

Case No: CO/3861/2017

Neutral Citation Number: [2018] EWHC 1611 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2018

Before :

MR JUSTICE DOVE

Between :

CANTERBURY CITY COUNCIL	<u>Claimant</u>
- and -	
SSCLG	<u>1st Defendant</u>
- and -	
GLADMAN DEVELOPMENTS LTD	<u>2nd Defendant</u>

Isabella Tafur (instructed by **Canterbury City Council**) for the **Claimant**
Sarah Sackman (instructed by **Government Legal Department**) for the **First Defendant**
John Barrett (instructed by **Irwin Mitchell**) for the **Second Defendant**

Hearing dates: 25th & 27th April 2018

Judgment

Mr Justice Dove :

Introduction

1. The claimant is the local planning authority for an administrative area which includes the village of Blean. On 20th November 2015 the second defendant applied for planning permission for the erection of up to 85 residential dwellings together with structural planting and landscaping, informal public open space, surface water attenuation and a vehicular access. The claimant refused planning permission on 19th February 2016 and the second defendant appealed to the first defendant. Following a public inquiry the first defendant's duly appointed Inspector issued a written decision dated 11th July 2017 granting conditional planning permission for the development.
2. The claimant's case is advanced upon grounds centred around the interpretation of planning policy relevant to the decision. Ground 1 is the contention that the Inspector misinterpreted policies H1 and H9 of the Canterbury District Local Plan 2006 ("The Local Plan"). Ground 2 is related, and is the contention that the interpretation which the Inspector gave to policy H9 of the Local Plan was not only not advanced as legitimate by either party, but was also in substance wrong. Ground 3 relates to the Inspector's interpretation of the (at that time) emerging Canterbury District Local Plan ("The Draft Local Plan") and in particular his interpretation of policy SP4 in the draft Local Plan. In relation to Grounds 1 and 2 it is contended that since the Inspector misinterpreted policies from the development plan he failed to lawfully apply the requirements of the exercise of the discretion in relation to the grant of planning permission in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004 which are set out below. Both the first and second defendants contend that the interpretations of each of those policies by the Inspector was accurate and lawful and thus that there is no error of law in the decision which the Inspector reached.
3. Given the nature of the claimant's challenge it is appropriate firstly to set out in some detail the relevant policies which were in play in relation to the Inspector's decision and the legal arguments in the case. Following that, the Inspector's conclusions in respect of those policies and the overall planning balance will be rehearsed. The legal principles on which the parties rely will then be set out, followed by the submissions and conclusions in relation to the arguments raised in the case.

The Relevant Policies

4. The statutory development plan for the purposes of the decision in relation to the second defendant's application and appeal was comprised solely on the Local Plan which had been adopted in July 2006. Pursuant to a direction under paragraph 1(3) of Schedule 8 of the 2004 Act the first defendant saved policies H1 and H9 of the Local Plan on 30th June 2009. In issuing the direction the first defendant observed as follows:

"The extension of saved policies listed in this Direction does not indicate that the Secretary of State would endorse these policies if presented to him as new policy. It is intended to ensure continuity in the plan-led system and a stable planning

framework locally, and, in particular a continual supply of land for development...

Following 13 July 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 decisions. In particular, we would draw your attention to the importance of reflecting policy in Planning Policy Statement 3 *Housing* and the Housing Green Papers – *Homes for the future: more affordable, more sustainable* in relevant decisions.”

5. The Local Plan contained at its outset a short chapter entitled “Key Vision and Strategic Development Objectives”, which set out the overarching strategy against which the Local Plan was framed and which provided the context for the policies to be taken into account in considering a variety of types of proposal in a number of different categories of location. For the purposes of the arguments raised in the present case the following extracts from that chapter are pertinent:

“1.4 To fulfil the City Council’s vision and to apply the principles of the key objectives, as set out in the Introduction, the City Council considers that Strategic Development Objectives are required. The Strategic Development Objectives briefly set out fundamental development principles for the implementation of the vision and key objectives. Consequently, the particular objectives of all other policies in the Local Plan are to be interpreted as having been formulated not to contradict or undermine the Strategic Development Objectives...”

1.7 The Council’s Urban Housing Capacity Study (2003), a study of potential residential development sites within the urban boundaries, indicates a significant proportion of the housing land requirement for the Plan period can be met by the release of previously developed land in the urban areas. However, some “greenfield” sites will also need to be released to ensure the full housing requirement is met...

1.13 The Council also recognises the need, as expressed in Planning Policy Statement 7 (PPS7), to protect the countryside for the sake of its intrinsic character and beauty, the diversity of its landscapes, heritage and wildlife, the wealth of its natural resources and so it may be enjoyed by all.

1.14 The rural areas of the district are defined essentially as all those areas outside the built-up areas of the towns and villages. In these areas the general countryside policies set out in this Plan, the South East Plan and Kent & Medway Structure Plan, will apply. The urban areas are defined in the Local Plan by

urban area boundaries shown on the Proposals Map. Village boundaries are not specifically defined on the Proposals Map...

1.23 The Council's Strategic Development Objectives for the District will carry more weight than other policies in the Local Plan. The Council is committed to these objectives and will continue to promote these throughout the Plan period. This should supplement the Council's general approach to encourage investment in Canterbury District in order to achieve urban renaissance, quality housing for all, balanced and sustainable rural communities and regeneration and renewal for the well-being of the District's residents and the attractiveness of Canterbury and East Kent generally.

1.24 The Council's Strategic Development Objectives are set out as follows:

a) To focus sustainable housing development within the defined urban areas on previously developed land, seeking to protect the environment and green space...

e) To promote sustainable rural communities and enhanced and managed environments, and to protect the countryside for its own sake, and for the benefit of all."

6. Chapter 2 of the Local Plan was entitled "Providing Decent Housing". Policy H1 together with relevant extracts from its explanatory text provided as follows:

"2.7 The City Council is committed to the principles set out by central Government guidance, which are to maximise the residential development of land that has previously been developed, is derelict or underused; and to promote and improve the quality of life in our City, coastal towns and existing urban and suburban areas.

2.8 There is and has been growing pressure to build residential development on land outside our urban areas; however, the Council believes that the future of our City and coastal towns and built up areas depends on making the best use of land within them through recycling, reuse and making the most efficient use of existing land.

2.9 In the City Council's view, the built up areas provide better options for new homes as these are sustainable, accessible and make the best use of the urban fabric by changing the nature and quality of places. In essence, location, quality and intensity of development are the three critical components in new housing development in our built up areas...

2.11 The UHCS demonstrates that there is the potential and capacity within our existing urban areas to achieve the strategic

housing requirements set out by the Structure Plan, until 2011. On the basis of this Study, the Council does not need to allocate, or grant planning permission for large new housing development outside the urban areas before 2011. The City Council will ensure that the three critical components of location, quality and intensity of development are implemented to achieve urban renaissance and to improve the character and appearance of the urban fabric. It is the City Council's intention therefore to continue to promote residential development on land that has been previously developed, is derelict or underused within the urban and suburban areas...

2.13 There are some sites outside urban areas but within villages that are previously developed, used, underused or derelict. Such sites could come forward as large windfall sites if they do not have an adverse impact on the social and physical infrastructure of the villages and surrounding areas and are acceptable in all other respects. These will be assessed against policy H9. Housing development on previously developed land outside the villages will not be acceptable unless there are exceptional circumstances, and where it is sustainable...

