A Queen's Bench Division

Peel Investments (North) Ltd *v* Secretary of State for Housing, Communities and Local Government and another

B **[2019] EWHC 2143 (Admin)**

2019 aMay 22, 23; Aug 2 Dove J

Planning — Development — Sustainable development — Developer's appeal against
C *refusal of planning permission for housing development — Local planning authority's development plan expiring and not replaced — Secretary of State dismissing appeal as development plan not out-of-date — Whether Secretary of State wrongly interpreting revised national planning policy — Whether development plan out-of-date — National Planning Policy Framework (2018), paras 11(d)(i), 213*

D The local planning authority refused to grant planning permission to the claimant developer for two residential developments. The Secretary of State recovered the claimant's appeal for his own determination and after a public inquiry the appointed inspector prepared his report, recommending that the appeal be dismissed and permission be refused. In reaching that conclusion, the inspector found that the local planning authority's development plan, which had been adopted in 2006 with a plan
E period expiring in 2016, and specifically policy EN2, were not out-of-date but were consistent with the 2012 version of the National Planning Policy Framework (the "NPPF 2012"). In July 2018 the Secretary of State published a revised NPPF (the "NPPF 2018")[1], which included in paragraph 11 revised text of the presumption in favour of sustainable development. In November 2018 the Secretary of State accepted the inspector's recommendation and refused the appeal, agreeing that policy EN2 remained part of the development plan, that the plan was in line with paragraph
F 11(d) of the NPPF 2018 and accordingly the policy was not out-of-date. The claimant sought a statutory review of the Secretary of State's decision pursuant to section 288 of the Town and Country Planning Act 1990, on the ground, inter alia, that the Secretary of State had failed correctly to identify that the development plan and thus its constituent policies, having passed its end date of 2016 without having been replaced, were collectively "out-of-date" as a whole, so that the presumption (or "tilted balance") in favour of sustainable development under paragraph 11(d) of the
G NPPF 2018 should have been engaged.

On the application—

Held, refusing the application, that the starting point had to be an understanding that this was a question of planning policy, in particular the planning policy contained in paragraphs 11(d) and 213 of the NPPF 2018; that since the notion of a policy being out-of-date was one which existed within the structure of the NPPF and for particular purposes, namely the question whether or not the tilted balance should
H apply and the weight which should be attached to the policy in the decision-taking process, it was to be interpreted and applied within the context of the NPPF and was not to be defined by elements of the statutory framework which were not referred to

[1] National Planning Policy Framework (2018), para 11(d)(i): see post, para 11. Para 213: see post, para 15.

by the NPPF; that there was nothing in the relevant provisions of the NPPF 2018 to suggest that the expiration of a plan period required that its policies should be treated as out-of-date; that, conversely, the provisions of paragraph 213 of the NPPF 2018 specifically contemplated that older policies that were consistent with the NPPF 2018 should be afforded continuing weight; that the question whether a policy was out-of-date was a question of fact or in some cases of fact and judgment; that the expiration of the end date of a development plan might be relevant to that exercise but was not dispositive of it; that the Town and Country Planning (Local Planning) (England) Regulations 2012 were not designed, nor did they purport, to govern the application of the NPPF's term "out-of-date" for the purposes of paragraph 11 of the NPPF 2018; and that, accordingly, in deciding that the development plan was not out-of-date the Secretary of State had not erred in interpreting and applying paragraph 11(d) of the NPPF 2018 (post, paras 58–59, 63, 82).

Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2017] PTSR 1283 applied.

Dictum of Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, para 63, SC(E) not applied.

The following cases are referred to in the judgment of Dove J:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283

Canterbury City Council v Secretary of State for Communities and Local Government [2018] EWHC 1611 (Admin); [2019] PTSR 81

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

Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 127 (Admin); [2019] PTSR 1302

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74; [2017] PTSR 1126

St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643; [2018] PTSR 746, CA

South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)

Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)

The following additional case was cited in argument or referred to in the skeleton arguments:

R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)

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

By an application under section 288 of the Town and Country Planning Act 1990 the claimant, Peel Investments (North) Ltd, applied for an order to quash the decision of the first defendant, the Secretary of State for Housing, Communities and Local Government, in a written decision dated 12 November 2018, dismissing the claimant's appeals under section 78 of

A the 1990 Act against the refusal by the second defendant local planning authority, Salford City Council, of its applications for planning permission for: (i) the construction of up to 600 dwellings, marina facilities and basin, Class A1 (retail) and Class A3 (cafe) uses, associated formal and informal green space and recreation provision, landscaping and drainage works, vehicular access, car parking, diversion and realignment of public rights of way, the creation of new footpaths and connections to adjoining B footpath network, the creation of an ecological mitigation area at Aviary Field including the formation of a pond and the creation of a recreation area at Aviary Field, dated 9 April 2013; and (ii) a residential scheme with associated road and utilities infrastructure, open space and other green infrastructure, hard and soft landscaping and drainage infrastructure, dated 3 April 2017. The claimant challenged the Secretary of State's decision on the C grounds that the Secretary of State had: (1) failed correctly to identify that policy EN2 of the Salford Unitary Development Plan 2004–2016 ("SUDP") was "out-of-date" thus triggering the presumption in favour of sustainable development and the "tilted balance" under paragraph 11(d) of the National Planning Policy Framework 2018 ("NPPF 2018"); (2) failed correctly to identify that the SUDP development plan document ("DPD") and thus its D constituent policies (including policy EN2) were collectively "out-of-date", thus triggering the presumption and the tilted balance under paragraph 11(d) of the NPPF 2018; (3) failed correctly to interpret paragraph 11(d) of the NPPF and had regard to irrelevant considerations in determining the datedness of policy EN2; (4) failed correctly to identify any specific policy, paragraph or provision within the NPPF 2018 with which policy EN2 was consistent for the purposes of paragraph 213 of the NPPF; (5) failed correctly E to identify that policy EN2 was inconsistent with the housing policies of the NPPF, both specifically and as a whole, including Chapter 5 of the NPPF and its constituent housing policies; (6) erred in law in identifying that the second defendant was able to demonstrate a qualifying housing supply for the purposes of paragraph 73 of the NPPF, thus triggering paragraph 11(d) of the NPPF, determining this purely on the basis of a mathematical assessment F of supply; (7) erred in law in basing his decision on the inspector's erroneous and inconsistent findings as to the impact of policy EN2 on the provision of housing; (8) erred in law in basing his decision on the inspector's erroneous and inconsistent findings as to the prospect of a future local plan making provision for housing, contrary to the local planning authority's express concession as to the lack of any basis for refusal in national planning policy covering prematurity; (9) given inadequate reasons, generally, in respect of G each of the above grounds; and (10) had reached irrational conclusions generally in respect of each of the above grounds. By an order dated 11 February 2019 Sir Wyn Williams sitting as a judge of the Queen's Bench Division granted permission to the claimant to appeal on grounds 1–5 but refused permission to appeal on grounds 6–8. On 13 February 2019 the claimant sought renewal of permission on grounds 6–10. Holgate J ordered H that the application for renewal should be heard immediately prior to the substantive hearing.

The facts are stated in the judgment, post, paras 1–32.

Martin Kingston QC and *James Corbet Burcher* (instructed by *Shoosmiths llp*) for the claimant. A

Richard Honey (instructed by *Treasury Solicitor*) for the Secretary of State.

Christopher Katkowski QC and *Matthew Fraser* (instructed by *Combined Legal Services Division, Manchester and Salford City Councils, Manchester*) for the local planning authority. B

The court took time for consideration.

2 August 2019. **DOVE J** handed down the following judgment.

Introduction C

1 The claimant applies pursuant to section 288 of the Town and Country Planning Act 1990 to quash the decision of the first defendant made on 12 November 2018 in relation to appeals against the refusal of planning permission by the second defendant. Appeal A was an application for the construction of up to 600 dwellings, marina facilities, retail and cafe uses together with other ancillary hard and soft landscaping. Appeal B was D an application for residential development with associated hard and soft landscaping including open space and drainage infrastructure. For simplicity the appeals before the first defendant will hereafter be referred to as the appeal.

2 The history of the matter was that appeal A had its origin in an application for planning permission dated 9 April 2013. The claimant E appealed against the refusal of that application; on 30 December 2013 the first defendant recovered the appeal for his own determination. A decision in relation to appeal A was made by way of a decision letter dated 26 March 2015. The claimant challenged that decision, and by order of this court it was quashed on 28 July 2016. In the meantime the claimant had submitted another application which was also the subject of an appeal. The first defendant concluded that a new inquiry was required in order to determine F the appeal and that inquiry occurred in February and March 2018.

3 Following the inquiry, the inspector recommended in his report to the first defendant dated 11 July 2018, that planning permission should be refused. The first defendant accepted that recommendation, and refused the appeal. The claimant's case in this challenge raises numerous concerns in relation to the approach taken to the application of policy from the G development plan within the context of national planning policy set out in the National Planning Policy Framework. This judgment examines firstly, the policies of the development plan which were relevant to the decision together with the elements of the Framework, in both the 2012 and 2018 versions, which were pertinent to the first defendant's decisions. The judgment then proceeds to consider the conclusions which were reached by the inspector and, thereafter, the first defendant in relation to the issues, and particularly H the policy issues, raised by the appeal. The claimant's grounds are then set out followed by an analysis of the legal principles which are involved in the evaluation of those grounds. Finally, the judgment sets out the court's assessment of the merits of those grounds against the background of the submissions made by all parties.

The relevant planning policies

4 The statutory development plan for the appeal site was comprised by the saved policies of the City of Salford Unitary Development Plan 2004–2016 ("the UDP"). For the purposes of the inquiry it was agreed that there were around 40 policies of the UDP which were relevant to the appeal. Three policies of the UDP particularly featured in the debate before the inspector. Firstly, policy EN2, which is a policy concerned with the Worsley Greenway and which provides:

> "Policy EN2 Worsley Greenway Development will not be permitted where it would fragment or detract from the openness and continuity of the Greenway, or would cause unacceptable harm to its character or its value as an amenity, wildlife, agricultural or open recreation resource.
>
> "*Reasoned justification*
>
> "12.7 The Worsley Greenway is a strategically important 'green wedge' within the Worsley area. It covers some 195 hectares, and is of great value to the city and local area. It provides amenity open space, recreational land and facilities, attractive landscapes, farmland, water features such as Old Warke Dam, public access, strategic recreation routes, areas of ecological importance, attractive woodland, features of historic and heritage importance, and relief within an urban area. It also provides the setting for the settlements of Worsley, Roe Green, Beesley Green, and the Bridgewater Canal, and is an essential element of their historic character. The protection and enhancement of Worsley Greenway, in its entirety, is therefore of great strategic and local importance."

5 In addition to this policy, particular focus in the decision was placed upon policy R4, which is a policy related to key recreation areas and which contains the following provisions:

> "*Policy R4*
>
> "*Key recreation areas*
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> "Planning permission will only be granted for development within, adjoining or directly affecting a key recreation area where it would be consistent with the following objectives: (i) the protection and enhancement of the existing and potential recreational use of the area; (ii) the protection and improvement of the amenity of the area; (iii) the protection of existing trees, woodlands and other landscape features; (iv) where appropriate, the provision, improvement and maintenance of new areas of woodland planting; (v) the provision, improvement and maintenance of public access where appropriate, for walking, cycling, horse riding and water-based recreational activities; (vi) the provision, improvement and maintenance of accessible, open land recreation uses; and (vii) the protection, provision, improvement and maintenance of the quality and diversity of wildlife habitats.
>
> "*Reasoned justification*
>
> "14.16 The city council has identified a series of key recreation areas, which are of city-wide importance and are linked by the network of strategic recreation routes. These key recreation areas include areas of

Green Belt, open land and the Worsley Greenway, which have great potential to help meet the demand for recreational uses, in a sustainable way, by providing formal and informal recreational opportunities close to where a large number of residents live. It may not be possible to provide unrestricted public access across the whole of the key recreation areas, but such access will be maximised as far as possible. Parts of the key recreation areas also lie within the wider Core Forest Areas identified in the Red Rose Forest Plan.

