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Case No: CO/867/2019

HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2019

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

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Between :

PAUL NEWMAN NEW HOMES LTD	**Claimant**
- and –	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT (1) and AYLESBURY VALE DISTRICT COUNCIL (2)	**Defendants**

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Christopher Lockhart-Mummery QC (instructed by **EMW LLP**) for the **Claimant**
Guy Williams (instructed by **GLD**) for the **First Defendant**

Hearing dates: 25 July 2019

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Approved Judgment

Sir Duncan Ouseley:

1. This is yet another case in which the interpretation of the National Planning Policy Framework, the Framework, is at issue, and in particular the circumstances in which what planning jargon calls the "tilted balance" comes into play. That phrase summarises a policy in the Framework which requires a more favourable consideration of the application in certain circumstances than would otherwise be the case.

2. This application under s288 of the Town and Country Planning Act 1990 questions the validity of the decision of the Secretary of State for Housing, Communities and Local Government dated 24 January 2019, given through a Planning Inspector, dismissing the Claimant's appeal against the failure of Aylesbury Vale District Council to determine its application for planning permission for a residential development of 50 homes and associated facilities in the countryside. The District Council later expressed the reasons why it would have refused permission; a principal reason was the effect of the development upon the character and appearance of the rural area.

3. The Inspector found that the District Council had a five-year housing land supply. She found that there was a policy in the development plan which was relevant to the decision, that it was an up to date policy, and that on the proper construction of the 2018 version of the Framework, that policy by itself was sufficient to preclude the operation of the "tilted balance". Mr Lockhart-Mummery QC, for the Claimant, submitted that the Inspector misinterpreted the Framework: on the true construction of the Framework, it was the basket of most important policies which had to be considered up to date, and that the most relevant policies were out of date. One up to date policy could not prevent the application of the "tilted balance". He also submitted that the Inspector had misconstrued the one policy of the development plan which she said sufficed to preclude the operation of the "tilted balance."

The Framework 2018

4. The version of the Framework with which this case is concerned is the 2018 version, which replaced the 2012 version and has itself since been replaced by the 2019 version. I shall have to consider the changes from the 2012 version, since that formed part of Mr Lockhart-Mummery's submissions as to what the 2018 version meant. The changes to the 2019 version from the 2018 version are immaterial in this respect.

5. Paragraph 11 of the Framework is entitled "The presumption in favour of sustainable development." For making decisions, that presumption meant:

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

6. The crucial part for this case is the main statement of principle in 11d, not the exceptions. Footnote 7, against the words "out-of-date", states "This includes…situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites." This part of the footnote is marginally different in wording, so far as material to this case, from paragraph 49 in the 2012 version. The rest is different, but of no significance here.

7. For ease of comparison, I set out the paragraph 11d's equivalent in the 2012 version, [14]: "…where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless…" [provisions materially similar to those in the 2018 version then follow.]

The Decision Letter

8. The Inspector described the appeal site as a field, surrounded by fields and woodland, except for a single residential property on one boundary. The appeal site was neither within or on the edge of the rural settlements where, however, only much smaller

residential development might be permitted. The development plan consisted of the saved policies in the Aylesbury Vale District Local Plan, AVDLP. No policies in it "absolutely" restricted development on the appeal site. She continued in DL9:

> "Conversely, Policy GP.35 clearly relates to the effect of development upon the character and appearance of an area, which is a main issue in this case. Some of its provisions concerning design, form and materials are more relevant to a full reserved matters application, but those concerning the physical characteristics of a site and its surroundings, the natural qualities and features of the area and the effect on important public views and skylines are directly relevant to the fundamental question of whether a satisfactory development can be achieved in principle. Policy GP. 35 is therefore relevant to my decision on this outline proposal and, despite its age, its aims are consistent with those of the National Planning Policy Framework July 2018 (the Framework) in respect of achieving well-designed places and conserving and enhancing the natural environment. I therefore give it full weight."

9. There then followed her critique of the impact of the proposal on the rural character and appearance of the area, concluding in DL14 that it would unnaturally extend the settlement and encroach upon the countryside, and would be harmful to its rural character and appearance. "Thus it would conflict with Policy GP.35 of the AVDLP, particularly in terms of its requirements for development to respect and complement the physical characteristics of the area; the form of the locality; and important public views."

10. In DL22, she concluded that the District Council had a five-year land supply for housing.

11. Under the heading "The planning balance and conclusions", she said this:

> "26. I have found that the Council can demonstrate a five-year supply of deliverable housing sites.…Therefore, the planning balance set out in paragraph 11d of the Framework is not

engaged by this particular trigger. It is not engaged by there being no relevant development plan policies because Policy GP.35 of the AVDLP is relevant. Indeed apart from Policy GP.2 concerning affordable housing, it is the only policy relevant to my determination of the appeal. With the exception of policies RA.13 and RA.14 discussed above, neither party referred to any other policy during the hearing. Policy GP.35 is not "out of date" and so paragraph 11d of the Framework is not engaged because the policies most important for determining the application are out of date.

27. The appellant contends that paragraph 11d should apply because it is (non-specified) housing policies are "time-expired", and I note that this position has been adopted in some, but not all, of the appeal decisions referred to by the Council Appendix 6 of its Statement. At footnote 7, this sets out specific circumstances in which paragraph 11d is engaged by the five-year housing land supply position by reference to paragraph 73. This in turn provides a specific mechanism for measuring the existence or otherwise of a five-year supply in situations where plans are more than five years old. This whole process would be unnecessary if paragraph 11d of the Framework is intended to be engaged simply because a plan is "time-expired".