Policy H1

The City Council will permit residential development on sites allocated for housing or mixed use as shown on the Proposals Map (see also all Insets). On other non-identified sites on previously developed land within the urban areas, planning permission will also be granted unless the particular site makes an identifiable contribution to the economic, environmental or social well-being of the town or District, and there is unlikely to be an excessive supply of new housing development coming forward within the Plan period. In these circumstances policy H3 will be applied. All development will be subject to policy BE1 of the Local Plan, and those sites specified in paragraph 6.62 shall be the subject of a Development Brief."

7. Allied to policy H1 was policy H2 which made provision for a reserved housing site, and, in the explanation to that policy it was explained that the claimant would adopt a "plan, monitor and manage approach" to the release of housing land consistent with then Government policy in relation to prioritising previously developed land within urban areas.
8. Chapter 2 of the Local Plan also contained the following explanation related to new housing in villages:

"HOUSING OUTSIDE URBAN AREAS

2.53 The City Council's assessment of whether there is capacity within existing urban areas to accommodate additional

housing and the efficiency with which land is developed has been carried out through its UHCS. Based upon this Study, existing planning permissions and allocations and the trend of windfall development that is likely to come forward, it will not be necessary to allocate sites outside the existing urban areas for any housing redevelopment in the Plan period. The City Council recognises however that not every site identified is likely to come forward within the Plan period (2001-2011), and that is why it is committed to annual monitoring and review of how the District is achieving its strategic housing requirements through the Local Development Framework process.

2.54 In rural areas, outside the urban areas, housing provision is restrained by national and Structure Plan policies. Some minor development is permissible within existing villages and exceptionally in the open countryside, outside these villages. Replacement houses or extensions to houses in the countryside are addressed in policy HP5 and HP8 of the Structure Plan.

New Housing in Villages

2.55 The District contains villages of varying sizes and character. Some villages may have the potential for some limited minor housing development or infill development, consistent with the scale of the village. Infilling is generally defined as the completion of an otherwise substantially built up frontage by the filling of a narrow gap. However, infilling may not always be acceptable as open spaces between development can often make an important contribution to the character and setting of the village. Minor development needs to be considered in context with the size and character of the village it is planned for. For example, a proposed development of a vacant site with five to ten homes within a larger village might be considered acceptable minor development. Therefore, the scale, quality and location of appropriate minor development will be dependent on the individual characteristics of each village. The City Council does not identify the built confines of villages by a line on the Proposals Map, as to do this would infer that any vacant plot within this boundary is suitable for development, which may not necessarily be the case as the openness could be part of the character of the village.

2.56 ... Given the sequential approach to the location of new development as set out in PPG3, the City Council has sought to concentrate new residential development on previously developed land within the three main urban areas of Canterbury, Herne Bay and Whitstable. Therefore, the City Council considers that new residential development in all those villages listed below should be limited to minor development only....

... - Blean...

2.57 There will be some instances where brownfield land within villages becomes available for development, where the nature of the proposals constitutes more than minor residential development. In these circumstances, the impact of a housing scheme would need to be fully assessed prior to the proposal being acceptable in principle.

Policy H9

Planning permission for new residential development, in excess of minor development, on previously developed sites within villages, will only be granted where:

a) An appraisal has been carried out to ascertain that the development will not have an adverse impact upon the existing social and physical infrastructure of the village and surrounding area;

b) The development has regard to the character and appearance and historic environment of the village;

c) The development does not conflict with other Local Plan design or environmental objectives;

d) A Development Brief has been prepared in advance of any determination of a planning application to ensure the proper planning of the area.”

9. Before leaving the provisions of the Local Plan it is necessary for the purposes of the submissions which were made in the present case to note that chapter 5 of the Local Plan is entitled “Promoting Our Countryside”. The chapter contained the following explanatory material both in relation to the objectives of the claimant within the Local Plan, and also as to the provisions of the structure plan which were at the time of the adoption of the Local Plan still extant.

“5.1 The City Council places great importance upon the role of the countryside and the need to promote sustainable rural communities in an improved and managed countryside environment. The countryside is a valued asset, which serves the district and its visitors in providing housing, recreation and employment and a competitive rural economy, central to which is the farming industry. The rich and varied landscapes and habitats of the District are recognised as being of national and international importance. The District contains an Area of Outstanding Natural Beauty (AONB) and areas of special landscape value and character. A vibrant countryside helps to promote rural areas for tourism, recreation, access and leisure. This chapter sets out the City Council’s objectives for a living, working, protected and vibrant countryside, which incorporates

the objectives of the Kent and Medway Structure Plan policy EN1. It is a key aim of policies to protect the countryside for its own sake and to conserve and enhance its beauty, diversity, character and resources to be enjoyed by future generations...

5.27 One of the City Council's objectives is to protect and enhance the countryside, acknowledging its own intrinsic value and recognising that a high quality rural environment contributes to the economic, social and cultural well-being of the District...

5.29 The Structure Plan provides protection for the countryside: policy EN1 protects the countryside for its own sake; policy EN3 conserves and enhances Kent's landscape and wildlife habitats; policy EN4 protects the Kent Downs AONB and policy EN5 defines and protects Special Landscape Areas (SLAs). All these policies will be applied in the District. In addition to the Structure Plan policies, the Local Plan also provides protection for the Areas of High Landscape Value (AHLVs) which are landscapes of local importance..."

As a consequence of issuing a Regional Spatial Strategy it appears that the provisions of the Structure Plan were then cancelled or revoked by the first defendant. Thereafter on 24th March 2013, as a consequence of the approval of The Regional Strategy for the South East (partial revocation) Order 2013, the Regional Spatial Strategy relevant to the claimant's area was itself cancelled. This led to the position which has been outlined above, namely that the only element of the development plan in existence for the purposes of decision-making in the present case was the Local Plan.

10. Turning to the draft Local Plan, whilst it appears that the Inspector was working from a version which was not current at the time of the inquiry on the basis that the draft Local Plan Inspector had recommended a Main Modification in respect of this policy, it was clarified by all parties at the hearing that no point turned for the purposes of this case on the difference between the original version of the draft Local Plan and that as proposed to be modified (albeit that the difference might impact on an appraisal of the planning merits as distinct from scrutiny of an error of law of the kind involved in this case). The version as proposed to be modified which is to be used for the purposes of this decision was worded as follows:

"Policy SP4 Strategic approach to Location of Development

9.2.19... The urban areas of Canterbury, Herne Bay and Whitstable will continue to be the principal focus for development, with a particular focus at Canterbury, together with development at the rural service centre and local centres. Policy SP3 identifies the key sites for mixed-use development...

2. Provision of new housing that is of a size, design scale, character and location appropriate to the centre and built form of the rural service centre of Sturry and the local centres of

Barham, Blean, Bridge, Chartham, Hersden and Littlebourne will be supported provided that such proposals are not in conflict with the other local plan policies relating to transport, environmental and flood zone protection and design, and the Kent Downs AONB, where applicable;...

5. In the open countryside, development will be permitted if requires for agriculture and forestry purposes (see Policy EMP13).”

11. For the purposes of understanding the context of the Inspector’s decision, and also the submissions made in the case, it is necessary to set out a relevant extract from the National Planning Policy Framework (“The Framework”):

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

12. This National Planning Policy Framework does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It is highly desirable that local planning authorities should have an up-to-date plan in place...

