material consideration. The appellant produced three housing-related witnesses and I heard a great deal about the need for family and aspirational housing in the area, the acute lack of affordable housing and the Council's poor record in meeting these needs, particularly in Worsley. It is also abundantly clear from the detailed evidence that the five year housing land supply will not address these needs, being largely concentrated in the city centre, given the very high proportion of apartments as opposed to houses and the limited number of affordable units anticipated in relation to the identified need ….

…

377. The Council's current housing land supply position represents a marked improvement since the time of the previous inquiry, when not even half of the required supply existed. This being the case, it cannot be said that

Policy EN 2 is impeding delivery or that the development plan as a whole is failing to deliver the necessary number of residential units.

378. Whilst this is so, the Council is clearly not meeting the needs of the housing market as a whole and there are significant deficiencies in the number of larger/aspirational family houses and wider issues in the area in respect of homelessness and affordability….

…

382. All of this is a material consideration to be weighed in the overall planning balance …."

33. The inspector's conclusion was expressed in these terms:

"414. Although there is compliance with most development plan policies in these cases, there is a clear and fundamental conflict with the development plan in respect of Policies EN 2 and R 4, policies which I do not consider to be out-of-date or inconsistent with the Framework. In these circumstances, the tilted balance of Framework paragraph 14 does not apply. I attach substantial weight to the harm that arises from conflict with these policies, which are fundamental to the plan taken as a whole.

415. There would be some benefits from the proposals, including a contribution towards meeting recognised needs for different types of housing, specifically larger family and affordable housing, though the contribution to the identified need would be relatively small. There would also be some benefit from the provision of school land, a marina, certain open space typologies, net gains in biodiversity, economic benefits, improved accessibility/sustainable transport provision, highway improvements and flood risk reduction. However, even cumulatively, the benefits or other material considerations to which I have been referred would not outweigh the harm that I have found or indicate a decision other than in accordance with the development plan."

34. He therefore recommended that the appeals be dismissed and planning permission refused in both cases. He added:

"417. If the Secretary of State disagrees with my conclusion that the tilted balance is not engaged for whatever reason, I nevertheless recommend that the appeals be dismissed and planning permission be refused in both cases. This is because the adverse impacts of the developments would be such as to significantly and demonstrably outweigh the benefits."

35. After completion of the inspector's report, but before it was placed in the public domain, the Secretary of State wrote to the appellant and the Council seeking submissions in relation to the effect of the publication of the 2018 edition of the NPPF on the cases made by the parties at the inquiry. Both the appellant and the Council responded to this request. For present purposes, it is relevant only to note that the appellant contended that there was no aspect of the new Framework to suggest that the SUDP or the provisions of policy EN2 should be afforded anything other than

very little weight; that the new Framework reaffirmed the importance of fully meeting housing needs; that it specifically required decisions to take account of the identified need for different types of houses; and that nothing in the new framework changed the importance of more family and affordable homes to the future regeneration, economic growth and sustainability of the city.

36. In the decision letter published on 12 November 2018, the Secretary of State indicated that he agreed with the inspector's conclusions and recommendations. Although he qualified this with the words "except where stated" there were in fact no exceptions identified in the letter. On the main issues, under the heading "Development plan", the letter stated:

> "15. The Secretary of State has gone on to consider whether policy EN 2 of the SUDP is out-of-date. For the reasons given at IR366-367, the Secretary of State agrees that the policy remains part of the development plan, and is not inconsistent with the Framework. For the reasons given by the Inspector at IR368-369, he concludes that the recognition of the need to release greenfield land and/or Green Belt to meet future housing needs attracts little weight in the context of these proposals.
>
> 16. For the reasons given at IR371-372, the Secretary of State agrees that even in the absence of policies for the need and distribution of housing, there remains a plan in place, and a policy for the land in question which is sufficient to establish that the developments are unacceptable in principle, and so the plan is in line the paragraph 11(d) of the Framework. He concludes, in agreement with the Inspector at IR370, that Policy EN 2 is not out-of-date."