28. For these reasons, the planning balance set out in Section 38 (6) of the Planning and Compulsory Purchase Act is the one to be applied in this case. I have found that the proposed development would harm the rural character and appearance of the area causing conflict with Policy GP.35 of the development plan. This conflict carries significant weight in my decision. The provision of housing, and affordable housing in particular, is a material consideration in favour of the proposal. However, because the Council complies with national policy in respect of housing delivery, this consideration does not outweigh the harm

> I have found. Similarly, taken together with the housing benefit, the more general economic benefit of the proposal does not outweigh the specific harm I have found.
>
> 29. I therefore conclude that the proposal should be determined in accordance with the development plan and it follows that the appeal should be dismissed."

Ground 1: the interpretation of paragraph 11d of the 2018 Framework

12. Mr Lockhart-Mummery submitted that paragraph 11d of the Framework contained three separate triggers for the application of the "tilted balance": no relevant policies in the development plan, the policies in the development plan most important for determining the application being out of date, and the policies deemed to be out of date because the council lacks a five year supply of housing land. There was a five year supply of housing land here, but he submitted that the Inspector had discounted the "tilted balance" on both the other triggers because of the existence of Policy GP.35: she had concluded that there was a relevant policy, that it was not out of date, and therefore that "the policies most important for determining the application" were not out of date. The policies referred to are, I agree, the policies in the development plan. He also submitted that the Inspector had misinterpreted paragraph 11d as disapplying those other two triggers once there was a five-year supply of housing land.

13. Mr Lockhart-Mummery submitted that the Inspector's interpretation of paragraph 11d of the 2018 Framework entailed a radical but unintended change from the 2012 Framework, and which worked contrary to its purpose of "boosting" the supply of housing. The phrase "no relevant development plan policies" meant no basket of policies sufficient for the determination of the application. Here, it was not sufficient for the determination of the application that there was just the one policy, GP.35, which restricted it, and that there were none for the supply of housing or its location, apart from GP.2 which clearly favoured the development of affordable housing, and two policies related to settlements, which were irrelevant.

14. Although I shall examine the policies of the AVDLP more closely for ground 2, I note for this ground that the AVDLP 2004, covering the period to 2011, now consists entirely of saved policies, and that many of its original policies were not saved; they are

therefore not part of the development plan; Schedule 8 Planning and Compulsory Purchase Act 2004. Those not saved included most of its policies for the conservation of the built environment, all but one of its policies for the conservation of the natural environment, the general policy for development in the countryside and the specific policy for residential development in the countryside, which would have applied to but resisted the development at issue here. The strategy policy for the distribution of new housing was not saved, although three policies related to affordable, low-cost and local needs housing were saved, along with housing and mixed development policies in the main towns.

15. Mr Lockhart-Mummery's submission requires examination of the 2012 Framework, which has been the subject of considerable judicial exposition. He pointed to its aim of boosting significantly the supply of high quality homes through maintaining a five year supply of housing land. The absence of such a supply was one of the triggers for the application of the "tilted balance." The language of that version was different, as set out above. In *Bloor Homes v Secretary of State for Communities and Local Government* [2014] EWHC 754, Lindblom J (as he then was) at [45]and [50-1] discussed the concepts of a plan being absent, silent or out of date:

> "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.
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> 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 that 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.
>
> 51. A plan may or may not be "silent" if it does not allocate the particular site in question for a particular use, whether on its own or as part of a larger area, or if it does not contain policy designed to guide limit or prevent development of one kind or another on that site or in that location."

16. Mr Williams for the Secretary of State pointed out that Lindblom J had not ruled out that a single policy might constitute a "body of policy", rather, in my judgment, depending on what that policy said, read in the context of the plan as a whole.

17. Holgate J put it this way in *Trustees of the Barker Mill Estates v SSCLG* [2016] EWHC 3028 (Admin) at [98], applying *Bloor Homes*:

> "Essentially "silence" is concerned with whether the development plan contains a policy or body of policy relevant to the proposal under consideration and sufficient to enable the acceptability of the proposal to be judged in principle. "Sufficiency" for that purpose does not require that the site be the subject of an allocation or a site-specific policy setting out restrictions on development. General development control policies may suffice to enable the decision-maker to say whether the proposal should be approved or refused in principle, subject to other material considerations."

18. Lindblom LJ returned to the issue in *Gladman Developments Ltd v SSCLG and Canterbury City Council* [2019] EWCA Civ 669, and, in agreement with Sir Terence Etherton MR and Floyd LJ, adopted the approach in *Bloor Homes* which had since been approved in the Supreme Court at [54] in *Hopkins Homes Ltd v SSCLG* [2017] UKSC 37. The case really turns on the policies at issue in that case, but there are observations useful to Mr Lockhart-Mummery. A corpus of relevant policy was found to exist where housing development was provided for in an identified hierarchy of locations, which carried with it the implication that housing development was steered away from other locations, and so not in accordance with the development plan; they were implicitly excluded. The exclusion of a policy permitting certain types of development did not mean that the saved policies should now be construed as permissive of it. Their meaning could not be changed from what it was when that other policy was part of the development plan; [33-34].

