Neutral Citation Number: [2019] EWHC 1993 (Admin)

Case No: CO/539/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2019

Before:

Mr Justice Holgate

- -

Between:

Monkhill Limited	**Claimant**
- and –	
Secretary of State for Housing, Communities and Local Government	**Defendant**
-and-	
Waverley Borough Council	

- -
- -

Mr Charles Banner QC and Mr Matthew Fraser (instructed by **Penningtons Manches LLP**) for the **Claimant**
Mr Richard Moules (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 9 July 2019

- -

Approved Judgment

Mr Justice Holgate:

Introduction

1. This claim raises important issues about the interpretation of the presumption in favour of sustainable development for decision-taking in paragraph 11(d) of the National Planning Policy Framework ("NPPF"). The challenge brought by the Claimant, Monkhill Limited, asks the court to consider how paragraph 11(d)(i) should be interpreted so as to determine which policies in the NPPF fall within its scope. This in turn raises an important issue about the interpretation of paragraph 172 of the NPPF in relation to development in an Area of Outstanding Natural Beauty ("AONB"), or a National Park, or the Broads.

2. Paragraph 11 of the NPPF (in so far as relevant) provides as follows: -

> "Plans and decisions should apply a presumption in favour of sustainable development.
>
> For **decision-taking** this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole"

Paragraph 11(d)(ii) is often referred to as the "tilted balance".

3. In summary, the effect of footnote 7 is that where a local planning authority is unable to demonstrate a five-year supply of deliverable housing sites in accordance with paragraph 73 of the NPPF, or where the Housing Delivery Test indicates that the delivery of housing was substantially below (that is less than 75% of) the housing requirement over the previous three years, "the policies which are most important for determining the application" are deemed to be "out-of date", so that the presumption in favour of sustainable development applies and planning permission should be granted unless either limb (i) or limb (ii) is satisfied.

4. Footnote 6 explains that the policies in limb (i) are:

> "those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in

> paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63; and areas at risk of flooding or coastal change."

5. The Claimant applies under section 288 of the Town and Country Planning Act 1990 to quash the decision of the First Defendant's Inspector given by a letter dated 10 January 2019 dismissing its appeal against the refusal of planning permission by the Second Defendant, Waverley Borough Council. The appeal arose from an application for planning permission to redevelop land at Longdene House, Hedgehog Lane, Haslemere, Surrey. The application was in two parts: first, outline planning permission for the erection of up to 28 new dwellings and the demolition of two existing dwellings, glasshouses and outbuildings; and second, full planning permission for the change of use and refurbishment of Longdene House from Office (Class B1a) to Residential (Class C3) to provide a new dwelling.

6. The appeal site comprised Longdene House, a Victorian dwelling currently in use as offices, its gardens and adjoining fields. Access is gained from Hedgehog Lane via a private driveway along a tree-lined avenue. The hybrid planning application related to 4 areas of the appeal site. Area A is to the north of the driveway. It is an open field, except for a small wooden storage building, and is used to raise horses. Outline planning permission was sought to build 25 dwellings on Area A. In Area B outline permission was sought for the replacement of a pair of semi-detached cottages in Area B with two dwellings. Area C comprised Longdene House. This was the subject of an application for full planning permission for change of use to a single dwelling with a detached garage. Within Area D, which includes the existing glass houses, it was proposed to erect one dwelling. The submitted plans showed that the other fields within the site would remain undeveloped.

7. The majority of Area A and all parts of Areas B, C and D lie within the Surrey Hills AONB. The remaining part of Area A is designated as an Area of Great Landscape Value ("AGLV"). The town centre of Haslemere lies about 1.3km from the site.

NPPF Policy on AONBs, national Parks and the Broads

8. Paragraph 172 of the NPPF sets out the policy on development in AONBs, National Parks and the Broads. The first part of the policy applies to development generally within these designated areas and provides as follows: -

> "Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within these designated areas should be limited."

9. The second part of paragraph 172 applies solely to "major development". Footnote 55 explains that for the purposes of paragraphs 172-173 (paragraph 173 being a similar policy concerned with areas defined as Heritage Coast): -

> "whether a proposal is 'major development' is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined."

That explanation raises essentially a matter of planning judgment for the decision-maker.