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

The Inspector's decision

12. The Inspector introduced the main issues which were pertinent to his decision in paragraph 15 of the decision including as the first main issue:

“whether the proposed development would accord or conflict with the existing and emerging planning policies for the area”

He set out his reasons in relation to the adopted Local Plan in the following terms dealing separately with policy H1 and H9:

“Accordance with policy

The Adopted Local Plan

Policy H1

16. In the Adopted LP, Policy H1 states that residential development will be permitted on allocated sites and on previously developed land within urban areas. As such, the policy is permissive of development within these locations, and silent on development elsewhere.

17. The appeal site is not allocated for development, nor is it previously developed land. And although the village of Blean does not have any defined boundary, there is no dispute that the site is outside the existing built up area. The proposed development therefore does not fall within any of the categories where development is expressly permitted by Policy H1. However, given the policy's purely permissive nature, this does not amount to a conflict.

18. The Council argues that there is an implicit ‘negative corollary’: that because some locations are identified for development, it must follow that all others are to be precluded. But nothing within the policy itself, or its explanatory text, supports that interpretation. It is well established case law that planning policies are to be read objectively, having regard to their language and context, and it is difficult to see how the concept of an implicit policy could sit comfortably with this doctrine.

19. Furthermore, as the Council's planning witness acknowledged, there is nothing in the National Planning Policy Framework (the NPPF), to support the proposition for a negative corollary. Indeed in the circumstances, it seems to me that this would effectively amount to a negative presumption, against any development other than that expressly proposed in a local plan. Such a presumption would run counter to the NPPF's presumption in favour of sustainable development.

20. It is also argued that broadening the scope of Policy H1 in the way the Council suggest, is necessary so as to give effect to the LP's strategic objective and 'long term vision' of protecting the countryside. But the strategic objectives and vision are not identified amongst the plan's saved policies. Nor is Policy H1 specifically linked to these by anything in the plan. It may well be unfortunate that, as a result of the revocation of the former Kent Structure Plan and South East Regional Strategy, the Council now finds itself with no policies to protect the countryside. But that does not justify mis-applying Policy H1.

21. I appreciate that the appellants themselves failed to argue the point about Policy H1 in their Planning Statement at the application stage, but that does not preclude them from doing so now. I am aware of the Daventry judgement⁷, but in that case one of the policies in question expressly precluded development in the countryside, whereas Policy H1 does not. I also note the comments of the Inspector in the written representations appeal for 8 dwellings at Thanington⁸. But in deciding the present appeal, I must have regard for all the evidence before me, and the balance of the evidence leads me to the view that I have expressed above.

22. For these reasons therefore, although the appeal proposal does not specifically accord with Policy H1, neither do I find any conflict with that policy.

Policy H9

23. Policy H9 states that permission for new residential development, in excess of minor development, on previously developed sites within villages, will only be granted where various requirements are complied with. Read in conjunction with the accompanying text at paragraph 2.56, it seems likely that what this was intended to mean is that the requirements specified in the policy are to be applied to any residential proposal which is either outside a village, or exceeds minor development, or is not on brownfield land. Consequently, despite some ambiguity, I agree with the Council that Policy H9 is relevant to the appeal proposal.

24. However, the Council is wrong, in my opinion, in suggesting that the policy seeks to prevent such developments. The policy is permissively worded, and does no more than to set out a list of relevant considerations. These include the effects on social and physical infrastructure, character and appearance, the historic environment, and the LP's design and environmental objectives. Provided a scheme is assessed with regard to these matters, and they are taken into account in any decision, it seems to me that Policy H9 will be satisfied. In the

present case the matters specified, where relevant, have all been considered, through the present appeal.

25. Consequently, subject to my findings on the relevant matters, on which I will comment later in my decision, I find no in-principle conflict with Policy H9.”

13. The Inspector’s understanding of draft policy SP4 and his conclusions in relation to it were set out in paragraph 34 of the decision in the following terms:

“34. Draft Policy SP4 provides that the principal focus of development will be at the main urban areas, together with some development at the rural service centres. Blean is identified as one of the latter. At the service centres, the policy gives general support to small-scale housing provision, of a scale and location appropriate to the settlement’s built form. What constitutes small-scale is not stated. On other developments, the policy is silent. With regard to the present appeal, Policy SP4 therefore gives no specific support, but neither does it preclude such development. Again I find no conflict.”

14. The Inspector reached his conclusions in relation to the development plan policy issues in the following terms:

“37. Of the key policies on which the Council relies, there are none in either the adopted or the emerging LPs that directly support the proposed development, but nor are there any with which the present outline proposal is in conflict. All of these policies are therefore essentially neutral, weighing neither for nor against the development. It follows therefore, that in this case the final planning balance will turn on other material considerations.”

15. A little later in the decision in the context of his consideration of “Other Matters” the Inspector gave specific consideration to whether or not there was compliance with the individual criteria set out in policy H9 and expressed his conclusions in the following terms:

“Compliance with Policy H9 criteria

91. Earlier in this decision, I found that the only adopted or emerging local plan policy relevant to the principle of development on the appeal site is Policy H9 of the adopted LP. That policy specifies four matters that are to be considered.

92. Criterion (a) relates to the effects on social and physical infrastructure in the village and the surrounding area. The original S.106 undertaking, dated 1 March 2017, provides for contributions to mitigate the impacts on local infrastructure, including education, libraries, recreation and play areas. The

Council has confirmed that these overcome RR5. I see no reason to disagree.

93. Criterion (b) relates to the effects on the character, appearance and historic environment of the village. Matters of character and appearance generally have been dealt with above. Badgers Farmhouse is a listed building, but there is little intervisibility between it and the appeal site. No objection has been raised by the Council or English Heritage on grounds relating to the building's setting. I consider that its setting would be preserved.

94. Criterion (c) relates to LP design and environmental objectives. In this case however, as explained above, design is not before me, and for the reasons already given, no harm would be caused to any environmental objectives.

95. The final requirement is for a development brief, but in the context of this appeal, it seems to me that this is satisfied by the illustrative Framework Plan and the other material submitted with the application, which I have taken into account in coming to my decision.

96. I therefore find no conflict with Policy H9."

16. The Inspector went on to express his overall conclusions in relation to the decision to allow the appeal at paragraphs 119-124 of the decision in the following terms:

"Conclusions

119. For the reasons set out in this decision, I find that there is only one Development Plan policy that is directly relevant to the principle of development on the appeal site, and that is adopted Policy H9. However, the development now proposed does not conflict with that policy. On the key issue of development in the countryside, adjoining larger villages such as Blean, the Adopted LP is otherwise silent or absent. So too is the emerging Draft LP.

120. The development now proposed would provide a significant boost to the local housing supply, in an area where some extra flexibility in the land supply would be valuable. The dwellings would be provided in a sustainable village location, with a good level of local service provision, and good public transport. The development would be in scale with the existing settlement, and would be well contained by existing landscape features. The scheme would provide some significant improvements to the local footpath/cycleway network, the upgrading of two existing bus stops, enhancements to the village recreation ground and play area, and some on-site public open space. It would also provide

around 25 units of affordable housing, and a significant boost to the local economy. Together, these benefits would be substantial.

121. On the other side of the planning balance, the development would have no significant adverse consequences. The harm to the landscape, and to the area's character and appearance, would be negligible. The issues with foul and surface water drainage, in so far as they are relevant to the development, are capable of being dealt with through conditions. There is no evidence of any unacceptable risks to highway safety. Any potential impact on nearby sites of ecological importance would be mitigated by the proposed SAMM contributions, and localised impacts can be avoided through conditions and detailed site planning.