37. Noting that the Council was able to demonstrate a housing land supply of over 13 years, the Secretary of State concluded (at paragraph 25 of the decision letter) that policy EN2 was not impeding delivery, nor was the development plan as a whole failing to deliver the necessary number of houses. He agreed that, in favour of the appeals, there were deficiencies in the number of large or aspirational family homes, and wider issues with homelessness and affordability. On the other hand, he took into account the impact on the character and appearance of the Greenway and afforded those "harms", and the resulting conflict with development plan policy, substantial weight. He therefore concluded that the appeal should be dismissed and planning permission refused.

The judgment of the Planning Court

38. In support of the application before the judge, the appellant advanced the five grounds in respect of which permission had been granted. First, it was argued that EN2 was a constituent policy within the development plan document which, as a whole, had passed its expiry date and was therefore automatically out-of-date so that the "tilted balance" should apply. In support of this submission, the appellant relied on the statement of Lord Carnwath in paragraph 63 of his judgment in ***Hopkins Homes***, that "on any view" the development plan under consideration in that case was "out-of-date, in that its period extended only to 2011". In rejecting this argument, the judge observed, at paragraph 58 of his judgment:

> "… the notion of a policy being out-of-date is one which exists within the structure of the Framework and which exists for particular purposes, namely the question of whether or not the tilted balance should apply and the weight which should be attached to the policy in the decision-taking process. In my judgment it is critical to note that there is nothing in the relevant provisions of the Framework to suggest that the expiration of a plan period requires that its policies should be treated as out-of-date. Indeed, to the contrary, the provisions of paragraph 213 specifically contemplate that older policies which are consistent with the Framework should be afforded continuing weight. Furthermore, I would entirely accept and adopt the formulation of the approach to the question of whether a policy is out-of-date given by Lindblom J in ***Bloor Homes***. It will be a question of fact or in some cases fact and judgment. The expiration of the end date of the plan may be relevant to that exercise but it is not dispositive of it, nor did Lindblom J suggest that was the case. In so far as reliance is placed by the Claimant on the observation of Lord Carnwath in paragraph 63 of ***Hopkins Homes***, I accept the submissions made by the First and Second Defendants that it is an obiter remark which does not lay down any legal principle, or provide a gloss on Lindblom J's approach. It is important to note that Lord Carnwath had endorsed Lindblom J's views at an earlier part of the judgment and it would be inconsistent with that endorsement to read the sentence in paragraph 63 as a further gloss on Lindblom J's conclusions. In short, this sentence from the judgment is quite incapable of bearing the forensic weight which the Claimant seeks to ascribe to it. Lord Carnwath was not identifying a legal principle that when a plan's end date has been passed its policies are out-of-date in the terms of the policy of the Framework."

39. Secondly, the appellant argued that policy EN2 has been significantly overtaken by events since adoption, having been based on a plan grounded in development needs which have long been superseded. The judge observed it was "perfectly clear" from paragraph 366 of the inspector's report that he was "very clearly mindful" of the contentions that policy EN2 had been "shorn of its strategic policy context". It was equally clear from paragraphs 371-2 that he was alive to the fact that the development plan no longer contained policies for the needs and distribution of housing since those policies have not been saved in 2009. The judge held that the inspector had been entitled to conclude that policy EN2 "continues to be effective in delivering its original objectives", adding that this was a planning judgment which he was entitled to reach and portrayed no error of law in the approach as to whether or not the policy was out-of-date.

40. The judge observed (at paragraph 66) that the conclusions in respect of these first two grounds of appeal were

> "not especially surprising. It is very far from uncommon to have policies in a plan related to environmental protection whose objectives will, and are intended to, continue well beyond the end of a plan period. Whilst, of course, when a local development document is formulated it is formulated as a whole, and is intended to present as a coherent suite of policies, that objective is not inconsistent with the inclusion of some environmental policies being intended and designed to operate on a longer time scale than that which may be contemplated by the plan period. The kind of policies to which this might apply are policies such as Green Belt

> (one of the characteristics of which is its "permanence"), or policies pertaining to environmental assets such as those relating to heritage assets or internationally protected and irreplaceable habitats. It would be both counter-intuitive, and contrary to long standing provisions of national policy, if policies in a development plan protecting these interests were deemed out-of-date at the expiration of a plan period."

