Case No: CO/4348/2015

Neutral Citation Number: [2016] EWHC 592 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil and Family Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 16 March 2016

Before:

THE HON MR JUSTICE COULSON

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Between:

Wychavon District Council	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**Defendant**
- and -	
Crown House Developments Ltd	**Interested Party**

- -
- -

Sarah Clover (instructed by **Legal Services, Wychavon DC**) for the **Claimant**
The Defendant did not appear and was not represented
Jeremy Cahill QC and Thea Osmund-Smith
(instructed by **Harrison Clark Rickerbys**) for the **Interested Party**

Hearing Date: 16 March 2016

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Judgment

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. Pursuant to section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"), the claimant seeks to challenge the decision of a planning inspector dated 4 August 2015 by which the inspector allowed the appeal of the Interested Party ("IP") and granted planning permission for 32 dwellings at Walcot Meadow, Walcot Lane, Drakes Broughton, Pershore, Worcestershire. The defendant has conceded that the decision should be quashed but has chosen not to appear today and has not explained why or how he has reached that view. The IP, however, maintains that there is no basis on which the inspector's decision should be challenged.

2. I set out the relevant facts, including passages from the Appeal Decision in **Section 2**. I set out the relevant law in **Section 3**. In **Section 4**, I identify what I consider to be the correct approach in circumstances such as these. I then deal with the criticisms of the inspector in **Section 5**. In **Section 6**, I deal with the issue of discretion, namely whether, if the inspector is found to have made a material error, whether I consider that the inspector would still have come to the same decision. There is a short summary of my conclusions at **Section 7** below. I am very grateful to both counsel for their clear and succinct submissions, which has enabled me to give judgment the same day.

2. THE RELEVANT FACTS

3. There was a relevant Local Plan, GD1. Under the heading ' Location Strategy for New Development', the Plan said:

> "Most new development to 2011 will be accommodated within the main built-up areas of Droitwich Spa, Evesham and Pershore, with some in the villages; in all cases it will be within defined development boundaries and/or on allocated sites."

4. On 6 February 2014, the IP made an application for outline planning permission at the site, which lies outside the settlement boundary of Drakes Broughton (and was therefore in conflict with GD1). The claimant failed to determine that application so the IP appealed.

5. The inspector, Mr Michael Boniface, held a one day hearing on 21 July 2015, which was combined with a site visit. On 4 August 2015, he published his Decision Letter ('DL').

6. The inspector rightly recognised, at paragraph 4 of his DL, that the main issue was whether the site was a suitable location for the proposed residential development having regard to Policy GD1 and other considerations. At paragraph 5 the inspector noted that Policy GD1 set out a location strategy for new development in the area, which required that all development was to be within defined settlement boundaries. He noted that it was common ground that the proposed site was outside the settlement boundary for Drakes Broughton and was not an allocated site. He identified, therefore, that the proposed development was "in clear conflict with Policy GD1".

7. At paragraph 6, the inspector noted that the IP had argued that GD1 was out of date because the specified plan period had ended in 2011. But the inspector went on to reject that submission, saying that the policy was saved by virtue of a saving direction issued in 2009. He went on:

> "6. …As such, it retains its full weight as part of the statutory development plan. Nevertheless, it is possible for the material considerations to outweigh the development plan and the policies and objectives of the National Planning Policy Framework are an important material consideration.
>
> 7. It was agreed during the Hearing that the principal of defining settlement boundaries is consistent with the Framework. I note an alliance with objectives to protect the countryside and promote sustainable patterns of development and the policy can be considered to be broadly consistent with those of the Framework. That said, it is not entirely consistent in that the boundaries and housing allocations were drawn up to address a housing need up to 2011. The Framework now seeks to boost significantly the supply of housing and this attracts substantial weight.
>
> 8. It is agreed between the parties that the Council can demonstrate a 5 year supply of deliverable housing sites as required by paragraph 47 of the Framework. Under these circumstances, the decision-taking criteria contained in paragraph 14 of the Framework are not engaged. Whilst this is so, the Framework seeks to boost significantly the supply of housing and the ability to demonstrate a 5 year housing land supply should not be seen as a maximum supply. Regardless of such a supply being available, the Framework advocates a presumption in favour of sustainable development and the application must be considered in these terms."