19. As Lindblom J said in *Bloor Homes* at [49] last sentence, so said Lindblom LJ in *Hopkins Homes* in the Court of Appeal at [30] on a point not affected by the Supreme Court decision: "out of date" was not confined as a concept to plan policies which were time-expired, though it "may" include them. Mr Williams referred me to what Dove J said in *Wavendon Properties Ltd v SSHCLG* [2019] EWHC 1524 (Admin) at [55-58] about how what that phrase meant in the context of the 2018 Framework. Each of the policies which made it into the basket of the most important policies for determining the application had to be judged to see if it was out of date. But that was not the end of the exercise because the notion of whether the most important policies for determining the application were out of date required an examination then of the policies overall, as some might be and some might not be out of date, in order to reach a conclusion as for whether the policies in the basket were overall out of date. The mere fact that a policy was itself out of date did not mean that the policies in question were overall out of date. I do not read Dove J as ruling out that that might be the case but rather as saying that it was not automatically the case.

20. I should add for the sake of completeness that I have considered the judgment of Holgate J in *Monkhill Ltd v SSCLG* [2019] EWHC 1993 (Admin) in which he analyses paragraph 11d; but the analysis relates to a different issue, as both parties before me agreed and it has no bearing on this case. One version of the Framework may well be

enough to consider, in view of the opportunities for litigation to which it has given rise, and as Holgate J said at [41], in despair or admonition: "The current version [2018] of the NPPF should be capable of being understood and applied without needing to make textual comparisons with the 2012 version."

21. What Mr Lockhart-Mummery drew from this was that the 2012 Framework applied the "tilted balance" where there was no body of planning policies in the development plan, relevant to the application and sufficient for a decision on it in principle. This concept would bring about the application of the "tilted balance", whether there was no plan at all, i.e. it was "absent", or the plan was "silent" for want of such policies.

22. There was no difference in the housing land supply context between the two versions of the Framework. A "significant boost" to its supply was sought in each, indeed was emphasised by the housing delivery test in the 2018 version. The 2018 consultation process showed that there had been no intention to make a radical change in the tests leading to the application of the "tilted balance". The 2018 consultation draft was identical, save for a footnote numbering change, to the adopted version. The explanatory document said that the Government wanted more houses built. The policy changes were to explain more clearly how three high-level objectives related to the presumption in favour of sustainable development. There were additional changes to that presumption which were to:

> "clarify that the policies which provide a specific reason for refusing development (at footnote 7) relate to areas or assets of particular importance identified elsewhere in the Framework. The decision-making part of the presumption has also been changed to provide greater clarity, so that it refers to circumstances where "there are no relevant development plan policies, or the policies most important to determining the application are out of date"; and to "refusing" rather than "restricting" development. These changes are intended to improve the application of the presumption by addressing aspects that have been subject to litigation about their scope or meaning."

23. The Government's response to consultation said that it had "made minor changes to the text of the presumption in favour of sustainable development in response to feedback…the changes are not designed to alter the general effect of the policy from that which was consulted on but rather to be clear about its scope and how it is intended to be applied."

24. Accordingly, submitted Mr Lockhart-Mummery there was no justification for giving a significantly different interpretation to the 2018 Framework from that which the Courts had laboured over on the 2012 Framework. If the Government had intended a significant change, it would have said so whether in the consultation process or in the 2018 version itself. But it had not done so.

25. He supported his approach with *Redhill Aerodrome Ltd v SSCLG* [2015] PTSR 274, Court of Appeal. This concerned the question of whether a change in Green Belt policy was meant to bring about a change in the way in which harm, other than harm to the Green Belt, was considered in relation to the very special circumstances required to permit inappropriate development there. Sullivan LJ said at [16] that if it had been the Government's intention to make such a significant change to Green Belt policy in the Framework, "one would have expected that there would have been a clear statement to that effect." All the essential characteristics of the policy remained the same, though the text had been re-organised. The policy had to be read in the context of the Framework as a whole.

26. This decision was applied in *R (Timmins) v Gedling Borough Council* [2015] EWCA Civ 10, in which at [28-29] Richards LJ accepted the submission that, while it was to be expected that a major change to Green Belt policy of the nature raised in *Redhill Aerodrome* would be specifically identified as such, that would not be so in relation to changes of a lesser degree made to previous policies by the Framework. Not all changes were to be heralded; if an omission were by oversight, rather than with the deliberate intent of change, the Secretary of State could make good the omission. The Court emphasised the importance of avoiding absurdity. The disagreement within the Court arose in relation to the particular interpretation of the Green Belt policy there at issue. I see no disagreement in relation to the principle of interpretation material here. And

the same approach would apply, in my judgment, to changes from one version of the Framework to another.

27. Mr Williams referred me to *Dartford Borough Council v SSCLG* [2017] EWCA Civ 141 in which Gloster LJ agreed with Lewison LJ. At [20] he accepted that, although the 2012 Framework was a stand-alone document, more than just a carry-across of the language of the guidance it replaced, and was in language materially different at various points from what went before, the previous policy guidance remained "relevant." But it was not to be "invoked in order to create ambiguities in the NPPF where the language of that document is clear." The previous guidance had been used to rebut ambiguity and an unnatural interpretation in *Redhill Aerodrome*. At [23] Lewison LJ said that it would be wrong to expect the public or developers to have to "undertake the investigation of previous iterations of government policy in order to understand the NPPF, let alone ministerial statements introducing previous iterations." The public nature of the documents was of critical importance. The public in principle was entitled to rely on the public document as it stood without having to investigate its provenance and evolution. In my judgment, the same applies to the use of earlier versions of the Framework.

