Neutral Citation Number: [2016] EWCA Civ 168

Case No: C1/2015/0583 and C1/2015/0894

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE SUPPERSTONE [2015] EWHC 132 (Admin)
MRS JUSTICE LANG [2015] EWHC 410 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2016

Before:

Lord Justice Jackson
Lord Justice Vos
and
Lord Justice Lindblom

- -

Between:

Suffolk Coastal District Council	**Appellant**
- and -	
Hopkins Homes Limited	**Respondent**
- and -	
Secretary of State for Communities and Local Government	**Interested Party**

Richborough Estates Partnership LLP	**Appellant**
- and -	
Cheshire East Borough Council	**First Respondent**
- and -	
Secretary of State for Communities and Local Government	**Second Respondent**

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Mr Jonathan Clay and Dr Ashley Bowes (instructed by **Sharpe Pritchard**) for the **Appellant**
Mr Christopher Lockhart-Mummery Q.C. (instructed by **DLA Piper**) for the **Respondent**
Mr Hereward Phillpot Q.C. and Mr Richard Honey (instructed by **the Government Legal Department**) for the **Interested Party**

Mr Christopher Young and Mr James Corbet Burcher (instructed by **Gateley Plc**) for the **Appellant**
Mr Anthony Crean Q.C. and Mr John Hunter (instructed by **Sharpe Pritchard**) for the **First Respondent**
Mr Hereward Phillpot Q.C. and Mr Richard Honey (instructed by **the Government Legal Department**) for the **Second Respondent**

Hearing dates: 14 and 15 January 2016

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Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1. This is the judgment of the court.

2. These two conjoined appeals concern the meaning and effect of government policy in paragraph 49 of the National Planning Policy Framework ("the NPPF"). In particular, they concern the meaning of the requirement in the policy that "[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", and the way in which the policy is to be applied in the making of planning decisions. These questions have been considered several times at first instance without entirely consistent results, but not until now by this court. In both of these cases permission to appeal was granted by Sullivan L.J.. As he acknowledged when granting permission, the wider importance of the issues raised by the appeals is a compelling reason for them to be decided by this court. All counsel who have appeared before us echo that view, and urge us to bring much needed clarity to the meaning of the policy. The benefit of this for local planning authorities, developers and local communities will be obvious.

The two appeals

3. In the first case the appellant is a local planning authority, Suffolk Coastal District Council. In September 2013 the district council refused planning permission for a development of 26 houses on land at Old High Road in Yoxford. The applicant for planning permission was Hopkins Homes Ltd.. Their appeal against the district council's decision was dismissed by an inspector appointed by the Secretary of State for Communities and Local Government, after an inquiry in February and June 2014. The inspector's decision letter is dated 15 July 2014. Hopkins Homes challenged the decision by an application under section 288 of the Town and Country Planning Act 1990. The challenge succeeded before Supperstone J., who on 30 January 2015 quashed the inspector's decision. Supperstone J.'s order is the subject of the district council's appeal before us. At first instance the Secretary of State did not seek to defend the inspector's decision, having conceded that the inspector had misunderstood and misapplied the policy in paragraph 49. Before us counsel for the Secretary of State have made submissions in support of Supperstone J.'s conclusions on the status of the disputed development plan policies in that case, though not on the other matters in dispute between the district council and Hopkins Homes.

4. In the second case the appellant is a developer, Richborough Estates Partnership LLP. In August 2013 it made an application for outline planning permission to Cheshire East Borough Council for a development of up to 170 houses on land north of Moorfields in Willaston. The borough council failed to determine the application within the prescribed period. Richborough Estates appealed to the Secretary of State. Its appeal was heard by an inspector at an inquiry in June 2014. In a decision letter dated 1 August 2014 the inspector allowed the appeal and granted planning permission for up to 146 dwellings. His decision was challenged

by the borough council. That challenge succeeded before Lang J., who quashed the inspector's decision by an order dated 25 February 2015. The appeal against that order was made not by the Secretary of State but by Richborough Estates. By a respondent's notice the borough council invited this court to uphold Lang J.'s order for additional reasons, but at the hearing it abandoned that position. Submissions were made to us on behalf of the Secretary of State supporting the argument put forward for Richborough Estates.

5. In both cases the inspector had to establish whether particular policies of the development plan relevant to the proposal were not to be considered "up-to-date" under the policy in paragraph 49 of the NPPF, and, if so, what the consequences for his decision should be.

The NPPF

6. The NPPF, published on 27 March 2012, contains national planning policy for England.

7. In the "Ministerial foreword" the Minister for Planning declared that "[the] purpose of planning is to help to achieve sustainable development". "Sustainable", he said, "means ensuring that better lives for ourselves don't mean worse lives for future generations", and "Development means growth", one aspect of which is that "[we] must house a rising population, which is living longer and wants to make new choices". He went on to say:

> "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. …".

8. The "Ministerial foreword" concludes by stating that "[by] replacing over a thousand pages of national policy with around fifty, written simply and clearly, we are allowing people and communities back into planning". Some judicial doubt has been expressed about that assertion. As Sullivan L.J. said in *Redhill Aerodrome Ltd. v Secretary of State for Communities and Local Government* [2015] 1 P. & C.R. 3 (in paragraph 22 of his judgment, with which Tomlinson and Lewison L.JJ. agreed), "[views] may differ as to whether simplicity and clarity have always been achieved, but the policies are certainly shorter". In an earlier case in which this court had to consider the meaning of the policy in paragraph 47 of the NPPF, *City and District Council of St Albans v Hunston Properties Ltd.* [2013] EWCA Civ 1610*,* Sir David Keene had expressed the view (in paragraph 4 of his judgment, with which Maurice Kay and Ryder L.JJ. agreed), that "[unhappily] … the process of simplification has in certain instances led to a diminution in clarity".

9. The Government's commitment to a "plan led" planning system is apparent throughout the NPPF. Paragraph 2 in the "Introduction" acknowledges the statutory presumption in favour of the development plan in section 38(6) of the Planning and Compulsory Purchase Act 2004, and the status of the NPPF as another material consideration:

> "Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The [NPPF] must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions. …".

There are several other references to the "plan-led" system: for example, in paragraph 17, which sets out 12 "core land-use planning principles" that "should underpin both plan-making and decision-taking". The first of these "core" principles is that planning should be "… genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area". It adds that "[plans] should be kept up-to-date …" and "should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency".