8. In paragraph 11 of the DL, the inspector referred to a recent appeal decision in which the inspector had concluded that there were no material considerations "that were sufficient to outweigh the development plan in that case". He went on:

> "As I have set out above, this balancing exercise is a necessary part of the appeal process and I shall go on to make such an assessment below. Although paragraph 14 of the Framework sets out criteria for the application of development plan policies in decision taking it does not, in my view, alter the overarching presumption in favour of sustainable development."

9. Thereafter, having considered a range of detailed matters, such as ecology, heritage assets, flooding and the like, the inspector undertook the balancing exercise required by law. At paragraphs 39-41, he dealt with the three dimensions of sustainable development (economic, social and environmental) and found benefits under each three heads. He then went on:

"42. Overall, I conclude that the proposal would constitute sustainable development having regard to the policies of the Framework taken as a whole. In this instance, the benefits of development outweigh the limited harm that has been identified and these benefits are sufficient to outweigh the conflict with Policy GD1 of the LP. Therefore the Framework's presumption in favour of sustainable development applies."

10. On 10 September 2015, the claimant lodged its application to quash that Appeal Decision pursuant to s.288 of the 1990 Act. As already noted, the defendant has conceded that the appeal should be allowed and has not attended. The IP resists the appeal.

3. THE RELEVANT LAW

3.1 The Proper Approach to s.288

11. The relevant part of s.288 provides as follows:

"**288 Proceedings for questioning the validity of other orders, decisions and directions**

(1) If any person—

(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—

(i) that the order is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that order; or

(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

…

(5) On any application under this section the High Court—

(a) may, subject to subsection (6), by interim order suspend the operation of the order or action, the validity of which is questioned by the application, until the final determination of the proceedings;

(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

12. The proper approach to such applications was set out at paragraph 19 of the judgment of Lindblom J (as he then was) in ***Bloor Homes East Midland Ltd v SSCLG*** [2014] EWHC 754 (Admin):

"19. The relevant law is not controversial. It comprises seven familiar principles:

(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in ***Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26*** , at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in ***South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953*** , at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining

an application for planning permission is free, "provided that it does not lapse into *Wednesbury* irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann **in *Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759*** , at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in ***Newsmith v Secretary of State for [2001] EWHC Admin 74*** , at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in ***Tesco Stores v Dundee City Council [2012] P.T.S.R. 983***, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, ***South Somerset District Council v The Secretary of State for the Environment*** (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in ***Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government*** [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An

> inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. ***Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6*** , at paragraphs 12 to 14, citing the judgment of Mann L.J. in ***North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137***, at p.145)."

3.2 The Significance of the Development Plan

13. The significance of any development plan in the consideration of a planning proposal can be seen in section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") which provides:

> "(6) 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."

14. Although paragraphs 11-16 inclusive of the National Planning Policy Framework ("NPPF") are headed 'The Presumption in Favour of Sustainable Development', the significance of the development plan is also there restated. Thus:

> "11. Planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.
>
> 12. This National Planning Policy Framework does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved, and proposed developments that conflicts should be refused unless other material considerations indicate otherwise. It is highly desirable that local planning authorities should have an up-to-date plan in place.
>
> 13. The National Planning Policy Framework constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications."

15. Paragraph 14 of the NPPF states that at the heart of the NPPF "is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking." As for decision-taking, it says that this means:

"● approving development proposals that accord with the development plan without delay; and

● where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

- specific policies in this Framework indicate development should be restricted."

The second option, sometimes referred to as Limb 2, has a footnote in which various policies that indicate a restriction on development are set out.

