Queen's Bench Division

Gladman Developments Ltd *v* Secretary of State for Housing, Communities and Local Government and another

[2019] EWHC 127 (Admin)

2018 Dec 6;
2019 Jan 29

Dove J

Planning — Development — Permission — Secretary of State's inspector upholding refusal of claimant's application for planning permission — Whether inspector giving adequate reasons for departing from earlier appeal decisions on status of applicable policy in local authority's core strategy — Town and Country Planning Act 1990 (c 8), s 70(2) (as amended by Localism Act 2011 (c 20), s 143(2) and Housing and Planning Act 2016 (c 22), s 150, Sch 12, para 11(2))[1]

The local planning authority refused an application by the claimant for planning permission for a residential development on the ground, inter alia, that the development was contrary to policy DM4 in its core strategy. The claimant appealed, pursuant to section 78 of the Town and Country Planning Act 1990, contending that the policy was inconsistent with the National Planning Policy Framework (2012) and should thus be regarded as out-of-date and of little weight. The Secretary of State called in the application for his own determination and a public inquiry was held before the appointed inspector. The inspector noted that there were previous appeal decisions bearing upon the question of the weight to be attached to the policy, in some of which the policy had been found to be out-of-date and of very limited weight. The inspector nevertheless concluded that the policy was not out-of-date and he dismissed the appeal and refused planning permission. The claimant applied under section 288 of the 1990 Act for an order quashing the decision on the ground, inter alia, that the inspector had failed to address and provide reasons for departing from the earlier appeal decisions in respect of the policy. The Secretary of State conceded that the inspector had erred in his consideration of whether the policy was out-of-date, and had failed to give adequate reasons for departing from the previous appeal decisions in circumstances where those decisions were recent and the same factual and policy background applied to them as applied in the claimant's case. The local planning authority contested the application.

On the application—

Held, granting the application, that in determining an application for planning permission, an earlier decision in an appeal or decision by the Secretary of State in which a similar issue had been deliberated upon and resolved was capable of being a material consideration to which the decision-maker was required by section 70(2) of the Town and Country Planning Act 1990 to have regard; that it was beyond argument that a previous decision on precisely the same issue (namely whether the policy in question was out-of-date and the weight to be attached to it) would be a material consideration for an inspector deciding an application in which that point subsequently arose; that, while consistency was important, it did not mean that

[1] Town and Country Planning Act 1990, s 70(2), as amended: "In dealing with an application for planning permission or permission in principle the authority shall have regard to— (a) the provisions of the development plan, so far as material to the application … and (c) any other material considerations."

like cases had to be decided alike although, where an earlier decision was to be distinguished or departed from, the reason for doing so ought to be identified and explained; that the fact that there were a significant number of previous decisions falling on both sides of the line in the debate was not a reason for not applying that principle; that in the present case the inspector had erred in law in failing properly to grapple with and provide reasons for departing from earlier decisions addressing the same issues in respect of policy DM4; and that, accordingly, the decision would be quashed and the matter remitted for reconsideration (post, paras 14, 16, 28, 30–35, 39).

North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P & CR 137 applied.

The following cases are referred to in the judgment:

Cumberlege of Newick (Baroness) v Secretary of State for Communities and Local Government [2018] EWCA Civ 1305; [2018] PTSR 2063, CA

Daventry District Council v Secretary of State for Communities and Local Government [2016] EWCA Civ 1146; [2017] JPL 402, CA

Dunster Properties Ltd v First Secretary of State [2007] EWCA Civ 236; [2007] 2 P & CR 26, CA

North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P & CR 137, CA

R (Fox Strategic Land and Property Ltd) v Secretary of State for Communities and Local Government [2012] EWCA Civ 1198; [2013] 1 P & CR 6, CA

No additional cases were cited in argument or referred to in the skeleton arguments.

APPLICATION under section 288 of the Town and Country Planning Act 1990

By a claim form, and with permission of Holgate J, the claimant, Gladman Developments Ltd, sought a statutory review, pursuant to section 288 of the Town and Country Planning Act 1990, of the decision dated 16 August 2018 of an inspector appointed by the first defendant, the Secretary of State for Housing, Communities and Local Government, dismissing its appeal against the refusal by the second defendant local planning authority, Central Bedfordshire Council, of an application for planning permission for a residential development on land at Langford Road, Henlow, Bedfordshire. The ground of challenge was that the inspector, in finding that a relevant policy in the local authority's core strategy was not out-of-date, had erred in his consideration of the issue or, alternatively, had failed to give any adequate reasons why he was departing from the judgment formed by inspectors in earlier appeal decisions that the policy was out-of-date. The Secretary of State conceded that the inspector had erred in his consideration of the earlier appeal decisions but the local authority contested the claim.

The facts are stated in the judgment, post, paras 1–11.

Peter Goatley (instructed by *Addleshaw Goddard llp*) for the claimant.

Saira Kabir Sheikh QC (instructed by *LGSS Law Ltd, Shefford*) for the local planning authority.

The Secretary of State did not appear and was not represented.

The court took time for consideration.

29 January 2019. **DOVE J** handed down the following judgment.

Background

1 On 8 July 2016 the claimant made an application for planning permission to the local planning authority for a development of up to 135 residential dwellings (including up to 35% affordable housing), the introduction of structural planting and landscaping, informal public open space and children's play area, surface water flood mitigation and attenuation, vehicular access points and other ancillary works at Langford Road, Henlow, Bedfordshire. That application was refused by the authority for two reasons on 6 October 2016. The claimant then appealed under section 78 of the Town and Country Planning Act 1990 and this is a challenge to the decision which the Secretary of State's duly appointed inspector reached on 16 August 2018 in relation to the appeal. The decision which the inspector made was that planning permission should be refused.

2 By the time of the public inquiry in relation to the appeal one of the reasons for refusal had been resolved, leaving the sole basis of refusal characterised by the inspector in the following terms as the main issue before him:

> "5. The main issue is the effect of the proposed development on the character and appearance of the area, with any identified harm being assessed within the context of the council's housing land supply situation, and the effect that this in turn, has on the weight to be given to that harm."