10. The development control policy applicable to major development in an AONB, National Park or the Broads is as follows:

> "Planning permission should be refused for major development[55] other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:
>
> a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and
>
> c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

11. It was common ground between the Claimant and the Second Defendant that the proposal in this case did not constitute a "major development". The Inspector reached the same conclusion in paragraph 31 of his decision letter (DL31).

The decision letter

12. The Inspector stated in DL6 that one of the main issues to be determined was whether the proposal would cause "material harm to the intrinsic character, beauty and openness of the Countryside beyond the Green Belt, the AONB and the AGLV" as a result of its urbanising impact and harm to the landscape character. He dealt with that issue between DL18 and DL33. Between DL34 and DL37 he addressed issues concerning highway safety, which had been raised not by the Second Defendant but by local residents. In DL37 the Inspector concluded that any resultant harm to highway safety should not weigh significantly against the proposal. He added:

> "residual cumulative impacts on the road network would not be severe, and any increased risk to highway safety would fall far short of an unacceptable impact which would, in accordance

> with the *Framework*, justify preventing the development on highway grounds."

13. In DL38 to DL42, the Inspector dealt with housing land supply. In DL41, he concluded: -

> "I find that the housing land supply here would be between 3.37 and 4.6 years. There is not enough information about individual sites for me to assess where within this range the current supply falls. Nevertheless, this is a significant shortfall."

14. In DL42, the Inspector continued: -

> "The additional dwellings from the proposed development would make a significant contribution to the supply of housing in Haslemere. The provision of 10 affordable dwellings would be particularly important in providing for local needs and would comply with LPP1 Policy AHN1. Given the housing land supply situation and the degree of shortfall, these are benefits which will be given significant weight in the planning balance."

15. Between DL43 and DL45, the Inspector dealt with "other matters". In DL43, he concluded that the proposal, whether alone or in combination with other developments, would not be likely to have a significant effect on the Wealden Heath Special Protection Area and therefore no appropriate assessment was required. In DL44, the Inspector identified employment benefits and ecological benefits to which he attributed moderate weight in the planning balance. In DL45, the Inspector explained that other matters raised in evidence, for example the Claimant's case that some development of AONB land would inevitably be required to meet the housing need in Haslemere, did not have any significant effect on his overall conclusions on the appeal.

Effect of the proposal on the character and appearance of the AONB

16. In DL18 the Inspector agreed with the parties that the development proposed in Areas B, C and D would conserve the landscape and scenic beauty of the AONB. However, it was the effect of development proposed in Area A which was in contention.

17. In DL19, the Inspector referred to the "Guidelines for Landscape and Visual Impact Assessment" and endorsed the agreement of the experts at the inquiry that a distinction needed to be made between the impact of the proposal on landscape character and its visual effects. On the latter aspect, he accepted that Area A is well screened in views from public vantage points.

18. In DL26, the Inspector described Area A as being bounded by trees, some almost 20 metres in height. He concluded that the scope for siting dwellings so as to minimise the potential harm to nearby trees would be limited and in the long term there was likely to be further harm through pressure from future occupiers of the proposed development to cut or lop trees to overcome adverse impacts on residential amenity.

19. In DL27, the Inspector stated that: -

> "The tall trees along the driveway adjoining Area A are a significant feature of the local landscape and are visible from vantage points in the wider area. If pressure from owners/occupiers resulted in their loss or cutting back that would harm the local distinctiveness of the area. In coming to this finding I have had regard to the pattern of development in Haslemere, where many dwellings are set within mature vegetation, often on sloping sites. But it seems to me that within this part of the AONB the loss or diminution of such a significant landscape feature would harm the character and appearance of the area."

20. The Inspector's conclusion on visual impact in DL30 was as follows:

> "Given the limited visibility into the site from public vantage points, but having regard to the visual significance of the avenue of trees, I consider that the proposal would have an adverse visual effect of minor/moderate significance."

21. As for the effect of the development on landscape character, in DL20 the Inspector rejected the Claimant's suggestion that the only issue concerned the effect of the proposal on the landscape character of the appeal site itself. He stated that the "area of landscape that needs to be covered in assessing landscape effects should include the site itself and the full extent of the wider landscape around it which the proposed development may influence in a significant manner." He considered that this area included at least the grounds of Longdene House and that the tree-lined approach through open countryside to what had been a country house with some parkland features "makes an important contribution to the landscape and character of this part of the AONB". In DL21, the Inspector said that in his judgment "the proposed residential development of Area A would introduce an urban form of development and associated activity into a countryside location, resulting in a loss of openness and local distinctiveness". He also had concerns about the proposals for access and landscaping on landscape character.

