Neutral Citation Number: [2024] EWHC 1916 (Admin)

Case No: AC-2024-LON-000726

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2024

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

Basingstoke and Deane Borough Council	**Claimant**
- and -	
Secretary of State for Levelling Up, Housing and Communities	**1st Defendant**
-and-	
Bewley Homes plc	**2nd Defendant**

- -
- -

Christopher Katkowski KC and James Neill (instructed by **Basingstoke and Deane Borough Council**) for the **Claimant**
Andrew Parkinson (instructed by the **Government Legal Department**) for the **1st Defendant**
Rupert Warren KC (instructed by **Penningtons Manches Cooper LLP**)for the **2nd Defendant**

Hearing date: **2 July 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Holgate:

The issue in this case

1. Section 70(2) of the Town and Country Planning Act 1990 ("TCPA 1990") requires local planning authorities ("LPAs") determining planning applications and the Secretary of State determining applications and appeals to have regard to *inter alia* relevant provisions of the development plan and "to any other material considerations."

2. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

3. Section 38(6) has two limbs. The first limb requires the determination of a planning application or appeal to be made "in accordance with" the development plan, save where, under the second limb, "material considerations indicate otherwise." The first limb has been described by the House of Lords as a presumption, or a priority, in favour of the development plan (*City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, 1450, 1458-9). The second limb requires a planning balance to be struck.

4. Mr. Katkowski KC submits on behalf of the claimant, Basingstoke and Deane Borough Council ("BDBC"), that the issue of whether all or some of the policies of a development plan are either out-of-date or up-to-date is legally irrelevant to the first limb of s.38(6). That consideration may only be taken into account under the second limb. This is the central question in this case for the court to resolve.

5. The nub of Mr. Katkowski's initial argument was set out in paras. 18, 19 and 36 of his skeleton. First, whether what is proposed in a planning application accords with a development plan depends upon whether it accords with *what is written* in those policies of the plan which are relevant to the proposal. Second, where a proposal accords with *what is written* in some of those policies but not others, the application of the first limb of s.38(6) depends upon whether that proposal accords with the plan *read as a whole*. Third, "whether what is written in the development plan is up-to-date or out-of-date has no bearing whatsoever on whether what is proposed accords with *what is written* in the plan when read as a whole" (emphasis added).

6. However, Parliament did not enact s.38(6) so as to read "the determination must be made in accordance with *what is written in* the plan …". There is no case law to support the claimant's attempt to read those additional, italicised words into the statute.

7. Mr. Katkowski's oral submissions moved away from that purely linguistic approach in his skeleton to acknowledge principles which are well-established in the case law. For example, Sullivan J (as he then was) pointed out in *R (Milne) v Rochdale Metropolitan Borough Council* (2001) 81 P&CR 27 that it is not at all unusual for development plan policies to pull in different directions. A proposal may accord with policies which encourage, for example, employment development, but conflict with policies that

protect open countryside from development. In such cases the decision-maker has to make a judgment on whether the proposal accords with the development plan read as a whole, taking into account such factors as the relative importance of the policies complied with or infringed, and the relative extent of that compliance or conflict (see [48] to [50] approved by the Supreme Court in *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983 at [34] and by the Court of Appeal in *BDW Trading Limited v Secretary of State for Communities and Local Government* [2017] PTSR 1337 at [21]). In addition, the relative importance of a policy to the overall objectives of the development plan is relevant to the first limb of s.38(6) of the PCPA 2004 (see *Milne* at [51] and *Tesco* at [34]). All these considerations involve matters of judgment for the planning authority.

8. Although Mr. Katkowski was constrained to accept that these evaluative factors are all relevant to the judgment which a decision-maker makes under the first limb of s.38(6), he maintained that the datedness of a local plan policy is not. So the limited point of law raised by the claimant has to be seen in the context of the common ground in [7] above. This raises the question: why should the matters of planning judgment referred to in [7] be relevant to the first limb of s.38(6), but not the datedness of the policies of a local plan?

The decision under challenge

9. This issue arises in a legal challenge brought by BDBC under s.288 of the TCPA 1990 to a decision dated 29 January 2024 of an Inspector acting on behalf of the first defendant, the Secretary of State for Levelling Up, Housing and Communities, by which he allowed the appeal of the second defendant, Bewley Homes plc ("Bewley"), against a refusal of planning permission by BDBC. The Inspector granted a hybrid planning permission on a site of some 22.45ha for a mixed use development comprising (a) a detailed planning permission for 82 dwellings with public open space, landscaping and associated infrastructure and (b) a severable outline permission for up to 188 dwellings, a 1600 sqm community building, a 1,200 sqm health centre, a 250sqm convenience retail store, open space, allotments, community gardens, a riverside park / nature trail, drainage, landscaping and associated infrastructure. The scheme would deliver 40% of the dwellings as affordable housing.

10. The appeal site comprises the agricultural holding of Common Farm. It is mainly grade 4 agricultural land, used for grazing livestock and some pony paddocks. The detailed permission relates to the eastern part of the site and the outline permission to the western part.

11. The statutory development plan comprises the Basingstoke and Deane Local Plan 2011-2029 (adopted in May 2016) ("BDLP") and the East Woodhay Neighbourhood Plan (2022-2029) ("EWNP") covering the Parish of East Woodhay and made by BDBC on 23 February 2023. The western part of the site falls within East Woodhay Parish.

12. BDBC has decided to update the BDLP ("the BDLPU"). The BDLPU was published for consultation under reg.18 of The Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012 No.767) ("the 2012 Regulations"). It was common ground in the appeal that no weight could be given to that document at that stage (DL 17).

13. The BDLP seeks to meet a housing requirement figure of 15,300 additional dwellings primarily by development within settlement boundaries and on greenfield sites allocated in the plan. The appeal site is not an allocated site and does not lie within any settlement boundary. It lies within the countryside for the purposes of the development plan (DL 23).

14. In summary, the Inspector concluded that the proposal would accord with a number of policies in the BDLP and in the EWNP relating to such matters as affordable housing, infrastructure, transport, biodiversity, nature conservation and delivering high-quality development (DL 133 to 134). It would also conflict with BDLP and EWNP policies relating to landscape and spatial policies regarding the scale and distribution of new housing inside settlement boundaries but not in the countryside (DL 135 to DL 136).

15. However, it was common ground between Bewley and BDBC, and the Inspector agreed, that the spatial distribution policies for housing and the settlement boundaries in the development plan were out-of-date. Those policies were more than 5 years old and were being reviewed through the BDLPU. Moreover, the actual housing delivery over the current local plan period from 2011 to March 2022 had been 769 dwellings less than the amount required by the BDLP over that period. The spatial strategy was not delivering the housing requirement that the BDLP was intended to deliver (DL 140). The Inspector then said that the spatial strategies were fundamental to what the BDLP seeks to achieve, which included the housing requirement that the plan was intended to deliver. Accordingly, the Inspector concluded that both those policies and the other relevant policies of the plan, taken as a whole, were out-of-date (DL 141).