"14.17 Some of the key recreation areas comprise neglected and underused land, which is to be the recipient of funding under the Newlands Programme. This will help to achieve transformations in the landscape of a scale that will change the image of the city and secure substantial local benefits. A number of the key recreation areas have the potential to form an important green gateway to Salford and to contribute to the objectives of the Regional Park (Policy R 3 'Regional Park').

"14.18 There are eight key recreation areas, and these are shown on the proposals map …"

7. Worsley Woods and Greenway …"

6 The third policy which was particularly the subject of contention at the inquiry was policy EN9, a policy related to wildlife corridors which, again, provides:

"*Policy EN9*

"*Wildlife corridors*

"Development that would affect any land that functions as a wildlife corridor, or that provides an important link or stepping stone between habitats, will not be permitted where it would unacceptably impair the movement of flora and fauna. Where development is permitted, conditions or planning obligations may be used to secure the protection, enhancement and/or management measures designed to facilitate the movement of flora and fauna across or around the site."

7 For the purposes of the claimant's submissions, it is important to note that because the UDP was adopted in 2006 it was necessary for the second defendant to apply to the first defendant for a direction under paragraph 1(3) of Schedule 8 to the Planning and Compulsory Purchase Act 2004 that policies in the UDP should be saved and have continuing effect. The policies referred to above were amongst those that were saved by the direction. The first defendant made certain observations at the time of giving the direction on 26 February 2009 in the following terms:

"Local planning authorities should not suppose that a regulatory local plan style approach will be supported in forthcoming development plan documents. LPAs should adopt a positive spatial strategy led approach to DPD preparation and not seek to reintroduce the numerous policies of many local plans.

"The exercise of extending saved policies is not an opportunity to delay DPD preparation. LPAs should make good progress with local development frameworks according to the timetables in their local

development schemes. Polices have been extended in the expectation that they will be replaced promptly and by fewer policies in DPDs. Maximum use should be made of national and regional policy especially given the development plan status of the regional spatial strategy.

"Following 21 June 2009 the extended policies should be read in context. Where policies were adopted some time ago, it is likely that material considerations, in particular the emergence of new national and regional policy and also new evidence, will be afforded considerable weight in his decisions. In particular, we would draw your attention to the importance of reflecting policy in Planning Policy Statement 3 Housing and Strategic Housing Land Availability Assessments in relevant decisions."

8 The claimant notes in particular that certain policies of the UDP were not saved by the first defendant. The policies which were not saved included policies ST2, ST11 and H2. Those policies were related particularly to the supply and distribution of housing and provided:

"*Policy ST2 Housing Supply*

"An adequate supply of housing will be secured through the:

"1. Refurbishment and improvement of existing dwellings;

"2. Achievement of an average annual rate of housing provision, net of clearance, of 530 dwellings per year during the period up to 2016;

"3. Control of the type of dwellings provided as part of new residential developments; and

"4. Selective clearance, and where appropriate the replacement, of dwellings that are unfit, obsolete or suffer from low demand."

"*Policy ST11*

"Location of new development

"Sites for development will be brought forward in the following order:

"1. The re-use and conversion of existing buildings.

"2. Previously-developed land in locations that: (i) are, or as part of any development would be made to be, well-served by a choice of means of transport, particularly walking, cycling and public transport; and (ii) are well related to housing, employment, services and infrastructure.

"3. Previously-developed land in other locations, provided that adequate levels of accessibility and infrastructure provision could be achieved.

"4. Previously undeveloped land in locations that: (i) are, or as part of any development would be made to be, well-served by a choice of means of transport, particularly walking, cycling and public transport; and (ii) are well related to housing, employment, services and infrastructure."

"*Policy H2*

"Managing the supply of housing

"The release of land for housing development will be managed in accordance with the sequential approach set out in Policy ST.

"11. 'Location of new development'. Where there is evidence of an unacceptable actual or potential oversupply of housing, planning permission for housing development will only be granted in the following circumstances: (a) the development is considered to be an

essential component in the regeneration of the local area; (b) the development is considered to be essential to the implementation of the UDP strategy; (c) the development would satisfy an important identified housing need; or (d) the development would be exceptional in terms of sustainable design and technology. An actual or potential oversupply will only be considered to be unacceptable if there is clear evidence that the oversupply is having, or is likely to have, an unacceptable adverse impact on: (i) the achievement of the overall strategy of regional spatial strategy for the north west, and of any subsequent regional spatial strategy; (ii) the regeneration of the regional pole of Manchester/Salford; (iii) the housing market renewal Initiative in Manchester and Salford and in Oldham/Rochdale; (iv) the achievement of other regeneration priorities within Salford; or (v) the adequate provision of infrastructure and other services.

"*Reasoned justification*

"7.6 Policy ST2 'Housing Supply' makes sufficient provision to ensure that the supply of new housing meets the target of an average of 530 new dwellings per annum net of clearance, as set out in the regional spatial strategy for the north west (RPG13). The nature of the sites means that they are likely to be developed reasonably evenly over the plan period. Some will almost certainly come forward later in the plan period, for example because they are currently occupied or suffer from infrastructure or contamination constraints, whereas others are immediately available for development. Nevertheless, it will be important for the city council to control the granting of planning permissions in order to ensure that there is not a significant over- or undersupply of new dwellings in relation to the regional spatial strategy target."

9 The effect, therefore, of the saving direction was that whilst certain policies concerned with environmental protection were saved for the purposes of development control decision-taking, the strategic policies to be read alongside them and addressing questions of the amount of housing to be developed, where that housing was to be located and how the supply of housing was to be managed in the context of the policies of the plan, were no longer in existence or part of the development plan.

10 Against the background of these circumstances pertaining to the UDP it was the claimant's contention both at the inquiry and in this case that the plan itself, and in particular certain of its policies including especially policy EN2, was out-of-date. The significance of a conclusion that a development plan policy is out-of-date arises from the provisions of the Framework. The relevant policy in the Framework at the time of the inquiry, the 2012 edition of the Framework, provided at paragraph 14:

"14. At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking."

"For decision-taking this means:

• Approving development proposals that accord with the development plan without delay; and

A • Where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless: (i) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or (ii) specific policies in this Framework indicate development should be restricted."

B **11** After the inquiry had closed, but prior to the decision of the first defendant on the appeal, the first defendant published a revised version of the Framework in July 2018. As will become evident, the first defendant sought the parties' views in relation to the implications for the decision of the revised Framework. In particular, the following paragraphs of the 2018 Framework were pertinent to the issues before the inquiry, and also have a direct C bearing on the grounds of the claim brought by the claimant. Firstly, there were revisions to the presumption in favour of sustainable development. Paragraph 11 of the 2018 Framework (together with its accompanying explanatory footnotes) provides:

"*The presumption in favour of sustainable development*

"11. Plans and decisions should apply a presumption in favour of D sustainable development."

"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 [footnote 7], granting permission unless: (i) the E application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed [footnote 6]; 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.

"[Footnote 6] The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and F those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or G coastal change.

"[Footnote 7] This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous H three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1."

12 One of the objectives espoused by the first defendant in the 2018 Framework is to significantly boost the supply of homes. An instrument of that policy is the requirement noted in footnote 7 to paragraph 11 of the 2018

Framework, the maintenance of a deliverable five-year supply of housing land. The provisions of the 2018 Framework relating specifically to the policy of delivering a sufficient supply of homes and the maintenance of the five-year housing land supply is set out in the following key paragraphs, 59–61, 67, 73:

> "59. To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay.
>
> "60. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance—unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for.
>
> "61. Within this context, the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies (including, but not limited to, those who require affordable housing, families with children, older people, students, people with disabilities, service families, travellers, people who rent their homes and people wishing to commission or build their own homes)."
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> "67. Strategic policy-making authorities should have a clear understanding of the land available in their area through the preparation of a strategic housing land availability assessment. From this, planning policies should identify a sufficient supply and mix of sites, taking into account their availability, suitability and likely economic viability. Planning policies should identify a supply of: (a) specific, deliverable sites for years one to five of the plan period; and (b) specific, developable sites or broad locations for growth, for years 6–10 and, where possible, for years 11–15 of the plan."
>
> "73. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies [footnote 36], or against their local housing need where the strategic policies are more than five years old [footnote 37]. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of: (a) 5% to ensure choice and competition in the market for land; or (b) 10% where the local planning authority wishes to demonstrate a five-year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or (c) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply [footnote 39]."

A "[Footnote 36] For the avoidance of doubt, a five-year supply of deliverable sites for travellers—as defined in Annex 1 to Planning Policy for Traveller Sites—should be assessed separately, in line with the policy in that document.

"[Footnote 37] Unless these strategic policies have been reviewed and found not to require updating."

B "[Footnote 39] From November 2018, this will be measured against the Housing Delivery Test, where this indicates that delivery was below 85% of the housing requirement."

13 This policy framework formed the backdrop to the decision-making process, and also the claimant's contentions that there were errors of law in the decision-making process.

C **14** Both the 2012 and the 2018 Framework contained policies dealing with the approach to be taken to whether or not a policy in the development plan should be considered out-of-date. The approach to this term (at the time in the 2012 edition of the Framework) was considered by this court in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283 which is set out below. The relevant provisions contained within the 2012 Framework were:

D

"210. Planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.

"211. For the purposes of decision-taking, the policies in the Local Plan (and the London Plan) should not be considered out-of-date simply because they were adopted prior to the publication of this Framework.

E

"212. However, the policies contained in this Framework are material considerations which local planning authorities should take into account from the day of its publication. The Framework must also be taken into account in the preparation of plans.

"213. Plans may, therefore, need to be revised to take into account the policies in this Framework. This should be progressed as quickly as

F possible, either through a partial review or by preparing a new plan.

"214. For 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004 even if there is a limited degree of conflict with this Framework.

"215. In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their

G degree of consistency with this framework (the closer the polices in the plan to the policies in the Framework, the greater the weight that may be given)."

15 The provisions of the 2018 Framework in relation to whether policies should be considered out-of-date was set out in paragraph 213:

H "However, existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

The decision-making process

16 As set out above the first defendant appointed an inspector to undertake a public inquiry and produce a report with a recommendation as to whether or not the claimant's appeal should be allowed. In that report at paras 28–32 the inspector identified the centrality to the decision of policy EN2, policy R4 and policy EN9, and also noted that a significant number of other UDP policies were relevant to his decision (amounting, as set out above, to no less than 40 relevant policies). To assist the smooth running of the inquiry a statement of common ground ("the SOCG") was agreed between the claimant and the second defendant. In relation to policy in the UDP the SOCG recorded:

> "*Policy*
>
> "50. The proposals comply with all relevant saved policies of the SUDP except policies EN2 and R4. The proposals accord with the parts of policy EN2 that relate to wildlife and agricultural resources. The proposals accord with criteria (iii) to (vii) of policy R4.
>
> "51. It is agreed that policy EN2, relating to the designation of the Worsley Greenway, was formulated in the context of a development plan housing requirement of 530 dwellings per annum as set out in policy ST 2 of the SUDP. This is less than one third of the most recently adopted housing requirement for Salford. The housing requirement in policy ST2 originated from policy UR7 of the North West Regional Planning Guidance (RPG13) published in March 2003. This housing requirement was itself informed by 1996-based Government Household Projections. It was intended to cover the period 2002 to 2006.
>
> "52. Policy ST2 of the SUDP was intended to cover the period April 2004 to March 2016. The policy was not saved beyond 21 June 2009 and has not formed part of the development plan for over eight years.
>
> "53. Salford does not have an up-to-date development plan policy regarding housing need. The SUDP does not contain any saved policies directly relating to a housing requirement or distribution. Policies in relation to housing mix, type, affordability and design are saved.
>
> "54. Part of the Greenway subject of SUDP policy EN2 is included in the draft SLP as an allocation for 60 dwellings."

17 In addition to this it was agreed between the claimant and the second defendant that there was a need for higher quality and higher value family housing within the second defendant's administrative area, and that Worsley was an area capable of accommodating higher quality and aspirational family housing owing to its strong property market and popularity.

