Neutral Citation Number: [2019] EWHC 3578 (Admin)

Case No: CO/2005/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before :

MRS JUSTICE LIEVEN DBE

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Between :

The Queen (on the application of ASDA STORES LIMITED)	**Claimant**
- and -	
LEEDS CITY COUNCIL	**Defendant**
- and –	
COMMERCIAL DEVELOPMENT PROJECTS LIMITED	**Interested Party**

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- -

Mr Tucker QC and Ms Reid (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Ms Hall (instructed by **Leeds City Council Legal Services**) for the **Defendant**
Mr Warren QC (instructed by **Birketts LLP**) for the **Interested Party**
Hearing dates: 11/12/19

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Approved Judgment

Mrs Justice Lieven DBE :

1. This is an application for judicial review of the decision of Leeds City Council, "the Council" to grant planning permission for

> *"construction of a mixed-use retail – led development comprising retail (use classes A1, A2, A3 and A5), leisure (use class D2), non-residential institutions (use class D1) and book makers (sui generis) with associated access, parking and landscaping ("The proposed development")."*

on a 5.9ha site at the former Benyon Centre, Middleton Ring road, Leeds (the site). The decision was dated 5 April 2019. The Interested Party was the applicant for planning permission. The claimant is the owner and operator of a large retail store on the site adjacent to and immediately to the south of the site.

2. The Claimant was represented before me by Mr Tucker QC and Ms Reid; the Council by Ms Hall; and the Interested Party by Mr Warren QC. I am very grateful for their submissions.

3. The main issue in the case is the interpretation of paragraph 90 of the NPPF (2019 version), which I will call "NPPF90".

The background

4. The application for planning permission was made on 18 October 2018. The Middleton District Centre, as defined in Leeds Unitary Development Plan, lies to the immediate west of the Asda store and both the Asda store and the site lie outside that Centre. The site lies to the east of the Asda, so all three areas lie around the arms of the Middleton ring road roundabout. From the edge of the site to the edge of the defined centre it is approximately 80m, so it is accepted that the site is within the edge of centre as defined in the NPPF.

5. The application was accompanied by a Planning and Retail Impact Statement that says at para 3.2.

> *"The site is located approximately 70m from the edge of the defined Middleton Town Centre. However, it is immediately*

> *adjacent to the proposed Centre boundary in the Leeds Sites and Allocation plan (SAP) which proposes an extension to the existing centre to incorporate the Asda store adjacent to the site. The design of the development seeks to integrate itself into the existing retail provision at Middleton Centre and utilises existing pedestrian infrastructure in order to provide legible links between the proposed development and the existing shop and businesses. As already stated the small unit shops are located at the south-western corner of the site, closest to the centre and are likely to be occupied by a range of uses within Use Classes A1, A2, A3, A5, D1 and sui generis."*

6. It was proposed that the scheme would be anchored by a Lidl store and a B&M Homestore and at the time of the application the Interested Party had agreed terms with both those retailers. The Planning Statement which accompanied the application confirmed that B&M intended to close its existing store in Middleton District Centre in order to operate from the proposed new store.

7. In August 2018 the Council commissioned CBRE to carry out an assessment of the likely re-letting prospects for the existing B&M store. CBRE concluded that there would be some, albeit limited demand, and they would expect an 18 month void period. B&M had told the Council that they intended to leave the property at the end of their lease, in the next year, in any event.

8. The application first came before the Council's Planning Committee on 18 October 2018. The Council's planning officer recommended refusal on two grounds, the first being;

> "*1) The proposal (in this edge of centre [sic] location) will result in a significant adverse impact on Middleton Town Centre, therefore harming the viability and vitality of the town centre location. The proposal is therefore contrary to paragraph 89 and 90 of the NPPF and policies SP2 and P8 of the Core Strategy."*

9. The first Officers Report (OR) stated that the site was considered not to be in-centre, but to be edge of centre, for the purposes of both the NPPF and the emerging Site Allocations Plan (SAP);