16. Mr. Katkowski accepted that the claimant's challenge depends on DL 145 where the Inspector said:-

> "Looking at the development plan as a whole, the proposal would accord with those policies I have identified above together with Policy SD1. On the other hand, it would conflict with the spatial strategy (Policies SS1, SS6 and HO2) and the landscape policies (Policies EM1 and NE1). Given that the spatial strategy is out-of-date, and that the degree of landscape harm is only of moderate weight, my overall conclusion is that the proposal is in accordance with the development plan as a whole."

17. Mr. Katkowski confirmed that BDBC does not challenge the Inspector's conclusion that the degree of landscape harm from the proposal "is only of moderate weight." The claimant's ground of challenge is that the Inspector made an error of law in DL 145 by taking into account his finding that the spatial distribution policies are out-of-date when he decided that the proposal is in accordance with the development plan as a whole.

18. BDBC says that if the Inspector had not made that legal error, then at the very least he could have concluded that the proposal was *not* in accordance with the development plan. On that basis, BDBC accepts that the out-of-datedness of those policies should have been taken into account as a material consideration weighing against the presumption in favour of the development plan. BDBC accepts that if the balance had been struck in that way, the Inspector could still have decided to allow the appeal and grant permission. But applying the test in *Simplex GE (Holdings) Limited v Secretary*

of State for the Environment [2017] PTSR 1041, if BDBC succeeds in establishing that the Inspector erred in law, it is entitled to have his decision quashed, unless the defendants can persuade the court that his decision would inevitably have been the same, i.e. to allow the appeal, on the basis of reasoning in the decision letter which is untainted by that error.

Relevant policies

Basingstoke and Deane Local Plan (2011 to 2029)

19. Chapter 3 of the BDLP is entitled "The Spatial Strategy between now and 2029." Paragraph 3.1 states that "the aim of the Local Plan is to provide the framework to deliver housing that meets the needs of our growing and changing population …".

20. Chapter 4 of the BDLP is entitled "Delivery of the Strategy." Paragraphs 4.2 and 4.3 deal with "sustainable development." The plan states that the principal purpose of the planning system is to achieve such development. The policies in the BDLP "combine to deliver a positive approach in favour of sustainable development." There then follows Policy SD1:

> "**Policy 1 – Presumption in favour of sustainable development**
>
> When considering development proposals the council will take a positive approach that reflects the presumption in favour of sustainable development contained in the National Planning Policy Framework. It will always work proactively with applicants jointly to find solutions which mean that proposals can be approved wherever possible, and to secure development that improves the economic, social and environmental conditions in the area.
>
> Planning applications that accord with the policies in this Local Plan (and, where relevant, with polices in neighbourhood plans) will be approved without delay, unless material considerations indicate otherwise.
>
> Where there are no policies relevant to the application or relevant policies are out-of-date at the time of making the decision then the council will grant permission unless material considerations indicate otherwise – taking into account whether:
>
> - Any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework taken as a whole; or
>
> - Specific policies in that Framework indicate that development should be restricted."

21. Policy SD1 creates a *policy* presumption in favour of sustainable development which resembles para.14 of the 2012 version of the NPPF (now para.11 of the current version).

22. There then follow sections in Chapter 4 dealing with housing delivery, the housing delivery target, and housing distribution. Paragraph 4.5 states that:

> "It is fundamental that the Local Plan provides a framework for the delivery of appropriate housing sites over the course of the plan period, in order to ensure that needs are met."

As we shall see, this thinking, which finds expression elsewhere in the BDLP, was central to the Inspector's application of s.38(6). BDBC sets a target to provide 850 dwellings a year over the plan period. This met the borough's "objectively assessed need" after taking into account a Sustainability Appraisal which tested a range of housing numbers and their implications on social, economic and environmental factors (para. 4.7). The target had also been informed by the borough's affordable housing needs (para. 4.10).

23. The BDLP states that the housing requirement over the plan period of 18 years was 15,300 dwellings and that after taking into account the supply as at April 2015, the Plan needed to provide an additional 7,600 dwellings (paras. 4.12 to 4.13).

24. The Plan then turned to the distribution of the new housing, beginning with the larger, named settlements (paras. 4.14 to 4.38). Paragraph 4.39 stated that 150 homes would be provided through Neighbourhood Plans across the borough. In addition, infill development within existing settlement policy boundaries would take place (para. 4.40). The settlement boundaries are defined on the Policies Map (para. 4.41).

25. The BDLP then set out its "housing delivery policies", beginning with Policy SS1:

> "**Policy SS1 - Scale and Distribution of New Housing**
>
> Within the period 2011 – 2029, the Local Plan will make provision to meet 15,300 dwellings and associated infrastructure.
>
> This will be provided by:
>
> a) Permitting development and redevelopment within the defined Settlement Policy Boundaries, which contribute to social, economic and environmental well-being; Sites outside of defined Settlement Policy Boundaries will be considered to lie in the countryside;
>
> b) Supporting regeneration in line with Policy SS2;
>
> c) Resisting developments that involve a net loss of housing, unless it can be demonstrated that the benefits outweigh the harm;
>
> d) Allocating the Greenfield sites set out in Policy SS3 to provide approximately 7705 dwellings over the plan period;

> e) Supporting the delivery of new homes through Neighbourhood Planning, in line with Policy SS5; and
>
> f) Permitting exception sites located outside of defined Settlement Policy Boundaries where it meets criteria set out in the other policies in the plan or it is essential for the proposal to be located in the countryside.
>
> Settlement Policy Boundaries will be reviewed through a future Development Plan Document."

26. Policy SS3 deals with the new allocations of housing land. Policy SS5 deals with neighbourhood planning.

27. Policy SS6 deals with new housing in the countryside. It provides:

> "**Policy SS6 – New Housing in the Countryside**
>
> Development proposals for new housing outside of Settlement Policy Boundaries will only be permitted where they are:
>
> a) On 'previously developed land', provided that:
>
> i) They do not result in an isolated form of development; and
> ii) The site is not of high environmental value; and
> iii) The proposed use and scale of development is appropriate to the site's context; or
>
> b) For a rural exception site for affordable housing; or
>
> c) [For the re-use of a redundant or disused permanent building]; or
>
> d) [A replacement dwelling]; or
>
> e) [Small scale residential proposals (i.e. 4 dwellings or less) meeting local need]; or
>
> f) [A new dwelling necessary for an agricultural etc. business]; or
>
> g) [An allocation in a Neighbourhood Plan]."

Bewley's proposal did not fall within any of the categories in Policy SS6 permitting new housing development.

28. Paragraph 4.70 of the BDLP states:

> "The aim of the Local Plan is to direct development to within the identified Settlement Policy Boundaries and specific site allocations. Within the countryside it is the intention to maintain the existing open nature of the borough's countryside, prevent

> the coalescence of settlements and resist the encroachment of development into rural areas. The countryside is therefore subject to a more restrictive policy."