10. After the "Introduction" the NPPF is divided into three main parts: "Achieving sustainable development" (paragraphs 6 to 149), "Plan-making" (paragraphs 150 to 185) and "Decision-taking" (paragraphs 186 to 207). There are three annexes: "Annex 1: Implementation", "Annex 2: Glossary" and "Annex 3: Documents replaced by this Framework".

11. Introducing the part of the NPPF devoted to the Government's aim of "Achieving sustainable development", paragraph 6 says that the policies in paragraphs 18 to 219, "taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system". Paragraph 7 identifies "three dimensions to sustainable development: economic, social and environmental". The "social role" is "supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations …". Paragraph 8 says that these three roles are "mutually dependent".

12. Under the heading "The presumption in favour of sustainable development", paragraph 12 acknowledges that the NPPF "does not change the statutory status of the development plan as the starting point for decision making". It says that "[proposed] development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise". It adds that "[it] is highly desirable that local planning authorities should have an up-to-date plan in place". Paragraph 13 confirms that the NPPF "constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications". Paragraph 14 explains how the "presumption in favour of sustainable development" is to be applied:

> "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.
>
> For plan-making this means that:

- local planning authorities should positively seek opportunities to meet the development needs of their area;
- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or
  - specific policies in [the NPPF] indicate development should be restricted. [Here there is a footnote, footnote 9, which states: "For example, those policies relating to sites protected under the Birds and Habitats Directives … and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."]

For decision-taking this means [Here there is a footnote, footnote 10, which says: "Unless material considerations indicate otherwise"]:

- 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 [the NPPF] taken as a whole; or
  - specific policies in [the NPPF] indicate development should be restricted. [Here footnote 9 is repeated.]"

13. We have already mentioned the first "core" principle in paragraph 17, relating to the "plan-led" system (see paragraph 9 above). The third "core" principle in that paragraph is that planning should "proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs". It goes on to say that "[every] effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth".

14. This part of the NPPF contains paragraphs 18 to 149, in 13 sections under the general heading "Delivering sustainable development".

15. Section 6, which contains paragraphs 47 to 55, is entitled "Delivering a wide choice of high quality homes". Paragraph 47 states:

"To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in

> [the NPPF], including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
> - identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% … to ensure choice and competition in the market for land. … ;
> - identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;
> - for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
> - set out their own approach to housing density to reflect local circumstances."

There are two footnotes to that paragraph. Footnote 11, which explains the concept of "deliverable sites" in the second bullet point, says that "[to] be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. …". Footnote 12, which explains the concept of "developable sites" in the third bullet point, says that "[to] be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged". Paragraphs 48 and 50 to 55 are all concerned with various aspects of authorities' planning for the development of new housing and affordable housing in their areas. Paragraph 49 states:

> "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."

16. Further sections in this part of the NPPF include section 9 – "Protecting Green Belt land" (paragraphs 79 to 92), section 10 – "Meeting the challenge of climate change, flooding and coastal change" (paragraphs 93 to 108), and section 12 – "Conserving and enhancing the historic environment" (paragraphs 126 to 141).

17. In the part of the NPPF dealing with "Plan-making", paragraph 157 enjoins local planning authorities to do several things, including to "plan positively" for the development required in their areas, to "allocate sites to promote development and flexible use of land, bringing forward new land where necessary", and to "identify land where development would be inappropriate, for instance because of its environmental or historic significance". Paragraph 159 says local planning authorities "should have a clear understanding of housing needs in their area", and requires them to prepare a "Strategic Housing Market Assessment to assess their full housing needs …" and a "Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and likely

economic viability of land to meet the identified need for housing over the plan period".

18. In the part entitled "Decision-taking" paragraph 197 says that "[in] assessing and determining development proposals, local planning authorities should apply the presumption in favour of sustainable development".

19. Annex 1 – "Implementation" explains the arrangements for the transition to the new policies in the NPPF. Paragraph 214 says that for 12 months from the day of the NPPF's publication, decision-takers "may continue to give full weight to relevant policies adopted since 2004 even if there is a limited degree of conflict with this Framework". Paragraph 215 states:

> "In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in [the NPPF], the greater the weight that may be given)."

What does the policy in paragraph 49 of the NPPF mean?

20. As we have said, the meaning of the policy in paragraph 49 of the NPPF has already been considered several times at first instance, with various results. We have had our attention drawn, in particular, to the decisions of Lang J. in *William Davis Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin), Lewis J. in *Cotswold District Council v Secretary of State for Communities and Local Government and others* [2013] EWHC 3719 (Admin), Lewis J. in *South Northamptonshire Council v Secretary of State for Communities and Local Government and Robert Plummer* [2013] EWHC 4377 (Admin), Ouseley J. in *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Land* [2014] EWHC 573 (Admin), Lindblom J. in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin), Lindblom J. in *Phides Estates (Overseas) Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 827 (Admin), and Lang J. in *Wenman v Secretary of State for Communities and Local Government* [2015] EWHC 925 (Admin).

21. Each of the advocates appearing in these appeals has drawn from the first instance case law either two or three distinctly different possible interpretations of the policy, which have been referred to in argument as the "narrow", the "wider" or "comprehensive", and the "intermediate" or "compromise". In the "narrow" interpretation, the meaning given to the expression "[relevant] policies for the supply of housing" is limited to policies dealing only with the numbers and distribution of new housing, and excludes any other policies of the development plan dealing generally with the disposition or restriction of new development in the authority's area. The "wider" or "comprehensive" interpretation includes both policies providing positively for the supply of new housing and other policies, to which Ouseley J. referred in *Barwood Land* (in paragraph 47 of his judgment) as "counterpart" policies whose effect is to restrain the supply by restricting housing development in certain parts of the authority's area. In the so-called

"intermediate" or "compromise" interpretation, some restrictive policies will qualify as "[relevant] policies for the supply of housing" but others will not. The latter category is said to comprise, as Ouseley J. described them in *Barwood Land*, "policies designed to protect specific areas or features, such as gaps between settlements, the particular character of villages or a specific landscape designation, all of which could sensibly exist regardless of the distribution and location of housing or other development" (paragraph 47).