> *"10.5 The Unitary Development Plan does not define Primary Shopping Areas. However, is does define Primary and Secondary Shopping frontages for Middleton Town Centre. The NPPF defines a Primary shopping area as a "defined area where retail*

> *development is concentrated". It can therefore be said that the protected shopping frontages define a very similar approximation of a primary shopping area. Whilst the draft Site Allocations Plan has not been adopted, it does define Primary Shopping Areas and is therefore considered a helpful material consideration in determining the status of the site's location.*
> *10.6 The draft Site Allocation has material weight as it has now been through the Examination stages, is based on up-to-date survey data and, with regards to Primary Shopping Area designations, has received very little objection. Crucially, the proposed Primary Shopping Area reflects the designated protected shopping frontages within the Unitary Development Plan. Therefore, as the proposal site is within 300m of both the adopted protected Shopping Frontages and the proposed Primary Shopping Area boundary it is considered appropriate in this case to define the site as edge of Centre. As a result, the proposal is not considered in-centre development and in accordance with policies SP2 and P8 of the Core Strategy and Chapter 7 must pass a sequential and Impact Assessment before the application is approved."*

10. The OR then considered the impact of the proposal on the Middleton Town Centre and said at paras 10.10;

> *"10.10 As with the previous applications on the site, the severity of the projected impact upon Middleton Town Centre rests largely on the likelihood of the re-occupation of the existing B&M Bargains unit that will be vacated as a result of the new development. Colleagues in Policy stated in their initial response on the 2nd July 2018:*
>
> *"…concerns persist as to the likelihood of the re-occupation of the existing B&M Bargains unit in Middleton Town Centre, which is likely to be rendered vacant by the proposal development. For the previous application the applicants submitted further information on the likely future occupiers of that unit. Whilst this assessment is less than a year old, it includes an occupier (Poundworld) that has since entered administration. This potentially casts some new light on the state of the discount retailer market. The LPA feel that the assessment of the B&M unit therefore requires updating and are proposing to commission an independent assessment of the likelihood of the re-letting of the existing B&M unit. This aspect of the application is crucial to assessing the retail impact of the scheme.*
>
> *Should the unit remain vacant over the long-term the projected impact upon Middleton Town Centre is predicted to be in the order of 42%. This would constitute a significant adverse impact and would justify the refusal of the scheme. The Council therefore*

> *consider that it is crucial that it can put together as accurate a picture as possible on the likelihood of re-occupation of this unit. The Council will not be able to arrive at a view on this application until this evidence forms part of the assessment picture."*

11. The OR concluded on this issue at 10.14

> *"During the consideration of the previous application, the LPA considered that Middleton Town Centre is performing well. Officer's view at that time was that the B&M Bargains Unit was an attractive one, owing to its visible location on the ring road and access to a large surface car park to the front of the store. However, the vitality of the centre currently relies upon the B&M unit to drive footfall and spend. As previously stated, should that unit not be re-occupied the impact upon Middleton Town Centre will be significantly adverse. In our view there is now significant doubt about that re-occupation, and given that the unit generates 42% of the turnover of the centre, the failure to re-occupy the unit with a store of a similar footfall and turnover would have a significant adverse impact on Middleton Town Centre."*

12. The OR then considered the relevance of the emerging Site Allocations Plan (SAP) and the fact that the boundary of the District Centre would change to include Asda, which would reduce the percentage impact of the proposal (because Asda boosted the overall trade of the centre). The officer's view was that it was appropriate to carry out the impact test on the existing adopted policy, and in any event, there would remain a significant adverse impact. The conclusion in the OR is at 13.1 and 13.2 and supports a refusal on the grounds of harm to the town centre. It is important to note that OR8.10 of the report had set out NPPF90 in entirely accurate terms, and Mr Tucker accepts this.