41. Thirdly, it was argued that the Secretary of State had failed properly to interpret paragraphs 11d and 213 by equating the task of identifying whether the policy was out-of-date with an assessment of consistency with the Framework, thereby leaving out of account other relevant factors. In rejecting this argument, the judge stated (at paragraph 65):

> "in my view the observation of the Inspector and the question of whether or not the policy was "not one of time but consistency with the Framework" was one which was a fair reflection of the requirements both of paragraph 213 of the Framework and Lindblom J in ***Bloor Homes***. As the Inspector observes in the preceding sentences, a policy may continue to be effective in delivering its original objectives and, moreover, may have been saved as the present policy was, and thus remain part of the development plan to be applied in accordance with the statutory Framework. Thus, the exercise required by paragraph 213 of the Framework and the ***Bloor Homes*** test is not one which is dictated simply by the passage of time, but rather an assessment of consistency of the Framework, and the factual circumstances in which the policy is being applied including, amongst other things, what the Inspector characterised as "results on the ground". In the particular circumstances of this case that was, as he reflected in paragraph 372 of the report, whether or not an appropriate quantity of housing was continuing to be delivered through the application of the remaining elements of the development plan which had not been saved. He concluded that in the light of the findings in relation to the five year supply of deliverable housing that it was."

He returned to this point at paragraph 68:

> "the difficulty with the Claimant's submission in relation to ground 3 is that it seeks to take what the First Defendant said in paragraph 15 of the decision letter in isolation. This paragraph needs to be read along with the whole of the decision letter including, in particular, paragraph 16. Both paragraphs 15 and 16 cross-refer to the relevant paragraphs in the Inspector's report. In my view it is clear from those paragraphs to which the First Defendant cross-refers that the appropriate interpretation of the Framework in relation to whether or not a policy is out-of-date has been applied. The assessment of the Inspector, adopted and acknowledged by the First Defendant, addressed both the issue of consistency with the Framework (and therefore the policy's continuing validity as a proper reflection of national planning policy) but also whether or not, as the Claimant contended, the policy had been overtaken by the demise of the policies relating to the need and distribution of housing and the current evidence in relation to housing need and supply. Both the Inspector's conclusions and paragraphs 15 and 16 of the decision letter deal directly with the question of whether or not the policy is consistent with the Framework and also whether it has been overtaken by events, and in particular the absence of policies for the need and distribution of

housing and the current position in relation to the evidence of housing need and supply."

42. Fourth, it was said that the Secretary of State had failed to identify any policy provisions within the 2018 NPPF with which policy EN2 was actually in conformity so as to justify the conclusion that it was not out-of-date. In rejecting this ground of appeal, the judge observed that the appellant had not identified any material difference between the substance of the two editions of the Framework. The only feature of the 2018 NPPF on which the appellant had relied were those policies relating to the qualitative features of the available supply of housing. The judge observed that this element of national policy in relation to qualitative requirements was debated before the inspector in the context of the 2012 NPPF. Accordingly, the Secretary of State had been entitled to rely on the reasons provided by the inspector.

43. The fifth ground of challenge before the Planning Court was that the decision letter failed to recognise that policy EN2 was in fact inconsistent with the housing policies of the Framework which, in particular, addressed the need for a balanced supply of housing including family housing and affordable housing within the available supply. The judge observed that it had been an important part of the appellant's case before the inspector that significant weight should be attached to the Council's failure to secure a balanced supply of housing in qualitative terms and an adequate supply of affordable homes. The absence of policies concerning such matters was clearly before the inspector and taken into account in his assessment of whether or not policy EN2 was out-of-date. The Secretary of State had therefore been entitled to refer to the inspector's detailed analysis in reaching a conclusion.

44. In addition to pursuing the grounds in respect of which permission had been granted, the appellant also renewed its application for permission to apply on grounds which had been refused on paper. For the purposes of this judgment, it is only necessary to consider the argument in respect of the one ground ("ground 7") which is pursued in this Court. It was contended that the inspector and the Secretary of State failed to identify that policy EN2 was in fact "impeding delivery". In refusing permission, the judge observed that the references in the inspector's report and in the decision letter to the policy "not impeding delivery" were references to the quantitative housing supply which the Council was able to demonstrate, namely over 13 years.