29. Chapter 6 of the BDLP deals with environmental management. In so far as is relevant, Policy EM1, dealing with landscape matters, provides:

> "**Policy EM1 – Landscape**
>
> Development will be permitted only where it can be demonstrated, through an appropriate assessment, that the proposals are sympathetic to the character and visual quality of the area concerned. Development proposals must respect, enhance and not be detrimental to the character or visual amenity of the landscape likely to be affected, paying particular regard to:
>
> a) The particular qualities identified within the council's landscape character assessment and any subsequent updates or relevant guidance;
> b) The visual amenity and scenic quality;
> c) The setting of a settlement, including important views to, across, within and out of settlements;
> d) The local character of buildings and settlements, including important open areas;
> e) Trees, ancient woodland, hedgerows, water features such as rivers and other landscape features and their function as ecological networks;
> f) Intrinsically dark landscapes;
> g) Historic landscapes, parks and gardens and features; and
> h) The character of the borough's rivers and tributaries, including the River Loddon and Test, which should be safeguarded.
>
> Development proposals must also respect the sense of place, sense of tranquillity or remoteness, and the quiet enjoyment of the landscape from public rights of way. Development proposals will not be accepted unless they maintain the integrity of existing settlements and prevent their coalescence.
>
> Where appropriate, proposals will be required to include a comprehensive landscaping scheme to ensure that the development would successfully integrate with the landscape and surroundings. The assessment of character and visual quality and the provision of a landscaping scheme should be proportionate to the scale and nature of the development proposed.
>
> …"

East Woodhay Neighbourhood Plan (2022-2029)

> "**Policy HO2: Settlement Policy Boundary ["SPB"] and Building in the Countryside**
>
> 10.29 The SPB for Woolton Hill is defined on Map 33.
>
> 10.30 Proposals for development and redevelopment within the SPB of Woolton Hill, which contribute to social, economic and environmental well-being will be permitted.
>
> 10.31 Proposals for development and redevelopment outside the SPB, including Rural Exception Sites will only be permitted if:
>
> a) They do not result in significant and adverse effects on landscape character or cause visual intrusion into open land that contributes to defining the form and character of the Parish.
>
> b) They are consistent with the Local Plan policies SS6 (New Housing in the Countryside), CN2 (Rural Exceptions for Affordable Housing), EP4 (Rural Economy). They must also be consistent with the North Wessex Downs AONB Management Plan 2019-2024.
>
> c) They are in a suitable location for their purpose in terms of access to facilities, services and public transport.
>
> 10.32 …"

National Planning Policy Framework

30. The NPPF published in December 2023 "provides a framework within which locally prepared plans can provide for sufficient housing and other development in a sustainable manner. Preparing and maintaining up-to-date plans should be seen as a priority in meeting this objective" (para.1). "Policies in local plans and spatial development strategies should be reviewed to assess whether they need updating at least once every five years, and should then be updated as necessary" (para.33). In *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88 the Court of Appeal discussed the imperative in national policy for an up-to-date local plan ([20]).

31. The presumption in favour of sustainable development is contained in para.11:

> "11. Plans and decisions should apply a presumption in favour of sustainable development.
>
> For **plan-making** this means that:
>
> a) …;
>
> b) ...

> For **decision-taking** this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[8], granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[7]; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

32. In the case of proposals for housing, Footnote 8 to para.11(d) identifies two circumstances in which it is deemed that the policies most important for determining a particular application are out-of-date. They include the LPA's inability to demonstrate a 5 year supply of housing land, or where para.226 applies, a 4-year housing land supply. Paragraph 226 did apply in this case because BDBC had published a reg.18 version of the BDLPU before the Inspector's decision was issued (see [12] above). Because BDBC was able to demonstrate a 4 year supply of housing land, the deeming provision in Footnote 8 did not apply in this case. But, it is important to note that out-of-datedness is a matter of planning judgment based on all the relevant circumstances of a case; it is not limited to the deeming provisions in Footnote 8. So in the present case the Inspector was entitled to assess, and did assess, whether, on the facts, the policies in the development plan most important for determining the application were out-of-date.

33. Chapter 5 of the NPPF deals with "delivering a sufficient supply of homes." Paragraph 60 reiterates the Government's objective of "significantly boosting the supply of homes" (see e.g. *Solihill Metropolitan Borough Council v Gallagher Estates Limited* [2015] J.P.L 713 at [5] and [14]). The NPPF refers to the importance of meeting objectively assessed housing needs in local plan policies through the approach set out in para. 11(b) (see also paras. 23, 35 and 123). Paragraph 75 requires LPAs to monitor their deliverable supply of housing land against their housing requirement, as set out in adopted policies. Save in the case of certain recent local plans (para. 76), LPAs are required by para. 77 to demonstrate a minimum of 5 years' land supply (or 4 years if para. 226 applies, as in the present case).

34. Chapter 15 of the NPPF deals with "Conserving and Enhancing the Natural Environment." Paragraph 180(a) states that planning policies and decisions should protect and enhance "valued landscapes." It was common ground, and the Inspector accepted, that the appeal site is not a valued landscape (DL 27 and DL 52). But para. 180(b) of the NPPF states that planning decisions should also recognise "the intrinsic character and beauty of the countryside."

A summary of the parties' cases to the Inspector.

35. It is helpful to see how the parties put their cases to the Inspector, in particular on the planning balance.

36. Ms. Brigid Taylor, a planning consultant, gave evidence on behalf of BDBC. She dealt with the planning balance in chapter 7 of her proof. At para. 7.1 she said that because the appeal site was located in the countryside outside any settlement boundary and did not meet any of the criteria in Policy SS6 of the BDLP, it was in conflict with that policy and also policy SS1. Taking into account other policies, she considered that the proposal conflicted with the development plan as a whole for the purposes of s.38(6).

37. Ms. Taylor then proceeded on the basis that para. 11(d) of the NPPF applied (para. 7.2). She weighed up the benefits and the harm of the proposal in order to strike the balance required by para. 11(d)(ii) of the NPPF (paras. 7.3 to 7.8). She concluded that the adverse impacts of the proposal would "significantly and demonstrably" outweigh its benefits (paras. 7.9 to 7.12).

38. Ms. Taylor did not carry out a separate balancing exercise for the purpose of s.38(6) of the PCPA 2004. Instead, at para. 7.13, she said:

> "For these reasons, I consider that the proposal conflicts with the development plan as a whole and there are no material considerations which outweigh that conflict. Accordingly, I consider that the appeal should be dismissed."

In effect, Ms. Taylor carried out one all-encompassing balancing exercise for the purposes of both s.38(6) and para. 11(d)(ii) of the NPPF, as the Court of Appeal in *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1450 held is permissible (applying Lord Clyde's speech in *City of Edinburgh* at [1997] 1 WLR 1447 at 1459H-1460D).

