Neutral Citation Number: [2024] EWHC 930 (Admin)

Case No: AC-2023-LON-002486

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 April 2024

Before :

Mr James Strachan KC sitting as a Deputy Judge of the High Court

- -

Between :

MID SUFFOLK DISTRICT COUNCIL	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES **(2) GLADMAN DEVLOPMENTS LTD**	**Defendants**

- -
- -

Mr Tom Cosgrove KC and Jack Parker (instructed by **Mid Suffolk District Council**) for the Claimant
Matthew Fraser (instructed by **Government Legal Department**) for the **First Defendant**
Guy Williams KC (instructed by **Addleshaw Goddard LLP**) for the **Second Defendant**

Hearing date: 30-31 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 2.00pm on 23 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JAMES STRACHAN KC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a claim under section 288(4A) of the Town and Country Planning Act 1990 ("the 1990 Act") by Mid-Suffolk District Council ("the Claimant"), the local planning authority, challenging a decision dated 26 July 2023 ("the Decision") of a planning inspector, Stephen Wilkinson BA BPI Dip LA MBA MRTPI ("the Inspector") appointed by the Secretary of State for Levelling Up, Housing and Communities ("the 1st Defendant").

2. The Inspector allowed an appeal made under section 78 of the 1990 Act by Gladman Developments Ltd ("the 2nd Defendant") against the Claimant's non-determination of the 2nd Defendant's application for outline planning permission in respect of Land east of Ixworth Road, Thurston, Suffolk ("the Appeal Site") for:

   "Up to 210 dwellings and new vehicular access to include planting and landscaping, natural and semi natural greenspace(s), children's play area and sustainable drainage system (SuDS), to include 35% affordable dwellings" ("the Development").

3. Permission to bring the challenge was granted by the Hon. Mrs Justice Lang DBE by Order dated 3 October 2023 on the two grounds set out in the Claimant's Statement of Facts and Grounds. These are:

   a Ground 1 - a contention that the Inspector misinterpreted Policy SP03 of the emerging Babergh and Mid Suffolk Joint Local Plan ("the EJLP"), or in dealing with that emerging policy, the Inspector failed to take into account relevant factors, acted irrationally, or failed to provide adequate reasons.

   b Ground 2 - a contention that the Inspector erred in his approach to carrying out the balancing exercise required under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), in circumstances where it was agreed that the Development was contrary to the statutory development plan taken as a whole, by reason of conflict with policies CS1 and CS2 of the Core Strategy Focused Review 2012 and Policy H7 of the Mid Suffolk Local Plan 2018.

4. The two grounds of challenge therefore both turn on the particular approach adopted by the Inspector as set out in his Decision.

5. At the hearing of the claim, the Claimant was represented by Tom Cosgrove KC and Jack Parker of Counsel, both of whom addressed me orally. The 1st Defendant was represented by Matthew Fraser of Counsel. The 2nd Defendant was represented by Guy Williams KC. I record at the outset my thanks to them all for the quality and clarity of their oral and written submissions.

The Factual Background

6. The Appeal Site is located adjacent to, and therefore outside, the settlement boundary of the village of Thurston in Suffolk. It is agricultural land. It is common ground that it is located in the countryside for the purpose of relevant development plan policies.

7. The outline planning application was originally made to the Claimant as long ago as 1 May 2019. It was first considered by the Claimant's Planning Committee on 20 September 2020. At that meeting the Claimant resolved to grant planning permission, subject to completion of a satisfactory agreement under section 106 of the 1990 Act.

8. In the event, the Claimant did not issue the planning permission at that time because of an outstanding judicial review claim that had been brought by Thurston Parish Council against the Claimant's grant of planning permission for another housing development in respect of the same settlement. The Claimant took the view that the judicial review claim raised issues which required resolution before any permission for the 2nd Defendant's Development could be issued.

9. The judicial review claim was not finally determined until the Court of Appeal gave judgment in October 2022 - see *R(Thurston Parish Council) v Mid Suffolk District Council* [2022] EWCA Civ 1417 - and then an application for permission to appeal to the Supreme Court had been rejected by the Supreme Court.

10. The Claimant's position was that in the intervening period between its resolution to grant planning permission, and the conclusion of the Thurston Parish Council judicial review proceedings, the planning context had changed in several regards which led it to change its stance on the Development.

11. Amongst other things, the Claimant pointed to the fact that during that intervening period, the Claimant had been progressing a new development plan for the area, namely the EJLP. As it happens, a final version of the EJLP was formally adopted by the Claimant on 20 November 2023. That adoption took place after the Inspector's decision in this case. The Claimant's position before the Inspector was that significant progress had been made towards its adoption. The Claimant sought to rely on that progress and the terms of the EJLP in its case opposing the Development.

12. When the 2nd Defendant's planning application had first been considered by the Claimant in September 2020, the Appeal Site had been proposed for allocation as a residential development site in the version of the EJLP that existed at that time. This proposed allocation had been treated by the Claimant in September 2020 to be a material consideration which set the "direction of travel" as a means of addressing local and district housing needs, even though the Claimant was able to demonstrate that it had over five years' supply of housing for the purposes of paragraph 74 of the National Planning Policy Framework ("the NPPF").

13. That version of the EJLP had been submitted to the 1st Defendant for examination in March 2021. Hearing sessions were held later in that year before the appointed Examining Inspectors. At hearing sessions held in the week of 18th October 2021 dealing with 'Matter 4 – Settlement Hierarchy, Spatial Distribution of Housing and Housing Site Selection Process', the Examining Inspectors had raised a number of concerns about those aspects of the EJLP. Following correspondence, the Examining Inspectors wrote to the Claimant on 9 December 2021 expressing their views that a fundamental review of the approach to these aspects of the EJLP were likely to be necessary. The Examining Inspectors stated in that letter (amongst other things):

"6. We recognise that a large proportion of the housing site allocated in the plan already have either full or outline planning permission. As a result it is very likely that the majority of them will be implemented. However, if these sites appear in the plan as allocations they have a formal planning status of significance if the existing permission are not implemented. Consequently, notwithstanding the existing permissions, these sites need to be robustly justified in their own right against possible alternative sites and form part of a robust spatial strategy.

7. Furthermore, we understand that across the two districts, around 90% of the housing requirement figure detailed in policy SP01 is already provided for by existing completions, sites under construction, sites with full or outline planning permission, sites with a resolution to grant planning permission subject to s106 agreement, allocations in made Neighbourhood Plans and the, reasonable, allowance for 1,000 windfall dwellings. This unusual situation means that demonstrating a supply of developable housing land for the vast majority of the plan's overall housing requirement figure is, for some years to come, unlikely to be dependent on the allocation of the housing sites included in the submitted plan.

8. Whilst we cannot reach final conclusions on the other aspects and policies of the plan at this stage (pending consultation on Main Modification and further SA/HRA work), we anticipate that, subject to the Main Modifications discussed at the hearing sessions, it is likely that we will be able to find them sound.

9. On this basis and subject to detailed discussion and consultation and necessary alteration to the Council's Local Development Schemes, we currently consider that the most appropriate way forward would be to:

- Delete policies SP04, LP09, LP30 and the LS01 and LA housing allocation policies;

-Retain the settlement boundaries in the current (as opposed to proposed) policies map;

-Significantly modify policies SP03 and LP01 to make clear where new housing development will be permitted;

…

10. In essence the plan would be a "Part 1" local plan, to be followed by the preparation and adoption of a "Part 2" local plan as soon as possible. The "Part 2" plan (and associated policies map alterations) would be likely to include:

- An up-to-date, robust settlement hierarchy;

- A spatial distribution for any housing allocations included insofar as are necessary to provide flexibility and ensure that the plan period housing requirement can be met;

- Consequent housing requirement figures for Neighbourhood Plan areas;

-Up-to-date and robustly justified settlement boundaries reflecting commitments and allocations;

…

11. In essence the preparation of the Part 2 plan would involve the same work detailed in paragraph 2 above, but could be undertaken, outside the constraints and difficulties

of a "live" local plan examination, and with the benefit of an up to date plan in place setting out a housing requirement figure and development management policies.
…"

14. The Claimant agreed in principle to the way forward proposed in the Examining Inspectors' letter. The Claimant communicated this to them by letter dated 10 December 2021. Work therefore began on proposed modifications to the EJLP.

15. In the meantime, in February 2023, the 2nd Defendant exercised its right of appeal under section 78 of the 1990 Act against the Claimant's non-determination of its extant outline planning application.

16. As a result of submitting that appeal, the planning application was reconsidered by the Claimant at a planning committee meeting on 8 March 2023. The Claimant resolved that if the appeal against non-determination had not been made, it would have refused the application on the basis that:

'The proposed development located, as it would be, outside the defined settlement boundary for Thurston and within the countryside, is contrary to Mid Suffolk's Core Strategy policies CS1 and CS2 and Local Plan policy H7. The application would not comply with the development plan as a whole. In applying the tilted balance, and recognising the primacy of the development plan, the harm in allowing a significant number of further dwellings to be released in the absence of any real and demonstrable district or local need, contrary to the development plan, significantly and demonstrably outweighs the benefits.'

17. This therefore represented a fundamental change in its stance from September 2020 when the Claimant had resolved to grant planning permission.

18. Meanwhile, as a result of the Claimant's further work on the EJLP, the Claimant published its proposed 'Main Modifications' to the EJLP for public consultation. That consultation process ran from 16th March 2023 to 3rd May 2023. In the Main Modifications proposed by the Claimant, the policy allocating the Appeal Site for housing was proposed for deletion. The Claimant subsequently relied upon this in responding to the Second Defendant's appeal before the Inspector, in addition to what was identified in its putative reason for refusal that arose from its decision on 8 March 2023.