18 The case made by the claimant in respect of policy EN2 was comprised of a number of strands of argument, but pertinent to the present case it was submitted that policy EN2 was out-of-date for the following reasons recorded by the inspector in his report as the claimant's case:

> "112. Policy EN2 is out-of-date because it was conceived in a different policy context, when far fewer houses were needed in the area and at a time when needs could be met through urban regeneration, favouring brownfield sites first. Its rigid application is preventing Salford's full housing needs being met. The council now accepts that housing needs can no longer be met through brownfield sites alone and

A proposes the allocation of greenfield land, including in the Worsley area and on part of the Greenway. The policy allows no balancing of any adverse impacts with positive benefits of development and is drafted in a form which is inconsistent with the Framework and the presumption in favour of sustainable development.

"113. Policy EN2 is out-of-date and very little weight can be placed on its provisions in the determination of these appeals."

B

19 It was also key to the claimant's case before the inspector that the second defendant's housing land supply was defective in that it was heavily dominated by a supply of apartments. Indeed 85% of the dwellings counted by the second defendant in their five-year supply were said by the claimant to be apartments, and 82% of these dwellings were located in but two of the wards in the second defendant's administrative area. The claimant also contended that the five-year housing land supply was defective in relation to its failure to provide for affordable dwellings.

C

20 In his conclusions the inspector noted that the second defendant had not pursued its second reason for refusal associated with prematurity. The two main issues, therefore, for the inspector to determine were, firstly, whether the proposals were in accordance with the development plan and, if not, whether material considerations indicated that planning permission should be granted and, secondly, whether the council's housing land supply could be considered to meet the requirements of the Framework.

D

21 The inspector analysed at length the relationship between the appeal's housing proposals and the objectives and purpose of policy EN2. The inspector concluded, in short, that the proposed development would be at odds with the objectives of policy EN2 and have a significant effect on the character of the area designated under the policy; indeed he concluded that the character of the area designated would be "changed beyond all recognition and this would not significantly alter as landscaping established". He found that unacceptable harm in terms of the conflict with policy EN2 would result from the development, which was also identified as amounting to a conflict with policy R4.

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22 The inspector then went on to grapple with the claimant's argument that policy EN2 was out-of-date. His conclusions in that connection were set out in his report in the following terms at paras 366–372:

"366. The appellant argues that the development plan is out-of-date for a number of reasons, specifically policy EN2. The SUDP was adopted in 2006 with a plan period expiring in 2016. It can certainly be said that it was produced in a different policy context and in light of different evidence and circumstances to those existing today. However, this does not necessarily mean that the plan or any individual policy should be considered out-of-date as it may very well continue to be effective in delivering its original objectives and those relevant today. The fact that a policy is saved means that it remains part of the development plan and must be applied unless material considerations indicate otherwise. The question is not one of time but consistency with the Framework and, ultimately, results on the ground.

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"367. Policy EN2 protects the Greenway for reasons that have already been identified. There is no reason to think that those reasons are any less relevant or important than they were within the plan

period. Paragraph 157 of the Framework positively promotes that local plans should, amongst other things, identify land where development would be inappropriate, for instance because of its environmental or historic significance. That is exactly what policy EN2 seeks to do and there is nothing inconsistent with the Framework in that approach, even if the development plan does not currently fulfil all other requirements of the Framework. Whilst the first part of the policy seeks to prevent development in absolute terms this is unsurprising given its objective to protect openness and continuity and it does not alter the need to undertake a statutory balancing exercise against material considerations.

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

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

"370. For all of these reasons I do not consider that policy EN2 is in any way out-of-date. It is an adopted development plan policy which has statutory force. I have found it to be consistent with the Framework and I attach the identified fundamental conflict with the policy full and substantial weight.

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

"372. In this case the development plan contains no policies for the need for and distribution of housing and the council is not seeking to

A apply any such policies. Policy EN2 relates specifically to the appeal sites in question and is unambiguous in restricting development of the type proposed. In these circumstances, it cannot be said that the development plan is absent, silent or relevant policies are out-of-date. Having regard to the cases of [*Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283 and *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2017] PTSR
B 408], there remains a plan in place and so it is not absent; there remains a policy for the land in question which is sufficient to establish that the developments are unacceptable in principle and so the plan is not silent; and given the forgoing, the fact that there are no policies for the need and distribution of housing bears little on the outcome where the development plan is continuing to deliver an appropriate quantity of
C housing, the relevant policies for these appeals are not out-of-date."

23 The inspector then moved to consider the arguments raised by the claimant in relation to housing land supply. He noted that it was common ground that the council could demonstrate a numerical five-year housing land supply in accordance with the requirements of the Framework. He set out and engaged with the claimant's arguments about the nature of the housing
D land supply, and the implications of that in policy terms, together with his conclusions on these issues, in paras 374–379, 381–382:

"374. The appellant suggests that this does not amount to a five-year housing land supply in accordance with Part 6 of the Framework in that it does not provide the full objectively assessed needs for market and affordable housing or a wide choice of high quality housing. This
E is because the identified supply would not meet the need for all types of housing, specifically family and affordable houses. In my view, that is not what is required for individual planning appeals. The second limb of paragraph 47 relates to decision-taking in that local planning authorities must identify and update annually a supply of deliverable sites sufficient to provide five years' worth of housing. That is a purely numerical
F exercise, which is agreed to be met in this case. The Court of Appeal held in the *Gladman* case that the other limbs of paragraph 47 relate purely to plan-making and have no implications for decision-taking where the second limb is met. In my view, the same applies for paragraph 50 which talks of planning for a mix of housing and setting policies. As such, whilst it is of little consequence in light of my conclusion above, I do
G not consider that relevant policies for the supply of housing should be considered out-of-date via paragraph 49 of the Framework.

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

the council and much of the detailed figures are agreed in SoCG1 and its Addendum. The dispute is largely a matter of weight in the planning balance as opposed to matters of detail.

"376. All scenarios put forward by the council demonstrate a five-year housing land supply and even using the worst case scenario put forward, a comfortable supply of 8·5 years is shown to exist. In fact neither of the parties favoured this methodology and based on the appellant's approach a supply of 9·2 years would result, compared to 11·8 years if the council's preferred approach is used. The appellant considered that a higher proportion of houses compared to apartments would be needed in the supply in order to address current needs and the accumulated shortfall but again, this does not affect the overall existence of a deliverable five-year housing land supply.

"377. The council's current housing land supply position represents a marked improvement since the time of the previous inquiry, when not even half of the required supply existed. This being the case, it cannot be said that Policy EN2 is impeding delivery or that the development plan as a whole is failing to deliver the necessary number of residential units.

"378. Whilst this is so, the council is clearly not meeting the needs of the housing market as a whole and there are significant deficiencies in the number of larger/aspirational family houses and wider issues in the area in respect of homelessness and affordability. Some 85% of the council's housing land supply comprises apartments and there would be a shortfall of at least 997 houses during the five-year period against the council's preferred GM SHMA requirement, deriving from 'Dwelling Type Mix 4'. This would be in addition to a shortfall in delivery of 102 houses since the GM SHMA base date (2014). The appellant suggests, based on the GM SHMA's higher estimates of housing need (Dwelling Type Mix 1) that the shortfall since 2014 could be as high as 762 houses, with a deficiency in the five-year supply as much as 2,097 houses. The supply is heavily focused upon the central parts of Salford, in the wards of Ordsall and Irwell Riverside and so it unsurprising that higher density apartment schemes are predominant, but that does not lessen the need for houses in the wider area.

"379. In addition, the council recognises that there are wider social and economic benefits in the provision of larger family and aspirational housing, likely to attract skilled and economically active people that would support the local workforce. It is also accepted that Worsley is an area which can assist in meeting these needs. There are currently relatively few areas of Salford where the market can support this type of provision."

"381. It is pertinent that the council is seeking to address these issues through the local plan process and it is anticipated that new greenfield sites will need to be released to accommodate needs. No one scheme will be able to rebalance the council's housing stock or meet the identified needs for various types of housing, certainly not either of the appeal schemes. It is therefore vital that the council progresses the local plan as swiftly as possible to ensure that this issue is dealt with on a planned and comprehensive basis. The appellant does not anticipate the emerging SLP being adopted until at least 2020, but the agreed housing land supply makes provision well beyond this period and, quantitatively,

should be sufficient to maintain supply until the SLP designates new sites. The plan-making process is clearly the most appropriate manner in which to effectively address the issue. That said, no definitive time scale for this was established during the inquiry and, for now, individual speculative schemes are the only way in which to begin to address such needs.

"382. All of this is a material consideration to be weighed in the overall planning balance. The identified need for family and affordable housing is significant whichever parties' detailed figures are favoured and both appeal schemes would make a limited but valuable contribution to the need in these areas. I attach the contribution towards meeting the needs for family/aspirational housing and affordable housing significant weight. This is based on the appellant's worst case scenario in respect of the need for houses but this would remain a matter of significant weight even having regard to the council's position."

24 The inspector's conclusions in relation to the overall planning balance were set out by him:

"*Planning balance and overall conclusion*

"414. Although there is compliance with most development plan policies in these cases, there is a clear and fundamental conflict with the development plan in respect of policies EN2 and R4, policies which I do not consider to be out-of-date or inconsistent with the Framework. In these circumstances, the tilted balance of Framework paragraph 14 does not apply. I attach substantial weight to the harm that arises from conflict with these policies, which are fundamental to the plan taken as a whole.

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

25 In the light of these conclusions the inspector recommended to the first defendant that planning permission should be refused. He went on to advise that if the first defendant disagreed with his conclusion that the tilted balance was not engaged for whatever reason, he would nevertheless recommend that the appeals be dismissed and that planning permission be refused, as a result of his conclusion that the adverse impacts of the appeal proposals would significantly and demonstrably outweigh their benefits.

26 Following the close of the inquiry, and after the inspector had completed his report but prior to it being placed in the public domain, the first defendant wrote to the parties seeking their submissions in relation to

the effect of the publication of the 2018 Framework on the cases made by the parties at the inquiry. The claimant's solicitors responded by letter dated 29 August 2018. So far as pertinent to the matters relating to this challenge that letter made the following observations:

> "*Material considerations*
>
> "The appellant presented evidence in relation to a number of important material considerations which should be afforded substantial weight in these appeals. Any implications of the new Framework for these considerations are addressed below.
>
> "1. Weight to be given to the Salford Unitary Development Plan ('SUDP')
>
> "The appellant's evidence demonstrates that the SUDP as a whole and policy EN2 in particular are seriously out-of-date and can be afforded very little weight. Nothing in the new Framework, which takes into account the outcome of the Suffolk Coastal decision in the Supreme Court [see *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623], contradicts this evidence.
>
> "There is no aspect of the new Framework that suggests that the SUDP or provisions of policy EN2 should be afforded anything other than very little weight as evidenced by the appellant …"
>
> "The new Framework reaffirms the importance of fully meeting housing needs. For example it notes that 'to support the Government's objective of significantly boosting the supply of homes it is important that a *sufficient supply and variety of land can come forward where it is needed* [and] that the needs of groups with specific housing requirements are addressed …'(59).
>
> "It adds that 'within this context, the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies (including, but not limited to, those who require affordable housing [and] families with children.' (61).
>
> "In addressing the identification of land for homes the new Framework requires strategic policy-making authorities (which include Salford City Council) to have a clear understanding of their supply and 'from this, planning policies should identify a *sufficient supply and mix of sites* …' (67).
>
> "In considering density it specifically requires decisions to take account of the 'identified need for different types of houses' (122a).
>
> "These statements are consistent with the approach taken in paragraphs 47–50 of the 2012 Framework and support the appellant's case that housing size, type, mix and tenure are all relevant to consideration of housing supply whether in plan-making or decision-making (see for example APP/AP/1: 2.1–2.26). The new Framework (73) is consistent with the requirements of the second bullet point of paragraph 47 of the 2012 Framework *in* making clear that local policy authorities should be able to demonstrate a five-year supply of deliverable sites 'against their housing requirements set out in strategic policies or local housing need where strategic policies are more than five years old'.
>
> "The appellant's evidence demonstrates clearly that the council and others have repeatedly recognised the importance of more family and

A affordable homes to the future regeneration, economic growth, and sustainability of Salford … Nothing in the new Framework changes this position."