16. The importance of the section 38(6) decision-taking process was emphasised by Lord Clyde in ***City of Edinburgh Council v Secretary of State for Scotland*** [1997] 1 WLR 1447 and more recently, by the Court of Appeal in ***Hampton Bishop Parish Council v Herefordshire Council and Others*** [2014] EWCA Civ. 878. A decision-maker has to decide whether a proposed development is or is not in accordance with the development plan, because otherwise the plan would not be given its statutory priority.

17. Moreover, the plan means that the starting-point in any consideration must be the refusal of planning permission. As HHJ Mackie QC put it in ***South Northamptonshire Council and Another v SSCLG and Another*** [2013] EWHC 11 (Admin):

> "I conclude from all this that the section requires not a simple weighing up of the requirement of the plan against the material considerations but an exercise that recognises that while material considerations may outweigh the requirements of a development plan, the starting point is the plan which receives priority. The scales do not start off in even balance."

3.3 Sustainable Development

18. I have already referred to paragraphs 11-16 of the NPPF. There are many other parts of the NPPF dealing with sustainable development including:

(a) The Ministerial Foreward, which includes the following:

> "The purpose of planning is to help achieve sustainable development.
>
> *Sustainable* means ensuring that better lives for ourselves don't mean worse lives for future generations.
>
> *Development* means growth. We must accommodate the new ways by which we will earn our living in a competitive world.

> We must house a rising population, which is living longer and wants to make new choices…
>
> Sustainable development is about change for the better, and not only in our built environment…
>
> So sustainable development is about positive growth-making economic, environmental and social progress for this and future generations.
>
> The planning system is about helping to make this happen.
>
> Development that is sustainable should go ahead, without delay – a presumption in favour of sustainable development that is the basis for every plan, and every decision. This framework sets out clearly what could make a proposed plan or development unsustainable."

(b) Paragraph 6 of the NPPF itself, which states:

> "The purpose of the planning system is to contribute to the achievement of sustainable development. The policy is in paragraphs 18-219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system;"

(c) Paragraph 7, which sets out the three dimensions to sustainable development: economic, social and environmental;

(d) Paragraph 47, which, under the heading 'Delivery of a wide choice of high quality homes' identifies a raft of matters which local planning authorities should do in order "to boost significantly the supply of housing";

(e) Paragraph 49 which provides that "housing applications should be considered in the context of the presumption in favour of sustainable development";

(f) Paragraph 197 which provides that "in assessing and determining development proposals, local planning authorities should apply the presumption in favour of sustainable development".

3.4 Decision Letters

19. Decision letters are to be read in a straightforward manner without an excessively legalistic approach: see ***South Bucks CC v Porter (No. 2)*** [2004] 1 WLR 1953. Linked to this is the importance of ensuring that a s.288 challenge is used as an opportunity to correct a failure to take into account material considerations or the taking into account of immaterial considerations or errors of law. It is not an opportunity to rerun the planning merits of an appeal on anything other than rationality grounds: see ***R (Newsmiths Stainless Steel) v SSETR*** [2001] EWHC 74 (Admin).

4. THE CORRECT APPROACH

20. In my view, in the sort of circumstances that arose in the present case, the correct approach required the decision-maker to ask a number of questions in sequence.

21. First: is there is a development plan? It is only if there is a development plan that s.38(6) of the 2004 Act comes into play.

22. Second: if there is a development plan, is it absent or silent or are relevant policies out-of-date? That question needs to be asked in order to see whether the approach set out in the second bullet point of paragraph 14 comes into play.

23. Third: if there is a development plan which is not silent and/or relevant policies are not out-of-date, then the decision-maker has to decide whether or not the proposed development is in accordance with the development plan. If it is in accordance with the plan, the proposed development must be approved without delay.

24. Fourth: if the proposed development is not in accordance with the development plan then the decision-maker has to undertake the balancing exercise referred to in s.38(6). In other words, the decision-maker must start with the statutory priority of the development plan, and therefore a presumption against granting planning permission, and balance against that other material considerations that may indicate the contrary result. That is also in accordance with paragraphs 11 - 13 of the NPPF.