19. In addition, before the Inspector determining the appeal, the Claimant also relied on:

    a. the fact that the Claimant considered it could now demonstrate 10.88 years' supply of housing, so almost double the supply which had existed when the planning application had been originally considered by the Claimant in September 2020;

    b. a number of planning permissions that had been granted in Thurston, adding to the supply of market and affordable housing in the village itself.

20. The inquiry into the 2nd Defendant's appeal was heard by this Inspector between 4-6 July 2023. The Inspector conducted a site visit on 5 July 2023.

21. At the inquiry, both the Claimant and the 2nd Defendant were in agreement that, by reason of its location in the countryside, the proposed Development was contrary to the statutory development plan when taken as a whole and, in particular, contrary to three policies: CS1 and CS2 of the Core Strategy Focused Review 2012 and Policy H7 of the Mid Suffolk Local Plan 1998.

22. That common position was recorded in paragraph 2.1.3 of a Statement of Common Ground produced for the appeal. It was therefore not in dispute that, in consequence of section 38(6) of the 2004 Act taken with section 70(2) of the 1990 Act, the appeal fell to be dismissed as involving development contrary to the development plan, unless there were material considerations indicating otherwise.

23. The Claimant submits that its case to the Inspector in response to the appeal was that permission should be refused because of: (1) a conflict with the development plan as a whole, so that the statutory presumption against a grant of permission in s 38(6) of the 2004 Act was engaged; and (2) although key policies CS1, CS2 and H7 could be considered technically out of date by reason of inconsistent language with the NPPF, such that the tilted balance under paragraph 11 of the NPPF applied, the key policies of the adopted Development Plan should be accorded very significant weight in the relevant planning balance, on the basis that the EJLP was now at an advanced stage and it had removed the Appeal Site as an allocation for housing; and (3) what was considered to be the very high level of extant housing supply both in the district and in Thurston itself.

24. The Claimant called five witnesses to give evidence at the inquiry to support its case. One of these dealt with housing supply matters, and one dealt with planning policy and the planning balance.

25. The 2nd Defendant called three witnesses to give evidence and to support its appeal, including its Head of Planning and one of its Senior Planners.

26. As part of its case and presentation of evidence, the Claimant drew particular attention to paragraph 48 of the NPPF and the policy that decision makers may give weight to relevant policies in emerging development plans according to: (1) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given); (2) the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and (3) the degree of consistency of the relevant policies in the emerging plan to the NPPF (the closer the policies in the emerging plan to the policies in the NPPF, the greater the weight that may be given).

27. The Claimant submits that it was an important part of its case (as set out in its closing submissions to the Inspector at paragraph 57), that the proposed development would be in conflict with Policy SP03 of the EJLP, which it stated the Second Defendant's planning witness had agreed when giving his evidence to the inquiry. The Claimant's position was that moderate weight should be accorded to that conflict in the planning balance, in light of paragraph 48 of the NPPF, on the basis that:

    a. the EJLP was at an advanced stage;

    b. while there were outstanding objections to the EJLP, the modifications proposed by the Claimant to Policy SP03 conformed with the expectation of the

Examining Inspectors in their letter of 9 December 2021; the Claimant contended that the policy in question recognised, in light of the latest evidence, that the identified housing need had very largely already been provided, and so it removed sites (such as the appeal site) from being allocated for housing; the Claimant also submitted that as evidenced during the inquiry, there was no indication from the Examining Inspectors at the hearing sessions which had taken place in the week preceding the appeal inquiry that there was any reason to think that the Examining Inspectors were not satisfied with the soundness of Policy SP03 (or any other policy of the EJLP) as proposed in its Main Modifications; and

c. there was nothing in Policy SP03 which was inconsistent with the NPPF.

The Inspector's Decision

28. The Inspector identified the main issue arising on the appeal in paragraph 6 of his Decision as follows:

> "6. The appeal raises the following issue:
>
> - Whether or not the location of the proposed development is acceptable having regard to adopted national and local policies and those emerging in the Joint Local Plan."

29. There is no challenge by the Claimant to the Inspector's identification of this as the main issue for his determination.

30. The Inspector then addressed what he considered to be relevant planning history at paragraphs 7-13. Again, there is no challenge to this part of the Inspector's reasoning. In view of the grounds of challenge, and the required legal approach to considering an Inspector's Decision of this kind, I consider it helpful to set out this part of the Inspector's reasoning (omitting the footnotes that provide references to the relevant Core Documents before the Inquiry):

> "7. In January 2020 a resolution was agreed that outline permission be granted for 210 dwellings on a site of Beyton Road, Thurston (the Bloor Homes site). A successful challenge lodged by the Parish Council in the High Court against the Council's decision was subsequently overturned by the Court of Appeal in October 2022; the permission was retained.
>
> 8. In September 2020 the Council resolved to grant planning permission, for what has now become the appeal scheme, subject to the completion of a S106. Given the similarities between the appeal scheme and the Bloor Homes scheme i.e. they both lie on the outside edge of the settlement boundary of Thurston, the Council stayed further work on the S106 until the outcome of the challenge had been resolved. The S106 was completed in November 2021.

9. In March 2021 the Council submitted the draft EJLP to the Secretary of State. The draft plan included Thurston as a focus for housing development and allocated the appeal site for approximately 200 houses (reference LA089).

10. Hearing sessions into the emerging local plan were suspended owing to the Examining Inspectors (ExI) concerns over the strategy and the housing allocations. The ExI in noting that around 90% of the total housing requirement figure was included in existing completions, sites under construction and sites with full or outline permission, advised the Council that a review was required of both the settlement hierarchy and the proposed housing allocations.

11. The Council, substantially revised the EJLP, with a draft Part 1 now focused on the joint vision, strategy and development management policies. There is no programme for the Part 2 plan which would address the settlement hierarchy, the boundaries and site allocations. The appeal site was removed as a housing allocation as part of the Main Modifications.

12. Following the lodging of this appeal over the non-determination of the application the Council at its meeting of 6 March 2023, resolved that it would have refused permission due to the location of the site beyond the settlement boundary in conflict with Policies CS1, CS2 of the Core Strategy and Policy H7 of the Mid Suffolk Local Plan.

13. Since 2020, the Council's housing land supply position increased from 5.4 to 10.88 (May 2023) years supply."

31. In my judgment, it can be seen from these paragraphs that the Inspector had well in mind, amongst other things: (1) that the grant of planning permission for the Bloor Homes Site at Thurston had been upheld as a result of the judicial review proceedings; (2) the nature of the concerns expressed by the Examining Inspectors to the EJLP; (3) the Main Modifications to the EJLP included proposing the deletion of the allocation of the Appeal Site; and (4) the Claimant's housing land supply position was 10.88 years' supply as at May 2023, in contrast to the 5.4 years' supply that had existed in 2020.

32. At paragraphs 14-21 of his decision letter, the Inspector then turned to deal with the location of the proposed development in terms of policy considerations.

33. In paragraph 14 he dealt with its physical location on the northern edge of Thurston, along with its relationship with two other development sites to the west and east which formed part of the "Thurston 5". This was a description of five development sites at Thurston benefitting from planning permission for the provision of a total of around 827 dwellings. I consider the Inspector was therefore well aware of, and was referring to, the further sources of supply of new housing for Thurston itself.

34. At paragraph 15 the Inspector dealt with the locational characteristics of the Appeal Site relative to the village centre, along with matters of landscape character and appearance. He identified that the Claimant had no objection to the Appeal Site in terms of proximity to services and the ability to access active travel modes, and he recorded the absence of any objection on landscape character and appearance.

35. At paragraph 16 he returned to the issue of housing land supply as follows:

> "16. Both parties agree that there is 10.88 year housing land supply and that the site lies outside the settlement boundaries contrary to the most important policies included in the Development Plan which includes Policies CS1, CS2 and H7."

36. The Inspector was therefore expressly referencing the common ground between the Claimant and the 2nd Defendant that there was 10.88 years' supply of housing land as at the time of the determination of the appeal, and that the Appeal Site was outside the relevant settlement boundaries, and so the development was contrary to what were considered to be the most important policies in the adopted Development Plan, specifically including Policies CS1, CS2 (of the Core Strategy Focused Review) and H7 (of the Local Plan).

37. The Inspector then continued in respect of his analysis of those policies and the Thurston Neighbourhood Plan ("TNP") as follows:

> "17. Together these three policies aim to direct development to towns and key service centres such as Thurston. Outside these centres whilst Policy CS1 requires that local housing needs could be located in primary and secondary villages, Policy CS2 aims to protect the countryside for its own sake with development restricted to specific types of development which do not include major housing development. Policy H7 seeks the protection of the existing character and appearance of the countryside requiring strict control over new housing.
>
> 18. I find that together these three policies service to focus development within the settlement boundaries of the main settlements based on the adopted hierarchy identified in the Core Strategy.
>
> 19. On the advice of the Neighbourhood Plan Examiner the TNP now includes the Thurston 5 within its settlement boundary. However this boundary does not include both the appeal site and the Bloor Homes site.
>
> 20. The Court of Appeal's judgment in the Bloor Homes case, clarified the interpretation of the policies of the TNP with their application. This identified that the Council's decision to grant permission for that scheme did not conflict with the TNP. This is a matter of common ground between the two main parties and I find that the same circumstances apply in this instance. Whilst I recognise that there is a tension between the policies of the TNP and the appeal site's location beyond the settlement boundary this does not amount to a policy conflict.
>
> 21. I conclude therefore that the proposed scheme conflicts with Policy H7 of the Local Plan and Policies CS1 and CS2 of the Core Strategy."

38. In reaching this conclusion, the Inspector was therefore concurring with the agreed position between the main parties in the Statement of Common Ground.