13. The application was deferred so that further information on retail impact could be provided. The minutes of the meeting refer to the fact that members had been on a site visit, and understood the difficulty of re-letting the B&M store. The application was returned to Committee on 20 December 2018 and a second officer's report was produced (OR2). In OR2 the officer addressed a query raised by members at the October meeting as to whether there was any opportunity to improve pedestrian links to the District Centre. The OR confirmed at para 4.1 that officers did not consider there to be any improvements which could be made. It is worth noting at this point that the reason no improvements could be made is that officers noted that there was already a wide pavement outside the Asda store, and a pedestrian crossing between the Asda and the District Centre.

14. The minutes of the December 2018 meeting state as follows;

> "*In response to questions and comments from the Panel, the following was discussed:*
>
> - *Some Members showed support towards the application and felt that the proposals would have a positive impact on the area. It was felt that the employment opportunities and the potential to attract more customers to the area were factors and could outweigh the recommendation for refusal.*
> - *Some concern that policy and guidelines would not be followed should the officer recommendation be overturned. The Panel received further advice with regard to this and informed that as decision makers it was for Members to decide what weight to give each material consideration and an alternative motion to the officer recommendation would have to be tabled should a different decision be sought.*
> - *There was still some concern with regard to the layout and design. It was reported that should the application be approved then the detailed design could be agreed with ward Members via discharge of conditions.*
>
> *There was a broad agreement across Members that other issues outweighed policy and that the application should be approved contrary to the officer recommendation. Issues highlighted included the opportunity for employment, economic impact, the site's location to Middleton centre and the opportunity to extend the centre.*
>
> *A motion to approve the application, contrary to the officer recommendation was made and seconded and following a vote it was:*
>
> ***RESOLVED**- That the officer recommendation be overturned and the application be approved in principle as the following were considered to outweigh the recommendation set out in the officer report:*
>
> - *The additional jobs growth provided by the development and the economic development it represents in the area.*
> - *The site location adjacent to the existing centre and the excellent links allowing for enhanced linked trips between the existing centre and the proposal site.*
> - *The proposal site is an obvious choice to expand the centre to provide an increased range of good [sic] and services for local people, given the limitations of the existing centre."*

15. The application returned to committee again on 21 February 2019 with a report that set out the following reasons;

> *"At the Panel meeting on 20th December, in considering the application, Members placed greater weight on the benefits of the scheme in terms of economic development, regeneration, increase in retail offer and job creation, and considered these benefits outweighed any harm the proposal would have on vitality and viability on Middleton District centre. Members also considered the proposal has the potential to boost trade at Middleton District centre, by new linked trips. The economic and regeneration benefits are material planning considerations and valid reasons to approve the application, contrary to the advice of Officers."*

16. Planning permission was granted on 5 April 2019.

The relevant policies

17. National Planning Policy ("the NPPF") sets out the Secretary of State's clear policy in respect of out of centre retail development as follows,

> *"89 When assessing applications for retail and leisure development outside town centres, which are not in accordance with an up to date plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set floorspace threshold…This should include assessment of:*
> *…*
> *the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and the wider retail catchment (as applicable to the scale and nature of the scheme.*
>
> *90 Where an application fails to satisfy the sequential test or is likely to have significant adverse impact on one or more the considerations in paragraph 89, it should be refused."*(emphasis added)

18. Policy SP2 of the Council's adopted Core Strategy, which is part of the Council's development plan, reflects the presumption contained in national policy against the grant

of planning permission where proposals have a significant adverse impact on the vitality and viability of the town centre,

> *"SPATIAL POLICY 2: HIERARCHY OF CENTRES AND SPATIAL APPROACH TO RETAILING, OFFICES, INTENSIVE LEISURE AND CULTURE*
>
> *The Council supports a centres first approach supported by sequential and impact assessments. The Council will direct retailing, offices, intensive leisure and culture, and community development to the City Centre and designated town and local centres in order to promote their vitality and viability as the focus for shopping, employment, leisure, culture, and community services. Proposals which would undermine that approach will not be supported..."* (Emphasis added).