3 Underpinning that main issue before the inquiry was the contention that the claimant's proposal was in breach of a number of development plan policies derived from the Central Bedfordshire Core Strategy and Development Management Policies November 2009 ("the CS"). One of those policies was policy DM4. The relevant parts of policy DM4, together with its introductory explanatory text so far as relevant to these proceedings, provided:

> "11.1.1 To define the boundaries between settlements and surrounding countryside the council has, through the proposals map, defined settlement envelopes for all those communities within the district that are set out in the settlement hierarchy. The settlement envelope review which was referred in Annex G, made recommendations to amend the settlement envelope boundaries. In some instances, where there is ambiguity in defining that boundary, the envelope has been used to reflect the character of the predominant land use, using the most appropriate and clear physical features on the ground."
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> "11.1.15 Outside settlements, where the countryside needs to be protected from the inappropriate development, only particular types of new development will be permitted in accordance with national guidance (Planning Policy Statement 7—Sustainable Development in Rural Areas) and the East of England Plan. This includes residential development on exceptions schemes as set out by CS7, or dwellings for the essential needs of those employed in agriculture or forestry, or that which re-uses or replaces existing dwelling."

A "Policy DM4: Development Within and Beyond Settlement Envelopes:

"Within settlement envelopes, the council will support schemes for community, education, health, sports and recreation uses or mixed community and other uses where a need for such facilities is identified through the infrastructure audit or up to date evidence. Where no land is available within the settlement, a site adjacent to the settlement may be
B granted planning permission. Such development should make the best use of available land and lead to more sustainable communities.

"Within the settlement envelopes of both major and minor service centres, the council will approve housing, employment and other settlement related development commensurate with the scale of the settlement, taking account of its role as a local service centre.

C "Within settlement envelopes in large villages, small-scale housing and employment uses, together with new retail and service facilities to serve the village and its catchment will be permitted.

"Within settlement envelopes in small villages, development will be limited to infill residential development and small-scale employment uses.

D "Beyond settlement envelopes, limited extensions to gardens will be permitted provided they do not harm the character of the area. They must be suitably landscaped or screened from the surrounding countryside and buildings may not be erected on the extended garden area."

4 The claimant's appeal site was beyond the settlement boundary giving
E rise to the undisputed proposition that development would be contrary to policy DM4. The claimant contended that there were a number of reasons why conflict with policy DM4, and other relevant policies in the CS, should be afforded less weight or treated as irrelevant to the merits of the proposal. The first of these was the contention that the authority could not identify a five-year housing land supply. The inspector rejected that contention. The
F second argument raised was that the weight to be afforded to policy DM4 had to be diminished as it was out-of-date. As the inspector noted in para 34 of his decision the tilted balance which favours the grant of planning permission contained within paragraph 14 of the National Planning Policy Framework (2012) ("the Framework") can be triggered when one of the relevant policies of the development plan is considered to be out-of-date. For the avoidance of doubt, at the time of the decision under challenge the operative version of
G the Framework was that published in March 2012, and all references to the Framework in this judgment are references to that document. The question of whether a policy is out-of-date is to be gauged against the policy contained in paragraph 215 of the Framework, which provides:

H "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 Framework, the greater the weight that may be given)."

5 It was the claimant's contention before the inspector that paragraph 215 of the Framework was particularly in point in relation to policy DM4,

and that it was a policy which was not consistent with the other policies contained in the Framework, and therefore should be regarded as out-of-date and of little weight, leading to the application of the tilted balance in resolving the question of whether or not planning permission should be granted. The inspector's reasons in relation to that contention were set out in paras 35–41 of the decision:

> "35. On the surface, and read in isolation, policy DM4 is a restrictive policy based on an outdated housing need, in that it limits development outside of settlement boundaries to limited extensions to gardens, provided that they do not harm that character of that area. However the supporting text in 11.1.15 makes clear that certain types of development that are in accordance with the now defunct Planning Policy Statement 7 will be permitted. These include exception schemes, dwellings for the essential needs of those employed in agriculture or forestry and the re-use or replacement of existing dwellings. Furthermore, the settlement envelopes referred to in the policy do not exist purely to accommodate the housing growth over the plan period but also, it is stated, to reflect the character of the predominant land use.
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> "36. The policy is not therefore completely restrictive and, whilst I acknowledge that paragraph 113 of the Framework seeks to protect landscape commensurate with its status, and that policy DM4 does not attempt to evaluate different landscapes, the Framework also makes clear in paragraph 17 that the intrinsic character and beauty of the countryside should be recognised. Furthermore, there is nothing in the Framework that indicates that the loss of undesignated land cannot be harmful to the character and appearance of an area and this is reinforced in the *Cawrey* judgment [*Cawrey Ltd v Secretary of State for Communities and Local Government* [2016] EHWC 1198 (Admin)], which confirms that the loss of undesignated countryside is capable of being harmful in the planning balance.
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> "37. The over-arching aim of the policy DM4 is to promote residential development in appropriate areas. This was an objective of the core strategy at the time that it was adopted, and whilst this was prior to the introduction of the Framework, it is still an objective that is very relevant and appropriate today and is a principle that still applies in the Framework, indeed it underpins the plan-led system, which is itself specifically supported by the Framework. Furthermore, whilst the principle of settlement boundaries is not specifically mentioned in the Framework, nor is it discounted.
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> "38. In this particular case the council can demonstrate a five-year housing land supply which indicates that the presence and use of DM4 has not been restrictive. I acknowledge that the inspector in the recent Meppershall decision considered that the existence of a five-year housing land supply was *despite* the existence of policy DM4. However, to my mind the examples of instances where development has been allowed contrary to policy DM4 indicates that a balancing exercise has been carried out in a pragmatic and correct way, and that consequently DM4 has not been used to restrict suitable development.
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> "39. I note that in the draft local plan the present settlement boundaries are to be superseded, with a considerable amount of housing

being promoted in areas outside of current settlement boundaries, and that in some cases housing has been allocated within the Green Belt. However, it has already been established that the draft local plan carries little weight at the current time.