22. Mr Jonathan Clay, who appeared for the district council in the Hopkins Homes case, and Mr Anthony Crean Q.C., who appeared for the borough council in Richborough Estates' appeal, both contended for the "narrow" – or, as Mr Crean described it in his oral submissions, "purist" – interpretation. Mr Christopher Lockhart-Mummery Q.C. on behalf of Hopkins Homes, Mr Christopher Young for Richborough Estates, and Mr Hereward Phillpot Q.C., who appeared for the Secretary of State in both appeals, all contended for the "wider" construction.

23. It is not our task to reconcile – if we could – the several judgments at first instance in which the meaning of this policy has been considered. Nor is it our task to select one of the interpretations given to the policy in those cases, in preference to the others. What we must do is interpret the policy correctly – regardless of whether the interpretation we find to be right has already emerged in one or more of the cases to which we have referred.

24. The approach the court will take when interpreting planning policy is well settled. As Lord Reed said in *Tesco v Dundee City Council* [2012] UKSC 13 (in paragraph 17 of his judgment, with which the other members of the Supreme Court agreed), a planning authority determining an application for planning permission "must proceed upon a proper understanding of the development plan", and "cannot have regard to the provisions of the plan if it fails to understand them". Lord Reed went on to say (in paragraph 18) that "in principle, in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context". He emphasized, however (in paragraph 19), that statements of policy "should not be construed as if they were statutory or contractual provisions". He also said (in the same paragraph) that "many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment", and that "[such] matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse …" (see also the judgment of Lord Hope, at paragraph 35). It has been accepted in this court, and is not in dispute in these appeals, that the same principles apply also to the interpretation of national policy and guidance, including policies in the NPPF (see, for example, the judgment of Richards L.J. in *R. (on the application of Timmins) v Gedling Borough Council* [2015] EWCA Civ 10, at paragraph 24; and the judgment of Sir David Keene in *Hunston*, at paragraph 4).

25. Our interpretation of the policy in paragraph 49 of the NPPF must therefore be faithful to the words of the policy, read in their full context and not in isolation from it.

26. The broad context is provided by the policies of the NPPF read as a whole (see paragraph 30 of Sir David Keene's judgment in *Hunston*). The Government's aim of providing "the supply of housing to meet the needs of present and future generations" in paragraph 7 of the NPPF is reflected generally in the policies for sustainable development, in the policies for plan-making, and in the policies for decision-taking. It is part of the "social role" of the planning system in achieving sustainable development referred to in paragraph 7 of the NPPF. And it sits in the part of the NPPF where the Government has gathered its policies for delivering "sustainable development" (see paragraphs 14 to 16 above).

27. The more specific context is set by the policies for housing development in the paragraphs immediately preceding and following paragraph 49, in the section devoted to the Government's objective of "[delivering] a wide choice of high quality homes" (see paragraph 15 above). These policies are partly directed to plan-making and partly to decision-taking. Underlying them all is the basic imperative of delivery. Where they concern plan-making, their aim, very clearly stated at the beginning of paragraph 47, is to "boost significantly the supply of housing". The first requirement in that paragraph – that an authority must "ensure" that its local plan meets the "full, objectively assessed needs" for housing, "as far as is consistent with the policies set out in [the NPPF]" – involves the making of an objective assessment of need before considering the impact of other policies in the NPPF (see paragraph 25 of Sir David Keene's judgment in *Hunston*). The second requirement is for local planning authorities to "identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements …".

28. As Mr Lockhart-Mummery reminded us, for many years successive governments have relied on the planning system to increase the supply of housing land. At least since the 1970's national planning policy has contained either an objective or a requirement for local planning authorities to identify and maintain a five-year supply of housing land. Between 1988 and 1992 there was a policy presumption in favour of planning permission being granted for housing where no five-year supply existed in the authority's area. The relevant statement of national policy current when the NPPF was published, and then superseded by it, was Planning Policy Statement 3: "Housing" (issued in June 2011), which said, in paragraph 71, that where authorities were unable to demonstrate "an up-to-date five year supply of deliverable sites" they "should consider favourably planning applications for housing …". The advent of the NPPF marked a significant policy shift. In *Solihull Metropolitan Borough Council v Gallagher* [2014] EWCA Civ 1610, Laws L.J. accepted (in paragraph 16 of his judgment) that the new policy for the assessment and meeting of housing need had "indeed effected a radical change". He agreed with the judge in the court below that the larger the need for housing, "the more pressure will or might be applied to [impinge] on other inconsistent policies".

29. The policy in paragraph 49 is not a policy for plan-making; it is a policy directed to the consideration of "[housing] applications". But it is linked to the policy for plan-making in paragraph 47 in a very obvious way, because it is predicated on the requirement for the local planning authority to "demonstrate a five-year supply of deliverable housing sites".

30. Paragraph 49 is also connected to the policy for the application of the "presumption in favour of sustainable development" in paragraph 14 (see paragraph 12 above). The connection lies in the concept of relevant policies of a development plan – "[relevant] policies for the supply of housing" – not being "considered up-to-date" (the expression used in paragraph 49) – or being "out-of-date" (the expression used in paragraph 14). The adjectives "up-to-date" and "out-of-date" do not always have an exactly opposite meaning in ordinary English usage. But in the way they are used in the NPPF we think they do. The concept of relevant policies that are "out-of-date" in paragraph 14 is not limited to policies in a statutory development plan whose period has expired, though it may include such policies. It embraces the concept of "[relevant] policies for the supply of housing" that are not to be considered "up-to-date" under paragraph 49, and it extends to policies in a plan whose period is still running.

31. We turn then to the words of the policy themselves, viewed in the context we have described.

32. The contentious words are "[relevant] policies for the supply of housing". In our view the meaning of those words, construed objectively in their proper context, is "relevant policies affecting the supply of housing". This corresponds to the "wider" interpretation, which was advocated on behalf of the Secretary of State in these appeals. Not only is this a literal interpretation of the policy in paragraph 49; it is, we believe, the only interpretation consistent with the obvious purpose of the policy when read in its context. A "relevant" policy here is simply a policy relevant to the application for planning permission before the decision-maker – relevant either because it is a policy relating specifically to the provision of new housing in the local planning authority's area or because it bears upon the principle of the site in question being developed for housing. The meaning of the phrase "for the supply" is also, we think, quite clear. The word "for" is one of the more versatile prepositions in the English language. It has a large number of common meanings. These include, according to the Oxford Dictionary of English, 2nd edition (revised), "affecting, with regard to, or in respect of". A "supply" is simply a "stock or amount of something supplied or available for use" – again, the relevant definition in the Oxford Dictionary of English. The "supply" with which the policy is concerned, as the policy in paragraph 49 says, is a demonstrable "five-year supply of deliverable housing sites". Interpreting the policy in this way does not strain the natural and ordinary meaning of the words its draftsman has used. It does no violence at all to the language. On the contrary, it is to construe the policy exactly as it is written.