39. The Inspector then turned to address "Material Considerations" under a separate sub-heading. It is apparent from the well-known wording of the statutory scheme that the reasoning in the earlier paragraphs was directed towards reaching his conclusion about whether or not the Development conflicted with the development plan - relevant for the consideration of the first part of section 38(6) of the 2004) – and the Inspector was therefore now turning towards the second part of that statutory provision, namely the question of whether or not there were "other material considerations" that might indicate determination of the application otherwise than in accordance with the development plan.

40. In this respect, at paragraph 22 the Inspector identified that both parties differed on the weight that they applied to additional market and affordable housing, new open space, highways connectivity, ecological benefits and economic benefits which arose from the scheme. These were, in reality, the main material considerations on which the 2nd Defendant was relying to address conflict with the development plan.

41. The Inspector dealt with each of these topics in turn under a series of sub-headings, the first of which was "Housing". This was dealt with in paragraphs 23-29 as follows:

> "23. The appeal scheme includes 135 market and 75 affordable homes.
>
> 24. The ExI identified that the two Councils (Babergh and Mid Suffolk) have around 90% of their total housing requirement included in sites benefiting from full or outline planning permission, resolution to grant permission, allocations in Neighbourhood Plans and windfall allowances.
>
> 25. The Council's own housing figures which are not disputed by the appellant, identify that it has a total committed supply of around 7,882 dwellings. When account is taken of completions for the period 2018-2021 and anticipated windfalls the total identifiable supply at April 2022 was 10,185 amounting to 100% of its local housing need for the plan period. Delivery of affordable housing in the period 2018-2022 has been in excess of need by around 127 units.
>
> 26. This picture is reflected in the figures for Thurston where the total number of homes expected to be delivered in the period 2022 to 2027 is around 707 out of a total of around 881 for the whole of the plan period. Within these figures, 291 will be affordable homes.
>
> 27. I accept that these figures would be in excess of the numbers of households in the housing register and particularly high when considered for those households which have a local connection to Thurston.
>
> 28. However, the District still experiences chronic levels of housing need as demonstrated by the increasing 'median affordability ratios' which are higher for the District than that of the County and the East of England. Furthermore, the District still has unacceptably high waiting times for family sized dwellings.
>
> 29. The Government's objective of significantly boosting the supply of new homes expressed in paragraph 60 of the National Planning Policy Framework (the Framework) remains a priority. Whilst the weight which I attach to the delivery

of market and affordable housing is tempered by the Council's delivery record and HLS, I still accord the market and affordable housing included in this scheme limited and moderate weight respectively."

42. The Inspector therefore decided to attach limited weight to the delivery of market housing from the Appeal Scheme, but moderate weight to the delivery of affordable housing, in light of the factors he had identified.

43. The Inspector then dealt in a similar fashion with "Highway Matters" at paragraphs 30-38, "Ecology" at paragraphs 40-42, "Open Space" at paragraphs 43-44, and "Economic Benefits" at paragraphs 45-46 explaining the weight he had decided to attach to these matters respectively, before setting out his conclusions on these issues at paragraph 47 as follows:

> "47. I accord the benefits derived from the inclusion of affordable housing, highways and economic benefits moderate weight. Market housing, ecology and open space would have limited weight."

44. The Inspector then turned at paragraphs 48-57 of his Decision to consider the planning obligations that were being proposed in the section 106 agreement.

45. The Inspector then addressed the planning balance at paragraphs 58-73. He began by referring to the statutory scheme and the NPPF as follows:

> "58. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that planning decisions are made in accordance with the development plan unless material considerations indicate otherwise.
>
> 59. Both parties acknowledge that the most important policies are out of date. This is a matter which I consider in detail later in this decision. In these circumstances, the Framework advises that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits.
>
> 60. However, the fact that policies have to be considered as out of date does not mean that they carry no weight. To carry weight policies must be consistent with the Framework, as explained in paragraph 219 which amongst, other things, explains that the closer that policies in the plan are to policies in the Framework, the greater weight that may be given to them. As such it is perfectly possible for policies which are deemed out of date to still carry significant weight."

46. Against this background, under the sub-heading "*Development Plan*", the Inspector carried out an assessment of the consistency of key development plan policies with the NPPF, namely Policy CS1 and Policy CS2 of the CS and Policy H7 of the Local Plan as follows:

> "61. Policy CS includes a settlement strategy requiring new development to be located within existing settlements with limitations on development which would be allowed in the countryside. The policy is consistent with the social and environmental objectives of the Framework in directing development to the

main centres across the district thereby reducing reliance on private transport and leading to the protection of the natural environment.

62. Policy CS2 identifies categories of development which would be allowed in the countryside outside the main centres defined by CS1. This is restrictive in nature and inconsistent with the Framework in the degree of protection it would afford the countryside compared to the more nuanced approach now required by the Framework. Whilst I regard Policy H7 as being consistent with both Policies CS1 and CS2 in seeking to protect the countryside it refers to the protection of the existing character and appearance of the countryside. Landscape considerations are not part of the Council's case.

63. For the reasons which I explained above I do not find conflict between the policies of the TNP and the appeal scheme. The appeal scheme may be inconsistent with the TNP but this does not amount to direct conflict.

47. The Inspector then set out his judgment in paragraph 64:

"64. For these reasons, despite the Council's HLS position, I accord the appeal scheme's conflict with these three policies, the most important ones for the decision, only limited weight."

48. The Inspector then turned to deal with the EJLP under the relevant sub-heading in paragraphs 65-68 of his decision, concluding with his judgment on that topic as follows:

"*Emerging Joint Local Plan*

65. The Council states that the appeal scheme would be contrary to the draft policies of the EJLP.

66. The Council's revised EJLP (Part 1 only) broadly reflects the advice of the ExI in substantially revising the draft plan into two parts. Hearings into the Main Modifications for the Part 1 plan were closed in the week before the Inquiry opened. Although at an advanced stage of preparation significant changes were made to its policies from those submitted to the Secretary of State and the outcome of the Hearings is unknown.

67. The draft Part 1 policies seek the retention of the existing settlement boundaries. Consequently, the bulk of extant permissions which would achieve the EJLP's housing requirement lie on sites beyond them. Part 2 is embryonic with matters such as the settlement strategy, hierarchy and boundaries still to be determined.

68. For these reasons, I accord the EJLP very limited weight."

49. Having considered the policies in this way, at paragraphs 69-73 the Inspector then considered the question of other material considerations under the sub-heading "Material Considerations". In so doing, he referred back to the judgments on weight he had already reached earlier in his decision as follows:

"*Material Considerations*

69. Set against the limited weight I accord to the conflict between the appeal scheme and the most important policies, it would include affordable housing, highway works and economic benefits which I accord moderate weight with limited weight for market housing, public open space and ecology.

70. Whilst the level of local housing need is not acute as in the Melford Case there is still a need for affordable housing across the S[trategic]H[ousing]M[arket]A[rea] which the appeal scheme would contribute to. In this case, the S106 includes obligations requiring affordable housing to be directed to the provision of family housing. This is an area of recognised need within the district.

71. I acknowledge the force of the Council's argument regarding the need for public confidence in a plan led system but find that in this instance the most important policies do not hold when balanced against the material considerations.

72. I recognise that my findings in this respect do not reflect recent decisions of my Inspector colleagues. However, whilst I do not have the full details of these cases before me, they were either for smaller numbers of units which did not for example include affordable housing or, if for larger schemes involved consideration of a broader suite of policies where other considerations prevailed.

73. The appeal scheme lies in a location which allows access to services through a choice of transport modes and would not result in landscape harm."

50. The Inspector then set out his overall conclusions as follows:

"**Conclusions**

74. This is a finely balanced decision given the Council's HLS position. Overall, I conclude that the benefits of the appeal scheme would significantly and demonstrably outweigh the harm identified when assessed against the policies of the Development Plan, when taken as a whole. As such the proposed development benefits from the Framework's presumption in favour of sustainable development.

75. Accordingly, the appeal is allowed and planning permission is granted."

Legal Framework

51. Section 38(6) of the 2004 Act, taken in conjunction with section 70(2) of the 1990 Act, provides that an application for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.

52. The Inspector identified the relevant parts of the adopted development plan in paragraph 4 of his Decision, before then referring to progress in respect of the EJLP at paragraph 5, as follows:

> "4. The development plan includes, the Mid Suffolk Local Plan 1998 (MSLP), with Alterations 2006, the Mid Suffolk Core Strategy (CS) 2008 and the Core Strategy Focused Review (CSFR) 2021 and the Thurston Neighbourhood Plan (TNP) 2019.
>
> 5. Hearings into the Main Modifications of the emerging Joint Local Plan (EJLP) with Babergh District Council have recently been completed. Although the policies of the EJLP are not cited in the Council's putative reason for refusal, references were made to both its evidence base and its draft policies during the inquiry."

53. Principles applicable to the application of s.38(6) of the 2004 Act were summarised by Lindblom LJ in *Secretary of State for Communities and Local Government v BDW Trading Ltd (t/a David Wilson Homes (Central, Mercia and West Midlands))* [2017] PTSR 1337, and then again in *Gladman Developments Ltd v SSHCLG* [2021] PTSR 1450 at [21]-[23] as follows:

> "21. First, the section 38(6) duty is a duty to make a decision (or "determination") by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde's speech in *City of Edinburgh Council*, at p.1458D to p.1459A, and p.1459D-G). Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull in different directions (see Lord Clyde's speech in *City of Edinburgh Council*, at p.1459D-F, the judgments of Lord Reed and Lord Hope in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, respectively at paragraphs 19 and 34, and the judgment of Sullivan J., as he then was, in *R. v Rochdale Metropolitan Borough Council, ex p. Milne* [2001] JPL 470, at paragraphs 48 to 50). Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides "whether the development plan should or should not be accorded its statutory priority", and secondly, "if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration" (see Lord Clyde's speech in *City of Edinburgh Council*, at p.1459H to p.1460D). Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole (see the judgment of Richards L.J. in *R. (on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA 878, at paragraph 28, and the judgment of Patterson J. in *Tiviot Way Investments Ltd. v Secretary of State for Communities and Local Government* [2015] EHWC 2489 (Admin), at paragraphs 27 to 36). And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance (see the judgment of Richards L.J. in *Hampton Bishop Parish Council*, at paragraph 30).