"40. In summary, based on the forgoing paragraphs, I find that some discrepancy in the working of policy DM4 relative to paragraph 113 of the Framework indicated that it should not be afforded full weight. However, given that I have found that the underlying objectives of the policy still hold good, it should still command at least moderate weight and cannot therefore be construed to be 'out-of-date'. It follows that the tilted balance outlined in the fourth bullet point of paragraph 14 of the Framework is not engaged.

"41. I note that there have been a series of appeal decisions, including two that have been issued after the close of this inquiry, that have grappled with the weight to be given to DM4 and that the results have varied from the policy being afforded moderate weight to being out-of-date. I have also been made aware of appeal decisions in other council areas that on the surface support the appellant's position. However, it would seem that the previous inspectors, apart from two very recent decisions, did not have the *Daventry* Court of Appeal legal judgment [*Daventry District Council v Secretary of State for Communities and Local Government* [2017] JPL 402] before them, and it is this that has helped inform my above reasoning. Furthermore, the weight afforded by an inspector to particular policies in an appeal scenario is a matter of planning judgment, dependent upon not only the information present, but also upon the *way* in which it has been presented."

6 The inspector rejected the other arguments presented by the claimant bearing upon the question of whether or not the tilted balance should apply. He thus did not apply the tilted balance in resolving the question of whether or not planning permission should be granted, and proceeded in the light of his other conclusions with respect to the impact of the development to reach the conclusion that the appeal should be dismissed and planning permission refused.

7 It will be recalled that in para 41 of the inspector's decision he noted that there had been a series of appeal decisions bearing upon the question of the weight to be attached to policy DM4 and the issue of whether or not it was out-of-date. Indeed, contained within the bundle before the court for the purposes of the hearing, there are no less than nine appeal decisions in which the question of the weight to be attached to policy DM4 and whether or not it was out-of-date was a main issue which the inspector needed to address. It is fair to observe that those decisions decided this point in different directions. In some of them the inspector concluded, akin to the inspector in the present case, that policy DM4 was not out-of-date, and that some weight should be attached to it, but the tilted balance not applied. Other inspectors reached the conclusion that policy DM4 was out-of-date and of very limited weight, leading to the application of the tilted balance in reaching the ultimate judgment on the planning merits of the appeal.

8 It is unnecessary for the purpose of this judgment to rehearse those decisions in full. In my view the decision which is particularly pertinent to the issues before the court, as recognised in the submissions made by Mr Peter

Goatley on behalf of the claimant, is the decision which was reached after the public inquiry in relation of the decision under challenge had closed, but prior to the inspector reaching a decision, in respect of an appeal at Meppershall on 22 May 2018 ("the Meppershall appeal"). The decision was circulated to the parties after the inquiry had closed, and they were afforded the opportunity to make submissions upon it, which they did. It therefore formed part of the material before the inspector in the present case.

9 The Meppershall appeal was related to another application for residential development which was contrary to policy DM4. The Meppershall inspector provided extensive reasoning in relation to the issues concerning the weight to be attached to policy DM4, bearing in mind that prior to his decision there had been the various appeal decisions described above which had addressed this issue. In particular the Meppershall inspector considered arguments which were presented to him pertaining to the decision of the Court of Appeal in *Daventry District Council v Secretary of State for Communities and Local Government* [2017] JPL 402 (the material passages from which are set out below).

10 The reasoning which the Meppershall inspector gave for forming his conclusions that only limited weight should be given to policy DM4 and that it was out-of-date, bearing in mind the sequence of earlier appeal decisions and the reasons provided within them, was set out in the decision (including the acronyms that he adopted and which are relatively straightforward to identify) at paras 13–23:

> "13. The consistency of various development plan policies with the Framework has been considered in a number of recent appeal decisions including those issued since the close of the inquiry. I have had regard to these reaching my own conclusions on these matters. The parties agree that the Court of Appeal judgment in *Daventry District Council v Secretary of State for Communities and Local Government* [2017] JPL 402 (ID6) provides assistance on how the assessment of consistency should be undertaken and the matters to be considered in assessing whether a policy should be regarded as being out-of-date for the purposes of paragraph 14 of the Framework.
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> "14. In that judgment, Sales LJ confirms that policies can be out-of-date even where there is a five-year housing land supply and that the mere age of policy is irrelevant. Paragraph 215 requires an assessment of the consistency of the development plan policy under consideration with all relevant policies in the Framework. Since an important set of policies in the Framework encourage plan-led decision making significant weight should be given to the general public interest in having plan-led decisions even if particular policies in the development plan might be old. He also held that 'the fact that the council is able to show with the current saved policies in place it has the requisite five-year supply tends to show that there is no compelling pressure by reason of unmet housing need which requires those policies to be overridden'.
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> "15. In the Meppershall decision (CD6.26) Inspector Doward found that any inconsistency with the Framework is sufficient to render a policy out-of-date and that core strategy policy DM4 is out-of-date on this basis. That approach has not been followed by the other inspectors and was challenged by the parties in the current appeal. The parties

A agree that what is required is a planning judgment as to the degree to which the policies are consistent with the Framework, as set out in the *Daventry* case.

"16. The *Daventry* case is listed as an inquiry document in the Crawley Road decision but there is nothing in that decision letter to indicate how that judgment has informed Inspector Gregory's conclusions on key policies. Her refence to it in para 21 seems to be in
B error, with the correct reference seemingly being to the *Cawrey* judgment (document ID17 in the current appeal). However, all the other inspectors appear to have considered the degree of consistency with the relevant policies and principles in the Framework in forming their conclusions as to weight and whether or not specific policies are out-of-date.