33. Our interpretation of the policy does not confine the concept of "policies for the supply of housing" merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognizes that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed – including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another

by preventing or limiting development. It reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it – that policies of both kinds make the supply what it is.

34. The "narrow" interpretation of the policy, in which the words "[relevant] policies for the supply of housing" are construed as meaning "[relevant] policies providing for the amount and distribution of new housing development and the allocation of sites for such development", or something like that, is in our view plainly wrong. It is both unrealistic and inconsistent with the context in which the policy takes its place. It ignores the fact that in every development plan there will be policies that complement or support each other. Some will promote development of one type or another in a particular location, or by allocating sites for particular land uses, including the development of housing. Others will reinforce the policies of promotion or the site allocations by restricting development in parts of the plan area, either in a general way – for example, by preventing development in the countryside or outside defined settlement boundaries – or with a more specific planning purpose – such as protecting the character of the landscape or maintaining the separation between settlements.

35. Restrictive policies, whether broadly framed or designed for some more specific purpose, may – we stress "may" – have the effect of constraining the supply of housing land. If they do have that effect, they may – again, we emphasize "may" – act against the Government's policy of boosting significantly the supply of housing land. If a local planning authority is unable to demonstrate the requisite five-year supply of housing land, both the policies of its local plan that identify sites for housing development and policies restrictive of such development are liable to be regarded as not "up-to-date" under paragraph 49 of the NPPF – and "out-of-date" under paragraph 14. Otherwise, government policy for the delivery of housing might be undermined by decisions in which development plan policies that impede a five-year supply of housing land are treated as "up-to-date".

36. We cannot see any logical basis for distinguishing here between restrictive policies of a general nature and those with a more specific purpose. It was this suggested distinction between restrictive policies of one sort and restrictive policies of another that generated the "intermediate" or "compromise" construction of the policy in paragraph 49. Mr Clay and Mr Crean submitted that this construction of the policy finds support in paragraph 47 of Ouseley J.'s judgment in *Barwood Land*. In that paragraph of his judgment Ouseley J. contrasted two kinds of development plan policy: first, "policies for the provision of housing" and "counterpart" restrictive policies that "may be generally applicable to all or most forms of development", and secondly, "policies designed to protect specific areas or features, such as gaps between settlements, the particular character of villages or a specific landscape designation", which "could sensibly exist regardless of the distribution and location of housing development". He considered policy EV2 of the South Northamptonshire Local Plan, which says "planning permission will not be granted for development in the open countryside", as a policy of the first kind. He did not, however, refer to the distinction between these two kinds of policy as if it divided policies that truly are "for the supply of housing" from policies that are not.

37. To infer that from what Ouseley J. actually said is, we think, to misunderstand what he meant. In our view he was simply acknowledging the distinction between restrictive policies of a general nature – such as policy EV2 – and restrictive policies whose purpose is more specific. That, of course, is a perfectly valid distinction. It may be relevant to the application of the policy in paragraph 49 of the NPPF, and the weight given to a particular policy of the development plan in the planning balance. It is not, however, a test of whether a particular policy is or is not a policy "for the supply of housing". And we do not believe that Ouseley J. was seeking to suggest that it was. As he went on to say in paragraph 48 of his judgment, "… once the Inspector has properly directed himself as to the scope of paragraph 49 [of the] NPPF … , the question of whether a particular policy falls within its scope, is very much a matter for his planning judgment". That statement is, in our view, correct – and we shall come back to it when we consider how the policy in paragraph 49 is to be applied.

38. We therefore reject the "intermediate" or "compromise" interpretation of paragraph 49. Like the "narrow" interpretation, it fails to recognize that it is the effect of certain policies – whether general or specific – in restricting housing development and preventing an authority from demonstrating a "five-year supply of deliverable housing sites" that brings them within the scope of the policy in paragraph 49.

39. Mr Clay and Mr Crean submitted that footnote 9 in paragraph 14 of the NPPF supports the "narrow" – or at least the "intermediate" or "compromise" – interpretation of paragraph 49. But we cannot see how it does. Footnote 9 explains the concept of specific policies in the NPPF indicating that development should be restricted. The NPPF policies it gives as examples relate to protected birds and habitats, Sites of Special Scientific Interest, the Green Belt, Local Green Space, Areas of Outstanding Natural Beauty, Heritage Coasts, National Parks, the Broads, heritage assets and locations at risk of flooding or coastal erosion (see paragraph 12 above). For all of these interests of acknowledged importance – some of them also subject to statutory protection – the NPPF has specific policies. The purpose of the footnote, we believe, is to underscore the continuing relevance and importance of these NPPF policies where they apply. In the context of decision-taking, such policies will continue to be relevant even "where the development plan is absent, silent or relevant policies are out-of-date". This does not mean that development plan policies that are out-of-date are rendered up-to-date by the continuing relevance of the restrictive policies to which the footnote refers. Both the restrictive policies of the NPPF, where they are relevant to a development control decision, and out-of-date policies in the development plan will continue to command such weight as the decision-maker reasonably finds they should have in the making of the decision. There is nothing illogical or difficult about this, as a matter of principle.

40. Mr Clay also submitted that the "narrow" or at least the "intermediate" construction of paragraph 49 is supported by the policy in paragraph 215 of the NPPF (see paragraph 19 above). Again, we cannot see how that can be so. Paragraph 215 is one of a series of paragraphs in Annex 1 to the NPPF dealing with the implementation of the policies it contains. These are, essentially, transitional provisions. They do not affect the substance of the policies

themselves. Under paragraph 214 there was a period of 12 months from the publication of the NPPF – until 27 March 2013 – within which decision-takers "may" continue to give full weight to policies adopted since 2004 even if they conflicted with the policies in the NPPF. After that, under paragraph 215, "due weight" was to be given to relevant plan policies, "according to their degree of consistency" with the policies in the NPPF. These provisions for the implementation of NPPF policy do not touch the interpretation of such policy, including the policies for the delivery of housing in paragraphs 47 to 55 and the policy explaining the "presumption in favour of sustainable development" in paragraph 14. The suggestion that they do is mistaken.