122. The development would therefore make a positive contribution to the locality in terms of its social and economic impacts, while its overall environmental impact would be neutral.

123. Having regard to NPPF paragraph 14, no material adverse impacts would arise. It follows that the likely adverse impacts would not significantly or demonstrably outweigh the development's benefits; indeed the reverse is true. No specific NPPF policies indicate that permission should be restricted. The presumption in favour of sustainable development therefore applies, and this is a consideration that weighs heavily in support of the appeal.

124. I have considered all the matters raised, but none points to any other conclusion than that permission should be granted. The appeal is therefore allowed."

The legal principles

17. The discretion as to whether or not to grant planning permission in response to an application is governed by section 70(1) and (2) of the 1990 Act which provide as follows:

"70 Determination of applications: general considerations.

Where an application is made to a local planning authority for planning permission—

(a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or

(b) they may refuse planning permission.

(2) In dealing with such an application the authority shall have regard to—

(a) the provisions of the development plan, so far as material to the application,

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations.”

18. The discretion is also governed as set out above by section 38(6) of the 2004 Act which provides as follows:

“38 development plan...

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

19. The cardinal importance of, in particular, section 38(6) of the 2004 Act was particularly emphasised in the case of R (on the application of Hampton Bishop Parish Council) v Herefordshire Council and Another [2014] EWCA Civ 878. The decision of the Court of Appeal in that case was set out in the judgment of Richards LJ with which the other members of the Court agreed. Richards LJ began his assessment by considering and applying the approach taken to section 38(6) in the case of City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 and his analysis was as follows:

“26 The correct general approach to the application of section 38(6) was set out by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, by reference to a corresponding section of the Scottish legislation (section 18A of the Town and Country Planning (Scotland) Act 1972). Lord Clyde stated that the section “has introduced a priority to be given to the development plan in the determination of planning matters” (1458B); in a speech agreeing with him, Lord Hope referred to it as introducing a “presumption in favour of the development plan” (1449H). Lord Clyde went on to describe what this meant in practice. The passage (at 1459D-G) has been cited frequently but it bears repetition:

“In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application

before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed those considerations and determined these matters he will require to form his opinion on the disposal of the application”

27 Lord Clyde referred next to a suggestion by counsel for the Secretary of State that in the practical application of the section two distinct stages should be identified, namely (1) the decision-maker should first decide whether the development plan should or should not be accorded its statutory priority; and (2) if he decides that it should not be given that priority, it should be put aside and attention concentrated upon the material factors which remain for consideration. Lord Clyde commented as follows on that suggestion (at 1459H-1460C):

“But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and

detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.”

28 That passage was evidently not intended to qualify Lord Clyde's earlier observations about the general approach required by the section. It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. I say “as a general rule” because there may be exceptional cases where it is possible to comply with the section without a decision on that point: I have in mind in particular that if the decision-maker concludes that the development plan should carry no weight at all because the policies in it have been overtaken by more recent policy statements, it may be possible to give effect to the section without reaching a specific decision on whether the development is or is not in accordance with the development plan. But the possibility of exceptional cases should not be allowed to detract from the force of the general rule...

30 The relevant principles were not affected by the introduction of the NPPF. That document refers in terms, at paragraphs 11-13, to section 38(6) of the 2004 Act and states that the NPPF does not change the statutory status of the development plan as the starting point for decision making: proposed development that accords with an up-to-date local plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It states that the NPPF constitutes guidance for local planning authorities and decision-makers both in drawing up plans and as a material consideration in determining applications. Whilst it is clear from other passages that the policies in the NPPF may affect the *weight* to be given to policies in the development plan, the duty to determine applications in accordance with the development plan unless material considerations indicate otherwise remains the same...

32 The judge went on to cite the passage from Lord Clyde's speech in the City of Edinburgh case in which the particular two-stage process suggested by counsel for the Secretary of State was rejected. He said that that passage provided a conclusive answer to Mr White's submission, which of course it would have done if that had been the submission Mr White was making. Then, in further reference to the same passage from Lord Clyde's speech, he said this (at paragraph 129):

“Whilst of course they must (i) identify and engage with the relevant policies in the development plan, properly understood and considered as a whole and (ii) pay proper regard to the statutory priority given to the development plan, there is no legal or practical requirement for planning decision-makers specifically to determine whether a development proposal is or is not in accordance with the development plan.”

33 I respectfully disagree with a proposition formulated in those terms. It will be clear from what I have said above that in my view compliance with the duty under section 38(6) *does* as a general rule require decision-makers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on that issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord Reed in *Tesco Stores v Dundee City Council* (see paragraph 29 above), they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations.”

20. It is now well established that the proper interpretation of a policy in the development plan is a question of law for the court. This principle was recognised by the Supreme Court in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. Having noted in paragraph 17 of his judgment that bearing in mind the terms of the statute and the requirement to have regard to provisions of the development plan a decision-maker could not have regard to those provisions if it failed to understand the policies correctly, Lord Reed went on to set out in subsequent paragraphs the justification for the principle, and the basis upon which the relevant question should be approached:

“18 The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19 That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 , 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.”

21. The correct approach to the question of law as to the proper interpretation of planning policy was returned to by the Supreme Court in the case of Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] 1 WLR 1865. Having set out extracts from Lord Reed’s judgment in Tesco Stores Lord Carnwath observed as follows:

“24 In the first place, it is important that the role of the court is not overstated. Lord Reed’s application of the principles in the particular case (para 18) needs to be read in the context of the relatively specific policy there under consideration. Policy 45 of the local plan provided that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any “suitable site” within or linked to the existing centres (para 5). The short point was the meaning of the word “suitable” (para 13): suitable for the development proposed by the applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed identified as one of textual interpretation, “logically prior” to the exercise of planning judgment (para 21). As he recognised (see para 19), some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis.

25 It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will

have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692; [2009] PTSR 19 , para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence (see *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49; [2008] 1 AC 678 , para 30 per Lady Hale.)

26 Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two.”

22. Lord Gill also addressed the issue in the following terms:

“72... The proper context, in my view, is provided by the overriding objectives of the development plan and the specific objectives to which the policy statement in question is directed. Taking a similar approach to that of Lord Reed, I consider that it is the proper role of the courts to interpret a policy where the meaning of it is contested, while that of the planning authority is to apply the policy to the facts of the individual case.

73 In my opinion, the same distinction falls to be made in relation to guidance documents such as the Framework. In both cases the issue of interpretation is the same. It is about the meaning of words. That is a question for the courts...”

Lord Gill went on at paragraph 81, when undertaking the exercise of interpreting paragraph 49 of the Framework, to conclude that the court had to read that paragraph in the policy context to which he had referred, and in view of the planning objective that the Framework sought to achieve.