19. The reasoned justification to the policy, which was relevant to the interpretation of the policy, is as follows,

> "*4.2.6 The Core Strategy approach, in line with the Centres Study and national guidance, is to achieve growth within centres, with a 'centres first' approach, protecting the vitality and viability of centres. This requires a sequential assessment and where appropriate, impact assessment to be conducted to direct town centre uses to the appropriate level within the centre's hierarchy. Further details regarding this approach are in Policy P8."*

20. Mr Justice Holgate ordered that the Secretary of State be served with the claim bundle in order to decide whether he wished to make any submissions to assist the Court on the issues of national policy raised in this case. The Secretary of State did not participate in the hearing and took a neutral stance on the application. However, he has filed submissions through counsel, in so far as material say as follows;

> *"10. There are a number of places in which the word "should" is used in the NPPF in a wide range of contexts.*
> *11. Paragraph 90 is found in a passage of paragraphs that set out national panning policy on "Ensuring the vitality of town centres", i.e. Chapter 7.*
> *12. This contains a number of policies that apply in plan-making context and a development control context.*
> *13. Paragraph 90 is an example of the word "should" being used in a development control context.*

> *14. Paragraph 90 follows the requirement in paragraph 89 for a local planning authority to require an impact assessment in certain circumstances which should include an assessment of the impact on the proposal on private investment (89(a)) and town centre vitality and viability (89(b)).*
> *15. Paragraph 90 then says that where an application is likely to have significant adverse impact on (a) or (b) it should be refused.*
> *16. These words should be given their ordinary meaning in this context. This is that where a proposal causes (for example) a significant adverse effect on town centre and vitality it should be assessed as contrary to national policy on ensuring the vitality and vitality[sic] of town centres. This would, in the absence of any other considerations, provide a basis for refusal of the application.*
> *17. Paragraph 90 read in context does not mean that in any case where the sequential test is failed or the proposals are likely to have a significant adverse effect on planned investment or town centre vitality and viability the application must be refused. In this sense, it is not mandatory.*
> *18. Such an interpretation would (a) not give "should" its ordinary meaning, (b) be inconsistent with the duties under section 38(6) and s70(2) to have regard to all material considerations, and (c) fail to read paragraph 90 in its proper context which is within the NPPF section addressing town centres.*
> *19. These submissions only address the question of interpretation paragraph 90 NPPF and not the question of the weight to be given to it in any given case."*

21. I have set out the Secretary of State's submission at length, because in my view the NPPF is somewhat confusing in its use of phrases such as "should be refused", and there is some relevance in what the author of the policy thinks it means.

Ground of Challenge

22. There are three grounds of challenge advanced by Mr Tucker. Ground one is that the LA misapplied para 90 of the NPPF. Ground two is closely aligned to that ground, and is that the LA failed to give adequate reasons for its decision. Ground three is that the decision was manifestly unreasonable.

The law

23. The law on the correct approach to judicial reviews of planning decisions, and the analysis of officer's reports is extremely well trodden ground, and not in principle in issue. In *Mansell v Tonbridge DC* [2017] EWCA Civ 1314;

"41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in Barwood v East Staffordshire Borough Council). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. …One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in every case – good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt.

42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in R. v Selby District Council, ex parte Oxton Farms [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in R. (on the application of Siraj) v Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin), at paragraph 15).
(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in R. (on the application of Morge) v Hampshire County Council [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in R. v Mendip District Council, ex parte Fabre (2000) 80 P. & C.R. 500, at p.509)…"

24. At the heart of Mr Tucker's case is a submission that the LA misinterpreted policy in para 90 of the NPPF, by not treating it as a presumption. The approach that the Courts should take to the interpretation of policy is set out in *Tesco v Dundee CC* 2012 UKSC 13 and the subsequent decision of the Supreme Court in *Suffolk Coastal DC v Secretary of State for Communities and Local Government* 2017 UKSC 37. Again, these authorities are so well known and so often repeated that I do not think it necessary to set out the relevant paragraphs yet again. I accept, as I return to below, that this is a case which concerns the interpretation and not the application of policy.