41. As we have said (in paragraph 23 above), we have not set out to reconcile the several first instance judgments in which the meaning of the policy in paragraph 49 has been considered before. In fact, that would not be possible. We ought to say, however, that those cases in which the court has rejected the "wider" interpretation of the policy have not in our view been correctly decided on that particular point. Of the cases cited to us (see paragraph 20), this may be said of the decision in *William Davis*, where the judge concluded that a policy restricting development in a "Green Wedge" (policy E20 of the North-West Leicestershire Local Plan, adopted in 2002) was not a relevant policy for the supply of housing within paragraph 49, despite the fact that it prevented housing development on the appeal site (see paragraph 47 of the judgment). We should add, however, that the judge did not have the benefit of all the submissions we have heard on this point, or of the later decisions in which it has been considered. In *Wenman* the judge appears to have accepted that two policies of a local plan dealing respectively with the "Environmental Implications of Development" and "Design and Layout" (policies D1 and D4 of the Waverley Borough Local Plan 2002) were not policies for the supply of housing, because they were not "general" restrictions on development and fell within the second kind of restrictive policy referred to by Ouseley J. in paragraph 48 of his judgment in *Barwood Land* (see paragraphs 57 to 59 of the judgment). But that distinction between two kinds of policy restrictive of housing development is not a dividing line between policies that are "for the supply of housing" and those that are not (see paragraphs 36 to 38 above). Again, however, we would add that the judge did not have the advantage of the argument we have heard. It also seems to us that the erroneous interpretation of the policy in paragraph 49 of the NPPF made no difference to the outcome of the proceedings because the two local plan policies in question were not, in fact, restrictive of housing development in either of the two respects identified by Ouseley J. in *Barwood Land*.

How is the policy in paragraph 49 of the NPPF to be applied?

42. The NPPF is a policy document. It ought not to be treated as if it had the force of statute. It does not, and could not, displace the statutory "presumption in favour of the development plan", as Lord Hope described it in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at 1450B-G). 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. Policies in the NPPF, including those relating to the "presumption in favour of sustainable

development", do not modify the statutory framework for the making of decisions on applications for planning permission. They operate within that framework – as the NPPF itself acknowledges, for example, in paragraph 12 (see paragraph 12 above). It is for the decision-maker to decide what weight should be given to NPPF policies in so far as they are relevant to the proposal. Because this is government policy, it is likely always to merit 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.

43. When determining an application for planning permission for housing development the decision-maker will have to consider, in the usual way, whether or not the proposal accords with the relevant provisions of the development plan. If it does, the question will be whether other material considerations, including relevant policies in the NPPF, indicate that planning permission should not be granted. If the proposal does not accord with the relevant provisions of the plan, it will be necessary to consider whether other material considerations, including relevant policies in the NPPF, nevertheless indicate that planning permission should be granted.

44. The NPPF presents the decision-maker with a simple sequence of steps when dealing with a proposal for housing development. The first step, under the policy in paragraph 49, is to consider whether relevant "policies for the supply of housing" in the development plan are "out-of-date" because "the local planning authority cannot demonstrate a five-year supply of deliverable housing sites". Gauging the housing land supply will entail the use of the appropriate method of assessment, whatever that may be (see, for example, the judgment of Lindblom J. in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), at paragraphs 101 to 135).

45. Whether a particular policy of the plan, properly understood, is a relevant policy "for the supply of housing" in the sense we have described is not a question for the court. It is, as Ouseley J. said in paragraph 48 of his judgment in *Barwood Land*, a question for the decision-maker. Provided the decision-maker acts on the correct understanding of the policy in paragraph 49 of the NPPF, and also on the correct understanding of the development plan policy in question, these being matters for the court, it is for him to judge whether the plan policy is or is not a relevant policy for the supply of housing. That is a matter for his planning judgment, and the court will only intervene on public law grounds. If the decision-maker finds that relevant policies of the plan are "out-of-date", he applies the "presumption in favour of sustainable development" in the way that paragraph 14 of the NPPF requires. Again, he will be exercising his planning judgment, and again, therefore, the court will only review that exercise of judgment on public law grounds.

46. We must emphasize here that the policies in paragraphs 14 and 49 of the NPPF do not make "out-of-date" policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H).

Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is "out-of-date" should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied. That idea appears to have found favour in some of the first instance judgments where this question has arisen. It is incorrect.

47. One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment (see paragraphs 70 to 75 of Lindblom J.'s judgment in *Crane*, paragraphs 71 and 74 of Lindblom J.'s judgment in *Phides*, and paragraphs 87, 105, 108 and 115 of Holgate J.'s judgment in *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government and Mid-Sussex District Council* [2015] EWHC 1173 (Admin)).

48. The policies in paragraphs 14, 47 and 49 of the NPPF are not, as we understand them, intended to punish a local planning authority when it fails to demonstrate the requisite five-year supply of housing land. They are, however, clearly meant to be an incentive. As Sir David Keene said in paragraph 31 of his judgment in *Hunston*:

> "… Planning decisions are ones to be arrived at in the public interest, balancing all the relevant factors and are not to be used as some form of sanction on local councils. It is the community which may suffer from a bad decision, not just the local council or its officers."

Was the policy in paragraph 49 interpreted correctly and applied lawfully in the Hopkins Homes case?