"17. Applying the approach in the *Daventry* case to core strategy
C policy DM4, my conclusions are aligned with those of Inspector Asquith in respect of the Silsoe appeal (ID19) and Inspector Hockenhull in Stotfold. I find that policy DM4 seeks to protect the countryside for its own sake and this blanket protection applies to all areas outside of settlement envelopes irrespective of their landscape value or sensitivity. The policy goes beyond government policy as set out in the fifth bullet
D of paragraph 17 of the Framework and conflicts with paragraph 113, which states that such protection should be commensurate with the status and quality of the landscape. The judgment in *Cawrey* (ID17) means that the loss of undesignated countryside is capable of being harmful in the planning balance. However, I do not read that judgment in supporting the DM4 approach of protecting the countryside for its own sake. In that respect, I take a different view to that reached by
E Inspector Gregory but, as she points out in her decision, the different conclusions reached by different inspectors may reflect how the cases have been put to them.

"18. The settlement envelopes were defined as part of a core strategy which sought to provide for a different and materially smaller housing requirement than the current objectively assessed need. Around 71% of
F the five-year HLS comprises dwellings on sites outside of the settlement boundaries in anticipation of what allocations might come forward in the subsequent SADP. However, there has been no subsequent revision of those boundaries and some 42% of dwellings in the housing trajectory on unallocated sites are also outside of the settlement envelopes.

"19. I do not know the circumstances under which all of those permissions were granted but this does provide strong evidence that the
G strict application of policy DM4 would frustrate the council's ability to achieve a five-year housing land supply and that the policy is, therefore, not consistent with paragraph 47 of the Framework. These circumstances are different to those which existed in the *Daventry* case in that the five-year housing land supply in Central Bedfordshire exists despite rather than because of SADP policy DM4.

H "20. I agree with Inspector Gregory that the Framework does not restrict the use of settlement boundary policies. However, the key issue is not the principle of their use but whether or not the council would be able to demonstrate a five-year housing land supply had the current settlement boundaries been strictly adhered to. The clear evidence is

that it would not. Policy DM4 is, therefore, inconsistent with the Framework's policies in housing supply.

"21. A significant number of sites outside of the existing settlement boundaries will need to be allocated in the emerging local plan to meet future housing needs and they are likely to include land in the Green Belt. This will be necessary to provide a forward land supply to meet the district's objectively assessed need the Luton unmet need and a substantial review of the existing boundaries will be required once these allocations have been finalised. Although the emerging local plan can carry only limited weight at this stage the parties agree that the unmet need of Luton is a material consideration of significant weight (SoCG paragraph 3.3).

"22. Taking all these considerations into account, I find that policy DM4 is sufficiently inconsistent with policies in the Framework to render it out-of-date for the purposes of paragraph 14. In view of that degree of inconsistency, I afford only limited weight to the policy. This finding is in line with those of Inspectors Asquith and Hockenhull and of Inspector Clark in the Cranfield Decision (ID1). Inspector Clark does not specify what weight the policy should attract but his comment that moderate weight ascribed by previous inspectors 'appears generous' indicates that he gave only limited weight to policy DM4. He found that the policy is not out-of-date but his reasoning for reaching his judgment is not fully set out. Inspector Gregory does not set out any finding as to whether DM4 is out-of-date but concludes that it should be given moderate weight.

"23. Inspector Hayden's finding in Clophill (CD6.20) that policy DM4 is not out-of-date appears to have been made on the understanding that the five-year supply was being met with all the relevant development plan policies in place. The strong evidence before me leads me to a different conclusion. Inspectors Parker in Potton (CD6.21) and Doward in the Meppershall decision (CD6.26) both found inconsistency with the Framework and attached moderate weight to the policy. Inspector Parker did not find the policy to be out-of-date but did not need to reach a conclusion on this question given his finding that the proposed accorded with the development plan as a whole. The weight to be given to Policy DM4 is a matter of planning judgment and the evidence before me supports my finding that only limited weight should be attached to it."

11 Whilst within the bundle of material before the court there are further appeal decisions reached after the appeal decision under challenge in this case had been promulgated in substance, they are not in my view pertinent to the issues which the court has to resolve.

The proceedings

12 The proceedings in this case were initially launched on five grounds. Having been served, the Secretary of State conceded that the decision should be quashed solely on the basis of ground 1. Holgate J granted permission for the claimant to proceed but only on the basis of ground 1. He ordered that the Secretary of State clarify his concession. On 17 October 2018 the Secretary of State advised the court:

A "The Secretary of State confirms that it is of the view that the inspector erred in his consideration as to whether policy DM4 was out-of-date. In particular, he failed to give adequate reasons for departing from the two previous appeal decisions in respect of policy DM4, in circumstances where those decisions were both recent and in which the same factual and policy background applied as in the present case."

B **13** The authority continued to contest the claim. Ground 1, which was the sole ground upon which this challenge proceeded, is the contention that the inspector erred in considering the true nature of the decision in the *Daventry* case [2017] JPL 402 and whether it had a material consequence as to the merits of whether or not policy DM4 was out-of-date or, alternatively, that he failed to give any adequate reasons as to why he was departing from the C judgment formed by inspectors in earlier appeal decisions that the policy was out-of-date.

The law

14 In determining an application for planning permission a decision-maker is required by section 70(2) of the Town and Country Planning Act 1990, as amended, to have regard to the provisions of the development D plan so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that a determination "must be made in accordance with the plan unless material considerations indicate otherwise."

15 National planning policy as contained in the Framework is a material consideration to which regard must be had in accordance with the statutory E decision-taking regime.