22. In DL28, the Inspector referred to concerns about the urbanising impact of the proposed cul-de-sac development. He judged that the "urban road configuration proposed for Area A would not accord with its location within the setting of a former country house in this part of the AONB" which he described as "rural". In DL29 the Inspector explained why he considered the proposals to be in conflict with paragraphs 127 and 130 of the NPPF.

23. In DL 30, the Inspector said:

> "Taking all the above into account I find that the scheme would have an adverse effect on the landscape character of the area, not just for the site itself, of major significance."

24. In DL 31, the Inspector concluded that although the development proposals did not amount to "major development" in the AONB, nevertheless, "the proposal would be

likely to result in harm of major significance to landscape character" and "of minor/moderate significance to visual amenity". "This would result in significant overall harm to the character and appearance of the area."

25. In DL 33, the Inspector said in relation to this main issue:

> "I consider that the outline proposal, with the submitted access and landscaping details, would be likely to result in a scheme that had a significant adverse effect on the character and appearance of the area. This would not conserve or enhance the landscape and scenic beauty of the AONB. The resultant harm, in accordance with the *Framework*, should be given great weight in the planning balance."

He also explained why these conclusions led to the proposal being in conflict with policies in the local plan which he found to be consistent with the NPPF.

26. The Inspector set out his overall conclusions in DL46 – DL51. In DL46, he accepted that the proposals gain some support from development plan policies to provide housing in Haslemere, to increase the supply of affordable housing and to enhance biodiversity. On the other hand, he concluded that the proposals would conflict with local plan policies for the protection of the AONB and AGLV, and also a countryside protection policy. He concluded that the proposal would be contrary to the provisions of the development plan taken overall. On that basis, he decided that paragraph 11(c) of the NPPF did not apply because the proposal did not accord with an up to date development plan. The Claimant makes no challenge to this reasoning in DL46.

27. In DL47, the Inspector concluded that because the Second Defendant could not demonstrate a 5 year supply of deliverable housing sites, paragraph 11(d) of the NPPF was engaged by virtue of footnote 7. He then rejected the Claimant's contention that this proposal did not engage any policies falling within the scope of paragraph 11(d)(i):-

> "In paragraph 11(d)(i), the reference to "protect" has its ordinary meaning to keep safe, defend and guard. It seems to me that that is precisely what paragraph 172 seeks to achieve with respect to landscape and scenic beauty in AONBs. This *Framework* policy for AONBs states that they have a highest status of protection in relation to conserving and enhancing landscape and scenic beauty, and that within AONBs the scale and extent of development should be limited."

28. The Inspector's conclusions in DL 48 – 50 need to be quoted in full:-

> "48. Given my findings about the effects on the character and appearance of the area, as set out above, I consider that applying *Framework* policies for the AONB here provides a clear reason for refusing the proposed development. So the provisions of paragraph 11 d) i. disengage the tilted balance. Therefore, the planning balance in this case is a straight or flat balance of benefits against harm.

> 49. The appeal scheme would provide additional housing in Haslemere, including affordable units, in an area of need. There would also be some benefits to the local economy and to biodiversity. But in my judgment these benefits would be outweighed by the harm to the character and appearance of the area, along with the harm to the AONB which attracts great weight. I find that the planning balance falls against the proposal.
>
> 50. The proposal would be contrary to the provisions of the development plan taken as a whole. It would not gain support from the *Framework*. There are no material considerations here which indicate that the determination of the appeal should be other than in accordance with the development plan."

For these reasons the Inspector dismissed the appeal.

The issues in this claim

29. On behalf of the Claimant, Mr Charles Banner QC and Mr Matthew Fraser submitted that on a true interpretation: -

    i) A policy cannot fall within paragraph 11(d)(i) of the NPPF unless it is expressed in *language* the *application* of which is capable of providing *a clear reason for refusal*;

    ii) The first part of paragraph 172 (see paragraph 8 above) which applies to development generally within an AONB, a National Park or the Broads, and irrespective of whether it constitutes "major development" does not satisfy the test in (i) above.