25. Fifth: if the development plan is silent or the relevant policies are out-of-date then the decision-maker must grant permission unless one or other of the two alternative limbs in the second bullet point in paragraph 14 of the NPPF applies.

5. THE CRITICISMS OF THE INSPECTOR

5.1 General

26. In the present case, there are a number of criticisms of the inspector, which I address in **Sections 5.2** onwards. But I should say at the outset that, in my judgment, the inspector followed the correct approach to which I have referred in the preceding paragraphs. He identified that there was a development plan, namely GD1. He rejected the argument that it was out-of-date (paragraph 6 of the DL) because he said it had been saved by virtue of a saving direction. In consequence, the inspector found that it "retained its full weight as part of the statutory development plan".

27. Thus, because there was a development plan, and because neither it nor the relevant policies were not out-of-date, the inspector rightly decided that paragraph 14 of the NPPF was "not engaged". Accordingly, he went on to undertake the requisite balancing act by comparing the full weight to be given to GD1 with the other material considerations. He rightly said at paragraph 6 that it was possible for those material considerations to outweigh the development plan, and he rightly said that the policies and objectives of the NPPF were an important material consideration in undertaking that balancing exercise.

28. In my view, he reached that conclusion in a way that was entirely consistent with the approach of Lindblom J (as he then was) in ***Ivan Crane v SSCLG and Another*** [2015] EWHC 425 (Admin). There the judge said:

> "62. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, government policy in the NPPF is a material consideration external to the development plan (see paragraph 23 of Kenneth Parker J.'s judgment in ***Colman***). Policy in the NPPF, including the "presumption in favour of sustainable development" in paragraph 14, does not modify the statutory framework for the making of decisions on applications for planning permission. It operates within that framework – as the NPPF itself acknowledges in paragraph 12. It is for the decision-maker to decide what weight should be given to NPPF policy in so far as it is relevant to the proposal. Because this is government policy it is likely always to command significant weight. But the court will not intervene unless the weight given to it by the decision-maker can be said to be unreasonable in the *Wednesbury* sense (see paragraph 46 of my judgment in ***Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government*** [2014] EWHC 754 (Admin)).
>
> 63. Once the Secretary of State had found Mr Crane's proposal to be in conflict with the development plan – as I have held he correctly did – he had to consider whether, in the light of the other material considerations in the case, he should nevertheless grant planning permission. That involved, for him, a classic exercise in planning judgment. His task was to weigh the considerations arising in the application of relevant policy in the NPPF, and any other material considerations beyond those arising from the development plan, against the statutory presumption in favour of the development plan enshrined in section 38(6) of the 2004 Act. Indeed, that is just what the NPPF itself envisages, in paragraphs 12 and 196.
>
> 64. In my view the Secretary of State did exactly what he had to do, in a legally unassailable way."

29. Having considered a range of matters taken from paragraphs 18-219 of the NPPF (and therefore the matters which, according to paragraph 6 of the NPPF, "constitute the Government's view of what sustainable development in England means in practice for the planning system"), the inspector then undertook the balancing exercise at paragraphs 38-42 of the DL. Pursuant to paragraph 7 of the NPPF he identified the three dimensions of sustainable development and concluded that the benefits of the development outweighed the conflict with the development plan. Thus he concluded that the rebuttable presumption in s.38(6) had indeed been rebutted.

30. In my view, unless a legalistic or nit-picking approach is adopted to the DL (contrary to the principles set out in **Section 3.4** above) no proper criticism can be made of his decision. That said, I turn to look at the three points raised by the claimant.

5.2 Giving GD1 Less Weight Than He Should Have Done

31. This first criticism involves the suggestion that the inspector did not clearly address whether GD1 was out-of-date and so may well not have given it its full s.38(6) weight or priority. In my view, this criticism is incorrect. The inspector expressly found that there was a development plan and, at paragraph 6, he rejected the criticism made by the IP that it was out-of-date.