The letter concluded that the 2018 Framework had no material effect on the substance of the claimant's case.

B **27** The second defendant also responded to the first defendant's letter. Having addressed a number of issues associated with housing land supply the submission then reflected upon issues associated with whether or not policies EN2 and R4 were out-of-date. In that connection the contentions of the second defendant were set out:

"*Matters arising from the 2018 Framework*

C "4.4 Paragraph 213 of the 2018 Framework states: 'existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).'

D "4.5 The approach set out above effectively mirrors that of the 2012 Framework.

"4.6 There are various examples within the 2018 Framework which support the city council's view that saved policies EN2 and R4 are consistent with the Framework and should be afforded full weight in decision taking.

E "4.7 In reference to policy EN2, paragraph 17 of the 2018 Framework indicates that: 'The development plan must include strategic policies to address each local planning authority's priorities for the development and use of land in its area.'

"4.8 Further to this paragraph 20 states that 'Strategic policies should set out an overall strategy for the pattern, scale and quality of development, and make sufficient provision for: inter

F alia (d) conservation and enhancement of the natural, built and historic environment, *including landscapes and green infrastructure*, and planning measures to address climate change mitigation and adaptation.' (Our emphasis.)

"4.9 Paragraph 23 of the 2018 Framework indicates that development plans should, amongst other things identify: 'Broad

G locations for development should be indicated on a key diagram, and land-use designations and allocations identified on a policies map.'

"4.10 This point was raised at para 3.8 of Simon Wood's proof of evidence which broadly mirrors paragraph 157, bullet point 4 of the 2012 Framework.

"4.11 Further to this paragraph 171 of the 2018 Framework states that: 'Plans should: distinguish between the hierarchy of international,

H national and locally designated sites; allocate land with the least environmental or amenity value, where consistent with other policies in this Framework; *take a strategic approach to maintaining and enhancing networks of habitats and green infrastructure*; and plan for the enhancement of natural capital at a catchment or landscape scale across local authority boundaries.' (Our emphasis.)

"4.12 In respect of policies EN2 and R4, it is considered that paragraphs 96 and 170 support's the city council's assertion that these policies are consistent with the 2018 Framework.

"4.13 Paragraph 96 of the 2018 Framework states that: 'Access to a network of high quality open spaces and opportunities for sport and physical activity is important for the health and well-being of communities.'

4.14 This approach largely mirrors that which was presented in section 8 of the 2012 Framework in relation to the promotion of healthy communities and the contribution that high quality open spaces can make to health and well-being of communities.

"4.15 Paragraph 170 of the 2018 Framework states that: 'Planning policies and decisions should contribute to and enhance the natural and local environment by: (a) *protecting* and enhancing *valued landscapes*, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan); (b) *recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital* and ecosystem services—including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland …' (Emphasis added.)

"4.16 Criterion (a) mirrors that which was set out in paragraph 109 of the 2012 Framework whilst criterion (b) largely mirrors bullet point 5 of the 2012 Framework. The Greenway is evidently valued by the local community and the city council alike given priority by the city council to protect this tract of land in the past, present and future development plans, and also the strength of value placed on its ongoing retention as an important amenity space by the local community.

"4.17 Given the above passages it is considered that saved policies EN2 and R4 are consistent with the 2018 Framework and should continue to be given full weight by the Secretary of State in the consideration of these appeals."

28 On 14 September 2018 the claimant's solicitors responded to the representations which had been made by the second defendant. In addition to engaging with the observations made about housing land supply the following was included in the claimant's representation responding specifically to the paragraphs set out above:

"7. Section 4 of the council's comments sets out its claim that policies EN2 and R4 of the UDP are consistent with the new Framework. It highlights a number of sections of the new Framework to support this position. Those sections referred to are not materially different from equivalent provisions of the 2012 Framework, though in a number of cases these were not previously being relied upon in the council's evidence to the inquiry. For example:

• Para 4.8 of the council's submission refers to paragraph 20 of the new Framework. This generally replicates provisions already contained in paragraph 156 of the 2012 Framework which Mr Wood's proof does not refer to as being relevant to his case that policies EN2 and R4 are is consistent with the 2012 Framework.

A • Para 4.11 of the council's submission refers to paragraph 171 of the new Framework. These provisions are generally captured in paragraphs 113 and 114 of the 2012 Framework but again Mr Wood's proof does not refer to these as being relevant to his case that policies EN2 and R4 are consistent with the 2012 Framework.

• Para 4.15 of the council's submission refers to paragraph 170 of the new Framework. The provisions referred to were also captured B in paragraph 109 and the fifth bullet of paragraph 17 of the 2012 Framework but again Mr Wood's proof does not refer to these as being relevant to his case that policies EN2 and R4 are consistent with the 2012 Framework. To the extent that the council's submission seeks to introduce matters not previously referred to in evidence these matters should be ignored, there has not been the opportunity to cross-examine C the council on these matters so that any reliance on them would be prejudicial to the appellants. In any event, the council concludes that the relevant parts of the new Framework essentially mirror provisions within the 2012 Framework so even if relevant they should not alter the decision in these appeals."

D **29** Once more it was contended by the claimant's solicitors in conclusion that the new Framework had no material effect on the substantial weight that should be accorded to the substance of the claimant's case, and that the appeals should be allowed. In particular it was contended:

"The fact that the development plan is out-of-date and that the council cannot demonstrate a five-year supply of deliverable housing E against its housing requirements or local needs mean that that the presumption in favour of sustainable development and the 'tilted balance' (11(d))) are engaged. The adverse impacts of the developments do not significantly and demonstrably outweigh the benefits of the developments and as such the appeals should be allowed.

"Even if the view is taken that the tilted balance is not engaged, the serious shortcomings in the housing supply of Salford; the adverse social F and economic impacts this is having on the city; and the significant and weighty benefits of the development comprise material considerations that justify the grant of planning permission notwithstanding minor conflict with the development plan."

30 On 12 November 2018 the first defendant published his decision letter G alongside the inspector's report. At para 5 of the decision letter he accepted and agreed with the inspector's recommendation that the appeals should be dismissed and planning permission refused. The first defendant recorded that he considered that the development plan policies of most relevance to the case were those set out at paras 29–32 of the inspector's report (see para 11 of the decision letter). In respect of the main issues, and starting with those associated with the development plan, the first defendant concluded at paras H 15–19:

"*Development plan*

"15. The Secretary of State has gone on to consider whether policy EN2 of the SUDP is out-of-date. For the reasons given at IR366–367, the Secretary of State agrees that the policy remains part of the development

plan, and is not inconsistent with the Framework. For the reasons given by the inspector at IR368–369, he concludes that the recognition of the need to release greenfield land and/or Green Belt to meet future housing needs attracts little weight in the context of these proposals. A

"16. For the reasons given at IR371–371, the Secretary of State agrees that even in the absence of policies for the need and distribution of housing, there remains a plan in place, and a policy for the land in question which is sufficient to establish that the developments are unacceptable in principle, and so the plan is in line with paragraph 11(d) of the Framework. He concludes, in agreement with the inspector at IR370, that policy EN2 is not out-of-date. B

"17. He has gone on to consider the impact of the proposals on the Greenway. For the reasons given at IR345–IR350, the Secretary of State agrees that the developments would detract from openness of the Greenway and that there would therefore be a breach of policy EN2. He further agrees, for the reasons given at IR351–IR352, that the proposal would fragment and detract from the continuity of the Greenway. For the reasons set out by the inspector at IR353–IR359, he agrees that the proposals would impact negatively on the character and appearance of the Greenway. C

"18. The Secretary of State agrees, for the reasons given at IR360–1R361, that in spite of the potential benefits which would provide some mitigation, there would be a small but unacceptable harm to the recreation and amenity value of the Greenway, in conflict with policy EN2. However, he agrees with the inspector and the parties [IR362] that there would be no harm to the Greenway as a wildlife or agricultural resource, and in that respect it does not conflict with policy EN2 or policy EN9 of the SUDP. D E

"19. However, overall he finds for the reasons above that the developments would fragment and detract for the openness and continuity of the Greenway and would cause unacceptable harm to its character and its value as an amenity and open recreational recourse, and as such that there would be a clear and fundamental conflict with policy EN2 of the SUDP, in agreement with the inspector at IR363. For the reasons set out by the inspector at IR364–365, the Secretary of State also agrees that the proposals conflict with the first two criteria of the SUDP policy R4. As such, and given his findings above, he affords the fundamental conflict with the policy substantial weight." F

31 Turning to the questions associated with housing land supply the first defendant set out that, having had regard to the inspector's analysis at paras 373–376 of his report, he had gone on to recalculate the housing land supply in line with the requirements of paragraph 73 of the 2018 Framework. His conclusions in respect of the housing land supply were set out at paras 22–27: G

"22. As such, the Secretary of State has gone on to calculate housing land supply. Using the methodology set out [in the] Guidance, the Secretary of State concludes that local housing need is 1,084. As that is not 40% more than recent annual housing requirement of 785 [dwellings per annum], he does not apply a cap to this figure. He has gone on to consider paragraph 73 of the Framework. While he has had regard to the council's representations at IR233–238 as regards H

mitigation, he concludes that there has been significant under-delivery in two of the three preceding years. As such he applies a 20% buffer, thus finding a five-year housing land supply of 6,504.

"23. Against this he sets the council's deliverable housing supply of 17,788 dwellings. As such he finds that the council can demonstrate a housing land supply of over 13 years.

"24. However, the Secretary of State further notes that even were he to make use of a housing land supply figure based on a method predating the Framework, as the inspector did at IR376, or calculated using the standard method but reflecting the 2014 household growth figures, the council would be able to demonstrate comfortably a five-year housing land supply, so it would not make a difference to his overall conclusion.

"25. As such he concludes, in agreement with the inspector [IR377], that policy EN2 is not impeding delivery, nor the development plan as a whole failing to deliver the necessary number of houses needed.

"26. However, for the reasons set out at IR375 and IR378–IR380, the Secretary of State agrees that the council is not meeting the needs of the housing market as a whole, and that there are significant deficiencies in the number of larger/aspirational family homes, and wider issues with homelessness and affordability. While the council is seeking to address this through the local plan process, the Secretary of State agrees [IR381] that at present individual schemes are the only way in which to begin to address such needs.

"27. As such, for the reasons given at IR382, he gives significant weight in favour of the appeals to their contribution towards meeting the needs for family/aspirational housing and affordable housing. For the reasons given at IR383, he agrees that the additional provision of affordable housing does not meet the tests for planning obligations and as such he affords no additional weight to the proposed provision beyond a 20% contribution."

32 The planning balance and overall conclusion were set out in the decision letter, at paras 40–44, leading to the dismissal of the claimant's appeals:

"40. For the reasons given above, the Secretary of State considers that the appeal schemes are not in accordance with policies EN2 and R4 of the development plan, and are not in accordance with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposals should be determined other than in accordance with the development plan.

"41. In favour of the appeals, the Secretary of State weighs the provision of affordable and aspirational housing, which attract significant weight. He also takes into account the transport improvements offered by the proposals, which he affords very limited weight. He affords moderate weight to the improvements in relation to flood risk. He attaches minimal weight to the benefits in terms of sports pitches and play areas. Further limited weight accrues to the socioeconomic benefits of the proposals. As regards Appeal A, he adds moderate weight to the provision of a shuttle bus. As regards Appeal B, he also gives further limited weight to the education provision provided by the scheme.

"42. Against the proposals he weighs the impact on the character and appearance, and openness and continuity, of the Greenway. He affords these harms, and the resulting conflict with development plan policy, substantial weight. He also gives limited weight to the harm by way of increased air pollution.

"43. As such the Secretary of State concludes that there are no material considerations sufficient to justify determining the appeals other than in line with the development plan.