39. Similarly, BDBC submitted in its closing submissions that the proposal did not accord with the development plan as a whole, taking into account the weight to be attached to the relevant policies (para. 48). The Council submitted, correctly, that if the appeal were to be determined after the publication of the reg. 18 draft of the BDLPU, the tilted balance in para. 11(d)(ii) of the NPPF would not apply by virtue of the deeming provision in Footnote 8. That Footnote was not engaged, because BDBC was able to show a housing land supply of at least 4 years. BDBC then submitted that while it accepted that policies SS1 and SS6 were out-of-date, that did not mean that the most important policies taken as a whole for determining the application were also out-of-date. But BDBC accepted that that would be a matter of planning judgment (i.e. for the Inspector) (para. 51). The claimant then explicitly agreed that the test to be applied by the Inspector was whether the impacts of the scheme as a whole significantly and demonstrably outweighed its benefits; i.e. the tilted balance (paras. 53 and 67).

40. At para. 67 of its closing submissions, BDBC submitted in relation to the test in para. 11(d)(ii) of the NPPF:

> "In summary, clearly, there are a number of benefits which this scheme should deliver, which the Council acknowledged when

> refusing permission and fully acknowledges now as part of its response to this appeal. The Council considers agrees that significant weight should be attached to several of those benefits, but for reasons primarily related to the substantial landscape and visual impact of this scheme, coupled with other harms as set out above in relation to settlement pattern, design and inadequate public open space, considers that those harms clearly and demonstrably outweigh the benefits."

41. Up until that point, BDBC's closing submissions had not addressed the second limb of s.38(6), or the balance between the first and second limbs. It now did so in the final paragraph of those submissions:

> "68. For much the same reasons as set out in relation to the benefits advanced under the tilted balance, the Council does not consider that there are any material considerations that outweigh the conflict with the development as a whole. On this basis it respectfully requests that the appeal should be refused."

This was the same approach as Ms. Taylor had taken in her proof ([37]-[38] above).

42. Mr. Rupert Warren KC appeared for Bewley both at the public inquiry and in this court. In para. 19 of his closing submissions he recorded a number of points which had been agreed by BDBC during the appeal process, which formed the basis for the Inspector's DL 140 (see below). Quite apart from the housing land supply position, BDBC agreed that the housing policies in the BDLP and their relationship with greenfield releases outside settlement boundaries are out-of-date and are to be reviewed in the BDLPU. It was also agreed that this affected in particular policies SS1 and SS6. The proposals conflicted with those policies, but they should be given less weight because of the out-of-datedness of the local plan.

43. Mr. Warren submitted that both in the officer's report to BDBC's Planning Committee and in Ms. Taylor's evidence to the inquiry, policies SS1 and SS6 had been referred to, but not relied upon as "a cause for permission to be withheld." The Council agreed that the tilted balance in para.11(d)(ii) of the NPPF applied because the development plan policies most important for determining the appeal were out-of-date (para. 95). Whether the tilted balance or a "flat" normal balance applied, the benefits of the proposal outweighed its harms.

The decision letter

44. The Inspector produced a careful, detailed decision letter. It is appropriate to summarise the letter fairly fully to see exactly why the Inspector considered BDBC's opposition to the development of the appeal site to have so little merit. This also provides the context in which the claimant now seeks to take in this court a highly technical legal point which is wholly unsound.

45. In DL 18 the Inspector set out what he considered to be the main issues in the appeal:

> "18. The main issues are:

- the effect of the proposal on the character and appearance of the area, including any effect on the scenic quality of the adjacent North Wessex AONB;

- whether the detailed proposals for Phase 1 would meet the objective of achieving well-designed places;

- whether the proposal would make satisfactory provision for public open space, children's play space and green infrastructure;

- whether the appeal site is at a location that is or can be made sustainable, through limiting the need for travel and offering a genuine choice of transport modes;

- whether the proposal is at risk of flooding and whether it would increase the risk of flooding elsewhere; and

- the nature and extent of any economic, social and environmental benefits."

Effect on the character and appearance of the area

46. The Inspector dealt with this first issue at DL 19 to DL 55.

47. The appeal site has an area of 22.45ha. it is bounded to the north by the River Enborne, which also forms the boundary between the areas of BDBC and of West Berkshire Council. Newbury town centre lies 5km to the north of the site. The site is bounded to the west by the A34 and to the east by the A343, the Andover Road (DL 19). To the north of the River Enborne lies the settlement of Enborne Road and the northern part of the settlement of Wash Water. Those two settlements have the appearance of a single linear settlement running east/west between the A34 and A343. The southern part of Wash Water comprises linear residential development to the south east of the appeal site (DL 20). To the north of Enborne Row and Wash Water (North) lies an open area of woodland and pasture, beyond which lies Wash Common, a southern suburb of Newbury. To the south and west of the appeal site, the A34 is on an embankment flanked by woodland. Beyond the A34 there are woodland areas falling within the North Wessex Downs AONB (now styled as a "National Landscape") (DL 21). A stream runs north/south through the centre of the farm holdings. The farm buildings are adjacent to the stream. The farm access is from the Andover Road (A343) (DL 22).

48. The housing required by policy SS1 of the BDLP was to be achieved through development on allocated sites and within settlement boundaries. The appeal site is outside any settlement boundary. Policy SS6 restricts new housing outside settlement boundaries, save in circumstances which do not apply in this case The site is regarded as countryside for the purposes of the development plan. The proposal therefore conflicts with policies SS1 and SS6 of the BDLP and policy H02 of the EWNP (DL 23).

49. The Inspector assessed the landscape and visual effects of the proposal at DL 24 to DL 39. Common Farm (the appeal site) is predominantly pasture land divided by

hedgerows into fields. It is largely contained by trees and woodland. The site is subject to some urbanising influences. Although the A34 is largely screened by woodland, traffic can be seen from some parts of the site and traffic noise affects much of the site, restricting any sense of tranquillity to the parts closest to the river. Housing in Enborne Row is readily apparent, but views are filtered by intervening trees (DL 26). Although the site is not a "valued landscape" within the NPPF, it is an attractive area with a predominantly rural character, albeit with some urbanising influences. The landscape character has a medium-high value (DL 27).

50. The site is visually contained by a combination of topography, vegetation and built form. There are no nearby viewpoints from west and south of the A34. The eastern part of the proposal would be visible from public realm in Enborne Row, albeit filtered views. There would be private views of the western part of the development from homes backing on to the river, but views from north of Enborne Row would be blocked by intervening built form and vegetation (DL 28).

51. The proposal would have an urbanising effect along the site frontage to Andover Road, where hedgerows would be recovered for the new access, and there would be views into the development (DL 29).

52. The Inspector described the retention of important trees within the site and the planting of new woodland and other vegetation. The replacement of the existing landscape within the site by built form and infrastructure would have a major adverse effect on the site itself but the effect on the landscape character area in which the site sits would be minor adverse. The landscape effects would be localised due to the visual containment of the site (DL 30 to DL 34).