25. Mr Tucker relies heavily on the analysis of Hickinbottom J in *Zurich Assurance Ltd v North Lincolnshire Council* [2012] EWHC 3708 for the proposition that para 90 of the NPPF creates a presumption in favour of refusal. That case concerned, inter alia, policy EC17.1 of PPS4, which for these purposes was in very similar terms to para 90 of the NPPF. It stated;

> *"EC17.1 Planning applications for main town centre uses that are not in an existing centre and not in accordance with an up to date development plan should be refused planning permission where;*
> *…*
> *(b) … the proposal is likely to lead to significant adverse impacts…."*

26. Hickinbottom J in [22] said the requirements of the policy are clear and were uncontentious between the parties, including;

> *"iv) If it has not been demonstrated, or if it has been demonstrated but there is clear evidence that the proposal is likely to lead to significant adverse impacts set out in Policies EC10.2 and 16.1, then the policy is that the application should be refused. However, that national policy (of refusing an application in these circumstances) is capable of being displaced if the planning committee considers that it is outweighed by other material considerations. That too requires the committee to perform a balancing exercise, but this exercise is performed outside the four corners of the policy: it is required because of the nature of the policy, not because of its terms. However, one negative factor that must be taken into account in this exercise is of course the fact that it is the national policy to refuse an application in these circumstances."*

27. At [40] the judge says "there is a presumption raised by Policy EC17 that the application will be refused".

> *"As I have indicated (paragraph 22(ii) above), the question as to whether an applicant has demonstrated compliance with the requirements of the sequential approach is capable of only one of two answers, "yes" or "no". If it has not demonstrated compliance, then there is a presumption raised by Policy EC17 that the application will be refused. In this case it is common ground that Simons failed to demonstrate compliance with the requirements of the sequential approach in the manner I have described (paragraphs 34-5 above)."*

28. Mr Tucker, who appeared for the claimant in that case, submitted as follows;

> *"Mr Tucker submitted that those passages displayed a fundamental misunderstanding and misapplication of Policy EC17 – because the policy does not admit of partially meeting of the sequential test. The committee, instead of being told in unequivocal terms that where there was (any) failure to meet the sequential test the national policy directed refusal of the application, were led to believe that the partial breach of the test should merely be weighed against the positive material considerations, notably the economic benefits of the development. That was a legal error with regard to the proper approach to Policy EC17, as a result of which the planning permission should be quashed."*

29. The Judge said he did not accept these submissions and said at [45iii];

> *"iii) However, that is not the end of the planning committee's exercise; because, having found that the applicant had not satisfied the sequential test (thereby giving rise to a national policy presumption of refusal), the committee still had to decide whether there are any other material considerations which displace that presumption…"*

Submissions

30. Mr Tucker points to the words of NPPF90 – where an application is likely to have a significant adverse impact "it should be refused". He submits that the members in the reasons for refusal, or any of the other relevant documentation, did not suggest that they were departing from the analysis in the OR that there would be a significant adverse

impact, or indeed the specific figure of 42% impact. He argues that in those circumstances the NPPF mandates refusal as a matter of policy. He does however accept that pursuant to s.38(6) of the Planning and Compulsory Purchase Act 2004 the Secretary of State could not actually mandate refusal, because the decision maker must under s.38(6) take into consideration other material considerations. He also accepts that pursuant *Tesco Stores v Secretary of State for the Environment* [1995] 2 All ER 636, the weight to be attached to a material condition is a matter for the decision maker, subject only to irrationality. However, he argues that properly construed NPPF90 requires the decision maker to apply a presumption, and s/he can only depart from therefore, Mr Tucker accepts that the policy does not require refusal, but it is a mandatory policy of a very high order and therefore should either be treated as a presumption, or involve a "tilted balance" or require the members to explicitly set out a good reason for departing from it.

31. Mr Tucker argues that for the members to apply the policy they must properly understand it, and looking at the reasons and in particular the reference to benefits being outweighed by harm, it appears the members did not properly understand the policy. Members wrongly thought that they were applying a simple planning balance, as opposed to a presumption or tilted balance in NPPF90.