23. 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 Tesco Stores at paragraph 19 and Hopkins Homes at paragraph 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 Tesco Stores at paragraphs 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 Tesco Stores at paragraphs 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 Hopkins Homes at paragraph 26).
24. In the light of the particular circumstances of the present case, which involves Local Plan text comprising both policies and explanatory material, it is necessary to have regard to the decision of the Court of Appeal in R (on the application of Cherkley Campaign Limited) v Mole Valley District Council and Another [2014] EWCA Civ 567. The factual context of that case was that there was a local plan policy relating to the development of golf courses. Within the provisions of the policy there was no specified requirement to demonstrate need for further golf course facilities. Within the explanatory text surrounding the policy there was a paragraph within which it was stated that applicants for new golf courses “will be required to demonstrate that there is a need for further facilities”. One of the issues before the Court of Appeal was to examine whether the policy required an applicant to demonstrate need. Akin to the present case, the policy of the Local Plan concerned was one which had been saved pursuant to a direction under paragraph 1 of schedule 8 of the 2004 Act. It was submitted that the effect of the saving direction was to save only the text of the policy and not the supporting or explanatory text. Giving the leading judgment in the Court

of Appeal, with which the other members of the Court of Appeal agreed, Richards LJ expressed his conclusions as follows:

“16 Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed *policies* for the development and use of land in the area. The supporting text consists of *descriptive and explanatory matter* in respect of the policies and/or a *reasoned justification* of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the policies will be implemented.

17 In this case, therefore, the correct focus is on the terms of Policy REC12. That policy contains no requirement to demonstrate need. It sets out six criteria against which proposals for new golf courses will be considered, none of which relate to need. It provides in addition that the Council will require evidence that the proposed development is a *sustainable* project without the need for significant additional development in the future. It also provides that new golf courses in the AONB and the AGLV will only be permitted if they are consistent with the primary aim of *conserving and enhancing* the existing landscape. None of those matters can be equated with or involves a requirement to demonstrate need and in my view no such requirement can be read into them. The policy must of course be read in the light of the supporting text, given the statutory role of that text as descriptive and explanatory matter and/or reasoned justification for the policy, and also bearing in mind the statement in paragraph 1.10 of the Local Plan that the text indicates how the policy will be implemented by the Council. But making all due allowance for the role thereby performed by paragraph 12.71, I do not see how the paragraph can provide a basis for reading a need requirement into the policy. For whatever reason, the reference to a requirement to demonstrate need was not carried over into the terms of the policy. Nor can paragraph 12.71 operate independently to impose a policy requirement that Policy REC12 does not contain.

18 The relevant provisions of the 2004 Act and the saving direction made under it serve to underline rather than to alter the position as I see it. Subject to the saving direction, the Local

Plan ceased to have effect at the end of the transitional period; and the effect of the direction was to save only the *policies* referred to in it, specifically including Policy REC12. It follows that the relevant question when considering the conformity of the proposed development with the Local Plan after the expiry of the transitional period must be whether the development is in accordance with saved Policy REC12. I do not accept, however, the appellants' submissions that the effect of the statute was to blue-pencil the supporting text on the expiry of the transitional period, leaving in place only the text of the policy, so that the policy fell to be interpreted thereafter without regard to the supporting text. To blue-pencil the supporting text would risk altering the meaning of the policy, which cannot have been the legislative intention. It seems to me that the true effect of the statutory provisions was to save not just the bare words of the policy but also any supporting text relevant to the interpretation of the policy, so that the policy would continue with unchanged meaning and effect until replaced by a new policy. The resulting position in terms of relationship between the saved policy and its supporting text is therefore the same as it was prior to the 2004 Act and the saving direction."

25. Finally, when considering the issues of principle arising in the present case it is necessary in the light of the submissions made to refer to the decision of Lindblom J (as he then was) in Bloor Homes East Midlands Ltd v SSCLG. Amongst the various grounds which were advanced in that case was a submission that the Inspector at the appeal under challenge had failed to deal with a principle controversial issue namely the question of whether or not the development plan in that case was "absence" or "silence" for the purposes of consideration of whether or not the presumption in favour of sustainable development and the tilted balance from paragraph 14 of the Framework should apply. As Lindblom J observed these submissions required him to consider the meaning of paragraph 14 and the correct approach to the failings in the development plan which may lead to the application of the tilted balance. He observed as follows:

"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 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...

49. Whether a plan is silent – as opposed to its being absent or its relevant policies out of date – is an issue that may fall to the court to decide. Where the meaning of planning policy is contentious it is, in the end, for the court to establish which interpretation is right. As Lord Reed said in paragraph 17 of his judgment in *Tesco v Dundee City Council*, a local planning authority must proceed on “a proper understanding of the development plan”. This is a necessary corollary of the authority’s duty in section 70(2) of the 1990 Act to have regard to the plan and its duty in section 38(6) of the 2004 Act to determine applications in accordance with the plan unless material considerations indicate otherwise. As Lord Reed said (*ibid.*), the authority “cannot have regard to the provisions of the plan if it fails to understand them”. If the authority fails to see that the plan is silent, or thinks it is silent when it is not, it will have gone wrong in law. It will have misconstrued the plan.

50. The answer to the question “Is the plan silent?” will sometimes be obvious, because the plan simply fails to provide any relevant policy at all. But often it may not be quite so clear-cut. The term “silent” in this context does not convey some universal and immutable meaning. The NPPF does not itself explain what the Government had in mind when it used that word. But silence in this context must surely mean an absence of relevant policy. I do not think a plan can be regarded as “silent” if it contains a body of policy relevant to the proposal being considered and sufficient to enable the development to be judged acceptable or unacceptable in principle.”

Submissions and conclusions

26. In support of Ground 1 Miss Tafur, on behalf of the claimant, submits that the Inspector failed to properly interpret policy H1 and as a consequence failed to reach a lawful conclusion as to whether or not the proposal accorded with the development plan. She sustained the submission which she had made on behalf of the claimant at the public inquiry into the appeal, that on the basis that the policy identified particular types of location for housing development it followed that areas inconsistent with those which have been identified were not supported by and conflicted with the policy. There was, therefore, an implicit “negative corollary” within policy H1 (and

also policy H9) which in fact should have led to the conclusion that the proposal was not in accordance with the development plan policy. Thus the Inspector's conclusions in paragraph 16 of the decision letter that policy H1 was "silent on development elsewhere", and in paragraph 22 that there was no conflict with policy H1, arose as a consequence of misinterpretation of the policy. The same point pertained in relation to policy H9 which, she submitted, also contained the same implicit corollary that if a proposal for what was in excess of minor development was not on a previously developed site within a village, then it was inconsistent and in conflict with the policy, and thus the conclusion of the Inspector that there was "no in principle conflict with policy H9" arose from the same kind of misinterpretation which had infected his approach to policy H1.

27. So far as Ground 2 was concerned Miss Tafur submitted that in addition the Inspector misinterpreted policy H9 in paragraph 23 of the decision letter when he concluded that read in conjunction with the text at paragraph 2.56 the requirements of the policy were to be applied "to any residential proposal which is either outside a village, or exceeds minor development, or is not on brownfield land". In fact the clear terms of the policy are that it applies only to "new residential development, in excess of minor development, on previously developed sites within villages", and the Inspector's interpretation of the policy was wholly inconsistent with the policy's terms. This was a further error of law infecting the Inspector's decision. Finally, in respect of Ground 3, Miss Tafur contended that draft policy SP4 was a further policy where the Inspector had failed to appreciate that when a policy provided for a specific location for a type of development, if such development were proposed outside of such a location the development was inconsistent with and conflicted with the policy, rather than the policy being silent about the alternative location and thus no conflict arising.
28. In support of the contention that the Inspector had misinterpreted the policy, and that his rejection of the "negative corollary" was an error of law, Miss Tafur referred to two authorities which are set out below which she submitted by analogy supported the contention that policies should be interpreted in the manner for which she contended. There was no difficulty in operating such policies in practice and interpreting planning policy by reference to a necessary inference was perfectly appropriate.
29. On behalf of the first defendant Miss Sackman submitted that the Inspector had properly understood and interpreted both policy H1 and policy H9. His conclusion that the policy was silent in relation to housing on the edge of a settlement in an open countryside location was entirely consistent with the terms of the policy itself, and he was entitled to conclude therefore that there was no conflict with that policy. She further submitted that on the claimant's approach it would be extremely difficult to measure the extent of the conflict of a proposal with the policy. Furthermore, she submitted that the Inspector was correct in his conclusion that policy H1 was silent in respect of housing development in the countryside beyond the village boundary on the basis that the policy itself had nothing to say about housing in such locations. There was no reference in the policy to housing proposals in open countryside beyond the settlement boundary not being supported, nor was there anything in the supporting text bearing upon that issue.
30. In any event she submitted that any references in the supporting text to countryside protection or the structure plan policies for countryside protection could not as a consequence of the decision in Cherkley be elevated to the status of policy. She