22. The authorities contain several passages relevant to the issue here. The first is in Lord Clyde's speech in *City of Edinburgh Council* (at p.1459H to p.1460C):

> "… [In] my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. … In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."

23. On the same theme Richards L.J. said in his judgment in *Hampton Bishop Parish Council* (at paragraph 28):

> "… It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. … ."
>
> Richards L.J. added (in paragraph 33) that if the decision-maker does not do that he will not be in a position to give the development plan what Lord Clyde described in *City of Edinburgh Council* as its "statutory priority". He went on (in the same paragraph) to recall Lord Reed's observation in *Tesco v Dundee City Council* (at paragraph 22) that "it is necessary to understand the nature and extent of the departure from the plan … in order to consider on a proper basis whether such a departure is justified by other material considerations".

54. Other material considerations in this context include national policy as expressed in the NPPF. In *Barwood Strategic Land II LLP v East Staffordshire Borough Council & Anor* [2018] PTSR 88 Lindblom LJ considered relevant policy in the NPPF, including what is often referred to as the "tilted balance" (in paragraph 14 of the NPPF as it stood at that time, but now paragraph 11 in the NPPF version before this Inspector) as follows:

> "22. Under the Government's policy in the NPPF, a local planning authority's failure to "demonstrate a five-year supply of deliverable housing sites" when a decision is being made on an application for planning permission, or on a subsequent appeal, is not a failure without consequence. That is well illustrated by the recent decision of the Supreme Court, dismissing the appeals of the two local planning authorities (Suffolk Coastal District Council and Cheshire East Borough Council) in *Suffolk Coastal District Council*. In summary, there are five basic points to be taken from that decision:

(1) The "primary purpose" of the policy in paragraph 49 of the NPPF is "simply to act as a trigger to the operation of the "tilted balance" under paragraph 14" (see paragraph 54 of Lord Carnwath's judgment in the Supreme Court; and paragraphs 42 to 48 of the Court of Appeal's).

(2) In a case where "housing policies" are not up-to-date under paragraph 49, "it is not necessary to label other policies as "out-of-date" merely in order to determine the weight to be given to them under paragraph 14". As the Court of Appeal recognized, "that will remain a matter of planning judgement for the decision-maker". The weight to be given to "[restrictive] policies in the development plan (specific or not)" in such a case "will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the "tilted balance"" (paragraph 56 of Lord Carnwath's judgment). The operation of the "tilted balance" involves the two specific exceptions relevant to a case in which "the development plan is absent, silent or relevant policies are out-of-date". As the Secretary of State has expressly acknowledged and emphasized in this appeal, the second of those two exceptions does not "shut out" the "presumption in favour of sustainable development" simply because any of the "specific policies" – of which examples are given in footnote 9 – is in play (see paragraph 45 of my judgment in *Watermead Parish Council v Crematoria Management Ltd* [2017] EWCA Civ 152). Once identified, the specific policy in question has to be applied – and, where that specific policy requires it, planning judgment exercised – before the decision-maker can ascertain whether the "presumption in favour of sustainable development" is available to the proposal in hand (see paragraphs 14, 55, 56 and 59 of Lord Carnwath's judgment, and paragraphs 79 and 85 of Lord Gill's; and paragraphs 26 to 30, 35, 45 and 46 of the Court of Appeal's).

(3) The contest between the different interpretations of the policy in the second sentence of paragraph 49 – to which Lord Gill referred (in paragraph 81 of his judgment) as a "doctrinal controversy", by contrast with what he called the "real issue" (paragraph 82) – was not decisive of the outcome in either appeal (see paragraphs 62 to 68 of Lord Carnwath's judgment, and paragraph 86 of Lord Gill's). The Supreme Court favoured the "narrow" interpretation of the policy – in preference to the "wider" understanding maintained by the Government in submissions made on behalf of the Secretary of State, and adopted by the Court of Appeal. But, as Lord Carnwath emphasized (in paragraph 59 of his judgment):

> "… The important question is not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47. If there is a failure in that respect, it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies. The shortfall is enough to trigger the operation of the second part of paragraph 14. As the Court of Appeal recognised [in paragraph 45 of its judgment], it is that paragraph, not paragraph 49, which provides the substantive advice by reference to which the development plan policies and other material considerations relevant to the application are expected to be assessed."

(4) The Court of Appeal was "therefore right to look for an approach which shifted the emphasis to the exercise of planning judgement under paragraph 14" (see paragraph 60 of Lord Carnwath's judgment, and paragraphs 80 to 85 of Lord Gill's). To achieve that, it is not necessary to treat restrictive policies – such as policies for the Green Belt or for an Area of Outstanding Natural Beauty – as "notionally "out-of-date"" – nor, of course, would one describe such policies in that way "merely because" the housing policies of the plan "fail to meet the NPPF objectives". Any relevant restrictive policy – Lord Carnwath's example was "a recently approved Green Belt policy" – is to be "brought back into paragraph 14 as a specific policy under footnote 9", and "the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles" (see paragraphs 60 and 61 of Lord Carnwath's judgment, paragraphs 29, 30, 39 and 45 to 48 of the Court of Appeal's).

(5) As Lord Gill observed, the "message to planning authorities [in paragraph 47 of the NPPF] is unmistakeable" (paragraph 77 of his judgment). The "obvious constraints on housing development" include, he said, "development plan policies for the preservation of the greenbelt, and environmental and amenity policies and designations such as those referred to in footnote 9 of paragraph 14", and the "rigid enforcement of such policies may prevent a planning authority from meeting its requirement to meet a five-years supply" (paragraph 79). If an authority "in default of the requirement of a five-years supply were to continue to apply its environmental and amenity policies with full rigour, the objective of the Framework could be frustrated". In those circumstances, said Lord Gill, it is "reasonable for the guidance [in paragraph 49] to suggest that … the development plan policies for the supply of housing, however recent they may be, should not be considered as being up to date" (paragraph 83). In such cases, "the focus shifts to other material considerations", and "the wider view of the development plan policies has to be taken" (paragraph 84). And the decision-maker "should … be disposed to grant the application unless the presumption [in favour of sustainable development] can be displaced" (paragraph 85).

22. Those five basic points show how the "presumption in favour of sustainable development" in paragraph 14 of the NPPF is engaged and how it is operated in cases where a local planning authority has failed to "demonstrate a five-year supply of deliverable housing sites". But they also provide the context in which the court has to consider the opposite case – such as the one we are dealing with here – in which the authority has done what Government policy in the NPPF requires it to do, has put in place an up-to-date local plan, and is able to demonstrate the necessary five-year supply."

55. In paragraph 50 of the same judgment, Lindblom LJ also stated:

"50 I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or

> in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave the decision-maker with a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law: see paras 8–14, 22 and 35 above. I would endorse, and emphasise, the observations to the same effect made by Holgate J in the Trustees of the Barker Mill Estates case [2017] PTSR 408 , paras 140–143."

56. The Court of Appeal reconsidered the principles as to the relationship between the 'tilted balance' and section 38(6) PCPA 2004 in *Gladman Developments Ltd v SSHCG* [2021] PTSR 1450. Amongst other things, the Court of Appeal recognised that breach of development plan policies may form part of the assessment of the tilted balance, including the weight to be given to such breach.

57. So far as challenges brought under section 288 of the 1990 Act are concerned, there are "seven familiar principles" set out in *Bloor Homes East Midlands Ltd. v SSCLG* [2014] EWHC 754 (Admin), but restated and reinforced in *St Modwen Developments Ltd v Secretary of State* [2017] EWCA Civ 1643, per Lindblom LJ at [6]:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953, at p.1964B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into *Wednesbury* irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason,

an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government*[2013] 1 P. & C.R. 6, ([2012] EWCA Civ 1198, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

58. The meaning of development plan policies is a matter of law: see *Tesco v Dundee City Council* [2012] PTSR 983 at paragraphs 17-22. That principle was repeated by the Supreme Court in *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] PTSR 623, Lord Carnwath at paragraphs 22 to 26. However, in so doing, Lord Carnwath at paragraph 26 also emphasised the need to distinguish clearly between issues of interpretation of policy appropriate for judicial analysis, and issues of judgment in the application that policy, and the importance of not eliding the two.

59. In that context, it is worth recalling that having set out the seven familiar principles in *St Modwen*, Lindblom LJ continued in that same judgment at [7] as follows:

"7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasised the limits to the court's role in construing planning policy (see the judgment of Lord

> Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKCSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council …*, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63)."

The Grounds of Challenge

60. Although there are two grounds of challenge, the reality is that they have a number of different elements. I will therefore deal with these elements in the grounds as the parties did in their written and oral submissions, principally using the description of the elements of the grounds advanced by the Claimant.

Ground 1(a): Alleged Inadequate reasoning in respect of whether the scheme was in compliance with Policy SP03

61. The first element of the Claimant's challenge under Ground 1 is the contention that the Inspector gave inadequate reasoning as to whether or not the proposed scheme was in compliance with Policy SP03 of the EJLP.