53. Turning to visual impacts, the Inspector said that these would mainly be experienced by nearby residents and users of public highways and a public right of way. The most affected residents occupy a group of houses on the A343 Andover Road opposite the site access. There, the effect would be moderate to major adverse, but there would be no harm to living conditions. The effect of the development on road users would be transient. There would be a moderate to major effect on the users of the public right of way crossing the farm, but it was proposed to divert the path to run through the riverside (DL 36 to DL 39).

54. The Inspector assessed the effect of the development on the setting of settlements at DL 40 to DL 47 (see Policy EM1(c) of the BDLP). The proposal would have no impact on the gap between Enborne Row / Wash Water (North) and Wash Common or on Wash common itself (DL 42). Whilst there would be a change to the setting of Enborne Row/Wash Water (north), that change would not be harmful to its character and identity and would not conflict with Policy EM1(c) (DL 43 to DL 45). Wash Water (south) mainly comprises ribbon development, large detached houses in substantial, well-vegetated plots. The character of the settlement is mainly determined by the features within it: the adjoining woodland to the west, and the open agricultural land to the east, neither of which would be affected by the scheme. The outlook from dwellings facing the access to the appeal site would be changed, but these were not "important views" in terms of Policy EM 1(c) or the character and visual amenity of Wash Water (south) as a whole. Any harm would be minor and not add materially to visual impact (DL 46 to DL 47).

55. There would be no impact on the landscape and scenic quality of the AONB (DL 48 to DL 49).

56. The impact on cycleway routes on the A343 would be minor (DL 50).

57. Although I have only summarised the Inspector's careful analysis of the effects of the proposal on landscape and the character of the area, it can readily be seen why in his conclusions at DL 51 to DL 54 on his first main issue, he considered the impact of the proposed development to be localised and limited:

> "51. As noted above, the proposal conflicts with BDLP Policies SS1 and SS6, and with EWNP Policy HO2, which together seek to restrict development in the countryside.
>
> 52. The appeal site is not subject to any landscape designations, nor is it a valued landscape in the terms of the Framework. Nevertheless, it is an attractive area with a predominantly rural character, albeit with some urbanising influences. It is a landscape that is representative of the characteristics described in both the LCA21 and the WBLCA. The proposal would result in the permanent loss of this landscape resource, which would be harmful. However, the effect on the wider landscape areas described in the LCA21 and the WBLCA would be minor. The most significant adverse visual effects would be those experienced by users of the PRoW that crosses the site, by users of Andover Road and by residents of houses facing Andover Road opposite the access to Common Farm. This would be contrary to BDLP Policy EM1, which seeks to avoid harm to the character and visual amenity of the landscape and to respect the quiet enjoyment of the landscape from public rights of way.
>
> 53. The proposal would accord with some elements of EWNP Policy NE1, in that it would sit below ridgelines and would maximise the use of existing and enhanced tree cover. However, for the reasons given above, it could not be said to conserve and enhance the natural landscape so should be regarded as being in conflict with the policy as a whole. EWNP Policy NE5 seeks to protect trees and hedgerows. Although some trees and hedgerows would be lost, replacement trees and hedgerows would be provided. Important tree groups would be retained and given adequate space. I consider that the proposal would accord with EWNP Policy NE5.
>
> 54. The Framework states that planning decisions should recognise the intrinsic character and beauty of the countryside. I consider that the appeal scheme has had proper regard to the landscape characteristics of the site and its surroundings. This is reflected in the overall amount of green infrastructure, the provision of parks and open spaces along the river corridor, the provision of an ecological buffer adjacent to the A34, the retention of the most important tree groups and the creation of

> green corridors running south to north. These would divide the proposal into compartments within a strong landscape framework, consistent with the prevailing pattern of development in the locality. The proposal would accord with the Framework in this regard.
>
> 55. Having regard to the localised nature of the landscape and visual effects, and the mitigation inherent in the proposal, I attach moderate weight to landscape and visual harm."

Whether the detailed proposals for phase 1 would meet the objective of achieving well-designed places

58. The Inspector addressed this second main issue at DL 56 to DL 63. At DL 63 he concluded:

> "Drawing all this together, I consider that the proposal represents a considered and appropriate design response to the site context. It would represent high quality design in accordance with Policy EM10. It would also accord with the design objectives of the Framework."

DL 155 notes that condition 42 requires the submission of design codes for later phases of the development, in the interest of securing good design (see also e.g. DL 43).

Whether the proposal would make satisfactory provision for public open space, children's play space and green infrastructure

59. The Inspector addressed this third main issue at DL 64 to DL 69. Policy EM5 of the BDLP requires that development proposals should not prejudice the delivery of BDBC's Green Infrastructure Strategy ("GIS") (DL 64). Although BDBC had raised a concern about the size of the proposed kickabout area for phase 1 (DL 66), the Inspector addressed that in DL 67. In DL 69 he concluded:

> "69. In general terms I consider that Phase 1 would be well provided with open space. The policy test is whether or not the appeal scheme would prejudice the delivery of the GIS. In my view it is reasonable for the larger of two kickabout areas to be provided alongside later phases. Moreover, I see no objection to the allotments being provided with the later phases. There would be no prejudice to the GIS and the proposal would accord with BDLP Policy EM5. It would also accord with EWNP Policy CF2 which seeks to ensure that green spaces are provided in accordance with the GIS"

Whether the appeal site is at a location that is or can be made sustainable, through limiting the need for travel and offering a genuine choice of transport modes

60. The Inspector addressed this fourth main issue at DL 70 to DL 82. He noted that this issue was not contentious as between Bewley, BDBC and the County Council, but had been raised by West Berkshire Council and others (DL 70).

61. The Inspector's overall conclusion on this issue was at DL 82:

> "82. Drawing all this together, I conclude that the proposal would accord with BDLP Policy CN9, insofar as it would promote transport choice through improvements to public transport services and by providing coherent and direct walking and cycling routes. It would also comply with the relevant policies of the Framework, in that it would prioritise pedestrian and cycle movements, maximise the catchment area for bus services and promote sustainable transport modes"

Whether the proposal is at risk of flooding and whether it would increase the risk of flooding elsewhere

62. The Inspector addressed this fifth main issue at DL 83 to DL 94. There was no significant issue on this aspect between Bewley and BDBC (DL 83 to DL 84) Objections came from other parties (DL 85). At DL 94 the Inspector concluded:

> "94. I conclude that the risks of flooding, from all sources, have been properly considered. The proposal would not be at risk of flooding, nor would it increase the risk of flooding elsewhere. It would accord with BDLP Policy EM7 which seeks to manage flood risk."

The nature and extent of any social, economic and environmental benefits.

63. The Inspector addressed this sixth main issue at Dl 95 to DL 128.

64. In relation to general market housing and affordable housing, the Inspector said at DL 113 to DL 114:

> "113. The proposal is for up to 270 units, of which 60% would be market housing. The Council accepts that significant weight should be attached to the delivery of housing. Having regard to all the circumstances of this case, and the general imperative to boost the supply of housing set out in the Framework, I agree.
>
> *Affordable housing*
>
> 114. The UU provides for 40% of the dwellings to be affordable housing, with a tenure split in accordance with BDLP Policy CN1. The Annual Monitoring Report (2022) states that, in the latest monitoring year, 283 affordable units were delivered against a target of 300. This illustrates the continuing challenge of securing affordable housing. The Council and the appellant agreed that significant weight should be attached to the delivery of affordable housing. I share that view."