30. On behalf of the Secretary of State, Mr Richard Moules argued against both submissions. He said that the way in which submission (i) was developed involved putting an unwarranted gloss on paragraph 11(d)(i) of the NPPF. He pointed out that that provision refers to "policies" in the plural, recognising that in some cases two or more "Footnote 6" policies may be engaged. Where that is so, a decision-maker is entitled to treat the combined application of those policies as providing a "clear reason" for refusing planning permission, even if the separate application of each policy would not provide freestanding reasons for refusal.

31. Nevertheless, he recognised that in a case where a proposal engages only *one* "Footnote 6" policy, then it is necessarily implicit that paragraph 11(d)(i) cannot be used to overcome the presumption in favour of sustainable development unless that policy is capable of sustaining a reason for refusal. The argument during the hearing focused on what type of language is sufficient for that purpose.

32. In relation to submission (ii), Mr Moules submits that, when properly understood and applied, the first part of paragraph 172 of the NPPF is capable of sustaining a clear and independent reason for refusal of a planning application.

33. The Claimant accepts that the second part of paragraph 172, concerning proposals for "major development" (see para. 10 above), qualifies as a policy falling within paragraph 11(d)(i) of the NPPF. The Claimant's argument is therefore limited to the first part of paragraph 172. It also became clear during the hearing that Mr Banner accepts that, on his submissions, this passage is the only policy in the NPPF dealing with subjects listed in Footnote 6 that would not qualify as a policy within paragraph 11(d)(i). In a nutshell, his submission is that the first part of paragraph 172 does not so qualify because it does no more than specify a degree of weight, namely "great weight", that should be applied to one factor, namely "conserving and enhancing landscape and scenic beauty" in the designated areas.

34. If Mr Banner's interpretation of the first part of paragraph 172 of the NPPF is correct, it is common ground that the Inspector's decision must be quashed. This is because the Inspector decided that the presumption in favour of sustainable development was overcome by relying solely upon limb (i) and by applying that test solely to the first part of paragraph 172. Mr Banner accepts that the first part of paragraph 172 could properly have been taken into account under limb (ii) of paragraph 11(d), as the alternative route by which the presumption in favour of sustainable development may be overcome. But, it is plain that the Inspector did not apply limb (ii). Although the Inspector did apply s.38(6) of the Planning and Compulsory Purchase Act 2004 in this case (about which no complaint is, or could be, made), it is plain that he applied only limb (i) and not limb (ii).

35. The issue about the interpretation and effect of the first part of paragraph 172 of the NPPF only arises in the present case because the local planning authority was unable to demonstrate a 5 year housing land supply and this was the only policy relied upon to overcome the presumption in favour of sustainable development. Understandably the Claimant's argument is targeted at the way in which this particular appeal was determined under paragraph 11(d)(i). However, it will readily be appreciated that Mr Banner's submission about the meaning and effect of paragraph 172 goes far beyond his client's appeal or even the application of paragraph 11(d)(i). It affects the application of paragraph 172 of the NPPF generally in AONBs, National Parks or the Broads, certainly where "major development" is not proposed. If Mr Banner's submission is correct, then, as he accepted during the hearing, it would follow that a breach of the first part of paragraph 172 of the NPPF could never by itself support a freestanding reason for refusal. It could only be one consideration along with others in an overall planning balance.

36. This outcome would have a serious effect on the determination of relatively common, straightforward cases where the only material consideration is the harmful impact of the proposal on the landscape and scenic beauty of the designated area, or alternatively that impact has to be weighed against any benefits of the proposal. In such cases the harm to the landscape resulting from a single development proposal may sometimes be less than substantial, but the importance attached to protection in an AONB, for example, may enable the planning authority to refuse planning permission and to resist incremental or "creeping" change to the character of such an area resulting from the cumulative effect of multiple small developments. Such developments might typically include the building of a single dwelling, or an extension to an existing property, or the construction of small business development generating economic benefits. This issue would also arise where local policy in the

development plan simply followed the approach set out in paragraph 172 of the NPPF. Policies of the kind set out in that paragraph have existed in one form or another for many years and must have been applied on countless occasions in areas where special protection is given to the landscape. So, it is surprising that the issue in this challenge has not arisen before.

Legal principles on the interpretation of planning policy

37. The principles governing the interpretations of planning policy have been set out in a number of authorities, including Tesco Stores Limited v Dundee City Council [2012] PTSR 983; Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] 1 WLR 1865; East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88; Mansell v Tonbridge and Malling Borough Council [2018] J.P.L 176; St Modwen Developments Limited v Secretary of State for Communities and Local Government [2018] PTSR 746; Canterbury City Council v Secretary of State for Communities and Local Government [2019] PTSR 81.