62. The Claimant submits that Policy SP03 of the EJLP, in its proposed modified form, seeks to address the sustainable location of new development in light of the Claimant's latest evidence base addressing housing supply and need. Policy SP03 proposes that new housing development will come forward through extant planning permissions, allocations in made Neighbourhood Plans, windfall development in accordance with the relevant policies of the Plan and any forthcoming allocations in the Part 2 Plan. The Claimant submits that, as such, any development for which planning permission had already been granted, would be in conformity with the Plan (through Policy SP03(1)) but, otherwise, SP03(2) provides that the existing settlement boundaries are being carried through without change as shown on the Policies Map. Policy SP03(2) therefore stated:

> *"[o]utside of the settlement boundaries, development will normally only be permitted where the site is allocated for development, or in a made Neighbourhood Plan, or is specifically permitted by other relevant policies of this Plan, or it is in accordance with paragraph 80 of the NPPF (2021)."*

63. This ground of challenge focuses on that part of the Inspector's decision dealing with the EJLP, and paragraphs 65-68 of his decision in particular.

64. The Claimant submits that although the Inspector recorded in paragraph 65 of his Decision that the Council's position was that the appeal scheme would be contrary to the EJLP, he did not record that the 2nd Defendant's main planning witness had agreed that would be the case, and the Inspector did not make any finding as to whether, in his

judgment, the proposed development would be in conflict with Policy SP03, or any other policy in the EJLP.

65. In this regard, the Claimant notes that the 1st Defendant accepts that the Inspector did not state in terms whether he found the scheme to conflict with policy SP03 but, that the Defendants have both submitted that there was no need for the Inspector to record his finding on this issue, given the parties' agreement that there would be a conflict with Policy SP03. In response, the Claimant submitted this is wrong because, irrespective of whether the parties were in agreement, it is not possible to understand whether or not the Inspector accepted that the proposed development was in conflict with this key policy in the emerging JLP, or if he did not accept that to be the case, what his reasons for that finding were.

66. Mr Cosgrove developed these submissions orally before me at the hearing in conjunction with the other elements of Ground 1, but with a particular focus on the question of whether or not the Inspector had erred in his approach to Policy SP03, whether in terms of its interpretation or in relation to the need to take account of material considerations and adopt a rational approach (the other elements of Ground 1 with which I will deal with later). I find it convenient to deal with this element of Ground 1 first.

67. Applying the well-established legal principles to an Inspector's decision of this kind (above), and reading the decision-letter as a whole addressed to the well-informed reader, I do not consider there to be any force in this element of Ground 1.

68. I agree with the submissions made by Mr Fraser and Mr Williams for Defendants that it is relevant to this ground that it was clear that the main parties had accepted that there was conflict with Policy SP03 of the EJLP. In my judgment, such acceptance was unsurprising given the terms of that emerging policy and the location of the Appeal Site. I agree with their submissions that this was not, therefore, a matter in issue before the Inspector; it was not one with which he was required, as a matter of law, to deal with expressly in his Decision (particularly given that such a Decision is directed to the parties who were in agreement).

69. In my judgment, there was no requirement in law arising on the facts of this case for the Inspector to record that the 2nd Defendant's planning witness agreed with the position. It was common ground in any event. Nor was he required to set out more reasoning on this, in the absence of any material dispute between the parties before him on the appeal as to the existence of such conflict.

70. I also consider it is implicit in the context of the Decision read as whole, reflecting the agreed position of the main parties at the inquiry, that the Inspector was proceeding on the basis that such a conflict did inevitably arise in consequence of the proposed deletion of the allocation of the Appeal Site from the EJLP through the Claimant's Main Modifications.

71. That proposed deletion, along with the other proposed Main Modifications, necessarily meant that the Appeal Site fell outside the settlement boundary and remained part of the countryside. The parties, and the 2nd Defendant's planning witness, understandably agreed that the proposed development was consequently in conflict with policy SP03. It was a proposal for development outside the relevant settlement boundary, on a site no longer proposed for allocation. No one was suggesting it was proposed for

development in the Neighbourhood Plan, nor that it was otherwise specifically permitted by other relevant policies of the EJLP, nor that it was in accordance with what was paragraph 80 of the NPPF (2021). There was therefore no issue between the main parties which the Inspector was required to resolve, let alone a principal important controversial issue in this respect.

72. In these circumstances, I do not consider that the Inspector was under any legal duty to record the agreement of the 2nd Defendant's planning witness to this; nor was under a legal duty to set out his own express agreement with that conclusion, particularly where it is both unsurprising, and implicit in the Decision read as a whole in any event. As to the latter, I consider it implicit from the way in which the Inspector proceeded to deal with the matter which was in issue before him, namely the weight to be attached the EJLP. The respective differences between the parties on that issue, and the Inspector's own conclusion on that topic, are implicitly predicated on the acceptance of the Development's conflict with the EJLP. The material issue in dispute was the weight to attach to the EJLP given that conflict.

73. The Inspector's reasoning was therefore unsurprisingly directed at that question. This naturally was the focus of his reasoning in paragraphs 65-71. It is in those paragraphs that the Inspector went on to explain his reasons for attaching the EJLP very limited weight. On any fair reading of the decision, it is implicit that in ultimately deciding to do so, the Inspector was accepting the common ground that the Development conflicted with Policy SP03. It is not realistically tenable to read the Decision in any other way.

74. Accordingly, I do not consider there to have been any legal error in the Inspector's approach to Policy SP03, nor any inadequacy in his reasoning for the reasons summarised above, and for the reasons given by the Defendants. This element of Ground 1 fails.

Ground 1(b): Failure to take account of material considerations and irrational approach to the weight to be accorded to Policy SP03

75. Under this second element of Ground 1, the Claimant contends that although the Inspector concluded his section on the EJLP with the conclusion that he accorded the emerging JLP "very limited" weight (as identified above), the Inspector's reasons for reaching that judgment disclose errors of law in his approach.

76. The Claimant submits that the weight to be accorded to Policy SP03 was a principal important controversial issue at the inquiry. The Claimant contends that having regard to the factors relevant to the question of weight that are identified in paragraph 48 of the NPPF on which the Claimant relied, the Inspector necessarily accepted that in general terms the EJLP was at an advanced stage. The Claimant contends this was a matter which suggested giving greater weight to the EJLP's policies (as it had argued before the Inspector). The Claimant also submits that the Inspector identified no inconsistency between the EJLP and the NPPF, again which the Claimant submits justified giving greater weight to the EJLP's policies.

77. In this context, the Claimant contends that the only reason identified by the Inspector which might conceivably justify reducing the weight to be given to the EJLP was that stated in paragraph 66 of his Decision: "significant changes were made to its policies from those submitted to the Secretary of State and the outcome of the hearings was unknown." The Claimant submits that neither the fact that there were significant

changes to the policies, nor that the outcome of the hearing sessions was unknown, were, in and of themselves, good reasons to accord the emerging plan 'very limited' weight.

78. Moreover, the Claimant contends that insofar as the Inspector considered it relevant to take those matters into account, it was incumbent on him also to factor into his judgment that:

    a. the changes to policy to which the Inspector referred were made at the request of the Examining Inspectors of the EJLP in light of having heard and considered extensive evidence; and

    b. there was no indication whatsoever from the Examining Inspectors at the hearing sessions that had recently been held at the time the Inspector conducted the inquiry that the changes made by the Claimant were in any way unsound or objectionable.

79. In response to a submission from the Defendants that the Inspector should be taken to have considered the factors that the Claimant alleges were left out of account, the Claimant submits that there is nothing in the Inspector's decision to suggest that these matters were in fact weighed in the balance by the Inspector in determining the weight to be accorded to Policy SP03.

80. The Claimant submits that by failing to factor in the considerations which the Claimant says the Inspector omitted, and by basing his judgment solely on factors which the Claimant considers do not, in and of themselves, provide good reasons for the Inspector's ultimate conclusion, the Inspector left out of account matters that were plainly material to his judgment on this issue and adopted an irrational approach. Alternatively, the Claimant argues that even if the Inspector had in some way considered these factors, it is impossible to understand how such an approach can rationally have led to the conclusion of 'very limited weight' to 'policies' in the EJLP.

81. Notwithstanding the elegant and inventive way this element of the ground was argued by Mr Cosgrove, I am satisfied that there is no substance to it and that the Inspector did not err in any of the ways suggested.

82. As a basic starting point, the question of what weight to attach to the EJLP (and so the Development's conflict with Policy SP03 referred to above) was quintessentially a matter for the Inspector's planning judgment, in light of all the circumstances before him, unless there was any public law error in the way he undertook that task.

83. In addition, it is now a well-established principle that the question of what material considerations to take into account in making a judgment of that kind is itself a matter for the Inspector's judgment, save to the extent that there were mandatory material considerations which the Inspector was bound to take into account.

84. Reading the Inspector's decision letter in a straightforward way, I do not agree that it is either fair, or correct, to read it as suggesting that the only reason the Inspector could have been identifying for giving the EJLP very limited weight was what was stated in the last sentence of paragraph 66. That was undoubtedly part of the Inspector's reasoning. But the Inspector also identified set out reasoning in paragraph 67 about the bulk of the extant permission to achieve the EJLP's housing requirement lying on sites beyond the settlement boundaries, where Part 2 of the EJLP was embryonic with matters

such as the settlement strategy, hierarchy and boundaries still to be determined. That was before then stating, at paragraph 68, that for those preceding reasons, he accorded the EJLP very limited weight. I will address this part of the reasoning further when dealing with the challenge made to it under the third element of Ground 1 below.

85. Even if the Claimant were right (however), that it was only the reasoning in paragraph 66 which caused the Inspector to reach the conclusion on very limited weight, I am satisfied that the Inspector acted lawfully in reaching such a judgment for the reasons he gave, and that there is no basis for suggesting that he necessarily left out of account anything he was obliged to consider. I consider that his reasoning in this respect can be clearly discerned from what he stated and the context in which he stated it.