32. The suggestion that there was in some way some ambiguity over the inspector's approach to the plan and its age is, in my view, contrived. It is certainly right that the inspector noted at paragraph 7 that the plan was not entirely consistent with the NPPF, and he explains that observation on the basis that the housing allocations were drawn up to address a housing need up to 2011, four years before his decision. But that was a correct observation; it in no way detracts from the "full weight" that the inspector said that he gave GD1.

33. On behalf of the claimant, Ms Clover sought to rely on the decision of Beverley Lang J in ***Daventry*** (citation below). There is no analogy because in that case the inspector expressly found that the age of the plan meant that he should give it reduced weight, which is not something that occurred here.

34. I conclude that, on a fair reading of the DL as a whole, the inspector accorded GD1 "full weight" and there is no suggestion that he resiled from or modified that view because of his observations in paragraph 7 of the DL. Paragraph 42, in which he concludes the balancing exercise, does not suggest any such reduction in weight. In my view, therefore, there is nothing in this first criticism.

5.3 The Statutory Priority

35. Ms Clover's second point is that, even assuming that the inspector gave "full weight" to GD1, he nowhere said in the DL that he recognised the statutory priority under s.38(6). Accordingly she said there was legitimate doubt that the inspector had applied the right test. This is the first of the two stated grounds for the s.288 application, namely that the inspector "erred in law in failing to apply the approach to decision-taking set out in s.38(6) of the 2004 Act".

36. I agree that it might have been better if the inspector had said that what he called the "full weight" to be given to GD1 meant that the statutory priority in s.38(6) was being applied. But that is a counsel of perfection and I have no hesitation in concluding that it is not a criticism of substance. I have referred in **Section 3.4** above to the proper approach to decision letters like this. There can be no doubt that the inspector was writing to an informed audience. He would have known that, when he said that he was giving GD1 "full weight", that that was (and would be taken to be) a reference to s.38(6) of the 2004 Act. No other interpretation of "full weight" was proffered by Ms Clover: what else (one may ask rhetorically) could it mean than that the inspector was giving it the statutory priority envisaged by s.38(6)? In my view, the inspector could only have meant that, by giving GD1 full weight, he was applying that priority.

37. For that reason, I reject the claimant's second ground of challenge.

5.4 The Creation of Incorrect Presumptions

38. It is the claimant's case that the inspector created two incorrect presumptions which were central to his DL. The first was in respect of sustainable development; the second was in respect of boosting the housing supply. I deal with each in turn.

39. As to the presumption in favour of sustainable development, what the inspector had to do was to balance the statutory priority of the plan GD 1 against the other material considerations in accordance with section 38(6) and paragraphs 11-13 of the NPPF. In my view, for the reasons already noted, that is what he did.

40. On an analysis of the claimant's case on this point, my first observation is that the claimant's approach to this issue is rather confused. The second ground for the s.288 application is said to be that the inspector "failed to apply the approach to decision-taking set out in paragraph 14 of the NPPF". But it was agreed by both parties that the decision-taking route envisaged by paragraph 14 did not apply at all here, because there was a plan and the relevant policies were not out of date. On that basis, the second ground falls away and that is the end of the application.

41. But secondly, it is quite wrong to say that a presumption in favour of sustainable development does not exist in the NPPF outside paragraph 14. I have referred in **Sections 3.2** and **3.3** above to a number of the paragraphs in the NPPF which refer to the presumption in favour of sustainable development. It is the 'golden thread' running through the NPPF. The inspector properly had regard to it as an important material consideration, in the same way as the SSCLG had regard to it in ***Crane***.

42. Thirdly, I consider that Ms Clover lays too much stress on the word 'means' in paragraph 14 in support of her submission that this is the only place where the presumption is defined. Paragraph 14 does not offer a true definition at all; it is instead an explanation of the *effect* of the presumption. And there are many other places in the NPPF where 'mean' or 'means' is used in the context of this presumption, such as the Foreward and paragraph 6.