The term "UU" refers to the unilateral undertaking under s.106 of the TCPA 1990 entered into by Bewley (see DL 8).

65. The Inspector then carefully went through each of the benefits claimed for the scheme, indicating the extent to which he accepted each point and the weight he gave to it.

The Inspector's conclusions

66. The Inspector set out his overall conclusions at DL 132 to DL 148.

67. At DL 133 to DL 136 the Inspector set out the relevant policies of the development plan with which the proposal either accorded or conflicted:

> "133. For the reasons given above, I consider that the proposal would accord with the following BDLP policies:
>
> • EM4 – biodiversity, geodiversity and nature conservation;
>
> • EM5 – green infrastructure;
>
> • EM7 – managing flood risk;
>
> • EM10 – delivering high quality development;
>
> • CN1 – affordable housing;
>
> • CN6 – infrastructure; and
>
> • CN9 – transport
>
> 134. It would also accord with the following EWNP Policies:
>
> • NE5 – trees and hedgerows;
>
> • TT1 – traffic and parking; and
>
> • CF2 – recreation.
>
> 135. I consider that the proposal would conflict with the following BDLP policies:
>
> • EM1 – landscape;
>
> • SS1 – scale and distribution of new housing; and
>
> • SS6 – new housing in the countryside.
>
> 136. It would also conflict with the following EWNP policies:
>
> • HO2 – settlement boundary and building in the countryside; and
>
> • NE1 – protecting the landscape"

68. Thus far, the Inspector had not taken into account policy SD1 of the BDLP. This he did between DL 137 and DL 144. Mr. Katkowski confirmed that the claimant does not

criticise either the interpretation or the application of SD1 in that part of the decision letter.

69. The Inspector set out Policy SD1 at DL 137. He then said that the policy should be applied in broadly the same way as para. 11 of the NPPF. In particular, he considered that his assessment of whether "relevant policies are out-of-date" under SD1 should follow the approach taken under the NPPF to deciding whether "the policies which are most important for determining the application are out-of-date" (DL 138)

70. In DL 140 the Inspector explained why he considered the spatial strategy of the BDLP, in particular policies SS1 and SS6, to be out-of-date, not merely because it is more than 5 years old and needed to be reviewed, but because it had failed to deliver the housing requirement that it was intended to deliver:

> "140. I consider that the relevant policies are those that I have listed above. The appellant's evidence was that BDLP Policy SS1 (scale and distribution of new housing); BDLP Policy SS6 (new housing in the countryside) and EWNP Policy HO2 (settlement boundary and building in the countryside) are out-of-date. Even though the EWNP was made relatively recently, it was prepared on the basis of the housing requirement in the BDNP and does not contain any housing allocations. The Council did not challenge the appellant on these matters. I agree that these policies are out-of-date. The scale and distribution of new housing, and the settlement boundaries designed to deliver the housing needed, are more than five years old and are being reviewed through the BDLPU. *Moreover, it is common ground that housing delivery over the plan period (from 2011 up to March 2022) was 769 dwellings lower than the plan requirement over the same period. Thus, the spatial strategy is not currently delivering the housing requirement that the plan was intended to deliver*." (emphasis added)

71. In DL 141 the Inspector explained why he considered that the relevant policies of the BDLP as a whole are out-of-date for the purposes of policy SD1:

> "141. The Council and the appellant agree that all of the other relevant policies listed above are up to date. I share that view. However, although the policies that are agreed to be up to date are more numerous, it does not follow that the relevant policies as a whole should be regarded as up to date. In my view, the policies that are intended to shape the spatial strategy (SS1, SS6 and HO2) are fundamental to what the plan seeks to achieve. As these policies are out-of-date, I consider that the relevant policies as a whole are out-of-date. It follows that the balancing exercise set out in Policy SD1 is engaged."

The claimant makes no criticism of this paragraph.

72. The Inspector then performed the balancing exercise required by policy SD1 at DL142 to DL144:

> "142. When carrying out that balancing exercise, the adverse impacts are the landscape and visual effects, to which I attach moderate weight, and the conflict with the spatial strategy of the development plan, to which I attach limited weight because the spatial strategy is out-of-date.
>
> 143. The benefits are the delivery of market housing (significant weight); delivery of affordable housing (significant weight); open space and improvements to the PRoW (moderate weight); convenience store (moderate weight); employment and other economic benefits (moderate weight); and improved choice of transport modes for new and existing residents (moderate weight).
>
> 144. I conclude that the adverse impacts would not significantly and demonstrably outweigh the benefits. Moreover, there are no specific policies in the Framework that indicate that development should be restricted. Policy SD1 therefore indicates that planning permission should be granted."

The BDBC makes no criticism of these paragraphs. They contain no error of law. Indeed, if the Inspector had failed to take into account and apply policy SD1 that would have been an error of law.

73. The Inspector then turned to consider the application of s.38(6) of the PCPA 2004. At that point he had to consider the BDLP as a whole, which had to include policy SD1 and his reasoning in DL 138 to DL 144, leading to the conclusion that SD1 favoured the grant of planning permission.

74. The Inspector decided that the proposal was in accordance with the development plan as a whole, the first limb of s.38(6), for the reasons set out in DL 145 (see [16] above).

75. BDBC's challenge depends upon its criticism of this paragraph. That criticism is simply that the Inspector should not have had regard to the agreed out-of-datedness of the plan's spatial strategy when deciding whether or not the proposal was in accordance with the development plan as a whole.

76. The Inspector then went on to apply the second limb of s.38(6) in Dl 146 to DL 147:

> "*Other material considerations*
>
> 146. The Framework is a material consideration. In my view the policies that are most important for determining the appeal are out-of-date for the reasons given above. However, it is not necessary to carry out the balancing exercise set out in paragraph 11(d) because the proposal is in accordance with the development plan. Even if that exercise were carried out, it would take account of the same factors that apply to the Policy SD1 balancing exercise. It would also reach the same conclusion, which is that the adverse impacts would not significantly and demonstrably outweigh the benefits. There are

> no policies of the Framework that provide a clear reason for refusing the proposal. Accordingly, the Framework is a material consideration that can only add to the case in favour of the appeal.
>
> 147. I have not identified any other material considerations that indicate a decision other than in accordance with the development plan."

Legal Principles

77. Under s.15 of the PCPA 2004 a LPA must prepare and maintain a "local development scheme." The scheme is to specify (*inter alia*) local development documents which are either development plan documents (the subject of the presumption in s.38(6)) or supplementary planning documents.

78. Section 17(3) requires a LPA's adopted local development documents, taken as a whole, to set out the authorities' policies relating to the development and use of land in their area. The policies must be contained in those documents (see e.g. *Westminster City Council v Great Portland Estates plc* [1985] AC 661, 674).