86. First, it is clear from the Decision as a whole, including paragraphs 65-67 in particular, that the Inspector was well aware of the stage that had been reached in the EJLP process. There can be no doubt that he was aware of the recent hearings to which the Claimant was referring, given the terms of paragraph 66. The Inspector himself acknowledged in that paragraph that the EJLP was as "at an advanced stage of preparation" in that sense. But in so doing, the Inspector was specifically qualifying that advanced stage in a way which he was lawfully entitled to do, and in my judgment correctly did so, by the words that surround that phrase: "Although at an advanced stage of preparation significant changes were made to its policies from those submitted to the Secretary of State and the outcome of the Hearings is unknown."

87. I agree with the Defendants that the position was in fact more nuanced than the Claimant's assumptive position that the weight the EJLP should enjoy was greater than that decided by the Inspector, given the specific reasons the Inspector gave, even if succinctly expressed.

88. As the Claimant has identified, it was certainly the case that the Examining Inspectors considered there to be fundamental problems with the EJLP as submitted for examination to them in terms of its approach to strategic housing. It is also the case that the Examining Inspectors had put forward proposals to address those problems as set out above. But it is also clear from the terms of those proposal in the Examining Inspectors' letter that they had not stipulated, or prescribed, the specific form of replacement policies like Policy SP03. That was inevitably a matter for the Council to formulate by way of Main Modifications. It is also obvious that once formulated, such Main Modifications would then need to be subject to public consultation. One purpose of this consultation would be to allow persons to make representations about what the Claimant was proposing by way of a response. The Main Modifications and representations about them would then be scrutinised by the Examining Inspectors, with hearings as necessary, in the way that had happened, but where the outcome of that process was unknown.

89. Accordingly, whilst the EJLP was in an advanced stage of preparation in one sense (i.e. it had reached the stage of Main Modifications having been subject to public consultation and hearings in respect of representations about those Main Modifications had just concluded), the Claimant's specific reliance on that stage reached in that process, and the attack presented in the ground of challenge, fail to recognise the basic point that the Inspector was lawfully raising in his reasoning. The "Main Modifications" that the Claimant had proposed did indeed involve "significant changes" to the EJLP when considered against the EJLP submitted for examination

originally. Policy SP03 set out a proposed policy approach by the Claimant affecting the Development in a manner which was not prescribed, or pre-endorsed, by the Examining Inspectors at the time. It was a proposed Main Modification on which the public could expect to be consulted, be able to submit representations, and expect the Examining Inspectors duly to consider and express views in due course. That is the process to which the Inspector here was referring when identifying that the outcome of the Examination hearings before the Examining Inspectors was unknown.

90. Policy SP03 in its proposed form in the Main Modifications created a presumption against housing development being provided outside of settlement boundaries and in circumstances where the previous settlement boundaries were being maintained. Its effect was therefore very similar in operation to the already adopted development plan, which similarly presumes against housing development outside the same settlement boundaries, and in particular policy CS2 and H7 which the Inspector had addressed in his Decision and paragraphs 17-21 and 61-64.

91. At the hearing I was taken to Policy SP03 of the EJLP in a form which shows both how it was originally formulated, and how the Claimant had proposed to modify it in the Main Modifications in consequence of the Examining Inspector's letter of December 2021. I agree with the Second Defendant that care must be taken in this respect in referring to the tracked change version of Policy SP03 as being "Policy SP03 as modified". It shows the version of Policy SP03 in the form that the Claimant was proposing it should be modified, but in respect of which there had been public consultation, representation, and hearings in light of which the Examining Inspectors were yet to report before any adoption of the EJLP by the Claimant itself.

92. In its original form Policy SP03 was based on a settlement hierarchy and a spatial strategy with revised settlement boundaries to accommodate what the Claimant was identifying as proposed housing requirements for its area, in circumstances where the Appeal Site had been proposed for inclusion within the new settlement boundary for Thurston and allocated as a development site.

93. The Claimant no doubt considered that it was proposing modifications to the EJLP, and Policy SP03 in a form which it considered would address the Examining Inspectors concerns expressed in their letter to the Claimant. But that was for the Examining Inspectors to decide. That was not something that the appeal Inspector was somehow legally required to pre-determine or assume was pre-determined. The Examining Inspectors in their letter had considered "the other aspects and policies" of the plan to be likely to be found sound, but the Examining Inspectors had – for self-evident reasons – reserved their position in relation to the questions of spatial strategy and housing distribution.

94. Moreover, the stage which had been reached in the EJLP process needs to be seen in the context known to the main parties. The 2nd Defendant had made objections to the proposed amendments to SP03 in the EJLP process, including submitting that it was inconsistent with the NPPF. The Examining Inspectors were considering those objections. The outcome of the hearings into the resumed examination for airing such objections was, as the appeal Inspector was referencing, unknown.

95. In that context, I agree with the 2nd Defendant that the Claimant is wrong in principle in seeking to place such reliance on the comments of the Examining Inspectors' earlier letter as necessarily establishing, or pre-endorsing, the soundness of what the Claimant

subsequently formulated in its Main Modifications for Policy SP03. The Claimant's submissions move close to assuming that the Examining Inspectors had predetermined the soundness of such a reformulated policy when that is not the case.

96. To like effect, I consider the Claimant's attempted reliance on what the Claimant reported to the appeal Inspector as to the absence of adverse comments from the Examining Inspectors at the resumed hearings to be misplaced. Drawing inferences from silence in such a situation is a necessarily speculative exercise. Even positive or negative expressions of view can prove to be an unreliable basis for anticipating the ultimate views as expressed in a report. The whole point of the examination process and the production of a report (as with any subsequent formulated judgment after hearing or considering representations), is that it will reflect the considered views, after taking account of all of relevant considerations.

97. In my judgment, therefore, the fact that the EJLP was at an advanced stage of preparation in the sense claimed by the Claimant did not mean that the Inspector was somehow bound to attach more than the weight he actually chose to attach to the Development's conflict with the EJLP for the reasons he was identifying. The Inspector was entitled to rely upon the fact that the significant changes had been made to the EJLP of relevance to the conflict before him, those changes remained the subject of the unconcluded further examination process, and the outcome of the hearings considering the reformulation of those policies were unknown. That outcome could inevitably affect whether or not the Main Modifications were ultimately adopted, or adopted in the form proposed.

98. The issue of weight to be attached to the EJLP in these circumstances was a matter of dispute at the inquiry. The Claimant suggested moderate weight and the 2nd Defendant suggested very little weight. The Claimant has focused on the case it put to the Inspector for attaching moderate weight, but the 2nd Defendant has identified that it had put forward its own case to the Inspector as to why very little weight should be attached (as can be seen from its closing submissions). It relied on the fact that the current iteration of the proposed wording of Policy SP03 had only recently been devised and was under consideration by the Examining Inspectors after that process of consultation, so submitting that "the particular policy wording was not at an advanced stage of preparation" and raising the fact that objections had been made to the wording constituting "significant unresolved objections" where, as a result "the outcome of the objections and their consideration was unknown".

99. The matters set out in paragraph 48 of the NPPF do not dictate the outcome of that dispute. It is obvious from the terms of the Inspector's reasoning that he was weighing up the various factors affecting the weight in light of paragraph 48 of the NPPF and the submissions made from the parties. I reject the notion that the Inspector was required to do more to set out his reasoning on that topic, given the basic presumption that the Inspector would have had paragraph 48 in mind. He did not need to set it out in terms in the decision letter itself, nor address each and every point made by the parties. The Inspector was lawfully entitled to prefer the position of the 2nd Defendant on this issue for the reasons the Inspector gave. This was very much a matter of judgment for the Inspector in the circumstances. He was lawfully entitled to reach that judgment for the reasons he set out both in DL66 and 67. I do not consider there to be any irrationality in the Inspector's conclusion. It was open to him on the facts that existed before him at

the time, in circumstances where the outcome of the EJLP hearings was unknown. I therefore reject this element of the challenge under Ground 1.

Ground 1(c): Misinterpretation of Policy SP03

100. Finally under Ground 1 the Claimant argues that the Inspector misinterpreted Policy SP03 of the EJLP. The Claimant contends that in light of paragraph 67 of the Decision the Inspector appears to have considered it to be relevant to the weight to be accorded to Policy SP03 (assuming that the Inspector had it in mind) that the policy retains the existing settlement boundaries and that the bulk of extant permissions which would achieve the EJLP's housing requirement were outside those boundaries with the matters such as the settlement boundary, hierarchy and boundaries to be determined in a Part 2 plan.

101. The Claimant submits that this reasoning reveals an error of law in the Inspector's interpretation of Policy SP03, and/or an irrational approach to it, because Policy SP03 is clear that sites with an extant planning permission are in conformity with the policy (irrespective of whether they are outside the settlement boundary) and that sites without an extant planning permission (such as the proposed development site) are contrary to it. It is said that the Inspector failed to acknowledge or apply the policy in that way and has thereby misinterpreted the policy.

102. Additionally or alternatively, the Claimant argues that insofar as the Inspector reduced the weight to be accorded to Policy SP03 on the basis set out in DL67, it was irrational for him to do so. The Claimant further submits that the Inspector's reasons for reducing the weight to be accorded to Policy SP03 at DL67 were inadequate and left genuine doubt over what was decided and why: *R (on the application of CPRE Kent) v Dover District Council* [2017] UKSC 79 at 42.

103. I have already identified that I consider that the Inspector's reasons for deciding to attach very little weight to the conflict with the EJLP include both what he stated in paragraph 66, as well as what is set out in paragraph 67, so rejecting the Claimant's submission that the only reason he gave was that in paragraph 66.