32. Mr Tucker accepts that ground two is parasitic on ground one, so if he fails on ground one he fails on ground two. He says that the failure to set out a good reason for departing from NPPF90 is a failure to give adequate reasons.

33. On ground three Mr Tucker accepts that irrationality is a particularly high test in the planning context, see *Newsmith v Secretary of State for the Environment*. However, he argues that the test is met here, because the reasons refer to the potential to "boost" trade at the centre, but the members had accepted a significant impact.

34. Ms Hall, on behalf of the Council and Mr Warren for the Interested Party, both argue that NPPF90 does not create a presumption, and does not legally change the normal approach to weight in decision making being a matter for the decision maker, as set out by Lord Hoffman in *Tesco Stores*. Ms Hall took me through the NPPF to show me that in paras

11-14 the NPPF uses the word "presumption" and in that context the Government plainly intended there to be a true presumption and a tilted balance. In other places, such as paragraph 80 the NPPF says "significant weight should be placed…." and para 130 "permission should be refused", but these do not require the decision maker to apply a presumption or a tilted balance, and they are merely an indicator of the importance that the Government places on those particular policies. She says that if the Government intended a presumption, or equivalent effect, then that would have been made clear.

35. She says that Mr Tucker's argument would make the policy framework virtually unworkable because there would be competing presumptions, which would on the facts of particular cases have to be balanced against each other. She also pointed out that Mr Tucker was not arguing that there was a breach of SP2, which does not use the words "should be refused", but rather says that applications which have a significant adverse impact "will not be supported". But SP2 must be in conformity with the NPPF or it would not have been found to be sound. Therefore, the logic of Mr Tucker's argument is either that SP2 is not sound, or that the words "will not be supported" also create a presumption.

36. Ultimately Ms Hall argues that there is no magic in NPPF90 and it merely reflects the normal planning decision making structure, of weight being a matter for the decision maker.

37. On ground three Ms Hall argues that the reference to a potential boost to the town centre is plainly a reference to mitigation of the adverse impact which had already been accepted, rather than the members deciding that there would be an overall boost.

38. Mr Warren supported Ms Hall's submissions. He made the following points. Firstly, NPPF90 and the NPPF generally were not to be read as a statute. Secondly, the policy in that paragraph is not of a different order to the rest of the document and does not create a presumption. Thirdly, the words "should be refused" do not say "in all circumstances". It is a negative marker, or directory policy and cannot be anything else as a matter of law. Fourthly, the Secretary of State's submissions should be read as a whole and although the wording is not wholly satisfactory, it is quite clear that the NPPF does not intend to place adverse retail impact in the same category as the items covered by footnote 6 of the

NPPF. Fifthly, members had been properly advised as to what para 90 said and it is clear from the minutes and the OR what the members meant and why they departed from the officer's recommendation. Finally, he said there was nothing irrational about the conclusion because members had plainly accepted the significant impact but thought there was scope for mitigation.

39. In his skeleton and his opening Mr Tucker referred to para 90 as creating a "presumption" in favour of refusal. He relies on the judgment of Hickinbottom J in ***R (Zurich Assurance) v North Lincolnshire Council*** [2012] EWHC 3708 at [45-46], where the Judge refers to the equivalent policy in PPS4 creating a "national policy presumption of refusal", see [45iii]. He argues that when the Committee came to its reasons, as set out at xxx above, there is no reference to any presumption and the Committee simply refer to "placing greater weight on the benefits of the scheme". They therefore carried out a simple balance, rather than according either appropriate weight, or has he argued a tilted balance, because of the breach of para 90.

40. Ground Two is effectively parasitic upon ground one, because if there was no legal requirement to approach para 90 in a different way, then the reasons would be adequate. If however, Mr Tucker is correct on ground two, then the reasons fail to adequately explain how the proper approach to the presumption in para 90 was applied.

41. Ground three is that the members said in their reasons that "the proposal has the potential to boost trade in Middleton District centre by new linked trips", which Mr Tucker says is irrational because they had accepted that there would be a significant adverse impact on the town centre.