79. Regulation 5 of the 2012 Regulations describes the documents which are to be prepared as local development documents. They include documents setting out site allocations and policies for development management, which are then defined by reg. 6 as local plans.

80. In preparing a development plan document or any other local development document, the LPA must have regard to *inter alia* national policies and advice contained in guidance issued by the Secretary of State (s.19(2) of PCPA 2004).

81. Regulation 10A of the 2012 Regulations requires a LPA to complete a review of its local plan within every 5 years, starting from the date of adoption of the plan.

82. The Secretary of State, as the central planning authority, has the function of helping to bring coherence and consistency in development control. National policy is part of the framework for consistent, predictable and prompt decision-making. The formulation of national policy is an essential element of securing coherent and consistent decision-making. The power to make such policy derives expressly or by implication from the legislation which gives the Secretary of State overall responsibility for the oversight of the planning system. National policy does not displace the primacy given by s.38(6) of the PCPA 2004 to the statutory development plan. It is an "other material consideration" to which a decision maker must have regard (s.70(2) of the TCPA 1990). The weight to be given to conflict or compliance with the NPPF is a matter of judgment for the decision-maker. It is also a matter for his judgment as to whether other considerations outweigh the priority to be given to the development plan (*R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [139]-[143], *City of Edinburgh* [1997] 1 WLR at 1459-1460; *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 at [19] to [21]; and *Gladman Developments* at [33] to [34]).

83. As we have seen, the statutory scheme and the NPPF require development plans to be kept up-to-date. In this case, that principle is incorporated in the BDLP itself by policy SD1. The House of Lords has accepted that where a policy in a development plan is out-of-date, it may be accorded less weight (*City of Edinburgh* at [1997] 1 WLR 1458E).

84. In *Loup v Secretary of State for the Environment* (1995) 71 P&CR 175 the Court of Appeal held at p.186 that although s.38(6) gives priority to the development plan, it does not tell the decision-maker what weight to give to the plan, or to other material considerations. These are matters for the decision-maker to weigh. This statement was approved by the House of Lords in *City of Edinburgh* at [1997] 1 WLR 1458H to 1459A. As Lord Clyde added, it is for the decision-maker to assess the relative weight to be given to all material considerations, including the development plan.

85. In *Gladman* the Court of Appeal considered the relationship between the statutory presumption in favour of the development plan (contained in s.38(6)) and the policy presumption in favour of sustainable development (contained in para. 11 of the NPPF). The Court rejected the appellant's contentions that (i) development plan policies were only to be taken into account in the balance under s.38(6) and not under para. 11 of the NPPF and (ii) the two presumptions had to be applied separately. The appellant had suggested that the balance in para. 11 of the NPPF should be struck before applying s. 38(6).

86. Instead, the Court of Appeal held that these two provisions could be applied either separately or together in a single, comprehensive exercise. If a single assessment is carried out, the decision-maker must keep in mind the statutory priority of the development plan (see [63] to [67]). As Lord Clyde stated in *City of Edinburgh* at [1997] 1 WLR 1460:

> "In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course due regard to the priority of the latter, but reaching his decision after a general study of all the material before him."

87. One important reason why it is possible for the two exercises to be combined in a single assessment is, as held in *Loup*, that s.38(6) does not lay down how much weight should be given to the development plan. That is a matter of judgment for the decision-maker in the circumstances of the case.

88. The principles upon which this court may intervene in a challenge under s.288 of the TCPA 1990 are well-established and have been summarised in *St. Modwen Developments Limited v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [6]-[7].

The short answer to this challenge

89. Having gone carefully through the parties' cases to the Inspector and his decision letter, it is possible to dispose of this claim quite briefly.

90. BDBC does not challenge the Inspector's reasoning in DL 140, based on common ground between the Council and Bewley, as to why the spatial strategy of the BDLP is not delivering the housing requirement that that strategy (including existing settlement boundaries) was designed to deliver.

91. BDBC does not challenge the Inspector's reasoning in DL 141 as to why the spatial strategy policies (SS1 and SS6 of the BDLP and H02 of the EWNP) and all the relevant policies as a whole are out-of-date.

92. BDBC does not challenge the Inspector's reasoning in DL 141 to DL 144 that:-

    (i) The balancing exercise in policy SD1 (equivalent to para. 11(d) of the NPPF) had to be carried out;

    (ii) The adverse impacts upon landscape and visual effects carried moderate weight;

    (iii) The conflict with the spatial strategy had limited weight because that strategy was out-of-date;

    (iv) The proposal had the benefits listed in DL 143 and the various weights there set out;

    (v) The adverse factors would not significantly and demonstrably outweigh the benefits and so policy SD1 indicated that permission should be granted.

93. As to point (iii), there is no dispute that the out-of-datedness of the spatial strategy was a relevant factor in the balance to be struck under para. 11(d)(ii) of the NPPF and, by the same token, policy SD1 of the BDLP.

94. When addressing the first limb of s.38(6) of the PCPA 2004 the Inspector had to consider whether the proposal accorded with the development plan as a whole. In doing so he had to take into account his earlier conclusion, on the application of policy SD1 of the BDLP. He did so in the first sentence of DL 145. None of this is challenged by BDBC, nor could it be.

95. It was permissible for the Inspector to apply both the presumption in favour of sustainable development and the priority in favour of the development plan simultaneously in one balancing exercise (see *Gladman*), *a fortiori* because the BDLP included policy SD1, which replicates para.11(c) and (d) of the NPPF. DL 145 formed part of that exercise at DL 145 to DL 147.

96. In deciding whether the proposal accorded with the development plan as a whole, it was logical and consistent with the application of policy SD1 in this case for the Inspector to take into account the out-of-datedness of the spatial strategy (see last sentence of DL 145). Indeed, to have ignored that factor would have been internally inconsistent and would have failed to apply the development plan as a whole.

97. For these reasons alone, the challenge must fail.

What if policy SD1 is disregarded?

98. I do not consider that the dismissal of this claim depends upon the fact that the BDLP includes policy SD1. Some local plans do not contain a policy replicating the NPPF's presumption in favour of sustainable development. In the present case, even if policy SD1 is disregarded for the sake of argument, I see no error of law in DL 145. In my judgment, the Inspector would still have been entitled to take into account the out-of-datedness of the spatial strategy of the development plan when deciding whether the proposal was in accordance with that plan as a whole.

99. *Milne* and related authorities have decided that the issue of whether a proposal accords with a development plan is not a purely linguistic exercise. Policies are likely to pull in different directions. The decision-maker's task is to reach a judgment on whether a proposal accords with the development plan as a whole. That involves forming a view on the relative importance of the relevant policies and the nature and extent of compliance or non-compliance with those policies. It is also relevant to consider how the proposal relates to the objectives or purposes of the relevant policies and/or the plan.