38. The principles are well-known and do not need to be rehearsed in this judgment. For the present case I would simply emphasise that NPPF policies of the kind we are dealing with are to be interpreted in a straight forward manner and on the basis that their purpose is to guide or shape practical decision-making.

The interpretation of paragraph 11 of the NPPF

39. I am grateful for counsels' written and oral submissions, which I found to be of great assistance. It became clear during the course of the hearing that they were agreed on a number points to do with the interpretation and effect of paragraphs 11 and 12 of the NPPF, forming part of the context for the arguments for and against the ground of challenge. Taking those agreed points into account, it would be helpful to summarise my understanding of the meaning and effect of this part of the NPPF, before going on to consider the legal challenge in this case:

1) The presumption in favour of sustainable development in paragraph 11 does not displace s.38(6) of the 2004 Act. A planning application or appeal should be determined in accordance with the relevant policies of the development plan unless material considerations indicate otherwise;

2) Subject to s.38(6), where a proposal accords with an up-to-date development plan, taken as a whole, then, unless other material considerations indicate otherwise planning permission should be granted without delay (paragraph 11(c));

3) Where a proposal does not accord with an up-to-date development plan, taken as a whole, planning permission should be refused unless material considerations indicate otherwise (see also paragraph 12);

4) Where there are no relevant development plan policies, planning permission should be granted *unless either* limb (i) *or* limb (ii) is satisfied;

5) Where there are relevant development plan policies, but the most important for determining the application are out-of-date, planning permission should be granted (subject to section 38(6)) *unless either* limb (i) *or* limb (ii) is satisfied;

6) Because paragraph 11(d) states that planning permission should be granted *unless* the requirements of either alternative is met, it follows that if either limb (i) or limb (ii) is satisfied, the presumption in favour of sustainable development ceases to apply. The application of each limb is essentially a matter of planning judgment for the decision-maker;

7) Where more than one "Footnote 6" policy is engaged, limb (i) is satisfied, and the presumption in favour of sustainable development overcome, where the individual or cumulative application of those policies produces a clear reason for refusal;

8) The object of expressing limbs (i) and (ii) as two alternative means by which the presumption in favour of granting permission is overcome (or disapplied) is that the tilted balance in limb (ii) may not be relied upon to support the grant of permission where a proposal should be refused permission by the application of one or more "Footnote 6" policies. In this way paragraph 11(d) prioritises the application of "Footnote 6" policies for the protection of the relevant "areas or assets of particular importance";

9) It follows that where limb (i) is engaged, it should generally be applied first before going on to consider whether limb (ii) should be applied;

10) Under limb (i) the test is whether the *application* of one or more "Footnote 6 policies" provides a clear reason for refusing planning permission. The mere fact that such a policy is *engaged* is insufficient to satisfy limb (i). Whether or not limb (i) is met depends upon the outcome of *applying* the relevant "Footnote 6" policies (addressing the issue on paragraph 14 of NPPF 2012 which was left open in R (Watermead Parish Council) v Aylesbury District Council [2018] PTSR 43 at [45] and subsequently resolved in East Staffordshire at [22(2)];

11) Limb (i) is applied by taking into account only those factors which fall within the ambit of the relevant "Footnote 6" policy. Development plan policies and other policies of the NPPF are not to be taken into account in the application of limb (i) (see Footnote 6). (I note that this is a narrower approach than under the corresponding limb in paragraph 14 of the NPPF 2012 - see eg. Lord Gill in Hopkins at [85]);

12) The application of some "Footnote 6" policies (e.g. Green Belt) requires *all* relevant planning considerations to be weighed in the balance. In those cases because the outcome of that assessment determines whether planning should be granted or refused, there is no justification for applying limb (ii) in addition to limb (i). The same applies where the application of a legal code for the protection of a particular area or asset determines the outcome of a planning application (see, for example, the Habitats Regulations in relation to European protected sites);