49. The development plan in the Hopkins Homes case comprised the Suffolk Coastal District Local Plan, adopted by the district council in July 2013, and certain "saved" policies of the Suffolk Coastal Local Plan, which was adopted in December 1994. Policy SP19 of the 2013 local plan, the "Settlement Policy", not

only sets the settlement hierarchy but the distribution of housing growth between the different types of centre within the hierarchy and provides for the scale of development appropriate to settlements in each tier of it. In "Key Service Centres", of which Yoxford is one, it indicates that "[modest] estate-scale [housing] development" is appropriate "[within] the defined physical limits" of the settlement. The site on which Hopkins Homes' development was proposed lies outside the defined physical limits boundary of Yoxford as a Key Service Centre. It is within the "Countryside", where the policy says there is to be "[no] development other than in special circumstances". Policy SP27, which relates to "Key Service Centres" and "Local Service Centres", says that housing development will be permitted "within defined physical limits …". Policy SP29 relates to the "Countryside". So far as is relevant here, it states that the council's strategy for new development "outside the physical limits" of settlements including Key Service Centres is that "it will be limited to that which of necessity requires to be located there and accords with other relevant policies within the Core Strategy …".

50. The inspector concluded that "it seems very unlikely that a 5 years supply of housing land can now be demonstrated", noting that, in its closing submissions at the inquiry, the district council had not sought to persuade him that it could be (paragraph 5 of the decision letter). Having referred to the policies in paragraphs 14 and 49 of the NPPF and Lang J.'s decision in *William Davis* (in paragraph 6), he went on to consider which were "relevant policies for the supply of housing". He acknowledged the conclusions of the inspector who had conducted the examination of the local plan (in paragraph 50 of his report) "as identifying that there would be advantages of considering development in the light of other [up-to-date] policies whilst accepting that, until a review was undertaken, relevant policies for the supply of housing may be considered not to be up-to-date" (paragraph 7). In paragraphs 8 and 9 of his decision letter he said:

> "8. … Policy SP19 sets the settlement hierarchy and shows a percentage of the total proposed housing growth which should go to the broad categories of settlements. This policy has a broad scope and does not suggest figures or percentages for individual settlements. In this context, I do not see this policy as not up-to-date.
>
> 9. Policy SP27 of the LP relates specifically to Key and Local Service Centres and seeks to, among other things: reinforce their individual character; permit housing within defined physical limits unless there is a proven local support for development appropriate to the particular community. I do not consider this policy to be a relevant policy for the supply of housing and I consider it to be up-to-date."

And in paragraph 14 he concluded that the proposed development "would be unacceptable in principle, contrary to the provisions of Policies SP27 and SP29 and contrary to one of the core principles of [the NPPF]".

51. Before Supperstone J., as before us, it was submitted for the district council that the inspector properly understood the policy in paragraph 49 of the NPPF, and applied it lawfully. We disagree. The judge was, in our view, right to accept the

submissions of Mr Lockhart-Mummery that the inspector misconstrued the policy in paragraph 49, and that this amounted to a "fundamental misdirection as to [the NPPF]" (paragraphs 33, 38 and 39 of the judgment). In our view it is quite clear on a fair reading of the passages of the decision letter to which we have referred that the inspector adopted the "narrow" interpretation of paragraph 49, and thus also misdirected himself in the application of the policy. As the judge held, these were errors of law fatal to the inspector's decision.

52. Having wrongly construed the policy in paragraph 49, the inspector regarded policies SP19, SP27 and SP29 of the local plan as being "up-to-date", and thus capable of carrying full weight in his decision. As Mr Lockhart-Mummery submitted, and Mr Phillpot on behalf of the Secretary of State accepted, all three of these policies of the local plan are, on a true understanding of the policy in paragraph 49 of the NPPF, "[relevant] policies for the supply of housing". They all affect the supply of housing land in a real way by restraining it. Mr Clay submitted that policy SP27 is not restrictive of development, but "entirely permissive or positive in its effect" (paragraph 68 of his skeleton argument). But that is not so. Read together with policies SP19 and SP29, policy SP27 is, and is clearly intended to be, restrictive of new housing development outside the defined boundaries of Key Service Centres. It is permissive only of housing development within the defined physical limits of the settlements to which it relates. And policy SP29 is generally prohibitive in its effect on development proposed in the "Countryside".

53. We therefore reject Mr Clay's submission that Supperstone J. misdirected himself as to the interpretation of these three policies of the local plan, and, in particular, in accepting that the inspector had erred in failing to treat policy SP29 as a policy "for the supply of housing". All three of these policies, properly construed, are policies by which a material degree of restraint was imposed on both the location and amount of new housing development. All three were obviously relevant to Hopkins Homes' site and proposal. If the inspector had adopted the correct interpretation of the policy in paragraph 49 of the NPPF – which he plainly did not – he could not reasonably have done other than conclude that these policies of the local plan were all "[relevant] policies for the supply of housing", and that, given his conclusion on the absence of a five-year supply of housing land, they were, each of them, "out-of-date". He would then have had to apply the "presumption in favour of the development plan" in accordance with the policy in paragraph 14 of the NPPF, giving these "out-of-date" policies of the plan such weight as he thought they should have in the particular circumstances of this case. That, however, is not what he did.

54. We should add that in our view Mr Clay's argument gains nothing from his reliance on passages in the local plan inspector's report – which is dated 6 June 2013. The local plan inspector concluded, in paragraph 51 of his report, that "[if] the proposal for a review were to be accepted, planning applications for housing would be considered in the context of an up to date suite of local development management policies that are consistent with the Framework, the CS settlement hierarchy and the locational guidance in the strategic policies", and that "[overall], the housing land supply would be improved while still ensuring sustainable outcomes". Those observations, based on the evidence before the local plan

inspector at the examination hearings held in October and November 2012, do not negate the conclusion of the inspector who heard Hopkins Homes' appeal at his inquiry in 2014 that it was very unlikely that the requisite five-year supply of housing land could now be demonstrated. It was in the light of that conclusion, which is not challenged in these proceedings, that the appeal inspector went on to consider whether policies SP19, SP27 and SP29 were up-to-date.

55. We conclude, therefore, that the policy in paragraph 49 of the NPPF was neither interpreted correctly nor applied lawfully by the inspector in the Hopkins Homes case. These errors of law vitiate his decision. And in our view the court could not properly exercise its discretion to withhold a quashing order.

Were there further errors of law in the inspector's decision in the Hopkins Homes case?

56. In view of our conclusion that government policy for housing development was both misinterpreted and misapplied in the decision on Hopkins Homes' appeal, and that the decision must therefore be quashed, we can take the remaining allegations of unlawfulness in this case quite shortly.