104. As to paragraph 67, I reject the Claimant's submission that it reveals any error of law on the part of the Inspector in interpreting Policy SP03. In my judgment, all parties and the Inspector had lawfully interpreted the effect of Policy SP03 in its proposed modified form, and the resultant conflict of the Development with the EJLP. In paragraph 67 the Inspector was addressing the somewhat different question of what weight to attach to that conflict in light of the substantive policy approach being expressed in Policy SP03. As can be seen from the 2nd Defendant's closing submissions, part of the 2nd Defendant's case was that this approach was inconsistent with the NPPF (as can be seen from paragraphs 26-40 of the 2nd Defendant's Closing Submissions).

105. The Claimant does not point to anything incorrect in what is stated in paragraph 67. The draft Part 1 policies did seek to retain the existing settlement boundaries. The consequence of this was the bulk of extant planning permissions to achieve the EJLP's housing requirement would lie on sites beyond those settlement boundaries. As pointed out by the appeal Inspector, Part 2 of the EJLP was indeed embryonic, with matters such as the settlement strategy and boundaries still to be determined.

106. None of this correct analysis involves some necessary misunderstanding by the Inspector as to the distinction between sites with extant planning permission and sites without planning permission. In my judgment, in reaching an overall decision as to what weight to attach to the Development's conflict with the EJLP, the Inspector was entitled to take into account what is obviously a somewhat counter-intuitive position - the bulk of the extant planning permissions making up the EJLP's housing requirement would (assuming the EJLP were adopted in that form) lie on sites outside the settlement boundaries shown in the EJLP. This was not a misinterpretation of the effect of the policy, but a factually correct analysis of the EJLP's effect.

107. To similar effect, the Inspector was correctly identifying that Part 2 of the EJLP was indeed embryonic, with matters such as the settlement strategy, hierarchy and boundaries yet to be determined. The fact that the EJLP was now being promoted in that way in consequence of the intervention of the Examining Inspectors (outlined above) does not affect the correctness of what the appeal Inspector was identifying. Nor does it affect his entitlement to reach a view as to what weight to attach to the EJLP in that form, in light of the way it was proposed to operate, and where matters in relation to settlement strategy, hierarchy and boundaries are yet to be determined within Part 2. In my judgment, those are matters which provide a rational basis for diminishing the weight to be attached to the EJLP in determining the case before him.

108. As the Defendants submit, the Claimant does not in fact provide any real particularisation of its claim that the Inspector misinterpreted Policy SP03. I can detect no such misinterpretation. There is, for example, no basis for suggesting that the Inspector in paragraph 67 of his Decision somehow might have been interpreting Policy SP03 as meaning that sites with planning permission outside settlement boundaries were also in conflict with Policy SP03. That is not what paragraph 67 says; nor is it what the Inspector meant on any fair reading of the decision. Indeed, such a submission misses the real point that the Inspector was identifying.

109. For these reasons and those given by the Defendants, I therefore also reject this third element of Ground 1. I do not consider there to be any basis for the suggestion that the Inspector misinterpreted Policy SP03 in the way alleged by the Claimant or at all. The Inspector was simply reaching a judgment on what weight to attach to the EJLP in light of its meaning. I do not consider there to be any irrationality in the planning judgment he reached on that issue.

110. Accordingly, I do not consider the Inspector to have erred in any of the ways alleged by the Claimant under Ground 1. In particular:

a. it is clear from the Inspector's decision that he agreed with the main parties that the Development was in conflict with the EJLP and he provided adequate reasons in relation to this matter in his decision;

b. there is no basis for suggesting that the Inspector failed to take into account relevant factors in finding that the EJLP should be accorded very limited weight;

c. the Inspector did not misinterpret Policy SP03;

d. the Inspector did not adopt an irrational approach to Policy SP03 or the weight to be accorded to it.

Ground 2: Alleged Unlawful approach to the conflict with the development plan

111. Under Ground 2 the Claimant alleges that the Inspector adopted an unlawful approach to the Development's conflict with the development plan. The Claimant refers to the fact that both main parties had agreed that the proposed development was contrary to the development plan, taken as a whole, by reason of the conflict with policies CS1 and CS2 of the Core Strategy and Policy H7 of the Local Plan. Consequently, the Claimant submits it was common ground that the starting point for the appeal, in accordance with s.38(6) of the 2004 was that the appeal should be dismissed, unless there were material considerations which justified the grant of permission that the presumption in favour of dismissing of the appeal should have been disregarded.

112. The Claimant submits with reference to the principles articulated in *BDW Trading* and *Gladman Development* that the Inspector erred in his approach to the balancing exercise required by s.38(6) of the 2004 Act. The Claimant accepts that the Inspector did acknowledge s38(6) of the 2004 Act in paragraph 58 of his Decision; but, the Claimant argues, the Inspector failed to apply the presumption it contains lawfully or at all.

113. The Claimant contends that the Inspector instead adopted a different balancing exercise, at odds with the duty imposed by s.38(6) of the 2004 Act, in order to determine to the appeal, namely the policy approach in paragraph 11 of the NPPF. In this respect, the Claimant notes the Inspector referred to paragraph 11 of the NPPF in paragraph 59 of his Decision, noting that where the most important polices for determining the appeal are out of date, the NPPF advises that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits. The Claimant places particular reliance on paragraphs 74-75 of the Inspector's Decision. It contends that, notwithstanding the discretion afforded to the Inspector in respect of his approach to the balance under s.38(6) of the 2004 Act (as identified in *Gladman* and as relied on by the Defendants in their response to this ground of challenge), the Inspector erred by proceeding on the basis that, if the tilted balance in paragraph 11 of the NPPF were met, planning permission should be granted. The Claimant submits that this was a fundamentally incorrect approach.

114. The Claimant further relies upon the fact that the Inspector stated at paragraph 60 of his Decision that: "to carry weight policies must be consistent with the Framework as explained in paragraph 219 […]" and he proceeded on that basis.

115. Paragraph 219 of the NPPF provides that:

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

116. The Claimant argues that properly construed and applied, paragraph 219 of the NPPF does not state that in order to carry weight, polices must be consistent with the NPPF, nor does it preclude weight being given to relevant policies even if they are not

consistent with the NPPF. The Claimant submits that by proceeding on the basis a different effect of paragraph 219 of the NPPF, the Inspector misunderstood paragraph 219 of the NPPF and fell into error.

117. In response to the Defendants' submissions that this was not the approach adopted by the Inspector, the Claimant argues that it plainly was, and contends that it was recorded in the Decision. Accordingly, the Claimant argues that whether in consequence of what it says was the Inspector's misunderstanding of paragraph 219 of the NPPF or otherwise, the Inspector's reasons for finding that the conflict with Policies CS1, CS2 and H7 could only be accorded limited weight depend entirely on their consistency with the NPPF as assessed by the Inspector.

118. The Claimant further argues that the Inspector has left out of account matters which were plainly relevant to the weight to be accorded to the conflict with the development plan policies that had been set out in detail in the Claimant's Closing Submissions to the Inspector at paragraphs 14-15, namely: (1) the supply of market and affordable housing in Mid Suffolk; (2) the EJLP and the evidence base underpinning it; and (3) the supply of market and affordable housing in Thurston.

119. The Claimant argues that the Inspector's failure to take these matters into account in determining the weight to be accorded to the conflict with the Development Plan was irrational, and founded on a misunderstanding of what he could and should lawfully consider. The Claimant disagrees with the Defendants' submissions that the Inspector should be taken to have taken those matters into account by reference to the parties' evidence and submissions, and submits there is nothing in the Inspector's decision letter to suggest that he took the matters complained about into account in reaching that judgment.

120. The Claimant summarised its position under this Ground as being that the Inspector erred in law by:

a. failing to approach the appeal on the basis that the starting point, in accordance with s.38(6) of the 2004 Act, was that it should be dismissed unless there were material considerations indicating otherwise;

b. approaching the appeal on the basis that if the tilted balance in paragraph 11 of the NPPF were met, planning permission should be granted;

c. proceeding on the basis that, in order to carry weight, polices must be consistent with the NPPF which was unlawful and a misunderstanding of paragraph 219 of the NPPF;

d. failing to take into account relevant considerations in determining the weight to be accorded to the conflict with the Development Plan.

121. As with Ground 1, it is clear from this that there are various elements to the way in which Ground 2 is articulated. I have considered the elements Ground 2 both individually and as a composite whole. For the reasons set out in more detail below, I do not consider there to have been any error of approach by the Inspector, when his decision is read fairly and as a whole, whether on any of the individual elements or cumulatively. In setting out my reasons for reaching that conclusion, it is convenient to deal with each of the elements in turn.

Ground 2(a) – alleged failure to approach the appeal on the basis of s.38(6) of the 2004 Act

122. In its submissions on this point, the Claimant accepts that the Inspector did "acknowledge" section 38(6) of the 2004 Act, and therefore the Claimant does not pursue an allegation of a failure to do so. It is clear from the terms of paragraph 58 of the Inspector's Decision that the Inspector had directed himself as to the effect of section 38(6) of the 2004 Act. Notwithstanding this, the Claimant argues that although acknowledging this provision, the Inspector subsequently failed to apply it when making his Decision in what followed.

123. In my judgment, that is a challenging argument in circumstances where: (1) the Inspector has correctly and explicitly identified the relevant statutory provision by way of starting point for his analysis; (2) it was common ground between the parties that the Development conflicted with the development plan; and (3) it is hardly surprising that the focus of the Inspector's reasoning was on the issue in dispute before him, namely whether or not the application before him should be determined otherwise in accordance with the development plan.