43. Fourthly, and perhaps most important of all, Mr Cahill QC rightly points out that, if the claimant was right, the presumption in favour of sustainable development would only apply if the development plan was silent or absent, or if the relevant policies were out-of-date (the requirements that trigger the last part of paragraph 14). That cannot possibly be right; that would be such an important limitation on the 'golden thread' that, if such was the intention of the NPPF, it would say so in the clearest terms.

44. Where there is a conflict between a proposal and a development plan, the policies within the NPPF, including the oft-repeated presumption in favour of sustainable development, are important material considerations to be weighed against the statuary priority of the development plan. In my view, it is as simple as that.

45. As to the inspector's reference to the NPPF seeking to boost significantly the supply of housing, that is precisely what paragraph 47 of the NPPF requires local planning authorities to have regard to. Again, the inspector properly had regard to this policy within the NPPF, because it was a material consideration.

46. I note in passing that Ms Clover relied on the decision of Beverley Lang J in ***Daventry District Council v SSCLG and Another*** [2015] EWHC 3459 (Admin) to say that

paragraph 47 applies only to plan-making and not decision-taking. On the face of it, that appears a rather surprising distinction and I can see no justification for it in the words used in paragraph 47 or its heading. In my view, paragraph 47 of the NPPF applies to both plan-making and decision-taking.

47. In addition, I agree with Mr Cahill QC that, on a proper analysis, the inspector here had regard to paragraph 47 as a material consideration, but certainly did not use it as any sort of presumption. A fair analysis of paragraphs 38-42, where he undertook the planning balance, makes plain that he regarded this as no more than a material consideration.

5.5 Summary

48. In the end, I believe that the highest that it can be put on behalf of the claimant is that, having found the conflict between GD1, on the one hand, and a raft of other material considerations and benefits of the proposals, on the other, the inspector a) failed expressly to refer to the balancing exercise that he undertook as being undertaken pursuant to s.38(6) or paragraphs 11-13 of the NPPF; and b) did not say in terms that the presumption in favour of sustainable development was a material consideration but no more. As I have indicated, it may have been better if he had done so. But in my judgment, the s.38(6) test was in substance the exercise that he performed, and he gave proper weight to the presumption in favour of sustainable development as a material consideration, but not more.. Accordingly, the criticism is one of form and not substance.

49. For all these reasons, I reject the criticisms of the inspector and reiterate that, in my view, he applied the right test and took into account all relevant material considerations. There can be no question of unlawfulness or *Wednesbury* irrationality.

6. DISCRETION

50. It is of course strictly unnecessary for me to consider this aspect of the case because I have not upheld the criticisms of the inspector's approach. But, if I was wrong about that, I would have no hesitation in exercising my discretion in favour of not quashing the inspector's decision.

51. The relevant legal test is set out in the recent case of ***Europa Oil and Gas Ltd v SSCLG*** [2014] EWCA Civ. 825. In that case, Ouseley J was not satisfied that, without the error made by the inspector as to the interpretation of 'mineral extraction', the decision would inevitably have been the same. The Court of Appeal agreed. They held that the judge was entitled to find that the decision might have been different but for the inspector's error and thus to exercise his discretion to quash the decision.

52. As noted above, the most that can be said against the inspector in the present case is that he did not say in terms that the balancing exercise that he undertook was pursuant to s.38(6) of the 2004 Act, or say that the presumption in favour of sustainable development was simply a material consideration. The criticisms are ones of form; they are not criticisms of substance. In those circumstances, even if the inspector had worded his decision letter in a clearer way, that would have made no difference to the

outcome. I reject the invitation to quash the inspector's decision on that ground as well.

7. CONCLUSIONS

53. For the reasons set out above, I dismiss this application to quash. The inspector applied the right test; he took into account all material considerations; and he did not take into account any immaterial considerations. Furthermore, even if I was wrong about that, I am in no doubt that, even allowing for any corrections, the inspector would have reached the same decision.