28. Here, submitted Mr Lockart-Mummery, the proper interpretation of the 2018 Framework meant that the Inspector should have concluded that there were no relevant development plan policies. For development plan policies to be relevant, they had to enable the decision-maker to assess the need for housing measured by the plan's strategy, the appropriateness of the location proposed for housing in terms of housing strategy, and the way in which the plan's constraints affected the proposal. The same broad tests, it seems to me, could apply to what constituted a body of policies sufficient for the determination of the acceptability of an application in principle.

29. The upshot of the Inspector's interpretation of paragraph 11d of the 2018 Framework was therefore radically different from the way in which the equivalent provision in the 2012 Framework would have been interpreted. Applying the 2012 Framework would have meant that the "tilted balance" applied. Although it could not have been said that the development plan was "absent", the development plan was "silent" because it did not contain a body of policies sufficient for a determination of the acceptability of the application in principle. The "tilted balance" was disapplied here however, because of

a single saved policy in a time-expired plan. Although that did not mean that any saved policy was necessarily out of date, see *Wavendon Properties* above, the Inspector's interpretation meant that the existence of a single relevant up to date development plan policy prevented the application of the "tilted balance". The 2012 triggers of the "absent" or "silent" plan, as interpreted by the Courts, would have been replaced by a much more demanding test: the negative had to be proved, that there were no relevant policies at all, and a single one would suffice to block that trigger, or that all the most important policies for determining the application were out of date, where again a single up to date policy could block that trigger, indeed it could be the only policy, and its importance given undue prominence simply because there were no other survivors. A single relevant development plan policy could be anything from landscape impact to traffic, access, design or drainage. Yet here, the housing strategy policy was out of date, as was the policy relating to housing development in the countryside. Such an interpretation would markedly reduce the circumstances in which the "tilted balance" could assist in "boosting significantly" the supply of housing land.

30. Mr Williams submitted that as GP.35 was a relevant development plan policy, the Inspector was right, giving the words of paragraph 11d of the Framework their natural meaning, to conclude that the first trigger for the "tilted balance" was inapplicable. Mr Williams accepted that a policy would be relevant for the first trigger if for example it dealt with affordable housing, and that general development control policies could be relevant policies for this purpose. He recognised that this analysis could lead to some oddities, but pointed to the other triggers and in particular the absence of a five-year housing land supply, enhanced by the new Housing Delivery Test in the 2018 Framework, as maintaining the intended significant "boost". The Inspector was also right to conclude that it was an important policy for determining the application, and up to date, and therefore that the second trigger for the "tilted balance" also did not apply. Her approach had been consistent with *Wavendon Properties*, which he submitted was very similar to the approach adopted in *Bloor Homes*. His analysis did however, it seems to me, permit the Inspector to identify just the one policy, and treat it as being the sum of "the most important policies for determining the application." That is indeed how DL [26] last sentence is worded, with its slightly awkward mix of singular and plural policy/policies.

31. Mr Williams also submitted that the 2012 Framework, and the cases deciding its meaning, were not relevant to the interpretation of the 2018 Framework in this context. Its language was materially different: "absent" and "silent" have gone; the second trigger now required an analysis of what the most important policies were, and then a consideration of whether, overall, they were out of date. Footnote 7 in the 2018 version, dealing with out-datedness through the absence of a five-year housing land supply, was new and paragraph 49 of the 2012 version was not included. By contrast with *Redhill Aerodrome*, the essential characteristics of the policy had not remained the same. *Bloor Homes* could not be read across into the 2018 Framework. There was no need for development plan policies to cover every consideration material to the determination of a planning application. As those policies which had not been saved were not part of the development plan, as it had to be considered for this purpose, they were not relevant. Indeed, the concept of an out of date policy in a development plan could only apply to a saved policy. But a policy in a time-expired development plan was not necessarily out of date.

Conclusions on ground 1

32. I start by construing paragraph 11d in its context in the Framework, as a document on its own. The phrase "where there are no relevant development plan policies" is quite clear. Where one or more relevant development plan policies exist, that trigger for the application of the "tilted balance" cannot be applied. One relevant development plan policy is sufficient to prevent it. Although that policy may exist in a time-expired plan as a saved policy, it is a development plan policy. This trigger contains no requirement that the policy be up to date rather than out of date. "Relevant" can only mean relevant to determining the application. There is, however, no adjective qualifying the degree of relevance it should have for that purpose, for example that it should be decisive or of high importance. "Relevance" connotes no more than some real role in the determination of the application. A fanciful connection would not suffice, and a policy of wholly tangential significance may be "irrelevant". There is also no requirement in this first trigger that the one or more relevant development plan policies should comprise one or more development plan policies important for determining the application, let alone that they should constitute a body of policy or policies sufficient for determining the acceptability of the application in principle. I agree with Mr

Williams that "relevant" does not exclude general development control policies, and so does not exclude the mundane policies applicable to the sort of development proposed, even if they are not remotely controversial in their application, such as the provision of adequate access to the highway or adequate sewerage. On that basis, the Inspector's interpretation of the first trigger is correct.