Submissions to this Court

45. In presenting the appeal to this Court on behalf of appellant, Mr Rupert Warren QC leading Mr James Corbet Burcher, advanced four grounds of appeal.

46. First, it was contended that the judge erred in law in determining that a development plan document having exceeded its end-date does not render that document and its constituent policies out-of-date for the purposes of paragraph 11d of the NPPF. In particular, the judge wrongly identified the dicta of Lord Carnwath in paragraph 63 of *Hopkins Homes* as obiter. It was submitted that Lord Carnwath was correct in saying that a plan which is past its expiry date is, in every case, a plan that is out-of-date. This is the correct reflection of the NPPF, construed as a whole, and the legislative framework, in particular regulation 5(1)(a)(i) of the 2012 Regulations.

47. Secondly, it was submitted that a plan without strategic policies such as policies for housing supply should be regarded as out-of-date for the purposes of paragraph 11d and the tilted balance. Section 19(1B) and (1C) of the 2004 Act require a development plan document to have strategic policies, and paragraphs 17 and 20 of the NPPF specify what the strategic policies should encompass. The judge therefore erred in law in determining that the fact that the development plan document contained no strategic policies in respect of housing did not render it out-of-date.

48. The appellant relied on Lord Carnwath's observation at paragraph 54 of ***Hopkins Homes***:

> "in the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission."

The appellant submitted that policy EN2 was inextricably linked to the policies that had not been saved. It is impossible to treat such a policy as freestanding. Shorn of the policies that were not saved, EN2 is out-of-date. A plan that contained no policy covering housing supply could not be an up-to-date development plan. Policy EN2 had plainly been overtaken by events because the circumstances in the protected area had radically changed.

49. The appellant also challenged the judge's observation at paragraph 66 that it would be "counter-intuitive and contrary to long-standing provisions of national policy" for policies in a development plan relating to environmental protection to be deemed out-of-date at the expiration of the plan period. It was pointed out that even a Green Belt designation can be out-of-date.

50. In its third ground of appeal, the appellant asserted that the judge erred in law in concluding that the Secretary of State correctly interpreted paragraph 11d by reference to paragraph 213 of the NPPF. At paragraph 15 of the decision letter, he erroneously equated the task of identification of whether a policy was out-of-date as solely covered by an assessment of consistency under paragraph 213. As result, he incorrectly interpreted his role for the purposes of paragraph 11d as limited to carrying out an assessment of consistency. Mr Warren submitted that, on the judge's interpretation, paragraph 213 was being made to do more work than it actually does. It is intended merely to relate to the weight to be attached to existing policies when the Framework comes into effect. It does not deal with policies that are "survivors" from out-of-date plans.

51. Although the judge at paragraph 68 of the judgment stated that paragraph 15 of the decision letter must be read alongside paragraph 16 and the inspector's conclusions, the Secretary of State's findings at paragraph 15 were premised solely upon the plan being in force and consistent. It was submitted that he therefore applied too narrow an approach when determining whether the policy was out-of-date. Furthermore, the judge wrongly referred at paragraph 68 to "the current position in relation to the evidence of housing need and supply". The fact that certain events are occurring cannot on a correct construction of the NPPF render a policy up-to-date, or protect it from being out-of-date. At best, such events are capable of being a material consideration in favour of a grant or refusal of permission, but only in the context of the inspector having correctly identified that paragraph 11d and the "tilted balance" are engaged. Equally, the housing supply figure was not capable of determining

whether policy EN2 and the plan as a whole were out-of-date. That factor can only be considered in the overall balance having first identified that paragraph 11d was engaged.

52. In the fourth ground of appeal, reiterating "ground 7" before the Planning Court, the appellant asserted that the judge erred in basing his decision on the inspector's erroneous and inconsistent findings as to the impact of policy EN2 on the provision of housing. It was submitted that, in paragraph 25 of the decision letter, the Secretary of State wrongly followed the inspector in paragraph 377 of his report in stating that policy EN2 was "not impeding delivery". That statement in the decision letter was, however, expressly placed in the alternative to "to deliver the necessary number of houses needed". The appellant submitted that this amounted to a statement that the policy was not restricting delivery of houses of any type. This was factually wrong. Neither the Secretary of State nor the inspector conducted any assessment of the specific effect of the policy restricting the supply of houses of the required type. The appellant's case was that the specific geographical nature of policy EN2 meant that this was one of the only locations in the area in which to provide housing of the required type. This was therefore an important consideration when determining whether the policy was out-of-date for the purposes of paragraph 11d.