16 A further matter which is capable of being a material consideration in an appeal against the refusal of planning permission (or a decision of the Secretary of State following the call-in of an application for his own determination) is an earlier decision in an appeal or decision by the Secretary of State in which a similar issue has been deliberated upon and F resolved. The justification for this is, amongst other things, the importance of consistency in the decision-making process. The principle is set out in a line of consistent authority starting with the decision in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137. Mann LJ stated, at p 145:

"One important reason why previous decisions are capable of being G material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore H free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

"To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference

> to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

17 This approach was endorsed and applied in *Dunster Properties Ltd v First Secretary of State* [2007] 2 P & CR 26 and in *R (Fox Strategic Land and Property Ltd) v Secretary of State for Communities and Local Government* [2013] 1 P & CR 6. This principle was also applied in the recent case, *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] PTSR 2063. The case was concerned with two appeal decisions in which the court concluded that the approach to the question of whether or not a policy was up-to-date had been determined in quite different ways in the two decisions. This circumstance plainly has a resonance with the present case. At para 56 of his judgment (with which the other members of the Court of Appeal agreed) Lindblom LJ observed:

> "The two cases were, as Mann LJ put it in the *North Wiltshire District Council* case 65 P & CR 137, 145, 'like cases', in the sense of their being, on the face of it, indistinguishable on an issue of critical importance in their determination—the interpretation and application of a relevant and significant policy in the development plan: see, for example, the first instance judgment in *Pertemps Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2308 (Admin) at [61]. Notwithstanding the other respects in which they were different on their [facts]—as [counsel for the developer] emphasised, their circumstances were closely enough related on that crucial issue to call for a clear explanation of the Secretary of State's approach in the second case if it was to diverge materially from the approach he had taken in the first. Policy CT1 was relevant in both cases, and in essentially the same way. Yet the approach taken to the status of that policy—whether it was up to date or not, the conclusion reached on this question, and the consequences of that conclusion—in particular, whether the 'presumption in favour of sustainable development' was engaged or not, were different. It cannot be said that such differences as there were between the two cases made it unnecessary for the Secretary of State, when determining the Newick appeal, to take into account his decision in the Ringmer appeal, and his conclusion there that policy CT1 was up to date. And if his approach to that issue and his conclusion on it were to be different, he had to explain why. No reasonable Secretary of State could have failed to do that. The interests of consistency in appellate decision-making required it."

18 It will be apparent from the contents of the appeal decision under challenge and the Meppershall appeal decision that in both appeals the

A inspectors had to address arguments based upon the conclusions of the Court of Appeal in the *Daventry* case [2017] JPL 402, and in particular the judgment of Sales LJ who gave the leading judgment. That was a case which again concerned contentions that development plan policy, in that case policies HS22 and HS24 of the local plan, were out-of-date. Before the inspector the appellant had contended that these policies were out-of-
B date and should have reduced or no weight. By contrast the local planning authority submitted that the policies showed a high degree of consistency with the Framework and should be given considerable weight. Having examined the decision letter Sales LJ expressed his view in relation to whether or not the inspector had erred in law in paras 35 and 36 of his judgment:

> "35. In my view, the judge was correct in her reasoning as highlighted
C above. Even reading the [decision letter ('DL')] benevolently, as is appropriate for planning decisions of this kind; adopting the proper approach of avoiding nit-picking analysis of a decision letter with a view to trying to identify errors when in substance there are none; and also, bearing in mind the expertise of the inspector and his likely familiarity with the [National Planning Policy Framework], it is clear that the inspector has failed to grapple as he should have done with the issue
D posed by [paragraph 215 of the Framework].
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> "36. This is not just a matter of a failure to give reasons. It is clear from the DL read as a whole that the inspector has not sought to assess the issue of the weight to be accorded to policies HS22 and HS24 under the approach mandated by paragraph 215 at all. As the judge correctly identified, this appears from the deficiencies of the inspector's reasoning
E at DL68 and his excessively narrow focus on [paragraphs 47 and 49 of the Framework], to the exclusion of other relevant policies in the [Framework] which ought to have been brought into account in any proper analysis of the consistency of policies HS22 and HS24 with the policies in the [Framework]. I add that it is a notable feature of the DL that, after making the necessary correction for the inspector's slip in
F DL15 in referring to [paragraph 215 of the Framework] when he meant paragraph 113, the DL makes no reference at all to paragraph 215, even though that was the provision in the [Framework] which set out the approach which the inspector ought to have followed."

19 Sales LJ went on to observe that these conclusions were sufficient to lead to the conclusion that the appeal should be dismissed and the order
G quashing the decision upheld, but since on behalf of the developer additional points had been raised in argument, and the matter was to be remitted to another inspector for redetermination, he thought it necessary to address those additional points. Prior to setting out both the points made and Sales LJ's conclusions in relation to them it is necessary to observe, firstly, that these remarks did not form part of the decision which was reached and are therefore properly to be regarded as obiter dicta. Secondly, they relate to
H points raised by the developer in an effort to persuade the court that there would be no difference to the decision and therefore the court should exercise its discretion not to quash as a consequence. Thirdly, and certainly in respect of the first two points, it is important to note that Sales LJ observed that further judgments would need to be reached in the redetermination of the appeal before a definitive conclusion on the points could be reached.

20 The points raised by the developer, and Sales LJ's observations upon them, are set out at [2017] JPL 402, paras 41–45:

> "41. In the particular circumstances of this case [counsel for the developer] submitted: (i) that the facts that policies HS22 and HS24 appeared in a local plan for the period 1991–2006, long in the past, and were tied into the structure plan (in particular, in relation to policy HS24, as set out in the explanatory text at para 4.97 of the local plan), which is now defunct, meant that very reduced weight should be accorded to them; (ii) that the local plan policies in relation to housing supply, which include policies HS22 and HS24, are 'broken' and so again should be accorded little weight; and (iii) that policies HS22 and HS24 have been superseded by more recent guidance, in the form of paragraph 47 of the [Framework], and so should be regarded as being outdated in the manner explained by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447. I do not accept these submissions.
>
> "42. As to (i), policies HS22 and HS24 were saved in 2007 as part of a coherent set of local plan policies judged to be appropriate for the council's area pending work to develop new and up-to-date policies. There was nothing odd or new-fangled in the inclusion of those policies in the local plan as originally adopted in 1997. It is a regular feature of development plans to seek to encourage residential development in appropriate centres and to preserve the openness of the countryside, and policies HS22 and HS24 were adopted to promote those objectives. Those objectives remained relevant and appropriate when the policies were saved in 2007 and in general terms one would expect that they remain relevant and appropriate today. At any rate, that is something which needs to be considered by the planning inspector when the case is remitted, along with the question of the consistency of those policies with the range of policies in the [Framework] under the exercise required by [paragraph 215 of the Framework]. The fact that the explanatory text for policy HS24 refers to the structure plan does not detract from this. It is likely that the structure plan itself was formulated to promote those underlying general objectives and the fact that it has now been superseded does not mean that those underlying objectives have suddenly ceased to exist. As the judge observed at para 49: 'some planning policies by their very nature continue and are not "time limited", as they are re-stated in each iteration of planning policy, at both national and local levels.'
>
> "43. As to (ii), the metaphor of a plan being 'broken' is not a helpful one. It is a distraction from examination of the issues regarding the continuing relevance of policies HS22 and HS24 and their consistency with the policies in the [Framework]. As [counsel for the developer] developed this submission, it emerged that what he meant was that it appears that the council has granted planning permission for some other residential developments in open countryside, i e treating policy HS24 as outweighed by other material circumstances in those cases, and that it relies on those sites with planning permission, among others, in order to show that it has a five-year supply of deliverable residential sites for the purposes of paragraph 47 of the [Framework] (second bullet point) and

A paragraph 49. [Counsel for the developer] says that this shows that the saved policies of the local plan, if applied with full rigour and without exceptions, would lead the council to fail properly to meet housing need in its area, according to the standard laid down in paragraphs 47 and 49 of the [Framework]. Therefore, he says, no or very reduced weight should be accorded to policies HS22 and HS24.

B "44. In my view, this argument is unsustainable. We were shown nothing by [counsel for the developer] to enable us to understand why the council had decided to grant planning permission for development of these other sites. So far as I can tell, the council granted planning permission in these other cases in an entirely conventional way, being persuaded on the particular facts that it would be appropriate to treat material considerations as sufficiently strong to outweigh policy HS24 C in those specific cases. Having done so, there is no reason why the council should not bring the contribution from those sites into account to show that it has the requisite five-year supply of sites for housing when examining whether planning permission should be granted on Gladman's application for the site in the present case. The fact that the council is able to show that with current saved housing policies in place it has the requisite five-year supply tends to show that there D is no compelling pressure by reason of unmet housing need which requires those policies to be overridden in the present case; or—to use [counsel for the developer's] metaphor—it tends positively to indicate that the current policies are *not* 'broken' as things stand at the moment, since they can be applied in this case without jeopardising the five-year housing supply objective. In any event, an assessment of the E extent of the consistency of policies HS22 and HS24 with the range of policies in the [Framework] is required, as set out in paragraph 215 of the [Framework], before any conclusion can be drawn whether those policies should be departed from in the present case.

"45. Finally, as to point (iii), the judge dismissed this contention at para 51 by ruling that paragraph 47 of the [Framework] sets out F policy for a planning authority's plan-making, not decision-taking. There is conflicting authority on this point at first instance, since Hickinbottom J ruled in *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 892 (Admin) at [52], that although the first bullet point of paragraph 47 relates to an authority's plan-making function, the rest of the paragraph is not so restricted and applies also to decision-making; and see, to G similar effect, the observation in passing of Coulson J in *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] PTSR 675, para 46."

Submissions and conclusions

21 On behalf of the claimants, Mr Goatley submitted that the inspector H fell into error firstly because, unlike the inspector in the Meppershall appeal, he failed to properly grapple with the reasons why earlier decision-takers, and in particular the inspector at Meppershall, had reached the conclusion that policy DM4 was out-of-date and of limited weight. The inspector in the decision under challenge provides no rationale for his departure from, in particular, the earlier decision from the Meppershall inspector (which

itself dealt relatively comprehensively with the earlier appeal decisions on the point), and he needed to provide specific reasons for reaching a different conclusion. Merely contradicting, or saying he had reached a different conclusion from earlier decision on the point was insufficient.

22 In detail, the inspector fails to address and provide reasons for departing from the conclusions of the Meppershall inspector that policy DM4 was inconsistent with the Framework at the fifth bullet point of paragraph 17, and conflicted with paragraph 113 of the Framework. Those paragraphs of the Framework provide:

> "17. Within the over-arching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking these 12 principles are that planning should …
>
> • Take into account the different roles and characters of different areas, promoting the vitality of our main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it."
>
> "113. Local planning authorities should set criteria-based policies against which proposals for any development on or affecting protected wildlife or geodiversity sites or landscape areas will be judged. Distinctions should be made between the hierarchy of international, national and locally designated sites, so that protection is commensurate with their status and gives appropriate weight to their importance and the contribution that they make to wider ecological networks."

Mr Goatley submitted that the inspector failed to address the point raised in para 17 of the Meppershall inspector's decision that these policies adopt a hierarchical approach to the status and quality of open countryside as a landscape resource rather than, as in previous national planning policy, protecting the countryside for its own sake. Furthermore, the inspector failed to grapple with the evidence both before the inspector at Meppershall and before him that a very substantial majority of the current five-year housing land supply was on sites which were outside settlement boundaries protected by policy DM4.

23 Mr Goatley observes that whilst the inspector suggested that the Court of Appeal decision in the *Daventry* case [2017] JPL 402 had helped inform his reasoning, that judgment had also been available to the Meppershall inspector and had been dealt with in detail by him in reaching his conclusions. Developing this point into what is in effect the first limb of ground 1, Mr Goatley contended that it appeared that the inspector had effectively taken the observations of Sales LJ in paras 41–46 and elevated them into the basis for the Court of Appeal's decision in that case. In particular the inspector appears to have ignored the fact that Sales LJ made clear that fresh conclusions would need to be reached on the points dealt with in those paragraphs in the context of a redetermination of the appeal. Thus he submitted that ground 1 was made out and the inspector had erred in law.