100. Mr. Katkowski submits that the Inspector treated policies SS1 and SS6 of the BDLP and policy HO2 of the EWNP as "fundamental" to the development plan, relying upon DL 141 (see para. 21 of his skeleton). He says that, by contrast, the Inspector did not treat the policies with which the proposal complied as fundamental to that plan. Accordingly, he suggests that the Inspector's finding that the proposal conflicted with fundamental policies of the plan could, indeed should, have led the Inspector to decide that the proposal did not accord with the BDLP read as a whole. He says that the Inspector's conclusions that the proposal *did* accord with the plan as a whole depended upon treating the conflict with landscape policies (which the Inspector did not consider to be fundamental) as "moderate" and, crucially, the spatial strategy policies as out-of-date, an irrelevant consideration.

101. However, BDBC's submission mischaracterises what the Inspector identified as being "fundamental" to the development plan. In DL 140 the Inspector found that housing delivery from 2011 to 2022 had been 769 dwellings lower than the plan's requirement for that period. Thus, the Inspector said that the spatial strategy was not delivering the required housing that the plan was intended to deliver. He understood the spatial strategy to be intimately bound up with the objectives of that strategy, indeed of the BDLP, including the delivery of the housing requirement for the borough. He was correct to do so (see [19] to [22] above).

102. Consistent with that understanding of the plan, the Inspector did not say in DL 141 that the spatial strategy policies (SS1, SS6 and HL02) taken by themselves were fundamental to the plan. Rather he said that they were fundamental to what the plan "seeks to achieve". In other words, he was addressing the relationship between that strategy and the objectives of the plan (see [7] and [99] above), which include the delivery of the housing requirement. The Inspector was perfectly entitled to come to that conclusion. It was because he considered that the spatial strategy was not achieving its intended purpose, a key purpose of the plan, that he concluded that it was out-of-date and needed to be reviewed (including the settlement boundaries – see DL 140).

103. Properly understood, the Inspector assessed the spatial strategy as being out-of-date solely by reference to an intrinsic part of the development plan itself, the strategy's

purpose. He did not base that conclusion on some externality, such as a change in central government planning policy. The Inspector's judgment went to the relative weight to be given to the spatial strategy within the development plan (including settlement boundaries), given its failure to deliver the BDLP's housing requirement, a fundamental aspect of what the plan seeks to achieve (DL 141). In these circumstances, the Inspector's approach in DL 145 to the first limb of s.38(6) cannot be criticised in this court.

The court's discretion

104. If I had decided that the claimant succeeded in demonstrating that the decision letter contained the error of law alleged, the defendants ask the court nevertheless to refuse to quash that decision applying the test in *Simplex*. The defendants have to show that if the error had not been made, it is inevitable that the Inspector's decision would still have been to allow the appeal and grant planning permission. This assessment has to be based solely upon parts of the decision letter untainted by the putative error of law.

105. In this part of the case, the court is asked to assume that the Inspector erred in law in DL 145 by taking into account the out-of-datedness of the spatial strategy in deciding whether the proposal did or did not accord with the development plan (the first limb of s.38(6)). Mr. Katkowski submits that if that had not happened, there is at least a possibility, if not a real likelihood, that the Inspector would have decided that the proposal did not accord with the development plan and therefore the statutory priority given by s.38(6) to that plan would have applied. However, Mr. Katkowski rightly accepts that the out-of-datedness of the spatial strategy would have had to be taken into account in the balance to be struck under s.38(6) (the second limb).

106. I will assume in the claimant's favour that if the Inspector had not taken out-of-datedness into account when applying the first limb of s.38(6), he would have decided that the proposal did not accord with the development plan. On that basis the presumption under s.38(6) would have been that the appeal should be dismissed unless material considerations indicated otherwise. But how far does that take the claimant?

107. As is plain from *Loup* and *City of Edinburgh*, s.38(6) gives no indication as to how much weight should be given to the development plan or to the presumption in favour of decision-making in accordance with the plan, whether that tells in favour of or against the grant of planning permission in any particular case. That is a matter for the judgment of the decision-maker, here the Inspector.

108. The effect of BDBC's legal argument is that the out-of-datedness of the spatial strategy would be moved from the first limb to the second limb of s.38(6). Mr. Katkowski said that under the second limb the Inspector would need to assess how much weight to give to conflicts and compliance with development plan policies and any other material considerations.

109. The question for the court is did the Inspector carry out that exercise in any event in a manner which cannot be impugned? In DL 133 to DL 136 the Inspector set out the conflicts and compliances with the development plan. Those paragraphs contain no error of law.

110. As I have noted, there is no legal challenge from the claimant to DL 140 to DL 144. Mr. Katkowski confirmed that there is no legal challenge to the Inspector's assessment that only moderate weight should be given to landscape harm and to conflict with the landscape policies (EM1 of BDLP and NE1 of EWNP) (see DL 142 and DL 145).

111. We also know that in DL 142 the Inspector gave only limited weight to the conflict with the plan's spatial strategy (policies SS1, SS6 and HO2). That finding was lawfully made in the context of the balancing exercise carried out under policy SD1. It is not challenged. There is no logical reason for not treating that finding as being equally applicable under the second limb of s.38(6).

112. We also know the weight given by the Inspector to the various benefits of the proposal, which would include compliance with development plan policies, such as affordable housing. Those assessments too are equally applicable to the balancing exercise under the second limb of s.38(6).

113. Lastly we know that the Inspector concluded that the disbenefits (including conflicts with policy) referred to above did not significantly and demonstrably outweigh the benefits (or compliances with the policy) (see DL 144). Although that was a balancing exercise carried out under policy SD1 of the BDLP, logically it would be impossible for the untilted balance under the second limb of s.38(6) to come up with an answer going the other way. The Inspector has made unimpeachable findings which plainly demonstrate that the s.38(6) balance would inevitably come down in favour of granting permission for the appeal proposal.

114. Mr. Katkowski also submitted that the Inspector needed to take into account paragraph 77 of the NPPF which requires LPAs to demonstrate a housing land supply of at least 5 years, or, in the case of BDBC, 4 years. It was relevant for the Inspector to take into account the Council's compliance with that policy. The Inspector did so (see DL 139). There is no ground of challenge that the Inspector left that finding out of account when he struck the balance required by policy SD1. Accordingly, this factor does not undermine the Defendant's reliance upon the Inspector's conclusion in DL 144 for the purposes of satisfying the *Simplex* test.

115. Accordingly, I am certain that the Inspector would inevitably have decided to grant permission for the appeal scheme if it be assumed that the putative legal error had not been committed.

116. This conclusion should come as no surprise. In this case, unlike others, the Inspector found that the proposal would cause relatively limited harm and that the conflict with the spatial strategy attracted only limited weight, given its failure to achieve a key objective of the development plan. The Inspector found that the benefits of the scheme clearly outweighed the harms. He was entitled to reach those conclusions. Here the LPA plainly lost the appeal on the planning merits in a way which cannot be impugned. This challenge has no legal merit at all.

Conclusion

117. The claim for statutory review is dismissed.