53. On behalf of the Secretary of State, Mr Richard Honey relied on the proposition, emphasised in a number of authorities, including *Hopkins Homes*, that the NPPF is a statement of policy not a statutory text. It does not have the force of statute and should not be treated as if it did. It does not have the same status in the statutory scheme as the development plan. As a result, the duty under s.38(6) of the 2004 Act is not displaced or modified by the Framework policy. The presumption in favour of sustainable development in paragraph 11 of the NPPF is not intended to alter the statutory presumption in favour of the development plan. Instead, paragraph 11d is intended to add an additional factor into the s.38(6) balance in particular circumstances, including "where the policies which are most important for determining the application are out-of-date".

54. Mr Honey submitted that the correct approach as to whether a policy is out-of-date is as expressed by Lindblom J in *Bloor Homes*, namely whether the policy has been overtaken by events that have occurred since it was adopted, including a change of national policy. It is therefore a question related to the substance of the policy and not merely a function of time passing. The appropriate way to consider whether a policy has been overtaken by a change in national policy is to consider, in line with paragraph 213, the policy's degree of consistency with the NPPF.

55. The terms of paragraph 11d demonstrate that it concerns *policies* which are out-of-date, not *plans*. Mr Honey submitted that the concept of a whole plan being out-of-date does not feature in the NPPF at all. There is nothing in the Framework requiring a policy to be treated as out-of-date for the purposes of paragraph 11d simply because the plan period has expired. The appellant's argument that, after the end of the plan period, all policies in the plan must be regarded as out-of-date is contrary to this Court's decision in *Gladman v Daventry* and to the decision of Sir Duncan Ouseley in *Paul Newman New Homes*.

56. Mr Honey pointed out that most policies will not be set by reference to a period of time. Instead, they will continue to be relevant when the plan period has passed

because the interest to which they relate is not tied to a particular period. It was submitted that the judge was right to observe, in paragraph 66 of his judgment, that it was very far from uncommon to have policies intended to continue well beyond the end of the plan period.

57. The first ground of appeal rests primarily on the single sentence in paragraph 63 of Lord Carnwath's judgment in ***Hopkins Homes***. Mr Honey submitted that the sentence does not have the effect of establishing a point of principle about the interpretation of paragraph 11d, and made a number of points in support of this submission. First, the comment was made about the plan being out-of-date in a general sense, not in terms of the presumption in favour of sustainable development in the NPPF. Secondly, the comment was *obiter* as it was not part of the Court's reasoning. Thirdly, a blanket approach to outdatedness based on the plan period would be incompatible with the more sophisticated approach set out by Lindblom J in ***Bloor Homes*** in a passage described by Lord Carnwath in ***Hopkins Homes*** as "helpful". Fourth, the changes in the language used to describe the presumption of sustainable development in the 2018 NPPF, which occurred after the Supreme Court's decision in the ***Hopkins Homes*** case - replacing the reference to "relevant" policies with "policies which are most important for determining the application" – makes it even clearer that the focus is on specific policies as opposed to the plan. Finally, it was submitted that a single sentence in a judgment should not be regarded as establishing any point of legal principle. It is, as the judge put it, incapable of bearing the forensic weight which the appellant seeks to ascribe to it.

58. With regard to the second ground, Mr Honey submitted that it would be perverse to determine whether the policies were out-of-date by asking whether the whole plan would retrospectively pass the current statutory and policy tests for the adoption of a new plan. Section 19 of the 2004 Act is headed "preparation of local development documents" and contains provisions governing that process. The subsections cited by the appellant – S.19(1B) and (1C) – were inserted by statute in 2017 and applied to the preparation of plans from 2018 onwards. The policy provisions on which the appellant relies in chapter 3 of the 2018 NPPF, headed "Plan-making", including paragraphs 17 and 20, apply to the making of new plans after the introduction of the NPPF. Mr Honey submitted that it would undermine the plan-led system if implementation of a new framework policy about adoption of plans automatically rendered pre-existing plans out-of-date.