"44. The Secretary of State therefore concludes that the appeals should be dismissed and planning permission refused."

The claimant's grounds in brief

33 The claimant identifies ten grounds of challenge in its skeleton argument, however it became clear at the outset of the hearing that in truth grounds 9 and 10 were effectively dimensions of the earlier six grounds and not freestanding. Grounds 1 and 2 of the claimant's case relate to the approach which should have been taken to whether or not policy EN2 was out-of-date. In both the written and oral argument Mr Martin Kingston QC, on behalf of the claimant, commenced by addressing ground 2 prior to turning to ground 1, although it will be seen they are related. Ground 2 is the contention that the first defendant failed to correctly interpret and apply paragraph 11(d) of the 2018 Framework. Mr Kingston submits that policy EN2 was a constituent policy within a development plan document which, as a whole, had passed its expiry date and was thereby automatically out-of-date and thus the tilted balance should apply. In making these submissions he draws parallels with the circumstances in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government*; *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2017] PTSR 623, and in particular an observation made by Lord Carnwath JSC at para 63 which is set out below. The claimant submits that the first defendant made no reference to the end date of the plan and its crucial significance in the decision letter, and failed to appreciate that the expiration of the plan period for the UDP rendered its policies out-of-date for the purposes of paragraph 11(d).

34 Ground 1 is also related to paragraph 11(d) of the Framework and the consideration given to the question of whether policy EN2 was out-of-date by the inspector, which was subsequently adopted by the first defendant in his decision letter. In particular, it is submitted that the first defendant failed to identify that policy EN2 had been significantly overtaken by events since adoption, in that it was based upon a plan grounded in economic, demographic and other evidence of development needs which had long since been superseded.

35 Three particular features of the inspector's report relied upon by the first defendant are the subject of particular criticism under this ground. Firstly, the inspector's reliance within para 366 of the inspector's report upon the point that the question of whether or not policy EN2 was out-of-date was "not one of time". The claimant contends that the elapse of time is central to the question of whether a policy is out-of-date, and that the inspector's subsequent reference to "results on the ground" was entirely opaque and unexplained. Further the claimant criticises the observations in para 370 of the inspector's report that policy EN2 was not in any way out-of-date.

In effect, therefore, the inspector excluded the end date of the plan in his consideration of whether or not it was out-of-date. Finally, at para 377 of the inspector's report, the claimant criticises the observation made by the inspector that policy EN2 was "not impeding delivery, nor the development plan failing to deliver the necessary number of houses needed". This was an observation which was flat contrary to earlier observations that there was a shortfall of houses of the required type and quality in the housing land supply. In effect, as a result of the effluxion of time, the UDP had been shorn of the substantial strategic parts of the plan addressing, for instance, housing requirements and economic needs, and deprived of this context it was of necessity out-of-date. Indeed, as the inspector noted, the second defendant had been obliged in its emerging plan to allocate housing on the area covered by policy EN2 demonstrating the significance of the absence of a context relating to housing requirements.

36 In grounds 3–5 the claimant turns to criticisms of the decision based upon the conclusions in relation to whether or not policy EN2 was out-of-date in the context of the application of paragraph 213 of the 2018 Framework. Ground 3 contends that the first defendant failed to properly interpret paragraphs 11(d) and 213 of the 2018 Framework, by equating the task of identifying whether the policy was out-of-date with solely an assessment of consistency with the Framework. This left out of account other factors which needed to be taken into account in order to decide whether or not the policy was out-of-date.

37 Ground 4 is the failure to identify any policy provisions or paragraphs within the 2018 Framework with which policy EN2 was actually in conformity, so as to justify the conclusion that it was not out-of-date. The Framework had been revised and republished since the inspector's report had been written, and the first defendant did not undertake any assessment measured against the 2018 Framework.

38 Ground 5 is the allegation that the first defendant's decision letter failed to recognise that policy EN2 was in fact inconsistent with the housing policies of the Framework which, in particular, addressed the need for a balanced supply of housing including family housing and affordable housing within the available supply. Again, the inspector's assessment was measured against the 2012 Framework, rather than the revised 2018 Framework which was available to the first defendant.

39 The claimant was not granted permission to argue grounds 6, 7 and 8. However, at the hearing the application for permission to apply to argue grounds 6, 7 and 8 was renewed. Mr Kingston presented these three grounds by commencing with ground 7. Ground 7 is the contention that the first defendant erred in law in basing his findings on the inspector's findings as to housing provision and, in particular, the finding at para 377 of the inspector's report that policy EN2 was "not impeding delivery". This was a conclusion which the first defendant relied upon at para 25 of his decision. Mr Kingston draws attention to the inspector's finding that Worsley was an area which could assist in the provision of large and aspirational family housing (see para 379 of the report), and also that the second defendant was allocating parts of the area designated under policy EN2 to meet future housing needs. The inevitable conclusion was that in the light of these factors policy EN2 was actively preventing housing, and the first defendant's conclusion that it

was not impeding delivery was one which failed to have regard to material considerations and was irrational.

40 Linked to ground 7, ground 8 is a contention that in para 25 of the decision letter the first defendant erred in failing to recognise that at para 381 of the inspector's report the inspector's conclusions were inconsistent with the abandonment by the second defendant of its prematurity reason for refusal, and further failed to address the fact that the preparation of a replacement development plan for the UDP had been substantially delayed, leading to ongoing deficiencies in housing supply in the meantime. There was therefore an error of law in the first defendant's approach to the local plan process and prematurity.

41 Finally, ground 6 is the contention that the first defendant erred in law in identifying that the second defendant was able to demonstrate a qualifying housing land supply for the purposes of paragraph 73 of the 2018 Framework. It was incorrect for the second defendant to rely purely upon a mathematical quantification of the housing land supply. There was a qualitative housing land supply shortfall in terms of the significant deficit in the number of larger family aspirational homes, as well as in terms of the provisions of affordable housing. The first defendant failed to have regard to the housing policies set out above in particular at paragraphs 59–61 of the Framework in relation to the provision of an adequate and deliverable qualitative housing land supply.

The law

42 Section 70(2) of the 1990 Act requires a decision-taker to have regard to the provisions of the development plan so far as the material to any application for planning permission that is being determined. Section 38(6) of the 2004 Act requires that the determination of a planning application "must be in accordance with the plan unless material considerations indicate otherwise". The 2004 Act also contains provisions in relation to the matters which must be addressed in the preparation of a local development document. In particular section 19 of the 2004 Act, as amended by section 8(1) of the Neighbourhood Planning Act 2017, contains the following provisions:

> "19 *Preparation of local development documents*"
> "(1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.
> "(1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole)."

43 Under section 17(7)(za) the first defendant has power to make regulations in relation to the form and content of local development documents. That power has been exercised, and the current version of the regulations made under this power are the Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767). Regulation 5 of the 2012 Regulations provides:

> "5 *Local development documents*
> "(1) For the purposes of section 17(7)(za) of the Act the documents which are to be prepared as local development documents are— (a) any document prepared by a local planning authority individually or in

co-operation with one or more other local planning authorities, which contain statements regarding one or more of the following— (i) the development and use of land which the local planning authority wish to encourage during any specified period; (ii) the allocation of sites for a particular type of development or use; (iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraphs (i); and (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission …"

44 The jurisdiction of the court in relation to a statutory challenge brought, as this challenge is, under section 288 of the 1990 Act is an error of law jurisdiction. As Sullivan J observed in *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126, whilst an allegation that a conclusion of the planning merits is irrational or *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) is, in principle, available to a claimant mounting a section 288 challenge, it will be a high hurdle to surmount (see paras 5 and 6 of the judgment).

45 Following the decision of the Supreme Court in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983 the question of the textual interpretation of a planning policy is question of law for the court to determine. The Framework, in addition to being an obvious material consideration to which regard must be had in accordance with the statutory decision-taking regime, is also an element of policy the interpretation of which is a question of law for the court. As noted in *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 81, para 23 the following principles emerge from the authorities to govern the resolution of questions of planning policy:

"In my view in the light of the authorities the following principles emerge as to how questions of interpretation of planning policy of the kind which arise in this case are to be resolved: (i) The question of the interpretation of the planning policy is a question of law for the court, and it is solely a question of interpretation of the terms of the policy. Questions of the value or weight which is to be attached to that policy for instance in resolving the question of whether or not development is in accordance with the Development Plan for the purposes of section 38(6) of the 2004 Act are matters of judgment for the decision-maker. (ii) The task of interpretation of the meaning of the planning policy should not be undertaken as if the planning policy were a statute or a contract. The approach has to recognise that planning policies will contain broad statements of policy which may, superficially, conflict and require to be balanced in ultimately reaching a decision (see the *Tesco Stores* case [2012] PTSR 983, at para 19 and the *Hopkins Homes* case [2017] PTSR 623, at para 25). Planning policies are designed to shape practical decision-taking, and should be interpreted with that practical purpose clearly in mind. It should also be taken into account in that connection that they have to be applied and understood by planning professionals and the public for whose benefit they exist, and that they are primarily addressed to that audience. (iii) For the purposes of interpreting the

meaning of the policy it is necessary for the policy to be read in context: see the *Tesco Stores* case, at paras 18 and 21. The context of the policy will include its subject matter and also the planning objectives which it seeks to achieve and serve. The context will also be comprised by the wider policy framework within which the policy sits and to which it relates. This framework will include, for instance, the overarching strategy within which the policy sits. (iv) As set out above, policies will very often call for the exercise of judgment in considering how they apply in the particular factual circumstances of the decision to be taken: see the *Tesco Stores* case, at paras 19 and 21. It is of vital importance to distinguish between the interpretation of policy (which requires judicial analysis of the meaning of the words comprised in the policy) and the application of the policy which requires an exercise of judgment within the factual context of the decision by the decision-taker: see he *Hopkins Homes* case, at para 26."

46 Dealing with the question of reasons in the determination of an appeal under section 78 of the 1990 Act by the first defendant, rule 18 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) provides:

"18 *Notification of decision*

"(1) The Secretary of State shall, as soon as practicable, notify his decision on an application or appeal, and his reasons for it in writing to — (a) all persons entitled to appear at the inquiry who did appear, and (b) any other person who, having appeared at the inquiry, has asked to be notified of the decision."

47 It follows from rule 18 of the 2000 Rules that in reaching his decision the first defendant is under a duty to provide reasons for the decision. The question which arises is as to whether or not those reasons are legally adequate. There are two dimensions to the consideration of that issue: the first is the question of the correct approach to the reading and examination of decisions in section 288 challenges, and second is the allied question of whether or not the reasons provided in the decision are legally adequate. So far as the approach to the reading and examination of decision letters in challenges under section 288 of the 1990 Act is concerned, Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, para 6 summarised seven principles to be applied in considering such cases (derived from his earlier judgment in *Bloor Homes* [2017] PTSR 1283, para 19):

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

"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to rehearse every argument relating to each matter in every paragraph …

"(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as

A it was and what conclusions were reached on the 'principle important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration …

"(3) The weight to be attached to any material consideration and all B matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into *Wednesbury* irrationality' … to give material considerations 'whatever weight [it] thinks fit or no weight at all' …

"(4) Planning policies are not statutory or contractual provisions C and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure to properly understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to D an immaterial consideration …

"(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question …

"(6) Because it is reasonable to assume that national planning policy E is familiar to the Secretary of State and his inspectors the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored …

"(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it F is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises …"

48 So far as the test for the adequacy for reasons is concerned the principles are set out (albeit not necessarily exhaustively) in the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v* G *Porter (No 2)* [2004] 1 WLR 1953, para 36 (which cross-refers to the second principle from *St Modwen* [2018] PTSR 746) in which he provided:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principle important controversial issues', disclosing how any issue of H law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such

adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

49 It will have been noted from the citation of the policies of both the 2012 and 2018 Framework that the concept of a policy being out-of-date is one which was originally formulated in the 2012 Framework, and then reiterated in the 2018 Framework. None of the parties to this case suggested, in my view entirely correctly, that the pre-2018 Framework authorities were not material to the question of the correct interpretation of the 2018 Framework in relation to the determination whether policies were out-of-date.