24 In response to these submissions Ms Saira Kabir Sheikh QC, on behalf of the authority, submitted that the inspector had reached an entirely rational judgment as to the appropriate weight to be attached to policy DM4. The question of whether or not policy DM4 was out-of-date and the weight attached to it were both quintessentially questions of planning judgment

which were for the inspector to determine. The inspector rightly identified that policy DM4 was a restrictive policy, and that the settlement envelopes created by the policy were not in place purely to facilitate or accommodate housing growth over the plan period, but also to reflect "the character of the predominant land use". As such he was entitled to conclude that the policy was up-to-date.

25 She submitted that the inspector's judgment as to consistency with the Framework was again a planning judgment open to him. He was, further, entitled to conclude in para 38 of the decision letter that the fact that there were housing developments which had been granted despite the existence of policy DM4 demonstrated that policy DM4 was not being used to restrict suitable development and was being applied in the context of a pragmatic and appropriate balancing exercise.

26 Ms Sheikh submitted that where, as here, there was a hotchpotch of decisions pointing in different directions it was not the job of the inspector to sort out the inconsistencies between the various decisions. Thus, she submitted, the case law in relation to consistency and decision-making exemplified by the *North Wiltshire* case 65 P & CR 137 were not pertinent to the exercise which the inspector had to undertake. She therefore submitted that there was no error of law of this kind in the decision, and that the inspector had done that which was incumbent upon him, namely to reach a rational judgment as to the weight to be attached to policy DM4 and whether it was out-of-date. She further submitted that as a matter of discretion the court should form the view that the decision upon any redetermination would be exactly the same. Ms Sheikh based this submission on the inspector's amenity findings and the fact that his conclusion that policy DM4 should only attract moderate weight was one which was reasonable in the circumstances.

27 In reaching conclusions in respect of the competing submissions it is sensible to commence with examining the question of whether or not the inspector was obliged to apply the principle from the *North Wiltshire* case in the particular circumstances of the appeal and, if so, whether or not he complied with it in reaching his decision. Having considered the submissions made on behalf of the authority by Ms Sheikh I am unhesitatingly of the view that this was a case in which the *North Wiltshire* principle applied.

28 The analysis, in my view, is straightforward. The statutory discretion under section 70(2) of the 1990 Act requires the decision-taker to have regard to material considerations. It is in my view beyond argument that a previous decision by a planning inspector on precisely the same issue (namely whether or not policy DM4 is out-of-date and the weight to be attached to it) will be a material consideration for an inspector in which that point arises subsequently. That subsequent inspector, when considering the material consideration which is the previous decision, will need to consider and apply the principles set out in the *North Wiltshire* case. As Mann LJ pointed out, whilst consistency is self-evidently important that does not mean that like cases *must* be decided alike. Where there is a basis for the earlier decision to be distinguished or departed from then that reason must be identified and the explanation justifying distinguishing the earlier decision must be explained. Simply because by the time this inspector came to determine the point there were a significant number of previous decisions falling on both sides of the

line in the debate over policy DM4 was not a reason for not applying the principle. A

29 It is of note that in the present decision, and indeed in the Meppershall appeal and other decisions in this catalogue of decisions, a phrase emerges where by it is suggested that a planning judgment such as whether or not policy DM4 is out-of-date and the weight to be attached to it could vary from case to case, dependent upon the evidence presented and how the case was argued. The use of that phrase may have led the inspectors concerned, including the present inspector, into thinking that the decision that each inspector reached on this point could vary from earlier decisions without the need to have careful regard to those earlier decisions which had been reached in relation to it, and without giving consideration to the application of the *North Wiltshire* principle in arriving at a conclusion on the point. In my judgment, if that was the nature of what was being observed by those inspectors in that phraseology, it was incorrect. In fact, it appears to me that in the Meppershall appeal the inspector did what was required in these circumstances, namely rising to the task of examining the earlier decisions which had been reached in respect of this question and explaining why he had reached a conclusion which conflicted with some of those earlier decisions, and providing the reasons for him departing from those conclusions which differed from his own. B C D

30 The next question which arises is as to whether or not the inspector's decision in the present case provided the reasons necessary to explain why he was departing from the conclusions which had been reached in the earlier decisions. In this context it appears to me most pertinent to consider the reasons provided in the most recent decision with which his decision conflicted, namely that at Meppershall, that being a decision which, as I have set out above, engaged with providing appropriate reasoning for the departure from earlier decisions supporting the contention that DM4 was not out-of-date and of at least moderate weight. In my view, taking account of the principles of benevolent reading which apply to decisions of this kind, the reasons which the inspector offered were not legally adequate. E

31 Firstly, the reference to the *Daventry* case [2017] JPL 402 could not have amounted in and of itself to a reason to depart from the Meppershall decision. That decision was before the inspector at Meppershall and directly referenced by him. Nothing in para 41 of the decision provides any explanation for why the inspector in the present appeal considered that the contents of that judgment justified a different decision from that which had been reached at Meppershall. Similarly, the contents of para 41 and the simple cross-reference to "a series of appeal decisions" could not, in and of itself, amount to adequate reasoning in relation to the departure which the inspector's decision represented. F G

32 It is of course important to read the decision letter as a whole and to take account of the points which the inspector raises in his earlier reasoning. However, taking into account the totality of what is stated in paras 35–41 does not, in my judgment, provide anything like adequate reasoning to explain why the inspector was distinguishing or departing from the Meppershall decision. In particular, the Meppershall inspector had reached the clear conclusion in paras 18–20 of his decision that, given the large scale of the five-year housing land supply which was on dwellings outside settlement envelopes and contrary to DM4, the strict application of policy H

A DM4 would frustrate any ability to achieve a five-year land supply contrary to the clear requirements of paragraph 47 of the Framework. The inspector's response in para 38 simply does not grapple with this reasoning. The fact that planning permission for residential development may have been granted by disapplying or affording limited weight to policy DM4 in the balancing exercise does not engage with the question of whether or not policy DM4 B can properly be regarded as an up-to-date policy, if its application would play a significant part in preventing the achievement of a five-year housing land supply. The inspector's gloss on how the decisions to grant planning permission might have taken place provides no justification for going behind the conclusion reached in the Meppershall appeal that policy DM4 was out-of-date because it was inconsistent with an ability to provide a five-year housing land supply, given the scale or amount of that supply which had had C to be provided in breach of the strict application of the policy.