33. There is an issue which arises in the context of the interpretation of GP.35, as to whether a policy which would be applicable to the design of a development, and which would have to be considered in a full planning application or on a reserved matters application, is relevant to a decision on an outline planning application, where design and siting as here, are reserved matters. I deal with that later under ground 3. However, on the Inspector's interpretation of GP.35, that issue does not arise. And even if she were wrong in her interpretation of GP.35, it would not alter the correctness of her conclusion on the first trigger because she found that GP.2, on affordable housing, was also a relevant policy, even though she did not appear to rely on it for her conclusion on the first trigger.

34. In my judgment, the key part of the second trigger, the phrase "where the policies which are most important for determining the application are out-of-date", is reasonably clear. A policy is not out of date simply because it is in a time-expired plan; that is the point which the Inspector appears to have been addressing in DL27, though it appears not to have been an issue before her. I agree with what Dove J said in *Wavendon Properties* in this respect. It is the correct interpretation. If the 2018 Framework had intended to treat as out of date all saved but time-expired policies, it would not have used the phrase "out-of-date", which has different or wider connotations, and would have used instead the language of time-expired policies or policies in a time-expired plan. The Inspector's comment in DL27 is apposite in that context. Although the earlier jurisprudence in *Bloor Homes* and *Hopkins Homes* related to that same phrase in the 2012 Framework, I see no reason to discount it here where its role is not materially different.

35. I also agree with the analysis of the phraseology of the second trigger as a whole in *Wavendon Properties*. The first task is to identify the basket of policies from the development plan which constitute those most important for determining the application. The second task is to decide whether that basket, viewed overall, is out of date; the fact that one or more of the policies in the basket might themselves be out of

date would be relevant to but not necessarily determinative of whether the basket of most important policies was itself overall out of date. This second trigger contains no requirement that the up to date basket of the most important policies in the development plan for determining the application should itself also constitute a body of policies sufficient for the determination of the acceptability of the application in principle.

36. I do not consider that the plural "policies" means that a single up to date policy, even if plainly by itself the most important for determining the application, cannot suffice to block the second trigger; the plural encompasses the singular, as is a commonplace construction. Otherwise even an up to date, self-contained, site and development specific policy, the crucial policy, the sole survivor, could lead to the application of the "tilted balance" and to the grant of permission unless the provisos in (i) and (ii) applied. The alternative construction focuses unduly on what is mere linguistic awkwardness, accepted for convenience. The plural "policies" avoids the somewhat legalistic "policy or policies", with "is or are" to follow, at the price of the slightly awkward language seen in DL 26, last sentence. On the basis of her interpretation of GP.35, and on that interpretation of the second trigger, the Inspector's conclusion that the "tilted balance" did not apply is correct.

37. I do not accept Mr Lockhart-Mummery's submission that I should interpret paragraph 11d of the 2018 Framework as if it were the different language of paragraph 14 of the 2012 Framework. The difference in language must be intentional; the changed language may respond to the Courts' exposition of paragraph 14 but the response does not obviously adopt the language of that exposition. It would be wrong to suppose, just because no changes were expressly heralded as significant, that no changes at all were intended, or that the changes were to be so minor that they might as well be ignored in favour of the exposition of the earlier but different language. The first trigger in each version would cover many of the same situations, but the 2018 version focuses on policies and not on the existence of a plan. The first trigger in the 2012 version would be blocked by the existence of a plan, whether or not it had any relevant policies, not so the 2018 version. The second trigger in each version (taking silence and relevant policies being out of date as a single trigger) would cover many of the same situations, but again the focus is differently expressed, and as I have said, the exposition in the decided cases was not in terms adopted. The Government decided to deal with the issues

in its own preferred language. I do not consider that paragraph 11d should be rewritten in the manner which would be necessary, were effect to be given to Mr Lockhart-Mummery's submissions.

38. In my judgment, it is right to consider the 2018 Framework on its own. I accept that such a document should be construed in general without reference to previous policies or versions for the reasons given by Lewison LJ in *Dartford Borough Council*, in which he echoes what has been the general approach of the Court of Appeal in earlier cases, and is reflected in *Barker Mill Trustees*. My analysis of the changes does not persuade me that I should determine the meaning of the 2018 Framework by reference to the 2012 Framework jurisprudence. Nor do I consider that the consultation documents and process were confounded by the changes actually made, and so they do not support a different interpretation from the one I have reached reading the 2018 Framework on its own.

39. The Secretary of State's interpretation may create an odd result in certain circumstances: the policies to be examined are those in the development plan; the most important ones can only be drawn from them. So, their selection will be skewed by what has survived. The "most important" may be comparatively unimportant when tested against the plan as once it was, or when tested against those policies which would conventionally be regarded as the most important for the determination of the acceptability of the application in principle. However, that oddity, intended or not, is not one which can be resolved by the interpretation sought by Mr Lockhart-Mummery without doing unwarranted violence to the language, and creating policy which it is for the Secretary of State to do. An interpretation which imported the effect of the Courts' exposition of "silent", so as to require the "most important" policies to be those which would provide the basis for determining the acceptability of the proposal in principle, suffers from the drawback that there was a clear response to that judicial exposition of the 2012 Framework in the 2018 Framework, and that response did not adopt the language of that exposition. It chose different phraseology. It would not be for judicial endeavour to create unintended policy. Government could amend the Framework if it concluded that there were unintended problems, which merited its amendment.