50 The case law relating to the current interpretation of the policy relating to the question of whether or not a policy is out-of-date commences with the decision of Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283. The first ground raised by the claimant in that case was the contention that the inspector had failed to properly interpret and apply paragraph 14 of the 2012 Framework, and in particular engage with the question of whether or not the relevant policy of the development plan was "absent" or "silent", or provide reasons for any conclusion in that regard. It was submitted that the relevant policy in the core strategy was "absent" or "silent" on the location of housing needed in the settlement to which the development was adjacent. Lindblom J observed that the consideration of this ground required the court to consider the correct interpretation of paragraph 14 of the Framework. He set out his conclusions in respect of paragraph 14 at paras 44–45:

"44. In the context of decision-taking paragraph 14 identifies three possible shortcomings in the development plan, any one of which would require the authority to grant planning permission unless it is clear in the light of the policies of the NPPF that the benefits of doing so would be 'significantly and demonstrably' outweighed by 'any adverse impacts', or there are specific policies in the NPPF indicating that 'development should be restricted'. The three possible shortcomings are the absence of the plan, its silence, and its relevant policies having become out-of-date.

"45. These are three distinct concepts. A development plan will be 'absent' if none has been adopted for the relevant area and the relevant period. If there is such a plan, it may be 'silent' because it lacks policy relevant to the project under consideration. And if the plan does have relevant policies these may have been overtaken by things that have happened since it was adopted, either on the ground or in some change in national policy, or for some other reason, so that they are now 'out-of-date'. Absence will be a matter of fact. Silence will be either a matter

A of fact or a matter of construction, or both. And the question of whether relevant policies are no longer up-to-date will be either a matter of fact or perhaps a matter of both fact and judgment."

51 The question of when policies might be out-of-date again arose in *Daventry District Council v Secretary of State for Communities and Local Government* [2017] JPL 402. The case concerned an appeal in relation B to residential development, and the application of two policies from a saved local plan. The first policy was HS22 which provided criteria to govern the grant of residential development within the existing confines of "restricted infill villages". The second policy was policy HS24 which applied to proposals for residential development in the open countryside, and directed that planning permission would not be granted for residential C development other than in a restricted number of categories in the open countryside. The claimant had contended at the planning inquiry into the appeal proposals that policies HS22 and HS24 should have reduced or no weight on the basis that they were out-of-date. The end date of the local plan had passed and the evidence base upon which the policies had been grounded was long since superseded. Sales LJ, giving the leading judgment in the Court D of Appeal, upheld Lang J's decision at first instance quashing the inspector's grant of planning permission, on the basis that the inspector had failed, as required by paragraph 215 of the 2012 Framework, to analyse in what way and to what extent policies HS22 and HS24 were or were not consistent with the policies set out in the 2012 Framework. Sales LJ expressed his conclusions at paras 35–36:

E "35. … Even reading the 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 NPPF, it is clear that the inspector has failed to grapple as he should F have done with the issue posed by paragraph 215 of the NPPF.

"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 at DL68 and his excessively narrow focus on paragraphs 47 and 49 G of the NPPF, to the exclusion of other relevant policies in the NPPF 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 NPPF. I add that it is a notable feature of the DL that, after making the necessary correction for the inspector's slip in DL15 in referring to paragraph 215 of the NPPF when he meant paragraph 113, the DL H makes no reference at all to paragraph 215, even though that was the provision in the NPPF which set out the approach which the inspector ought to have followed."

52 That conclusion, as Sales LJ noted, sufficed to indicate that the appeal should be dismissed and the inspector's decision quashed. However,

Sales LJ went on to consider the approach to be taken to old policies. He provided, at paras 40–44:

> "40. I would formulate the position in this way:
>
> "(i) Since old policies of the kind illustrated by policies HS22 and HS24 in this case are part of the development plan, the starting point, for the purposes of decision-making, remains section 38(6) of the 2004 Act. This requires that decisions must be made in accordance with the development plan—and, therefore, in accordance with those policies and any others contained in the plan—unless material considerations indicate otherwise. The mere age of a policy does not cause it to cease to be part of the development plan; see also paragraph 211 of the NPPF, set out above. The policy continues to be entitled to have priority given to it in the manner explained by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, 1458C–1459G.
>
> "(ii) The weight to be given to particular policies in a development plan, and hence the ease with which it may be possible to find that they are outweighed by other material considerations, may vary as circumstances change over time, in particular if there is a significant change in other relevant planning policies or guidance dealing with the same topic. As Lord Clyde explained: 'If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance.' (P 1458E.)
>
> "(iii) The NPPF and the policies it sets out may, depending on the subject matter and context, constitute significant material considerations. Paragraph 215 sets out the approach to be adopted in relation to old policies such as policies HS22 and HS24 in this case, and as explained above requires an assessment to be made regarding their consistency with the policies in the NPPF. The fact that a particular development plan policy may be chronologically old is, in itself, irrelevant for the purposes of assessing its consistency with policies in the NPPF.
>
> "(iv) Since an important set of policies in the NPPF is to encourage plan-led decision-making in the interests of coherent and properly targeted sustainable development in a local planning authority's area (see in particular the section on Plan-making in the NPPF, at paragraph 150ff), significant weight should be given to the general public interest in having plan-led planning decisions even if particular policies in a development plan might be old. There may still be a considerable benefit in directing decision-making according to a coherent set of plan policies, even though they are old, rather than having no coherent plan-led approach at all. In the present case, it is of significance that the Secretary of State himself decided to save the Local Plan policies in 2007 because he thought that continuity and coherence of approach remained important considerations pending development of appropriate up-to-date policies.
>
> "(v) Paragraph 49 of the NPPF creates a special category of deemed out-of-date policies, ie relevant policies for the supply of housing where a local planning authority cannot demonstrate a five-year supply of

deliverable housing sites. The mere fact that housing policies are not *deemed* to be out-of-date under paragraph 49 does not mean that they cannot be out-of-date according to the general approach referred to above.

"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 NPPF, 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 NPPF under the exercise required by paragraph 215 of the NPPF. 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 restated 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 NPPF. 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, ie 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 (second bullet point) and paragraph 49 of the NPPF. [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 NPPF. Therefore, he says, no or very reduced weight should be accorded to policies HS22 and HS24.

"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 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 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 extent of the consistency of policies HS22 and HS24 with the range of policies in the NPPF is required, as set out in paragraph 215 of the NPPF, before any conclusion can be drawn whether those policies should be departed from in the present case."

53 The next case in which issues of this kind arose was the decision of the Supreme Court in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623. In this case issues associated with the correct interpretation of both paragraph 14 and 49 of the 2012 Framework arose. In respect of the interpretation of paragraph 14, Lord Carnwath JSC reached the following conclusions, at paras 54–56:

"*Interpretation of paragraph 14*

"54. The argument, here and below, has concentrated on the meaning of paragraph 49, rather than paragraph 14 and the interaction between the two. However, since the primary purpose of paragraph 49 is simply to act as a trigger to the operation of the 'tilted balance" under paragraph 14, it is important to understand how that is intended to work in practice. The general effect is reasonably clear. In the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission, except where the benefits are 'significantly and demonstrably' outweighed by the adverse effects, or where 'specific policies' indicate otherwise. (See also the helpful discussion by Lindblom J in [*Bloor Homes East Midlands Ltd v*

Secretary of State for Communities and Local Government [2017] PTSR 1283], para 42 et seq.)

"55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgment, unrelated of course to paragraph 49 which deals only with housing supply. This may in turn have an effect on other related policies, for example for transport. The pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgment, not dependent on issues of legal interpretation.

"56. If that is the right reading of paragraph 14 in general, it should also apply to housing policies deemed 'out-of-date' under paragraph 49, which must accordingly be read in that light. It also shows why it is not necessary to label other policies as 'out-of-date' merely in order to determine the weight to be given to them under paragraph 14. As the Court of Appeal recognised, that will remain a matter of planning judgment for the decision-maker. Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the 'tilted balance'."

54 The claimant emphasises in its submissions the parallels between the position in the *Cheshire East* case, which was considered alongside the *Hopkins Homes Ltd* case by the Supreme Court, and in particular the fact that the relevant local plan in the *Cheshire East* case, the Crewe and Nantwich Replacement Local Plan, was adopted in 2005 with an end date of 2011, and was then the subject of a saving direction in 2009 which rendered it relevant to the inquiry involved in the *Cheshire East* case which occurred in June 2014. The comparable facts in relation to the UDP in the present case were that it was adopted in 2006 with an end date of 2016 and, as set out above, a saving direction in 2009 and no replacement at the date of the inquiry in 2018. When Lord Carnwath JSC turned to that facts of the particular cases before the Supreme Court he provided the following observations at para 63 in relation to the *Cheshire East* case (which was concerned with a site at Willaston):

"It is convenient to begin with the Willaston appeal, where the issues are relatively straightforward. On any view, quite apart from paragraph 49, the current statutory development plan was out-of-date, in that its period extended only to 2011. On my understanding of paragraph 49, the council and the inspector both erred in treating policy NE2 ('Countryside') as 'a policy for the supply of housing'. But that did not detract materially from the force of his reasoning: see the summary in paras 44–45 above. He was clearly entitled to conclude that the weight to be given to the restrictive policies was reduced to the extent that they derived from 'settlement boundaries that in turn reflect out-of-date housing requirements' (para 94). He recognised that policy NE4 had a

more specific purpose in maintaining the gap between settlements, but he considered that the proposal would not cause significant harm in this context (para 95). His final conclusion (para 101) reflected the language of paragraph 14 (the tilted balance). There is no reason to question the validity of the permission." A

55 Finally, reference was made to the decision in *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1302. This was another case concerned with a challenge to an inspector's decision on an appeal. In particular, the issue raised was the question of whether or not a policy from the Central Bedfordshire Core Strategy and Development Management Policies Document was out-of-date. Earlier inspectors in appeal decisions had concluded both for and against the policy being found to be out-of-date. By the time of the appeal decision under challenge being considered the most recent conclusion of an appeal inspector (in a decision on a site at a settlement called Meppershall), which took account of and provided careful reasons in relation to the earlier decisions, had concluded that the policy should be found to be out-of-date. In the appeal under challenge the inspector concluded that the policy was not out-of-date and therefore the tilted balance under paragraph 14 of the Framework was not engaged. The challenge was upheld on the basis of the failure of the inspector to provide legally adequate reasons to explain why he had reached a different conclusion from his predecessors, and in particular his most immediate predecessor who had, taking account of the earlier decisions, reached a properly reasoned conclusion that the policy was out-of-date. Furthermore, however, concern arose as to the reasons which the inspector had provided in relation to whether the policy was out-of-date irrespective of the earlier decisions. These concerns were set out at paras 34–37, and dealt with the earlier decision in *Daventry* [2017] JPL 402 and how it should be applied: B C D E

"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 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 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 the case he has failed to explain why he has formed a different view from the F G H

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.

"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."

Submissions and conclusions

56 I commence the consideration of the grounds raised by the claimant, as Mr Kingston did in his submissions, with ground 2. Under this ground Mr Kingston submits that the entire UDP was properly to be understood to be out-of-date, on the basis that the plan had passed its end date of 2016 without having been replaced, and therefore by operation of law and as a consequence of the end date being passed the plan was out-of-date. This submission was founded on a number of contentions. Firstly, Mr Kingston emphasised the provision of regulation 5(1)(a)(i) of the 2012 Regulations which determines as a characteristic of the development plan that it is prepared for a "specified period". The introduction of this legal requirement founded the conclusion that once the end date of the plan had passed it was as a totality out-of-date, as it would be inconsistent with the provisions of the 2012 Regulations in relation to the timescales of the plan. Furthermore, Mr Kingston emphasised and placed reliance upon the observation of Lord Carnwath JSC in *Hopkins Homes* [2017] PTSR 623, para 63 that the local plan in that case was out-of-date as a consequence of it being beyond its end date. In relation to the observations of Lindblom J in *Bloor Homes* [2017] PTSR 1283 Mr Kingston submitted that the law, and in particular the requirements of the 2012 Regulations, were a key requirement of governing force in determining that the plan was out-of-date. Thus, he submitted that it was an error of law for the first defendant to have failed to identify that as the UDP was as a whole out-of-date because it had passed its expiry date and therefore policy EN2, as a constituent policy of the UDP, was out-of-date.