59. In this particular case, the Secretary of State had decided in 2009 to save 104 out of 125 policies in the SUDP, including 13 of the 17 strategic policies, one of which was a strategic housing policy on sustainable urban neighbourhoods. It was submitted that the retained policies reflected the Secretary of State's view as to what policies the SUDP should contain to provide an appropriate planning framework.

60. In respect of the third ground of appeal, Mr Honey submitted that considering consistency pursuant to paragraph 213 of the NPPF was properly part of the overall consideration of whether policy EN2 was out-of-date, in accordance with the approach outlined in ***Bloor Homes*** of considering whether a policy had been overtaken by changes in events, including national policy. In any event, it was wrong to contend that the Secretary of State equated the task of identifying whether a policy was out-of-date as merely relating to consideration of consistency. Paragraphs 366 to 372 of the inspector's report, which were endorsed in paragraphs 15 and 16 of the

decision letter, referred to a wide range of considerations, all of which were taken into account.

61. As for the fourth ground of appeal, Mr Honey pointed out that, in paragraph 25 of the decision letter, the Secretary of State concluded that neither policy EN2 nor the development plan as a whole was impeding housing delivery. Paragraph 25 was addressing the quantity of housing, as opposed to the qualitative points which were addressed and taken into account separately. There was nothing inconsistent in the inspector finding that the numbers of houses being built was exceeding the five-year supply whilst noting, and taking into consideration, deficiencies in the quality of the houses being constructed. It was submitted that the inspector was entitled to conclude that the policy was not impeding the delivery of homes, given that the Council was comfortably meeting its five-year housing land supply. This was a matter for planning judgment for the inspector and, in turn, the Secretary of State.

62. In oral submissions, Mr Honey added that the appeal was academic because the inspector had indicated at the conclusion of his report, which was accepted in its entirety by the Secretary of State, that, even if the tilted balance was applied, he would nevertheless recommend that the appeals be dismissed and planning permission be refused on the grounds that the adverse impacts of the developments would be such as to significantly and demonstrably outweigh the benefits.

63. The arguments put forward on behalf of the Secretary of State were substantially reiterated by Mr Christopher Katkowski QC and Mr Matthew Fraser on behalf of the Council. They stressed that the obligation imposed on the decision-maker by paragraph 11d of the 2018 NPPF is to ascertain whether a particular set of policies – those which are "most important for determining the application" – are out-of-date. That is a policy-specific enquiry, rather than one which can be undertaken simply by checking whether the development plan as a whole has gone past the specified plan period. The observation of Lord Carnwath at paragraph 63 of his judgment in ***Hopkins Homes*** was not central to the decision on the facts in that case in which the Supreme Court did not rely on the plan period having expired as part of its reasoning for the policies being out-of-date. The appellant's arguments, in particular the first and second grounds of appeal, overcomplicate and overanalyse what are simply a series of planning judgments to be made when applying paragraph 11d. The terms of policy EN2, and the reasoned justification for the policy in the SUDP, demonstrate that it is intended to go beyond the plan period.

Conclusion

64. In my judgment, the arguments advanced on behalf of the Secretary of State and the Council are plainly correct.

65. There is nothing in paragraph 11d of the 2018 NPPF, or its predecessor paragraph 14 of the 2012 Framework, to suggest that the expiry of the period of the plan automatically renders the policies in the plan out-of-date. I agree with Sir Duncan Ouseley's observations in ***Paul Newman New Homes*** that a policy is not out-of-date simply because it is in a time-expired plan and that, if the Framework had intended to treat as out-of-date all saved but time-expired policies, it would not have used the phrase "out-of-date" but rather the language of time-expired policies or policies in a

time-expired plan. As a matter of construction of the terms of the NPPF, the appellant's argument on ground one is unsustainable.

66. I endorse and adopt the careful and precise analysis of paragraph 14 of the 2012 NPPF carried out by Lindblom J in ***Bloor Homes***. His analysis plainly applies to the revised terms of the presumption in favour of sustainable development in paragraph 11d of the 2018 Framework. If the policies which are most important for determining the planning application have been overtaken by things that have happened since the plan was adopted, either on the ground or through a change in national policy, or for some other reason, so that they are now out-of-date, the decision-makers must apply the tilted balance expressed in the presumption in favour of sustainable development.