57. The second ground in Hopkins Homes' application to the court asserts that the inspector erred in finding, in paragraph 13 of his decision letter, that the appeal site was "outside the physical limits boundary [of Yoxford] as defined in the very recently adopted Local Plan". The contention here was that the boundary had merely been carried over, without review, from the proposals map of the Suffolk Coastal Local Plan First Alteration, adopted by the district council in February 2001. In Appendix D to the 2013 local plan it is stated that the proposals maps will be "superseded by the adoption of subsequent Development Plan Documents". The contrary argument, put forward by Mr Clay, was that the local plan makes clear, in particular through policy SP19, that as a result of the adoption of the district council's core strategy, a number of settlements within the district had had their physical limits boundaries removed. It followed that the inspector was right as a matter of fact when he said that the physical limits boundary of the settlement was "defined" in the recently adopted local plan.

58. The judge's conclusion on this ground, in paragraph 46 of his judgment, was that the inspector had been mistaken in assuming, as he seems to have done, that the physical limits boundary of Yoxford had been established in the 2013 local plan, which it had not. The position as a matter of fact is that the physical limits boundary of Yoxford was defined on the proposals map of the old local plan, and had remained unchanged in the 2013 local plan. This was obviously germane to the status of the relevant plan "policies for the supply of housing". It does not mean, as Mr Clay submitted, that the settlement boundaries in the local plan are now generally to be "disregarded".

59. We accept that this ground merges with that relating to the inspector's interpretation and application of the policy in paragraph 49 of the NPPF. But nevertheless we think Mr Lockhart-Mummery's submissions to the judge, repeated in this court, are correct. The judge was right, in our view, to find that in

this particular respect, as well as more generally in his construction and application of the policy in paragraph 49 of the NPPF, the inspector fell into error.

60. The other additional ground is that the inspector misunderstood and misapplied national policy for the protection of heritage assets in paragraph 135 of the NPPF, failing to identify the "significance" of the historic parkland surrounding the late Georgian house at Grove Park as a heritage asset, and to consider the likely effect of the proposed development on that "significance".

61. Paragraph 129 of the NPPF says that local planning authorities "should identify and assess the particular significance of any heritage asset that may be affected by a proposal …", and "should take this assessment into account when considering the impact of a proposal on a heritage asset, to avoid or minimise conflict between the heritage asset's conservation and any aspect of the proposal". Paragraph 135 states:

> "The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

"Significance (for heritage policy)" is defined in the "Glossary" in Annex 2 to the NPPF as meaning "[the] value of a heritage asset to this and future generations because of its heritage interest …".

62. The site of Hopkins Homes' proposed development is within an area defined by the district council as "Historic Parkland" in its "Supplementary Planning Guidance 6 – Historic Parks and Gardens" of December 1995. Saved policy AP4 of the 1994 local plan relates to "Parks and Gardens of Historic or Landscape Interest". It says that development will not be granted planning permission if it would have "a materially adverse impact" on the "character, features or immediate setting" of a historic park or garden. Saved policy AP13 relates to designated "Special Landscape Areas", which include "the Parks and Gardens of Historic or Landscape Interest". It says the council "will ensure that no development will take place which would be to the material detriment of, or materially detract from, the special landscape quality" of these areas. The appeal site is in the River Yox Valley Special Landscape Area.

63. In paragraph 10 of his decision letter the inspector found "a degree of conflict" between policy AP4 of the 1994 local plan and government policy in the NPPF "due to the absence of a balancing judgement in Policy AP4", but that the "broad aim" of this policy was consistent with aims of the NPPF and the Planning Practice Guidance, so the weight it should be given was reduced but it was still due "some weight". He took a similar view of policy AP13, noting that the NPPF and the Planning Practice Guidance "recognise the intrinsic quality of the countryside and promote policies for the conservation and enhancement of the natural environment and to this extent, policy AP13 is consistent with those aims". In paragraphs 15 to 21 of his letter he considered "[the] effects of the proposal on the local historic parkland and landscape". He noted that the supplementary

planning guidance says "the essential qualities of the Park remain" (paragraph 15). He observed that "one of the key underlying qualities of parkland, that is openness and freedom from built development remains", and that "… the existence of the trees, the historic association with the house and the entrance at the south east, which has a perimeter wall of very similar design to the north east entrance are matters which qualify as "remnants of that former park"" (paragraph 16). He said the settlement of Yoxford "sits in a position virtually surrounded" by three historic parklands, which provide "a very attractive setting for the village" (paragraph 17). He concluded that in several respects the development would have a "negative" visual impact (paragraph 18), that the negative "landscape effects" would not be compensated for by the proposed new planting (paragraph 19), and that, because it would lie beyond the "strong and definite boundary to the built development of the village" formed by Old High Road, it "would be seen as an ad-hoc expansion across what would otherwise be seen as the village/countryside boundary …" (paragraph 20). In paragraph 21 he said:

> "In respect of these matters, the historic parkland forms a non-designated heritage asset, as defined in [the NPPF] and I conclude that the proposal would have an unacceptable effect on the significance of this asset. In relation to local policies, I find that the proposal would be in conflict with the aims of Policies AP4 and AP13 of the old Local Plan and Policies SP1, SP1A and SP15 of the LP."

64. Before the judge, and again before us, Mr Lockhart-Mummery submitted that the inspector was wrong to conclude that the "broad aim" of policy AP4 was consistent with government policy in paragraph 135 of the NPPF, but that, in any event, the inspector failed to grapple with the question of whether the development really would harm the significance of the historic parkland as a heritage asset, and, if so, how. Those submissions were countered by Mr Clay, who argued that, on a fair reading of the relevant parts of the decision letter, the inspector reduced the weight he gave to policy AP4 in the light of NPPF policy, and reached a clear conclusion on the harm the development would cause not merely to the local landscape but also to the significance of the heritage asset.

65. In paragraph 53 of his judgment, Supperstone J. accepted Mr Lockhart-Mummery's submission that the inspector had failed to undertake the assessment required by paragraph 135 of the NPPF. Again we think he was right. The inspector's error here, as Mr Lockhart-Mummery submitted, was that he failed to identify distinctly what the significance of the historic parkland was as an undesignated "heritage asset", having regard to the definition of "significance" in the NPPF; did not, therefore, equip himself to make the judgment required of him by paragraph 135 of the NPPF; and did not form that judgment. There can be no criticism of his treatment of the impact of the development on the local landscape, of which the historic parkland forms part. What is lacking, however, is a distinct and clearly reasoned assessment of the effect the development would have upon the significance of the parkland as a "heritage asset", and, crucially, the "balanced judgment" called for by paragraph 135, "having regard to the scale of any harm or loss and the significance of the heritage asset". It may well be, we accept, that if the inspector had undertaken the necessary assessment and formed that "balanced judgment", his conclusion in paragraph 21 would have been no different. But we

do not think one can be sure of that. On this ground too, therefore, we uphold the judge's decision.