57 In response to these submissions Mr Richard Honey, on behalf of the first defendant, and Mr Christopher Katkowski QC on behalf of the second defendant, contend that the question of whether or not a policy is out-of-date is a question of fact and judgment as Lindblom J observed in *Bloor Homes*. Further, they submit that the sentence extracted from Lord Carnwath JSC's judgment at para 63 in *Hopkins Homes* does not establish as a matter of law that once the end date of a plan has been passed it must be deemed to be out-of-date.

58 In my view the starting point of the evaluation of these submissions must be an understanding that at the heart of this issue is a question of interpretation of planning policy, and in particular the planning policy contained in paragraph 11(d) and 213 of the 2018 Framework. That is because the notion of a policy being out-of-date is one which exists within the structure of the Framework and which exists for particular purposes, namely the question of whether or not the tilted balance should apply and the weight which should be attached to the policy in the decision-taking process. In my judgment it is critical to note that there is nothing in the relevant provisions of the Framework to suggest that the expiration of a plan period requires that its policies should be treated as out-of-date. Indeed, to the contrary,

A the provisions of paragraph 213 specifically contemplate that older policies which are consistent with the Framework should be afforded continuing weight. Furthermore, I would entirely accept and adopt the formulation of the approach to the question of whether a policy is out-of-date given by Lindblom J in *Bloor Homes*. It will be a question of fact or in some cases fact and judgment. The expiration of the end date of the plan may be relevant to that exercise but it is not dispositive of it, nor did Lindblom J suggest B that was the case. In so far as reliance is placed by the claimant on the observation of Lord Carnwath JSC in para 63 of *Hopkins Homes*, I accept the submissions made by the first and second defendants that it is an obiter remark which does not lay down any legal principle, or provide a gloss on Lindblom J's approach. It is important to note that Lord Carnwath JSC had endorsed Lindblom J's views at an earlier part of the judgment and it would C be inconsistent with that endorsement to read the sentence in para 63 as a further gloss on Lindblom J's conclusions. In short, this sentence from the judgment is quite incapable of bearing the forensic weight which the claimant seeks to ascribe to it. Lord Carnwath JSC was not identifying a legal principle that when a plan's end date has been passed its policies are out-of-date in the terms of the policy of the Framework.

D **59** I am unable to accept the submission that the provisions of the 2012 Regulations also demand that once a plan period has expired the plan must be deemed out-of-date when applying the policy of the Framework. Firstly, the provisions of the 2012 Regulations are addressing the matters which need to be included when a local development document is being prepared and adopted or which defines a document as such. The Regulations are not designed, nor do they purport, to govern the application of the Framework's E term out-of-date for the purposes of paragraph 11 of the Framework. Indeed, as I have already emphasised, that is a policy concept to be interpreted and applied within the context of the Framework and is not, therefore, to be defined by elements of the statutory framework which are not referred to by the Framework in this connection at all. Indeed, the statutory framework is consistent with the provisions of paragraph 213 of the Framework in that this F statutory material does not, for instance, suggest that once the plan period for an element of the development plan has expired that plan ceases to be part of the development plan for the purposes of exercising the statutory discretion as to whether or not to grant planning permission, or should be treated differently in the decision-taking process. In short, therefore, I have reached the conclusion that the claimant's ground 2 is not made out.

60 I turn then to the contentions raised under ground 1. They are G to some extent linked to ground 2 in that they relate to criticisms of the first defendant's analysis of whether or not policy EN2 was out-of-date, in particular, in failing to identify consistently with the approach of Lindblom J in *Bloor Homes* [2017] PTSR 1283 and Lord Carnwath JSC in *Hopkins Homes* [2017] PTSR 623 that policy EN2 had been clearly overtaken by events since its adoption. In particular, it is submitted that it H was formulated in an entirely different national and local planning context and based on long superseded evidence of the second defendant's economic, demographic and development needs. As set out above, three particular features of the first defendant's reliance upon the inspector's report are criticised. Firstly, the observation in para 366 of the inspector's report that the question of out-of-date was not a question of time but rather consistency

with the Framework; secondly, the inspector's conclusion that policy EN2 was not "in any way" out-of-date which excluded consideration of the end date of the plan; and thirdly the observation at para 377 of the inspector's report that policy EN2 was "not impeding delivery", when it was plain that there was a conspicuous shortfall in larger aspirational family housing and affordable housing. A

61 In response to these submissions Mr Honey and Mr Katkowski again rely upon the conclusion of Lindblom J in *Bloor Homes* [2017] PTSR 1283 that the question of whether or not EN2 was out-of-date is a question of fact, or fact and judgment, and that the first defendant's adoption in para 15 and 16 of the decision letter of the inspector's conclusions at paras 366, 367, 371 and 372 of the report provides a perfectly satisfactory exercise of judgment to reach the conclusion that policy EN2 was not out-of-date. Mr Honey emphasises that the observation that the question was not one of time but consistency with the Framework indicated a proper appreciation of the *Bloor Homes* test, in the sense that passage of time per se is not sufficient to conclude that a policy is out-of-date, but the question properly understood was whether or not the passage of time had led to the policy being overtaken by events. Thus the inspector was entitled to conclude as he did that the policy was not in any way out-of-date. He was further entitled to conclude that, as a matter of planning judgment, policy EN2 was not impeding the delivery of homes. B C D

62 Again, in my view the starting point for the evaluation of these submissions must be the provisions of the 2018 Framework, and in particular para 213, alongside the conclusions of Lindblom J in *Bloor Homes*. It is perfectly clear from para 366 of the inspector's report that he was very clearly mindful of the contentions of the claimant that policy EN2 had been shorn of its strategic policy context, and that the evidence base upon which it had been grounded was no longer current. Furthermore, it is clear from para 369 that the inspector was alive to the existence of an emerging allocation in the area designated as subject to policy EN2 and, in paras 371 and 372 that the development plan no longer contained policies for the need and distribution of housing since those policies had not been saved in 2009. The factors stressed by the claimant in the current challenge in respect of the datedness of policy EN2 were, therefore, all in front of and taken account of by the inspector. E F

63 In reaching the judgment that he did I am unable to conclude that he, and in turn the first defendant, misinterpreted or misapplied the relevant provisions of the Framework. Applying the provisions of the Framework, and in particular paragraph 213, and the approach to the question of whether or not EN2 was out-of-date consistent with the *Bloor Homes* analysis, it is clear that the inspector concluded, firstly, that policy EN2 continued to be effective in delivering its original objectives and, secondly, that the reasons for policy EN2's protection were not only no less relevant than they had been within the plan period but also that they remained consistent with paragraph 157 of the 2012 Framework. These were planning judgments which the inspector was entitled to reach and portray no error of law in the approach to whether or not policy EN2 was out-of-date. G H

64 The inspector went on to consider the implications of the absence of policies for the need for and distribution of housing and, on the facts, was entitled to conclude that the development plan was continuing to deliver

A an appropriate quantity of housing, and policy EN2 had therefore not been overtaken by events in terms of the failure to save the policies of the UDP in relation to the housing need and distribution. Again, this was a planning judgment founded upon the particular circumstances of the case and were conclusions which the inspector was entitled to reach and the first defendant entitled to adopt.

B **65** Turning to the particular criticisms raised by the claimant, in my view the observation of the inspector and the question of whether or not the policy was "not one of time but consistency with the Framework" was one which was a fair reflection of the requirements both of paragraph 213 of the Framework and Lindblom J in *Bloor Homes* [2017] PTSR 1283. As the inspector observes in the preceding sentences, a policy may continue to be effective in delivering its original objectives and, moreover, may have been C saved as the present policy was, and thus remain part of the development plan to be applied in accordance with the statutory Framework. Thus, the exercise required by paragraph 213 of the Framework and the *Bloor Homes* test is not one which is dictated simply by the passage of time, but rather an assessment of consistency of the Framework, and the factual circumstances in which the policy is being applied including, amongst other things, what the inspector D characterised as "results on the ground". In the particular circumstances of this case that was, as he reflected in para 372 of the report, whether or not an appropriate quantity of housing was continuing to be delivered through the application of the remaining elements of the development plan which had not been saved. He concluded that in the light of the findings in relation to the five-year supply of deliverable housing that it was. This observation does not in my judgment found any suggestion that the inspector and in turn the E first defendant fell into error in connection with this issue. Moreover, in the light of the conclusions which preceded para 370 of the inspector's report I accept the submission made by Mr Honey that the inspector was entitled to conclude that policy EN2 was not "in any way out-of-date". Finally, the observation about not impeding delivery in para 377 has to be read in the context of the inspector's conclusions, and for these reasons and the reasons F set out below in relation to ground 7, I am satisfied that the reasoning given by the inspector is clear and is an obvious exercise of planning judgment.

66 Both in the circumstances of this case, and also generally, the conclusions reached in relation to both ground 1 and 2 are not especially surprising. It is very far from uncommon to have policies in a plan related to environmental protection whose objectives will, and are intended to, continue well beyond the end of a plan period. Whilst, of course, when G a local development document is formulated it is formulated as a whole, and is intended to present as a coherent suite of policies, that objective is not inconsistent with the inclusion of some environmental policies being intended and designed to operate on a longer time scale than that which may be contemplated by the plan period. The kind of policies to which this might apply are policies such as Green Belt (one of the characteristics of H which is its "permanence"), or policies pertaining to environmental assets such as those relating to heritage assets or internationally protected and irreplaceable habitats. It would be both counter-intuitive, and contrary to longstanding provisions of national policy, if policies in a development plan protecting these interests were deemed out-of-date at the expiration of a plan period. There is no warrant in the provisions of paragraph 11(d) and

213 of the Framework or the *Bloor Homes* test for such a conclusion. It is significant to note the inspector's lengthy analysis and clear conclusions that the land designated as EN2 continued to be a valued landscape, open space and recreational resource continuing to serve the amenity and countryside recreation purposes which justified its original designation. He identified that this purpose remained consistent with the policies of the 2012 Framework. These conclusions coupled with his conclusions in relation to the existence of a deliverable five-year housing land supply were consistent with the provisions of paragraphs 11(d) and 213 of the Framework and the application of the *Bloor Homes* test. This was a planning judgment properly open to the inspector and the first defendant.

67 I turn to consider the claimant's ground 3 which relates to the contention that the first defendant, at para 15 of the decision letter, erroneously equated the task of the identification of whether or not EN2 was out-of-date as being solely related to the assessment of whether or not it was consistent with the Framework. The claimant submits that the effect of *Bloor Homes* [2017] PTSR 1283 is clear, namely that other issues apart from consistency with the Framework are at stake when the assessment of whether or not a policy is out-of-date is undertaken. Furthermore, the claimant refers to para 30 of Sales LJ's judgment in *Daventry* [2017] JPL 402 and, for instance, the importance of considering whether or not policies which had been saved continued to represent a coherent set of plan policies or had been overtaken by events (see para 40(iv) of Sales LJ's judgment).

68 As set out above, it is undoubtedly right that the requirements of paragraph 213 of the 2018 Framework, taken together with the observations of Lindblom J in para 45 of *Bloor Homes*, represent the correct approach to determining whether a particular policy is out-of-date. In my view the difficulty with the claimant's submission in relation to ground 3 is that it seeks to take what the first defendant said in para 15 of the decision letter in isolation. This paragraph needs to be read along with the whole of the decision letter including, in particular, para 16. Both paras 15 and 16 cross-refer to the relevant paragraphs in the inspector's report. In my view it is clear from those paragraphs to which the first defendant cross-refers that the appropriate interpretation of the Framework in relation to whether not a policy is out-of-date has been applied. The assessment of the inspector, adopted and acknowledged by the first defendant, addressed both the issue of consistency with the Framework (and therefore the policy's continuing validity as a proper reflection of national planning policy) but also whether or not, as the claimant contended, the policy had been overtaken by the demise of the policies relating to the need and distribution of housing and the current evidence in relation to housing need and supply. Both the inspector's conclusions and paras 15 and 16 of the decision letter deal directly with the question of whether or not the policy is consistent with the Framework and also whether it has been overtaken by events, and in particular the absence of policies for the need and distribution of housing and the current position in relation to the evidence of housing need and supply. In these circumstances in my view there is no substance in the claimant's contentions under ground 3 and this ground cannot succeed.