Conclusions

42. Mr Tucker accepts that members were properly, and fully advised, as to the wording of NPPF [90]. It therefore cannot be argued that the members did not take into account the policy, and were not fully aware of it. Mr Tucker also accepts that pursuant to s.38(6) PCPA it was open to members to depart from the NPPF, and any breach of the NPPF could have been outweighed by other factors, including those that the members set out in their reasons. The issue is solely whether they were misdirected and misunderstood the policy because they believed the weight that they attached to the material

considerations was a matter for them and they were simply applying an unweighted balance, rather than some form of tilted balance.

43. In my view Ms Hall and Mr Warren QC are correct in their analysis of NPPF[90], albeit the terminology used is confusing, and seems to set a trap for decision makers. The NPPF has to be read as a whole, and in a way that makes sense of the document as a whole. In para 11-14 of the NPPF the Secretary of State has used the specific term "presumption" in relation to sustainable development, and has set out a structure by which that presumption is to be applied, and in particular circumstances outweighed. This includes footnote 6 which explains how the presumption works in particular types of case (not including those that fall within para 90). As all those engaged in planning law now know, para 11-14 creates a "tilted balance" which gives effect to the presumption, ***Hopkins Homes*** [2017] UKSC 37.

44. By contrast in NPPF90 the word "presumption" is not used, nor is there any suggestion of a tilted balance; or any attempt to tell decision makers that they should put more weight on one factor rather than another. It is not entirely clear whether the Secretary of state could lawfully mandate a decision maker to accord a particular factor particular weight, given the words of s.38(6) and the judgement of Lord Hoffman in ***Tesco Stores***, that weight is always a matter for the decision maker. However, the breadth of that issue is not before me in this case. What is clear is that the Secretary of State has not tried to do so in NPPF90. It is again notable that there are paragraphs in the NPPF where the Secretary of State does say, as a matter of policy, that particular weight should be given to particular matters, e.g. para 80 where significant weight is to be accorded to economic growth. I therefore do not think that Mr Tucker's argument is correct on a textual analysis of the NPPF as a whole.

45. Further, Mr Tucker's approach would create a legal minefield for decision makers with potentially different presumptions pulling in different directions. This is precisely the type of excessive legalism which Lindblom LJ warned against in [41] of ***Mansell***. In para 130 the NPPF says that "permission should be refused for development of poor design…". If Mr Tucker is right and NPPF90 creates a presumption, or places a legal requirement for particular weight to be attached, then it must follow that para 130 does

so as well. So there would then be at least three presumptions, para 11, para 90 and para 130 which could well lead to different outcomes. It would be very unclear how the express presumption in favour of sustainable development at paras 11-14, would play against the implicit presumption in paras 90 and 130.

46. As I have set out above Hickinbottom J (as he then was) in *Zurich Assurance* did use the language of "presumption" when considering EC17.1 of PPS4, which was for these purposes in identical terms to NPPF90. However it is important to note that the word "presumption" had been advanced by Mr Tucker in that case, and there was no consideration of the consequences of the policy being described as a presumption, or how that would work in the wider policy context. Most importantly, Hickinbottom J in [22iv] and [45iii] seems to have accepted that the decision maker would continue to undertake a balancing exercise, in which the ascription of weight was for the decision maker on normal *Tesco Stores* principles. Therefore, I do not think that there is anything inconsistent in the present case to the conclusion reached in *Zurich Assurance*.

47. It follows from these findings on ground one that ground two must also be rejected. There can be no failure to give adequate reasons, if there was no misinterpretation of the policy by the members. Therefore, grounds one and two are rejected.

48. Ground three also fails. It is clear from a full reading of the history of the matter that members were fully aware of the significant adverse effect on the Middleton town centre, and did not dispute that finding. Therefore, when they referred to the application scheme having the potential to boost the centre, they can only have meant boost after the significant adverse effect. To find otherwise would be to take the members' reasons completely out of context. I therefore reject ground three.