Was the policy in paragraph 49 interpreted correctly and applied lawfully in the Richborough Estates case?

66. The development plan in the Richborough Estates case comprised the saved policies of the Crewe and Nantwich replacement local plan 2011, adopted in February 2005, with an end date of 2011. The relevant, or potentially relevant, policies of this local plan were policy NE2 – "Open Countryside", policy NE4 – "Green Gaps", and policy RES5 – "Housing in the Open Countryside", all of which restrict the development of new housing in the areas to which they relate.

67. The inspector found that there was not a demonstrable five-year supply of deliverable housing sites (paragraph 24 of his decision letter). He concluded, in the light of that finding, that the weight to be given to development plan policies relevant to the supply of housing was reduced, and that this conclusion applied to policies NE2, NE4 and RES5 in so far as the settlement boundaries referred to or assumed in those three policies reflected out-of-date housing requirements, though he recognized that policy NE4 had a wider purpose in maintaining gaps between settlements, including the gap between Willaston and Rope (paragraph 94).

68. Before Lang J. it was not in dispute that the inspector was entitled to conclude that policies NE2 and RES5 were relevant policies for the supply of housing for the purposes of paragraph 49 of the NPPF, and were properly treated by the inspector as "out-of-date" (paragraphs 35 and 37 of the judgment). The contentious policy was policy NE4, about which the inspector had said, in paragraphs 34 and 35 of his decision letter:

> "34. RLP policy NE.4 (*Green Gaps*) and the proposals map designate a number of areas as green gaps. The policy states that in those gaps, in addition to the provisions of policy NE.2, approval will not be given for new buildings or the change of use of existing buildings or land which would result in erosion of the physical gaps between built-up areas or adversely affect the visual character of the landscape (except where no alternative location is available). I recognise that the policy thus performs 'strategic' functions in maintaining the separation and definition of settlements and in landscape protection, and this remains pertinent.
>
> 35. However, since the inner boundaries of the Green Gaps are also formed by the settlement boundaries, the considerations that apply to policy NE.2 also pertain to this policy in this respect. Significantly, two of the housing sites identified in the emerging [Chester East Local Plan] are in existing designated green gaps around Crewe. Although they are not in this vicinity and different considerations might apply, at this stage it cannot be assumed that the appeal site will remain outside the defined settlement boundary in the Plan when finally adopted. In this respect I consider that policy NE.4 is also not up-to-date in the terms of the NPPF and therefore the weight I give it is reduced."

69. Lang J. accepted the argument put forward by Mr Crean that policy NE4 was a restrictive policy of the second kind identified by Ouseley J. in paragraph 48 of his judgment in *Barwood Land* and not, therefore, a policy for the supply of housing within the meaning of paragraph 49 of the NPPF. The "natural meaning" of the "policies for the supply of housing" was, she said, "policies which make provision for housing" (paragraph 51 of her judgment). She went on to say, however, that she understood and endorsed Ouseley J.'s reasons for giving paragraph 49 "a broader purposive interpretation". But in her view it was "not open to inspectors to disregard the distinction [Ouseley J.] drew between general policies to restrict development and those policies designed to protect specific areas or features, as this goes to the heart of the meaning and purpose of paragraph 49, in the context of the NPPF as a whole and within its proper statutory context" (paragraph 53). She said the effect of the policy in paragraph 49, if construed as the Secretary of State contended, would be to "dis-apply local policies even though they have been adopted by the local planning authority and remain in force …" (paragraph 56). She doubted that the Government had intended the NPPF "to be used to routinely bypass local policies protecting specific local features and landscapes, as that would undermine the statutory scheme" (paragraph 57). If a policy came within the policy in paragraph 49, it was "effectively dis-applied in its entirety" (paragraph 62). The inspector had erred in finding that policy NE4 of the local plan came within the scope of paragraph 49, and had sought "to divide the policy, so as to apply it in part only" (paragraph 63).

70. As will be clear from what we have already said about the interpretation and application of the policy in paragraph 49 of the NPPF, we respectfully disagree with Lang J.'s analysis. In the first place, her interpretation of the policy was not correct. Secondly, the "broader purposive interpretation" adopted by Ouseley J. in his judgment in *Barwood Land*, which Lang J. said she endorsed, does not, in truth, distinguish between one kind of restrictive policy and another. It allows an inspector to form his or her own judgment – as the inspector in this case did – on whether any policy of the development plan, properly construed, is or is not a relevant policy "for the supply of housing". Thirdly, the policy in paragraph 49 does not disapply, or "bypass", an "out-of-date" policy in a statutory development plan. The effect of a relevant policy being found to be "out-of-date" or not "up-to-date" under paragraph 49 is that the presumption in favour of sustainable development is to be applied as paragraph 14 of the NPPF provides. As we have said (in paragraph 46 above), this does not mean that the policy in question is to be disregarded. It must still be given the weight it is due in all the circumstances of the case. In this case, for example, there was nothing wrong in the inspector finding policy NE4 to be one of the relevant policies of the local plan that was "out-of-date" under the policy in paragraph 49 but nevertheless giving it appropriate weight in the planning balance in view of its particular purpose to maintain a "green gap" between Willaston and Rope.

71. The inspector proceeded on a correct understanding of the policy in paragraph 49 of the NPPF and a correct understanding of the relevant development plan policies. He exercised his own judgment – as he had to – when resolving which of those policies were within the scope of paragraph 49, and how much weight he should give them when applying the statutory presumption in favour of the

development plan in section 38(6) of the 2004 Act and the policy "presumption in favour of sustainable development" in the NPPF. He made no error of law. Both his approach and his conclusions are legally sound. His decision should not have been quashed.

Conclusion

72. For the reasons we have given, the district council's appeal in the Hopkins Homes case must be dismissed and Richborough Estates' appeal allowed.