69 Ground 4 of the claimant's case is that when undertaking his assessment of whether or not policy EN2 was consistent with the Framework, the first defendant failed to identify the particular policies of the 2018

A Framework with which policies EN2 and R4 were consistent. It was not legitimate, the claimant contends, for the first defendant to rely upon the inspector's conclusions which were based upon the superseded policies of the 2012 Framework.

70 In my judgment, as pointed out in the submissions of Mr Honey and Mr Katkowski, there are a number of difficulties in the way of the claimant in advancing this case. Firstly, it will be apparent from what has been set out B above that the claimant did not contend, in responding to the first defendant's consultation about the issuing of the 2018 Framework, that there was any change in the Framework between the 2012 Framework which subsisted at the time of the inspector's report and the 2018 Framework which had been published prior to the first defendant's decision which would justify a different planning policy analysis. Indeed, it was a consistent theme of the C claimant's submissions that, so far as the appeal proposals were concerned, the 2018 Framework mirrored the provisions of the 2012 Framework. In particular, this was a position taken by the claimant in response to the second defendant's contentions in its post-inquiry correspondence that policies EN2 and R4 remained consistent with the 2018 Framework in the same way that they have been consistent with provisions of the 2012 D Framework, since similar provisions were incorporated in both of the editions of the Framework. Thus, in the representations before the first defendant it was not contended by the claimant that there was, in respect of the question of consistency with National Planning Policy, any material difference between the substance of the 2012 and the 2018 editions of the Framework. As the claimant's solicitor's correspondence observed, the sections referred to by the second defendant in support of the contention E that policies EN2 and R4 remained consistent with the Framework "are not materially different from equivalent provisions of the 2012 Framework". Against the backdrop of this material provided to the first defendant it is difficult to see how the criticism raised by the claimant under ground 4 could arise.

71 Secondly, in the course of his submissions, the only feature of the 2018 F Framework which Mr Kingston placed reliance upon were those policies relating to the qualitative features of an available supply of housing. It is clear, however, that this element of national policy in relation to the qualitative requirements for a satisfactory supply of housing were all matters debated before the inspector in the context of the 2012 Framework, and dealt with in the paragraphs set out above. Furthermore, as set out above the absence of policies for the need for and distribution of housing was a factor expressly G taken into account in reaching conclusions as to whether or not policy EN2 was out-of-date. Thus, in circumstances where there was no suggestion that the substance of the policies in the Framework had in fact changed between 2012 and 2018, and where there were in truth no significant differences which could be identified between the pertinent provisions of the Framework in respect of the issues in play, the first defendant was entitled to rely upon H the reasons provided by the inspector without more. I can detect no error of law in the approach which the first defendant took.

72 Turning to ground 5, and as a development of ground 4, the claimant contends that the first defendant erred in failing to recognise that policy EN2 was inconsistent with the provisions of the 2018 Framework in respect of the need for a balanced supply of housing including family and affordable

housing. The claimant draws attention to the fact that in its post-inquiry submissions the claimant's solicitors emphasised the importance afforded by the 2018 Framework to the need for a variety of land to come forward so as to provide for the size type and tenure of housing needed for different groups in the community (see para 61), and for a mix of sites alongside the necessity to provide for the needs for those who require affordable housing. Mr Kingston submits on behalf of the claimant that the first defendant missed the focus in his newly revised policy on the requirement for a quality and mix of supply and delivery of homes, and failed to appreciate, therefore, that the restraint of policy EN2 was inconsistent with this newly emerged policy.

73 Again, in my judgment, this submission has to be put in context. The first piece of important context is that it had been an important part of the claimant's case before the inspector that significant weight should be attached to the failure of the second defendant to secure a balanced supply of housing in qualitative terms and an adequate supply of affordable homes. The absence of policies in respect of the need for and distribution of housing was a matter clearly before the inspector and taken into account in his assessment of whether or not policy EN2 was out-of-date. Further, a second important piece of context is to note that the claimant's solicitors emphasised that the statements to which they referred in the 2018 Framework about the qualitative requirement of the housing supply were "consistent with the approach taken in paragraphs 47–50 of the 2012 Framework". Thus, this again was another area where the provisions of the 2018 Framework reflected or mirrored those which had featured in the 2012 Framework. It was not being suggested that the inclusion of these issues within the 2018 Framework was a new initiative or an innovation to national planning policy.

74 In these circumstances, akin to ground 4, the first defendant was in my judgment quite entitled to refer to the detailed analysis which had been undertaken by the inspector leading to the inspector's conclusion that policy EN2 was not out-of-date. Moreover, and this point is pertinent to ground 4 and ground 5, the reasons given by the inspector, which the first defendant was entitled to rely upon, engaged with the main issues raised by the claimant to substantiate its conclusion that policy EN2 was out-of-date as recorded by the inspector in para 112 of the inspector's report. Those main issues were addressed and responded to by the inspector in his report and accepted in substance by the first defendant in reaching his decision. I am unable to accept that there is an error in law of the kind claimed in ground 5 of the claim in the first defendant's decision.

75 I turn now to consider grounds 6, 7 and 8 for which permission has not been granted. Mr Kingston commenced his submissions in respect of these grounds by starting with ground 7. It will be recalled that ground 7 is the contention that the inspector, and thereafter the first defendant, failed to correctly identify that policy EN2 was in fact impeding delivery. The conclusion in para 377 of the inspector's report (relied upon by the first defendant at para 25 of the decision letter) was in error. The claimant contends that this can be simply demonstrated from a number of uncontroversial propositions. Firstly, the inspector accepted that the needs of the housing market as a whole in terms of larger or aspirational family homes were not being met by the available supply of housing, and it was not meeting the requirements in respect of affordability either (see para 378 of the inspector's report). Thus, the inspector accepted that a five-year housing land

supply would not meet all the needs of the housing market. It was accepted both that the area designated EN2 was one of the few areas available to meet these needs and it was already being allocated to do so in the emerging local plan. No alternative sites were offered to meet the need and therefore it was unaccountable that the inspector should conclude as he did that policy EN2 was not impeding delivery. Thus, the inspector's analysis was internally inconsistent and irrational and failed to reflect the policy objectives of the Framework.

76 In my judgment in making this submission the claimant fails to read the decision letter either fairly or as a whole. The observation made by the first defendant in para 25 of the decision that "policy EN2 was not impeding delivery, nor the development plan as a whole failing to deliver the necessary number of houses needed" is clearly a reference to the quantitative housing supply. Para 25 follows on from a sequence of paragraphs in which the first defendant updates the calculation of the five-year housing land supply bearing in mind changes to the 2018 Framework, and then concludes that the land supply is over 13 years, and thus the phrase complained of is undoubtedly, when the decision letter is read fairly and as a whole, a reference to the five-year land supply and the delivery of the number of homes required, quantitively, to meet the Framework's requirement that the council demonstrates a deliverable five-year supply of housing.

77 Similarly, when read in context, the observation of the inspector in relation to policy EN2 not impeding delivery is also a remark made in the context of the five-year supply of housing and the significant exceedance of five years that the second defendant could demonstrate. There is no substance in the claimant's complaints since they have taken a phrase out of the context in which it is expressed and, thereby, misread both the inspector and the first defendant's reasons. The issues in relation to meeting the needs of the housing market as a whole and in particular the need for larger or aspirational family homes and affordable homes was addressed separately to the discussion of whether or not policy EN2 was impeding delivery of the necessary number of homes. I do not consider that ground 7 is arguable and for these reasons permission is refused.

78 Ground 8 is the contention that the first defendant erred in law in failing to recognise the error of the inspector's analysis in para 381 of his report, in particular in the inspector's reliance upon the plan making process as the most appropriate manner to address the issue as to the type and mix of housing required to rebalance the second defendant's housing stock. The second defendant had disavowed prematurity as a reason for refusal as it was untenable.

79 In my judgment the claimant's contentions again involve a misreading of both the inspector's reasoning and the first defendant's conclusions. Neither the inspector nor the second defendant were relying upon prematurity as an objection to the scheme nor, indeed, relying upon opportunities through the plan making process as being material to the planning balance in the decision being made on the appeal as a point adverse to the claimant. Both at para 381 of the inspector's report and para 26 of the first defendant's decision it is noted that at the time of decision-taking individual speculative schemes were the only way in which to start to address the need to rebalance the second defendant's housing stock, and provide for both family and aspirational housing and the needs of those who

require affordable housing. That observation then feeds into the conclusions reached by the inspector at para 382 of his report, and the first defendant in para 27 of the decision letter, that significant weight should be afforded to the contribution which the appeal would make to meeting the needs for family or aspirational housing and affordable housing. That significant weight was taken into account in striking the overall planning balance. On analysis I do not accept that the point raised under ground 8 is one which is properly arguable, and I refuse permission for it.

80 The final ground presented by the claimant is ground 6. This is the contention that the first defendant erred in law in concluding that a qualifying five-year land supply could exist when it was demonstrated solely on a quantitative or mathematical basis. As set out above, a significant strand of the housing policies contained within the 2012 and 2018 Framework were those which required a qualitative assessment of the type of units and the nature of the tenure of the housing provided by the housing land supply. The claimant submits that this material should have been brought to bear on whether or not the second defendant could demonstrate a qualifying five-year housing land supply which was compliant with the Framework. On the basis of the conclusion that the second defendant's five-year housing land supply was a monoculture of very large city centre flats or apartments, without material provision for affordable housing, both the inspector and the first defendant erred in interpreting the Framework so as to conclude that the second defendant had a qualifying housing land supply.

81 I am unable to accept that the either the inspector or the first defendant failed to properly interpret the Framework in connection with a qualifying five-year housing land supply, or reached a conclusion which was either irrational or improperly reasoned in respect of this issue. In my view the provisions both of the 2012 Framework (in paragraphs 47 and 49) and, as set out above, in the 2018 Framework (in paragraph 73), are clear. The requirement to demonstrate a deliverable five-year housing land supply is one which is purely quantitative. It involves a calculation of the deliverable number of units within the five-year time period, and nowhere in the text of the policy pertinent to how the five-year housing land supply is to be assessed is there any suggestion that the qualitative nature of that supply (including its mix of house type or tenure) has any part to play in determining whether there is a qualifying five-year housing land supply available to a local planning authority. That is not to say that those qualitative issues are not relevant to the planning balance. As the inspector observed at para 375 of his report, an identified deficiency in the qualitative mix of housing is a matter which is relevant to the exercise of the planning balance and may, as in the present case, give rise to significant weight being attributed to this issue in support of planning permission being granted. The policies of the 2012 and 2018 Framework in relation to the need for a qualitative mix of type and tenure to be provided in the housing land supply were taken into account. The qualitative shortcomings of the second defendant's deliverable five-year supply of deliverable housing land had no bearing on how the five-year housing land supply was to be calculated; it had a clear bearing upon the weight to be put in the positive pan of the planning balance in respect of the resolution of the decision in the appeal given the contribution towards rebalancing the supply that the appeal proposals would achieve. It follows from the foregoing that I am unable to detect any legal error in the approach

taken by either the inspector or the first defendant in respect of the five-year housing land supply and qualitative housing land supply issues and in effect, I do not consider that ground 6 is arguable or that permission should be granted in relation to it.

Conclusions

82 It follows from the forgoing that having analysed the various grounds upon which the claimant's case has been brought I am satisfied that permission should be refused for grounds 6, 7 and 8 and that grounds 1, 2, 3, 4 and 5 should be dismissed.

Application refused.

FRASER PEH, Barrister