124. On any fair reading of the Inspector's decision taken as a whole, and in light of the common ground as to conflict with the development plan about which the Inspector did not need to elaborate, I consider it is clear that the Inspector was applying the approach set out in section 38(6) of the 2004 Act in his Decision. The conflict with the development plan was uncontroversial, as was the consequential presumption that followed from that. But the Inspector's reasoning understandably focused on the question of whether there were other material considerations indicated that the Development should be determined otherwise. I do not detect anything unlawful in that focus, addressed as it was to the parties to the dispute. I reject this element of the challenge under Ground 2.

Ground 2(b) – Allegation of approaching the appeal on the basis that if the tilted balance in paragraph 11 were met, planning permission should be granted.

125. As to the Claimant's allegation that the Inspector failed to apply section 38(6) of the 2004 Act by applying the policy approach in paragraph 11 of the NPPF instead, it seems to me that this is an obvious misreading of the Inspector's decision read as a whole. I agree with the Defendants that it fails to recognise the principles the Court of Appeal articulated in *Gladman* (summarised above) as to the lack of prescription as to how the Inspector goes about considering the issues under section 38(6) of the 2004 Act and the tilted balance under the NPPF. Moreover, the fact that the Inspector has addressed and applied the tilted balance in paragraph 11 of the NPPF in his Decision does not mean that he has failed to apply section 38(6) of the 2004 Act. I am unable to see any reasonable way of reading the Decision in that way. I regard this criticism as suffering from the sort of legalistic and over-complicated sort of attack on what is otherwise clear as to the general thrust of the Inspector's reasoning, and of a type which the Court has consistently sought to guard against.

126. Having directed himself in accordance with section 38(6) of the 2004 Act in the way I have set out above, the Inspector was not only entitled, but obliged, to consider the tilted balance under paragraph 11 of the NPPF in considering whether there were other material considerations indicating the appeal should be determined other than in accordance with the conflict with the development plan.

127. Recognising the policy effect of the tilted balance set out in paragraph 11 of the NPPF in a particular case, and then ultimately determining (as a matter of planning judgment) to grant planning permission in light of that policy approach, was an entirely lawful approach for the Inspector to adopt in this case. As the Defendants point out - and the principles clearly establish - there is no prescribed format as to the way the Inspector was required to set out his reasoning on these matters. The real question is whether the Inspector applied section 38(6) of the 2004 Act in substance. Taking account of the policy approach set out in paragraph 11 of the NPPF in the way he did was perfectly consistent with such application. In those circumstances, I do not consider there to be any force in the notion that the Inspector's analysis in paragraph 59 of his Decision, or in the summary of his conclusions in paragraphs 74-75 of his Decision, reveal an incorrect approach, or some sort of unlawful departure from the correct application of section 38(6) of the 2004 Act.

128. To the contrary, I consider that the Inspector was lawfully taking into account paragraph 11 of the NPPF as applied to the facts of the case. He was entitled: (1) to reach a conclusion that the most important development plan policies for determining the appeal were out of date; (2) to reach a judgment that the adverse impacts of granting planning permission would not significantly and demonstrably outweigh the benefits he had identified (having reached conclusions on the weight to attach to those benefits); and (3) to take that conclusion into account in his determination of the appeal in a way which is consistent with the application of section 38(6) of the 2004 Act.

129. Moreover, I agree with the 1st Defendant that this criticism of the Inspector's reasoning (with its understandable focus on the planning judgment that arose under paragraph 11 of the NPPF in this particular case) is surprising, given that the same focus is unsurprisingly to be detected in the Claimant's own Closing Submissions to the Inspector. To a significant degree, the parties themselves were inevitably concentrating on the question that arose under paragraph 11 of the NPPF. This was in light of the common ground that the Development conflicted with the development plan, but also that the "tilted balance" under paragraph 11 of the NPPF was engaged in this case.

130. Accordingly, notwithstanding the persuasive manner in which Mr Cosgrove sought to argue this ground of challenge in his written and oral submissions, I do not consider it to be well-founded. In reality, it amounts to little more than a disagreement with the merits of the Inspector's overall judgment on these issues before him.

Ground 2(c) – alleged misinterpretation of paragraph 219 of the NPPF

131. To similar effect, I consider the Claimant's criticisms of the Inspector's reasons in paragraph 60 of the Decision and his reference to paragraph 219 of the Framework to be without material substance. The Claimant argues that the Inspector misinterpreted paragraph 219 as requiring a policy to have consistency with the NPPF in order to carry weight. In my judgment, that is not a fair reading of paragraph 60 of the Decision, nor of the reasoning as a whole.

132. In paragraph 60 the Inspector was recognising that the fact that the development plan policies were considered to be out of date did not mean that they carried no weight. He identified correctly that it was possible for policies deemed to be out of date still to carry significant weight. I consider it is artificial to read the Inspector's words: "To carry weight policies must be consistent with the Framework" in isolation, or without proper recognition of the words that follow : "as explained in Paragraph 219 which,

amongst other things, explains that the closer that policies in the plan are to policies in the Framework, the greater weight that may be given to them." Reading these words as a whole, I consider it is clear that the Inspector had well in mind what is stated in Paragraph 219, and was not applying some misinterpretation of it. He was recognising that the question of what weight to give to the policies was affected by their degree of consistency with the NPPF, rather than approaching the issue in a binary way of treating the policies as incapable of carrying any weight if found to be inconsistent with the NPPF. Again, I consider the contrary argument to suffer from the vice of the sort of over-forensic and legalistic analysis to the precise form of words the Inspector used, rather than the natural sense of them read in context.

133. In addition, and in any event, I agree with the 1st Defendant that this sort of criticism of the Inspector's Decision must be considered against what is identified in *St Modwen*. This reinforces the artificiality of the criticism. If it is being suggested that an Inspector has failed to grasp a relevant policy, one must consider what the Inspector thought the important planning issues where, and decide whether it appears from the way he dealt with them that he must have misunderstood the policy. Performing that exercise, there is in fact no real basis for suggesting that the Inspector approached this Decision on the basis that key development plan policies carried no weight because of inconsistency with the Framework. Such a contention is irreconcilable with the Inspector's approach of deciding to attach limited weight to the Development's conflict with the development plan. I therefore reject this element of Ground 2 as well.

Ground 2(d) – Alleged failure to take into account material considerations

134. Finally, as part of Ground 2, the Claimant has submitted that the Inspector left out of account matters which it submits were plainly relevant to the weight to be accorded to conflict with the development plan, namely the matters set out in the Claimant's closing submission regarding the supply of market and affordable housing in Mid-Suffolk, the EJLP and the evidence base underpinning it, and the supply of market and affordable housing in Thurston.

135. I am also satisfied that this element of the ground of challenge is not well-founded. As a matter of principle, I have some doubts that the Claimant would be able to establish (as the Claimant would need to do) that these are in fact mandatory material considerations which the Inspector was necessarily required to take into account in making his decision, and where failure to do so would constitute an error of law. However, assuming for present purposes that the Inspector was under such a duty for these considerations in this case, I consider there is no proper basis for suggesting that he failed to take them into account as alleged, for any or all of the following reasons.

136. First, I agree with the 1st Defendant as with the similar allegation made under Ground 1 that the Claimant proceeds on a mistaken basis that mere failure to mention these factors (or failure to mention them sufficiently in the Claimant's view) means that the Inspector failed to take them into account in making his decision. Again, approaching the Inspector's decision with the principles identified in *St Modwen* in mind, I do not see any real basis for suggesting that the Inspector left these matters out of account when reading his decision as a whole. It is clear that the Inspector was well aware of each of these factors from the material before him and what he did say in his decision about them.

137. Second, and linked to the preceding point, in reality the terms of the Decision properly read reveal that the Inspector was well aware of these matters and was taking them into account when making his Decision in a way which he was entitled to do so as a matter of law. In particular:

a. It is clear from paragraphs 13, 16 and 23-29 of the Decision that the Inspector was well aware of the updated housing land supply position in Mid Suffolk, as he specifically refers to it in these paragraphs. It is untenable to suggest that he was somehow not aware of it when making the various judgments he did later in his Decision. And more fundamentally, this argument is irreconcilable with the paragraphs 62 and 64 of the Inspector's Decision, in the latter he makes it clear that he was giving limited weight to the policy conflict that had been identified "despite the Council's HLS [housing land supply position]" (emphasis added).

b. Secondly, as to the EJLP and its evidence base, it is not exactly clear how the Claimant is realistically contending that this material is of direct significance to the question of the Development's conflict with the development plan (as opposed to the EJLP). However it is clear from what I have already addressed in terms of the Inspector's Decision regarding the EJLP that the Inspector was well aware of the EJLP and relevant evidence that the Claimant was relying upon in that respect. It is therefore unrealistic to suggest that he failed to take that into account. This criticism ignores the way in which the Inspector approached the question of the development plan and the EJLP in turn, in a way which I consider he was lawfully entitled to do. He was entitled to address them in turn in that way, considering the respective weight to be attached to the conflict with both.

c. Finally, it is similarly clear from paragraphs 26 of his Decision that the Inspector was well aware of the specific housing position in Thurston, and that he took it into account in reaching his Decision (in addition to the wider district position already considered), both in dealing with the question of weight to be attached to the delivery of market and affordable housing in paragraph 29 of his Decision, and then again in dealing with the question of the weight to be attached to the conflict with the development plan in paragraph 64 of the Decision.

138. In such circumstances, I do not consider there to be any substance in reality to this element of Ground 2 either, nor to any of the elements of the Ground 2 whether considered individually or cumulatively. I therefore reject Ground 2.

Conclusion

139. Accordingly, despite the very clear and persuasive manner in which the Claimant's challenge was argued by Mr Cosgrove and Mr Parker, I am satisfied that this claim should be dismissed.