40. There seems to be another oddity in the relation between the two triggers. The first trigger can be blocked by the existence of a single relevant out of date development

plan policy. The second trigger would still however be pulled if the most important relevant development plan policies overall were out of date. It is difficult to see circumstances in which trigger one would be pulled in which trigger two would also not be pulled, and if trigger two is pulled it does not matter whether trigger one is pulled or not. I find it difficult then to see what the purpose of trigger one is. It is hard to see that trigger one serves to counter the possibility of a barrack-room lawyer argument that trigger two cannot be pulled, simply because there are no relevant development plan policies at all. This sort of problem is not unknown in statutory interpretation, however, as the draftsman moves from the apparently greater problem to the lesser. I am not persuaded that this oddity warrants giving paragraph 11d the interpretation contended for by Mr Lockhart-Mummery.

41. On that basis, and on her interpretation of GP.35, the Inspector did not err in her interpretation of paragraph 11d. GP.35 meant that it could not be said that there were "no relevant development plan policies", and GP.2 is noted in the fourth sentence of DL26 as a relevant policy, though it did not appear to play a role in her conclusion in relation to the first trigger.

42. On that basis, and on her interpretation of GP.35, she did not err in her conclusion in relation to the second trigger either. She was entitled to conclude that GP.35 was up to date, and was one of the most important, if not the most important, of the policies in the development plan for the determination of the application. There was no requirement for a basket of policies sufficient for the determination of the acceptability of the application to be found. It is not clear whether GP.2 on affordable housing was included as one of the most important policies in the development plan for the determination of the application. It is a saved and relevant policy but that says nothing about whether it is up to date, and the Inspector expresses no view about it in that context. But I have concluded that the second trigger is blocked by the presence of one policy in the development plan, which is the most important policy in the plan for the determination of the application.

43. Accordingly, ground one fails, but only in relation to the second trigger on the basis that the Inspector's interpretation of GP.35 is correct. That is the issue to which I now turn.

Ground 3: the interpretation of GP.35

44. Ground 3, the second ground argued, retained for convenience the numbering it originally had, before permission was refused and not renewed for ground 2. The submission that the Inspector had misinterpreted GP.35 was relevant to two of her conclusions: first, to her conclusion that the development was not in accordance with the development plan because it breached GP.35, whereas Mr Lockhart-Mummery submitted that it did not apply at the outline stage; and second, to her conclusion that the second trigger was blocked by the presence of GP.35 whereas Mr Lockhart-Mummery submitted that it was not a relevant policy at all for the determination of the outline application.

45. Policy GP.35 is in the General Policies section of the AVDLP, in the subsection headed "Conservation of the Built Environment" which starts:

> "4.105. Design and landscaping of development are important priorities. An approach is required that respects the traditional character of towns and villages, and, where development in the countryside is necessary or appropriate, the traditional character of rural landscape and buildings."

46. Under the first subheading "Design Principles for New Development", the first paragraph [4.108], stated that the Council encouraged good and discouraged poor design in the built environment, and supported development that respected and enhanced its surroundings. Local distinctiveness was the key: this concept referred to the qualities of buildings, planting and topography. There was a wide variety of landscape character types in the district, and a wide range of settlements. This led on to GP.34, a policy which was not saved, but which could be relevant to understanding what GP.35 meant. This read:

> "In determining planning applications the Council will seek to protect or improve the traditional building characteristics of towns, villages and the countryside. Development proposals should respect the local distinctiveness and environmental

> qualities of their setting and surroundings. Permission will not be granted for poor designs that harm these important visual and historic interests."

47. I note the last two sentences: the penultimate requires "respect" for local distinctives; the final sentence requires permission to be refused where those interests were harmed. As will be seen, there is no equivalent to that final sentence in GP.35.

48. The section then dealt with the several aspects of a development's design which contributed to its ability to reflect and reinforce local distinctiveness: siting and layout, scale, density, design details, materials and various aspects of landscaping. These were all discussed further under their own separate headings. Under "scale", it said that any development affecting a skyline could have a detrimental effect on public views of the site from elsewhere, and unacceptable impacts would be avoided. Policy GP.35 itself reads:

> "The design of new development proposals should respect and complement: a) the physical characteristics of the site and the surroundings; b) the building tradition, ordering, form and materials of the locality; c) the historic scale and context of the setting; d) the natural qualities and features of the area; and e) the effect on important public views and skylines."

49. Policy RA1, one of the unsaved Rural Areas policies, may also be used to interpret Policy GP.35. It provided:

> "In dealing with proposals for development in Rural Areas the Council will give priority to the need to protect the countryside for its own sake. Development will not be permitted in the countryside unless it is necessary for the purposes of agricultural or forestry, or for enterprise, diversification or recreation that

> benefits the rural economy without harming countryside interests."

50. RA12, another policy not saved, dealt with housing in the countryside outside existing settlements. Permission would only be granted in exceptional circumstances for such a development. It would need to serve the essential needs of agriculture, forestry or some other special need that could not be met by building elsewhere. RA15, also not saved, provided that in the Rural Areas beyond the Green Belt, and outside the built-up areas of listed settlements, permission for the construction of new dwellings, other than those specifically provided for in the AVDLP, would "be granted only in the exceptional circumstances of providing affordable housing to meet a local need, but housing necessary for the purposes of agriculture or forestry."