contended that that was in truth the substance of the claimant's submissions. The claimant's reliance upon elements of the explanatory text, in particular those referring to the countryside, were an attempt to either incorporate within policies H1 and H9 that which was not there, namely a provision precluding housing in open countryside beyond the settlement boundary, or alternatively an attempt to resurrect the Structure Plan policy of countryside protection which had existed and complimented the policies of the Local Plan at the time when they were adopted. Thus she contended that the approach to policy H1 and H9 attacked in ground 1 was entirely legitimate.

31. Turning to Ground 2, Miss Sackman relied upon the fact that the Inspector had in fact accepted that the policy was relevant and sought to consider and apply the criteria set out in the policy. He had therefore addressed the criteria as relevant considerations and reached a conclusion in respect of them which led to him finding no conflict with the detailed provisions of the policy. So far as policy SP4 was concerned, and Ground 3, Miss Sackman submitted that the Inspector's approach was a legitimate interpretation of that policy just as much as his approach to the "negative corollary" had been legitimate in relation to policies H1 and H9.
32. On behalf of the second defendant Mr Barrett adopted the submissions made by the first defendant. In addition he emphasised that the provisions of policy H1 and H9 had been prepared in respect of Structure Plan housing requirements long since superseded and in respect of a plan period which ended in 2011. The age of the plan was, he submitted, part of the context within which the plan had to be interpreted, and when the Local Plan had been saved by the Secretary of State in 2009 it had not been contemplated that reliance would continue to be placed upon it in 2017. So far as Ground 2 and policy H9 was concerned he submitted that the Inspector had undertaken a purposive interpretation of the policy and examined the development proposal against the detailed criteria of the policy bearing in mind its purpose.
33. Having considered these arguments I am satisfied that the Inspector was in error when he interpreted policies H1 and H9 as being silent in relation to housing development which was not on previously developed land within urban areas and therefore concluded that there was no conflict with either of those policies in principle. Taking the language of the policy itself, and without reference to any of the explanatory text, it is clear that the purpose of the policy is to identify, for the purposes of housing development, the types of location where the plan required housing development to take place. In essence, the locations which are identified for the permission of residential development are those allocated in the plan, or non-identified sites on previously developed land within urban areas (if other criteria unrelated to location are met). It follows that if housing development is proposed in a location which does not accord with the types of locations specified in the policy, that proposal will be inconsistent with and unsupported by the policy and therefore not in accordance with it and in conflict with it. The interpretation is simple: policies H1 and H9 identify the types of location where housing development will be permitted; if housing development is proposed in other types of location it is not supported by the policy and therefore in conflict with it and, to the extent of that policy (as part of the exercise of assessing compliance with the development plan taken as a whole), not in accordance with the development plan. Whether it is described as a "negative corollary", or a necessary inference, or an obvious implication, what matters is that it is clear that the purpose of the policy is to identify those types of location where

housing development is to be permitted and if an application is made outside one of those identified types of location then that is clearly not in accordance with the policy.

34. It is not unusual for policies dealing with kinds of development and the types of location in which they will be permitted to be included within planning policy. For instance, it would not be unusual to find a policy in a Local Plan which identified that retail uses will be permitted if they are located within a town centre. Bearing in mind the nature of a planning policy, I see no warrant for the suggestion that in the absence of the policy going on to specify that retail development would not be permitted in all other potential types of location before it would be possible for the decision-maker to conclude that a retail proposal outside the town centre and on the edge of the town was not supported by and in conflict with the policy. Similarly, in the present case, I see no justification for the conclusion that the policy is required to go on to specify that in all other types of location apart from on allocated sites or previously developed land within urban areas planning permission for residential development will be resisted, before it is possible to reach the conclusion that a housing proposal in such a location is in conflict with the policy. Any requirement for such drafting to exhaustively deal with other possible types of location in which housing development might be located and dismissing them is, given the purpose of the policy, both overly legalistic and unnecessary.
35. It follows that, based solely on the texts of policy H1 and H9, I am unable to accept that the Inspector correctly interpreted them and therefore correctly approached the application of section 38(6) of the 2004 Act. The correct interpretation does not involve either elevating the explanatory text in relation to countryside protection (for instance in paragraph 5.1) to the status of policy. Nor does it involve the resurrection of the extinct structure plan policies protecting the countryside for its own sake. The interpretation simply seeks to understand where in principle, by virtue of policies H1 and H9, it is intended that housing development should occur, and then concluding that when housing development is proposed outside those supported locations it is not in accordance with the plan. The Local Plan in policy H1 was not silent in respect of the proposal advanced by the second defendant. The second defendant's housing proposal was not supported by and was in conflict with policy H1 and H9, in that it was a housing proposal in a location which was not identified by policies H1 and H9 as the type of location where housing development would be permitted. In my judgment it is a fallacy to suggest that simply because the policy is expressed in permissive language that it has nothing to say about, and is irrelevant to, housing proposals in locations other than the types where permission is contemplated as potentially being forthcoming.
36. Once the scope of the interpretative exercise is expanded to include the explanatory text supporting both the strategy of the plan, and the policies in particular, then the position as to the correct interpretation arising from the words of the policies themselves is further reinforced. It is clear from paragraph 2.11 and 2.13 when read as supporting policy H1 that the basis of the policy is that the requirements for housing will be satisfied on the basis of reliance on the kinds of locations contemplated by policy H1 namely proposed allocations and previously developed land within urban areas. This is reinforced in paragraph 2.53 to 2.55. These paragraphs read against the paragraphs of the overarching strategy at paragraphs 1.7 and 1.24(a) clearly reinforce the interpretation of the policy set out above, namely that there are clear preferred

locations for housing development, and that it will be inconsistent with and unsupported by policy for housing to be developed in other types of location.