67. The appellant's case on the first ground of appeal rests almost exclusively on a single sentence in paragraph 63 of Lord Carnwath's judgment in the ***Hopkins Homes*** case cited at paragraph 26 above. I agree with Dove J that it was an *obiter* remark which does not lay down any legal principle and which is quite incapable of bearing the forensic weight which the appellant seeks to ascribe to it. I do not accept the appellant's submission that the contention that the policies in a plan which is past its expiry date are in every case out-of-date is a correct reflection either of the NPPF as a whole or of regulation 5(1)(a)(i).

68. With regard to the second ground of appeal, I do not accept the appellant's submission that a plan without strategic housing policies is automatically out-of-date for the purposes of paragraph 11d so as to engage the tilted balance. The Secretary of State decided in 2009 to save a significant number of the policies in the SUDP, including the majority of the strategic policies. It is, therefore, incorrect to characterise policy EN2 as a "freestanding" policy but rather one of a hundred and four policies in the SUDP saved by the Secretary of State. Furthermore, it is obvious that many policies will not expire with the plan but, rather, will survive beyond the plan period. The policy under consideration here, which addresses environmental protection, clearly has a life beyond the expiry of the plan. I agree with the judge's observation at paragraph 66 of his judgment that although a local development document is intended to present as a coherent suite of policies, that objective is not inconsistent with the inclusion of some environmental policies being intended and designed to operate on a longer time scale than that which may be contemplated by the plan period. Paragraph 133 of the 2018 NPPF describes the "fundamental aim" of Green Belt policy as being "to prevent urban sprawl by keeping land permanently open", adding that "the essential characteristics of Green Belts are their openness and their permanence". This characterisation of Green Belt policy in the NPPF is wholly inconsistent with the notion that environmental policies lapse automatically when the plan period comes to an end or when there are no strategic housing policies in the plan. The provisions in s.19(1B) and (1C) of the 2004 Act and paragraphs 17 and 20 of the 2018 NPPF do not, in my judgment, provide support for the appellant's case on the second ground of appeal. They relate to the preparation of future plans, not the question whether existing policies are out-of-date.

69. Turning to the third ground of appeal, the suggestion that the Secretary of State in this case approached the question whether the policy was out-of-date solely by reference to its consistency with the NPPF overlooks the fact that the inspector took into account (at paragraphs 366 to 372 of his report) a wide range of factors, including those raised on behalf of the appellant. His analysis was accepted by the Secretary of

State at paragraphs 15 and 16 of the decision letter. As Dove J noted at paragraph 68 of his judgment, the assessment of the inspector, adopted and acknowledged by the Secretary of State, addressed the issue of consistency with the Framework and the question raised by the appellant whether the policy had been overtaken by the demise of the policies relating to housing supply, together with the current evidence in relation to housing need.

70. As for the fourth ground of appeal, the reference to "not impeding delivery" is manifestly a reference to the issue of the number of houses being built to ensure a five-year supply, in respect of which there had been, as the inspector observed at paragraph 377 of his report, a marked improvement. The inspector and the Secretary of State were plainly aware of, and took into account, the separate point that the Council was not meeting the needs for certain types of housing (see paragraph 378 of the inspector's report). As Mr Honey submitted, there was nothing inconsistent in the inspector finding that the numbers of houses being built was exceeding the five-year supply whilst noting, and taking into consideration, deficiencies in the quality of the houses being constructed.

71. It seems to me that the key to interpreting paragraph 11d lies not in paragraph 63 of Lord Carnwath's judgment in *Hopkins Homes* but, rather, in paragraph 55, where he observed that, whether a policy becomes out-of-date and, if so, with what consequences are matters of pure planning judgment, not dependent on issues of legal interpretation.

72. For these reasons, I conclude that there was no error of law in the judgment at first instance. I would dismiss these appeals.

SIR STEPHEN RICHARDS

73. I agree.

LORD JUSTICE LEWISON

74. I also agree.