33 This would alone suffice to justify the conclusion that there was an error of law in the decision, as the inspector has failed to provide adequate reasons for departing in this respect from the decision in the Meppershall appeal. However, I also consider that the reasoning of the inspector in relation to the consistency of policy DM4 with paragraphs 17 and 113 of the Framework is a further difficulty. D

34 The acid test in relation to whether or not a policy is out-of-date is, it will be recalled, the extent to which it is consistent with the Framework. In para 40 (following from earlier reasoning from para 36) the inspector accepts that there is "some discrepancy" between policy DM4 and paragraph 113 of the Framework. It will be recalled that the inspector in the Meppershall appeal had noted this conflict, and also that the policy E went beyond the policy of the Framework set out in the fifth bullet point of paragraph 17 of the Framework. The inspector appears not to accept the decision of the Meppershall inspector in this respect in para 36 of the decision letter when he states: "the Framework also makes clear in paragraph 17 that the intrinsic character and beauty of the countryside should be recognised." He does not deal with this aspect of inconsistency with the Framework when F he deals with the discrepancy which he has found between the policy and the Framework in para 40, as he limits his observations to paragraph 113. The inconsistency of policy DM4 with the fifth bullet point of paragraph 17 of the Framework is, again, a further and important aspect of the Meppershall appeal decision which the inspector does not grapple with. If he is disagreeing with the conclusion that the policy DM4 goes beyond the Framework policy in the fifth bullet point of paragraph 17 that is not clear, and if that were G the case he has failed to explain why he has formed a different view from the Meppershall inspector. It is clear that this element of inconsistency with government policy was a matter which formed part of the justification for the Meppershall inspector concluding that policy DM4 was out of date. The inspector's reasons are therefore, again, legally inadequate in respect of this departure from the decision reached by the Meppershall inspector.

H **35** For all of these reasons I am satisfied that the second element of ground 1 is made out and, in effect, I agree with the reasons provided by the Secretary of State for concluding that the inspector erred in law. In those circumstances it is not necessary to consider in detail the further submission that the inspector misconstrued and misapplied the decision of the Court of Appeal in the *Daventry* case [2017] JPL 402. In my view the

precise position in relation to the claimant's submissions is unclear. I have already observed that the inspector's reference to the *Daventry* case does not provide adequate reasoning to explain his departure from the earlier decisions. In so far as he was drawn to the reasoning in paras 41–46 of the judgment of Sales LJ as providing some kind of support for his conclusions, as I have already observed, those paragraphs did not form the substance of the decision of the Court of Appeal's decision and Sales LJ's observations were obiter.

36 Furthermore, Sales LJ was careful to express his conclusions in a contingent manner, since how the judgment on whether or not policies HS22 and HS24 were out-of-date was going to be resolved would depend upon the evidence available to the decision-taker at the redetermination. I will confine myself to the following observations in respect of those obiter remarks. Firstly, in so far as para 42 of the judgment is concerned, and the reference to those policies being in place "to preserve the openness of the countryside" (in addition to encouraging residential development at appropriate centres) it is important to observe that in the case of policy DM4 the Meppershall inspector (and indeed earlier inspectors) had concluded that the previous national policy of simply protecting the countryside for its own sake had given way to a more sophisticated policy reflected in the fifth bullet point of paragraph 17 and paragraph 113 of the Framework. This reinforces the need when arguments arise as to whether or not a policy is out-of-date to carefully apply paragraph 215, and examine the circumstances of the particular policy and the evidence pertaining to it to determine the extent to which it is consistent with the Framework. In a similar manner the conclusions of Sales LJ in para 44 need to be put in the context that Sales LJ ultimately left the conclusion as to whether or not policies HS22 and HS24 were consistent with the policy of the Framework to an evaluation in the redetermination of that case.

37 It appears to me that in para 44 of his judgment all that Sales LJ was suggesting was that the fact that the council had granted planning permission for some of the sites in the five-year housing land supply on sites in breach of policy HS24 would not in and of itself justify a conclusion that that policy was out-of-date. That was an issue which would require, again, careful evaluation against the background of the terms of the policy, the available evidence as to its performance and scrutiny of its consistency with the Framework. That will inevitably be a case-sensitive exercise. In the present case Ms Sheikh accepted, in my view correctly, that the decision which the Meppershall inspector had reached in relation to whether or not policy DM4 was out-of-date was one which was rationally open to him, and which demonstrated the way in which a rational planning judgment can be formed on the facts of a particular case. It further demonstrates that Sales LJ was not laying down any legal principle in what he observed in para 44 of his judgment.

38 So far as Ms Sheikh relied upon the potential exercise of the court's discretion not to quash, in circumstances where an error of law had been found in the inspector's decision, the argument can be dealt with shortly. The reason why the claimants were contending that policy DM4 was out-of-date was so as to seek to trigger the tilted balance contained within paragraph 14 of the Framework. In my view it is not possible to conclude that the decision as to whether or not policy DM4 is out-of-date would be the same if the

matter was returned for redetermination. It follows that it cannot be said to be beyond argument that the tilted balance might apply in the overall evaluation of the planning merits of this proposal. It therefore follows, again, that it cannot be properly contended that the decision would be the same if the matter were to be redetermined.

39 In the light of the conclusions which I have set out above I am satisfied that the inspector erred in law in his failure to properly grapple with and provide reasons for departing from the earlier conclusions of inspectors addressing the same issues in respect of policy DM4, and in particular the conclusions of the inspector in the most recent Meppershall appeal in which earlier decisions had been addressed. In my view that error must lead to the decision reached by the inspector being quashed and this matter being redetermined. I do not consider this is an appropriate case in which I should exercise my discretion not to quash.

Application granted.

BENJAMIN WEAVER ESQ, Barrister