37. It follows from what has been set out above that I would have reached the conclusion under Ground 1 that the Inspector's interpretations of policies H1 and H9 were incorrect and involved an error of law without the support of the analogous authorities relied upon by Miss Tafur. However, when reference is made to those authorities they further reinforce the interpretation set out above. The first of those authorities is the case of Crane v SSCLG and Another [2015] EWHC 425. That case concerned, amongst other issues, whether or not the defendant had erred in law in concluding that the residential development proposed conflicted with the Neighbourhood Plan. The relevant provisions of the plan in respect of housing proposals were set out by Lindblom J (as he then was) in his judgment in the following terms:

"11 Policy H1 is the only policy in which specific allocations of land are made for housing, its objective being to allocate land "for at least 400 new homes". It allocates two sites for new housing development and a reserve site, which in total are intended to produce 528 new dwellings. The two allocated sites are Site 1A, "North of Broughton Way", for 310 dwellings, and Site 2, "South of Coventry Road", for 190 dwellings – making a total of 500. The policy says that these two sites "are allocated as a result of the public consultation and Options" (paragraph i). The reserve site, "North of Dunton Road", is for 28 dwellings. Under the heading "Appraisal Process" the policy explains how development on the allocated sites will be brought forward together with the necessary new infrastructure. It says that "[a] logical sequence of phased construction will be monitored by the Steering Group and its progress assessed to ensure that Broughton Astley is not falling below its allocation of housing (policy P1)" (paragraph iii), and that "[should] new housing not be delivered on the two allocated sites within the proposed phasing sequence ... development on the identified reserve site may then be considered" (paragraph iv). Paragraph v of the policy says that "[new] housing development in Broughton Astley will be accompanied simultaneously with the provision of local infrastructure including recreational and leisure facilities, retail provision and employment opportunities". Paragraph vii says that new housing "should not be constructed on land which is known to be on a floodplain ...". The "Justification" for the policy refers to the core strategy requirement for "at least an additional 400 new homes" to be provided in Broughton Astley by 2028, and to the indication in policy CS16 that locations for housing development will be "set out in an allocations plan, in this case the Neighbourhood Plan".

12 Policy H2 is concerned with the provision of affordable housing. It requires "at least 30% of all new housing developments" to be "high quality affordable housing".

13 Policy H3 provides for “windfall and back land development”. Its definition of “[windfall] development ...” is “any residential development that is granted consent on land or buildings not specifically allocated for residential development in the Harborough District Core Strategy”. The policy says “[it] is accepted that there may be some windfall developments over the life of the Neighbourhood Plan on previously developed ‘brownfield’ or unallocated sites with direct highways access”; that “[small], well designed residential sites which do not have a detrimental effect on the surrounding area and neighbouring properties will be supported” (paragraph i); and that “[in] principle development will be supported on sites of less than 5 dwellings on previously developed land” (paragraph ii).”

The nature of the claimant’s submission that the proposals did not conflict with the policies of the neighbourhood plan were summarised by Lindblom J at paragraph 37 of his judgment in the following terms:

“37 The neighbourhood plan does not define a “settlement boundary” for Broughton Astley, as Policy CS2 of the core strategy envisaged. Nor does it contain any specific policy restricting the development of the appeal site. Policies EH1 and EH2 do not have that effect. So, submits Mr Hill, the Secretary of State could not rely on any conflict with a policy of restriction, and he did not. If he had understood policies H1, H3 and SD1 correctly, he could not have found any conflict with them. Policy H1 simply allocates sites for new housing development in Broughton Astley. It does not preclude development on other sites. The Secretary of State seems to have inferred from policy H1 that there is some “counterpart policy protection for unallocated land”. That was not permissible. Policy H3, the policy for “windfall” development, is irrelevant to proposals such as Mr Crane’s. It does not prevent housing development being approved on larger sites. Mr Crane’s proposal could not properly be found to be in conflict with it. Policy SD1 simply demonstrates support for proposals in accordance with the policies in the neighbourhood plan. A proposal cannot be contrary to that policy unless it is contrary to some other policy of the plan, which Mr Crane’s was not.”

38. That was a submission Lindblom J rejected. His reasoning for rejecting that submission was expressed in the following terms:

“42 First, it is in my view clear from the passages I have quoted from sections 1, 2 and 3 of the plan that the allocations in policy H1 represent both the acceptable location and the acceptable level of new housing development in Broughton Astley in the plan period, albeit with the latitude for approving “windfall” development in policy H3. The allocations in policy H1 are explicitly the result of a process of selection, having

emerged as the sites chosen for allocation in the light of public consultation and the evaluation of options (paragraph i of policy H1). ...

43 Secondly, it is in my view significant that housing development on sites other than the allocations in policy H1 is deliberately provided for in the way that it is in policy H3. Apart from “windfall” proposals coming forward under that policy, the plan does not provide for, or envisage, any housing development in excess of the 528 dwellings on the sites allocated under policy H1. Policy H3 goes no further than to allow for development “on sites of less than 5 dwellings on previously developed land”. If the intention had been to accept the development of housing on larger, unallocated sites, a policy drafted in this way would not have been included in the plan.

44 Thirdly, in deciding which sites should be allocated for housing and which should not, the parish council considered the sustainability of the new housing it was planning. This can be seen in the policies specifying the particular requirements for the allocated housing sites. It can be seen in the policies relating to other allocations. And it can also be seen in the overarching policy for sustainable development – policy SD1. The plan is composed of policies, both specific and general, which connect to each other and form a coherent whole. The effect is to create a full picture of the development and infrastructure for which the parish council has planned...

46 It follows from my understanding of the relevant provisions of the neighbourhood plan that a proposal for housing on a site other than those allocated in policy H1 will only accord with the plan if it finds support in policy H3 as a “windfall” proposal, and is consistent with other relevant policies. Larger proposals for housing on unallocated sites will not accord with the plan. They will be contrary to its strategy for housing development in policies H1 and H3. They will therefore be in conflict both with the neighbourhood plan itself and with the development plan as a whole.

47 I reject the notion that the plan, properly construed, allows for development such as Mr Crane's so long as it does not conflict with specific policies for the protection of the environment, such as policies EH1 and EH2, and would not frustrate or delay development on any of the sites allocated in policy H1. That is not what the plan says, and not what it means. As Ms Lieven and Mr Smyth submit, such an interpretation could not be squared with the plan's obvious purpose in providing for sustainable development in Broughton Astley. It would undo the balance that was struck when the plan was prepared – the balance between the aim of allocating sites

for additional housing to satisfy the core strategy's minimum requirement, the aim of avoiding excessive expansion into the countryside, and other relevant goals. It would negate the strategy which the parish council conceived.”

39. I accept the submission made by Miss Tafur on behalf of the claimant that the approach taken by Lindblom J to the question of whether or not there was conflict in that case between the policies and proposals of the neighbourhood plan and a proposal which was on the edge of the settlement and not on an allocated site is strongly analogous to the present situation, and supports the interpretation which she advances in relation to policies H1 and H9 in the present case. It is clear that policies H1 and H9 were formulated as part of a strategy, as in Crane, which sought to restrict housing development to particular kinds of location namely, in the case of H1, those sites which were allocated and previously developed sites within urban areas and, in H9, with housing development in excess of minor development on previously developed sites within villages subject to certain criteria. In the same way that Lindblom J endorsed the defendant’s conclusion in the case of Crane that a proposal on an unallocated site would did not accord with the strategy embodied in the neighbourhood plan’s policies, in the present case the second defendant’s proposal was in conflict with policies H1 and H9 as being inconsistent with the locations for housing development which had been identified, and inconsistent therefore with the plan’s strategy. Whilst Miss Sackman sought to distinguish the factual position in Crane from the present case by drawing attention to the permissive wording of policies H1 and H9, I do not consider that that is a means of escaping the essential logic of Lindblom J’s conclusions and that the permissive language of the policy in the present case was framed so as to make clear those kinds of locations where housing development should occur so as to implement a policy which restricted housing development to allocations and previously developed sites. It does not follow that framing the policy in the way in which it did that the plan was either silent or irrelevant as to housing development in other locations. I accept the submission made by Miss Tafur that the approach of Lindblom J in Crane clearly reinforces the conclusion that the Inspector erred in law in his interpretation of the policies.
40. The other case relied upon by Miss Tafur was the case of Gladman Developments Ltd v Daventry District Council and Another [2016] EWCA Civ 1146, which was referred to by the Inspector. That was a case concerning, again, housing development on undeveloped land adjoining a village. The development plan included a Local Plan which had been adopted in 1997 and then subsequently saved by direction of the Secretary of State. It contained two policies pertinent to the appeal. Firstly, policy HS22 which provided that planning permission would normally be granted for residential development in villages categorised as restricted infill villages provided that certain criteria were met. The explanatory text provided that an objective of the policy was to ensure that new development did not bring about an extension of a village into open countryside. Secondly, the Local Plan also contained policy HS24 which specifically provided that planning permission would not be granted for residential development in the open countryside other than for a very limited category of exceptions related to agriculture, forestry or replacement of an existing dwelling. In dealing with the conclusions of the Inspector in the decision under challenge Sales LJ noted that the Inspector had concluded that “the proposals would accord with the