51. ST1, the strategy policy for the division of housing and employment between Aylesbury and the Rural Areas had also not been saved. The RA policies which had not been saved would have been of particular relevance to this proposal, within the basket of those of most importance for determining the application.

52. Mr Lockhart-Mummery submitted that GP.35, in context, related to the design of development at the reserved matters stage, or on a full planning application, and was not concerned with what the Inspector described in DL9 as the fundamental question of whether a satisfactory development could be achieved in principle. It was therefore not relevant to an outline planning application in which all matters except for access were reserved. The principle of development was a matter for other policies, which had not been saved, but which served to demonstrate the limited scope of GP.35. The requirements of GP.35 could be met by the imposition of appropriate conditions on the outline permission. I regard that as an important point.

53. Mr Lockhart-Mummery submitted that the Inspector had misunderstood the limited scope of GP.35 in treating it as containing principles for application when deciding whether to grant outline planning permission. The Inspector did not conclude that there was no design which could be acceptable. (Incidentally, I do not accept his suggestion that the planning officer of the District Council understood GP.35 in the limited way he contended for. In the light of the overall arguments in the officer's report, it is plain that

the officer saw GP.35 is relevant both in principle and in detail. Likewise, I see nothing in the report actually expressing the view that the "tilted balance" applied.)

54. Mr Williams submitted that she had not misunderstood the policy at all, recognising that there were aspects more relevant to a full planning or reserved matters application, but that there were others relevant to the acceptability of a housing proposal in principle. An example was design respecting the physical characteristics of the site and surroundings; this included its topography and how the proposal would fit in the landscape. Her analysis of the impact of the development demonstrated the relevance to the proposal of the components of GP.35.

Conclusions on ground 3

55. The language of s38(6) Planning and Compulsory Purchase Act 2004 requires a judgment as to whether or not GP.35 would be breached by the development, and if so whether the development would accord with the development plan's saved policies as a whole. The language of paragraph 11d of the 2018 Framework requires a judgment as to whether GP.35, read in the context of the other policies of the development plan, as it was when adopted, was relevant to the determination of this planning proposal, and then a judgment as to its relative importance. S38(6) and paragraph 11d require judgments about GP.35 which the development plan, as it was, never called for in that way.

56. The issue is whether GP.35 can go to the principle of a development in a particular location or whether it only applied once the principle of development was settled under other policies. In the latter case, even on a full application it would have no part to play in determining the principle of the development but would be confined to controlling, as matters of detail only, the specific factors listed as reflecting and reinforcing local distinctiveness: siting and layout, scale (with particular reference to skyline and views), density, design details, materials and various aspects of landscaping. The Inspector treated GP.35 as in part concerned with detail at the reserved matters stage or on a full application, and as in part relevant to the fundamental question of whether a satisfactory development could be achieved in principle. In my judgment, GP.35 is relevant to that question.

57. There was no issue between the parties but that the meaning of GP.35 could not be changed by the fact that other policies in the AVDLP, whether in the General Policies section or in the Rural Areas section had not been saved and were no longer part of it. I agree; that is consistent with principle and authority, notably in this context *Gladman Developments Ltd v Canterbury City Council*. The policies which once existed alongside GP.35, and the text of the AVDLP supporting them, cast light on the issue. Indeed, they were the foundation for Mr Lockhart-Mummery's submissions.

58. I accept that there is a good deal of textual and contextual material which supports him. The language of the relevant section of the "General Policies" assists him: it is headed "Conservation of the Built Environment" and the supporting text for GP.35 is sub-headed "Design Principles for New Development." Mr Williams also accepted that, on the Inspector's interpretation, the words at the start of GP.35 "The design of" were of no significance to its meaning. One would normally expect the very words which govern what follows to have considerable significance. But I agree that that is the consequence of the Inspector's interpretation. The words of the policy are not that "new development should not be permitted where it would harm the natural qualities and features of the area or harm important public views or skylines". It is the design of development which should not be permitted to do so. And there is no equivalent to the last sentence of GP.34. The language of [4.117] in the supporting text to GP.35, and the avoidance of unacceptable impacts on views and skylines, tends however to support the view that GP.35 has the broader interpretation of the Inspector.

59. I accept, on the Inspector's interpretation, that GP.35 is in part exclusively referable to a full application or a reserved matters application, and that factors (a), (d) and (e) can be relevant to a decision on detail. However, parts, notably those three factors are also relevant as a matter of development plan policy to a decision on the principle of the development, that is to the decision on an outline application. I acknowledge that the text of GP.35, and in particular its introductory words, draws no such distinction between the roles that the various factors may play; the distinction derives from their nature and the way they are expressed.

60. Much of Mr Lockhart-Mummery's submissions would be sounder if addressed to the construction of a statute. But the drafting of local plan policies is not such a rigorous or necessarily logically and cleanly structured process. This is partly a question of who

the draftsman is, and how policies get drafted, and put together. It is also that they are not expected to be analysed as if they were legislation, albeit that Courts have to construe them. It is to be assumed that they will be construed with an eye on the intended planning outcome. A planning authority, concerned that landscape or rural character and appearance should be part of the decision-making process, as a matter of policy, could readily conclude that they need not be part of the RA policies, which deal with the general locational principles governing what is not permitted in rural locations or what exceptionally can be. The general locational principles raise wider issues than impact on its character and appearance, such as social and physical infrastructure. The character and appearance or landscape issues could readily be thought to find a comfortable enough home in the design policy section. GP.35 does not confine itself expressly to details, with nothing to say about principle. As I come to, there are very good reasons for that.