development plan as a whole”. He expressed concern in that regard in paragraphs 27 and 28 of his judgment as follows:

“27...It is opaque how the Inspector can say that the proposals would accord with the development plan as a whole, when they conflict directly with policies HS22 and HS24. My confusion deepens when I read the Inspector's overall conclusion at DL86 to the effect that “as the Council can demonstrate a 5 year [Housing Land Supply] the weighted presumption in favour of sustainable development (NPPF 14 [i.e. the second bullet point in relation to decision-making in para. 14 of the NPPF, as set out above]) does not apply and the appeal should be determined on the normal planning balance.” If it were really true that the proposals accord with the development plan, however, the Inspector should have applied the first bullet point in relation to decision-making in para. 14 of the NPPF and approved the development proposals “without delay”. I do not think that Mr Kimblin QC, for Gladman, was able to provide any convincing explanation for this.

28 But it does not matter, because it is clear that even if the Inspector did find that the proposals were in accordance with the development plan as a whole, that was on the basis that any conflict with policies HS22 and HS24 ought to be given reduced weight as explained by him at DL68. The point therefore adds nothing to the main submission made by Mr Kimblin, that the Inspector was entitled to find that those policies were out of date and, in the exercise called for by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, should be treated as outweighed by statements in the NPPF, particularly in para. 47 of the NPPF.”

41. These concerns were expressed against his earlier conclusion in the section of his judgment dealing with the factual background that the application directly conflicted with both policy HS22 and HS24. The submission made by Miss Tafur was therefore that in so far as Sales LJ accepted that the proposal conflicted with policy HS24, that was a conclusion which supported her argument in the present case by analogy, since that was a policy which was permissive of residential development, but that the proposal in the Daventry District Council case was in conflict with on the basis that it was proposed in a location not supported by the policy.
42. Miss Sackman sought to distinguish the Daventry case on the basis that there was a clear policy in that case in the form of policy HS24 which precluded residential development in the open countryside. Thus she submitted the Inspector and the court would have had to have read both of the policies together and interpreted policy HS22 in the light of the existence of policy HS24. Whilst there is some force in Miss Sackman's submission, nevertheless the conclusions of Sales LJ in that case were in my view clear, in that there was conflict with both of the policies and thus, again by analogy, in my view Miss Tafur's submissions are supported by this authority. It provides further reinforcement of the view set out above that the Inspector was in error in his interpretation of policies H1 and H9 in the present case.

43. Miss Tafur also drew attention to another decision of the first defendant in respect of a housing proposal at Castlemilk, Moreton Road, Buckingham where she submitted the defendant reached a conclusion which conflicts with the interpretative approach taken by the Inspector in the present case. I do not propose to dwell upon this submission, and in my view it is unnecessary for reliance to be placed upon this in order to reach the conclusion that Ground 1 of the claimant's case is made out.
44. Whilst Mr Barrett submitted that it should be born in mind that the Local Plan policies H1 and H9 were designed for a plan period ending in 2011 which had long since expired at the time of the present appeal decision, in my view that is a matter which goes to the question of the weight to be attached to the policy after it has been correctly interpreted. The meaning of the policy as a question of law cannot vary at different times of its life. Its interpretation as a question of law is a pure examination of what the meaning of the words properly understood, applying the correct approach to interpretation set out above, amount to. No doubt once that interpretation has been arrived at there will be many factors which the decision-maker will need to take into account as affecting the weight or value that can properly be afforded to the extent to which a proposal is not in accordance with the policy when reaching a decision on the planning merits. In this case the points made by Mr Barrett in relation to the timescales for which the policy was designed would no doubt be a matter to be taken into account in connection with the judgement as to the weight to be attached to it. The meaning of the words properly understood and interpreted do not however alter from time to time. It is the pure question of interpretation of the policy with which the court must be concerned and not the weight or value to be ascribed to that policy as part of its application within the decision-making process.
45. Turning to Ground 2 I am also satisfied that the Inspector made an error of law in his interpretation of policy H9 beyond that which has already been identified under Ground 1. The text of policy H9 is in my view perfectly clear and makes plain that it applies in relation to developments "in excess of minor development, on previously developed sites within villages". I can see nothing either in the text of the policy, or in the explanatory text at paragraph 2.56, which justifies the Inspector's conclusion in paragraph 23 of the decision letter that what this language "was intended to mean was that the requirements specified in the policy are to be applied to any residential proposal which is either outside of the village, or exceeds minor development, or is not on brownfield land". In paragraph 23 the Inspector appears to have reached the conclusion that the policy's requirements apply to proposals in a variety of locations none of which are specified in the text of the policy. His conclusion that the policy was relevant for those reasons was clearly misconceived. Whilst Miss Sackman is entitled to point out that the Inspector did go on to apply the criteria from policy H9 as part and parcel of his conclusions that cannot gain say the fact that he misinterpreted the policy prior to reaching those conclusions. Ground 2 is therefore made out.
46. Turning finally to Ground 3 it is clear that in the Inspector's approach to draft policy SP4 in paragraph 34 of his decision there is again force in Miss Tafur's submissions. In the light of the conclusions which I have reached in respect of the development plan policies H1 and H9, however, Ground 3 adds little to the overall conclusion which must be drawn namely that the Inspector failed to properly interpret the policies of the development plan in policies H1 and H9 leading to a failure to

correctly apply paragraph 38(6) of the 2004 Act on the basis that he proceeded on a misunderstanding of the correct meaning of the policies. For those reasons I am satisfied that there is substance in the claimant's complaints and that the Inspector's decision must be quashed.

IN THE HIGH COURT OF JUSTICE

Claim No. CO/3861/2017

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN:

CANTERBURY CITY COUNCIL

Claimant

- and -

**SECRETARY OF STATE
FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT**

First Defendant

- and -

GLADMAN DEVELOPMENTS LIMITED

Second Defendant

ORDER

UPON hearing counsel for the Claimant and the First and Second Defendants,
AND UPON reading the documents filed,

IT IS ORDERED that:

1. The Claimant's application under s.288 of the Town and Country Planning Act 1990 is allowed;
2. The Inspector's decision of 11 July 2017 is quashed;
3. The Second Defendant's appeal is remitted to the Secretary of State for redetermination by a different Inspector;
4. The First Defendant pay the Claimant's costs in the sum of £19,218.
5. Any application for permission to appeal, if so instructed, shall be made to Dove J in writing no later than 7 days from judgment being handed down.