61. There is no necessary hard and fast line between what is acceptable in principle and what the impact of a particular development, with a known siting, scale and layout, might be. The one can affect the other. Details of a development may be provided in a full application, or by way of illustration, so that its landscape impact, in particular on views and skylines, can be judged. This would help decide the degree of harm which a development might do, or whether a development, suitably designed, could be made acceptable. A local authority might require the submission of detail, illustratively or as part of the application for that very reason.

62. It would be a sound argument against the grant of planning permission that the applicant could not demonstrate how a development could be sited, laid out or otherwise designed so as to avoid harm to the factors in GP.35. The fact that a development could not comply with GP.35 would mean that no condition could be imposed on an outline application, reserving that matter to the stage of approval of reserved matters. The ability of the proposal to comply with GP.35 would thus be for determination as part of the principle of development. Local authorities would be astute to prevent the pass being sold by the grant of an outline permission for which no acceptable details could be approved, because some version of the details would ultimately have to be approved. Obviously, on a full application, all matters would be considered together, and the judgment that the proposal did not comply with GP.35 would be relevant to the

decision. It is crucial to Mr Lockhart-Mummery's submission that his application was in outline only, with the design issues reserved.

63. GP.35, I agree, is to be interpreted as if it were still alongside the RA policies, notably RA1, 12 and 15. A decision under RA1, 12 or 15 which considers harm to the rural area, and whether or not an exception should be made, may have to consider whether an outline application could be acceptable having regard to the factors in GP.35, notably (a), (d) and (e), or whether, if permitted, any design of the development would inevitably breach GP.35, because none would complement and respect the physical characteristics of the site and surroundings, or the natural qualities and features of the area, or important public views and skylines.

64. The relationship is illustrated by RA.12, which provides that residential development in the countryside, outside existing settlements, would only be granted exceptionally. Its supporting text states that housebuilding is to be strictly and carefully controlled "in the interests of preserving the rural character of the countryside." It adds that when a dwelling has to be provided in the open countryside, "it should be designed and sited in such a way as minimises the effect on the character of the area." This indicates that the factors in GP.35 would be applied to it. This policy is of particular importance as it is the policy specific to new dwellings in the countryside, in the light of which GP.35 has to be construed. But the ability of a proposal to comply with GP.35 would be relevant to whether an outline planning permission could be granted, leaving those issues of detail, by condition, safely for decision at the reserved matters stage.

65. RA.15, which provides for an exception to RA.12 for the construction of new dwellings "in the exceptional circumstances of providing affordable housing to meet a local need", would operate in the same manner. The exceptional case would have to be made, taking into account the harm which might be done to the character and appearance of the countryside. The same point about the role of the acceptability of the details would apply. And the same would apply to RA.1.

66. I can see the argument that any development in the rural area, whether or not proposed as an exception to that policy, would need to grapple with its impact on the character and appearance of the countryside, landscape and public or skyline views, and would need to do so regardless of the existence of GP.35, because those factors are of obvious

relevance to the assessment of the impact of development on the character and appearance of a rural area. But that does not show that GP.35 should be confined to the approval of details of a development already shown to be acceptable in principle. The expression of factors in a policy, and the language used, performs the task of identifying what is important, how and why. Many policies deal with considerations which would obviously be material even if policy did not exist. I do not see GP.35 as just a handy reference point for topics relevant to the assessment of the impact of a development on the character and appearance of a rural area. It gives policy weight and significance to them, which as I have illustrated, bite at the stage when an outline planning permission is being considered.

67. I do not see GP.35 either as simply working through the RA policies, rather than biting in its own right in that respect. Development which could not be made acceptable under GP.35 is development which would breach GP.35 if permitted. The grant of permission with a condition requiring the approval of details would breach GP.35 if no acceptable details could be submitted for approval.

68. I do not accept Mr Lockhart-Mummery's suggestion that the Inspector reached no conclusion on the acceptability in principle of the development, never saying that no design or layout could avoid infringing GP.35. The totality and strength of her conclusions in DL 10-13 show that she did not consider that any development could be made acceptable by design factors. So, had she granted permission, she would inevitably have concluded that it was in breach of GP.35.

69. I appreciate that the Inspector did not reach her conclusion in the light of the RA policies. It is possible that she considered GP.35 as if it were the sole policy. But if she did, albeit that approach would have been an error, her interpretation would still have been the same, and correct, and would still be so even if she had not referred to it as fundamental to the question of principle.

70. I am satisfied therefore that the Inspector was right to hold that GP.35 was relevant and would be breached. She was entitled then to conclude that the development would not accord with the development plan.

71. Turning now to paragraph 11d of the Framework, her approach to the existence of a relevant development plan policy was correct because, as I conclude, GP.35 was relevant to a decision on an outline planning permission.

72. Likewise, her approach to what constituted the most important development plan policies for determining the application, and whether as a whole they were up-to-date was correct because GP.35 was relevant and important rather than wholly irrelevant for determining the application.

Conclusion

73. The application is dismissed.