13) In other cases under limb (ii), the relevant "Footnote 6 policy" may not require all relevant considerations to be taken into account. For example, paragraph 196 of the NPPF requires the decision-maker to weigh only "the less than substantial

harm" to a heritage asset against the "public benefits" of the proposal. Where the application of such a policy provides a clear reason for refusing planning permission, it is still necessary for the decision-maker to have regard to all other relevant considerations before determining the application or appeal (s. 70(2) of the 1990 Act and s. 38(6) of the 2004 Act). But that exercise must be carried out without applying the tilted balance in limb (ii), because the presumption in favour of granting permission has already been disapplied by the outcome of applying limb (i). That is the consequence of the decision-making structure laid down in paragraph 11(d) of the NPPF;

14) There remains the situation where the application of limb (i) to a policy of the kind referred to in (13) does *not* provide a clear reason for refusal. The presumption in favour of sustainable development will not so far have been disapplied under limb (i) and it remains necessary to strike an overall planning balance (applying also s.38(6)). Because the presumption in favour of granting planning permission still remains in play, it is relevant, indeed necessary, to apply the alternative means of overcoming that presumption, namely limb (ii). This is one situation where the applicant for permission is entitled to rely upon the "tilted balance";

15) The other situation where the applicant has the benefit of the "tilted" balance is where no "Footnote 6" policies are engaged and therefore the decision-maker proceeds directly to limb (ii).

40. Applicants for planning permission may object that under this analysis of paragraph 11(d), the availability of the tilted balance is asymmetric. Where a proposal fails the test in limb (i), the tilted balance in limb (ii) is not applied at all. In other words, the tilted balance in limb (ii) may only be applied where the proposal either passes the test in limb (i) (and there still remain other considerations to be taken into account), or where limb (i) is not engaged at all. This analysis is wholly unobjectionable as a matter of law. It is simply the ineluctable consequence of the Secretary of State's policy expressed through the language and structure of paragraph 11(d).

41. The current version of the NPPF should be capable of being understood and applied without needing to make textual comparisons with the 2012 version. But in this case reference has been made to decisions on the earlier NPPF, notably the decision of Coulson J (as he then was) in Forest of Dean District Council v Secretary of State for Communities and Local Government [2016] PTSR 1031. I note that at [36]-[37] the judge dealt with the relationship between limbs (i) and (ii) (which appeared in the NPPF 2012 but in the reverse order). He indicated that if a proposal passed the test corresponding to what is now limb (i), then the "broader review" under limb (ii) should take place. But that was in the context of a limb (i) assessment where the relevant "restrictive" policy required only *some* and *not all* relevant planning considerations to be taken into account at that stage (see [36] and the submissions of Mr Gwion Lewis for the Secretary of State at [16]). The analysis I have set out above is entirely consistent with what was said by Coulson J in Forest of Dean. The judge did not go any further. In particular, he is not to be taken as having suggested that limb (ii) should be applied in *all* cases, whether or not a proposal overcomes objections under limb (i).

42. The above analysis is also consistent with the written submissions by Mr Lewis in the previous s. 288 claim justifying the Secretary of State's decision to submit to an order quashing the decision dated 4 September 2017 of a different Inspector on this same planning appeal.

43. Any suggestion that because limb (ii) falls to be applied where a development *passes* limb (i), it follows that limb (ii) should also be applied where a proposal *fails* limb (i) involves false logic. It has nothing to do with the way in which paragraph 11(d) of the NPPF 2018 has been structured and drafted.

44. In the present case Mr Banner QC did not fall into that trap. He rightly accepted that if the first part of paragraph 172 of the NPPF qualifies as a "Footnote 6" policy, (a) the Claimant could not challenge the Inspector's judgment reached on the application of limb (i), and (b) the proposal having failed that limb, it would have been improper for the Inspector then to have applied limb (ii). Mr Banner accepted that if the Inspector had been entitled as a matter of law to determine the limb (i) issue as he did, he did not err in law by not applying or addressing limb (ii). I agree with Mr Banner's analysis on this point.

45. The following practical summary may assist practitioners in the field, so long as it is borne in mind that this does not detract from the more detailed analysis set out above:-

- It is, of course, necessary to apply s.38(6) in any event;
- If the proposal accords with the policies of an up-to-date development plan taken as a whole, then unless other considerations indicate otherwise, planning permission should be granted without delay (paragraph 11(c) of the NPPF);
- If the case does not fall within paragraph 11(c), the next step is to consider whether paragraph 11(d) applies. This requires examining whether there are no relevant development plan policies or whether the most important development plan policies for determining the application are out-of-date;
- If paragraph 11(d) does apply, then the next question is whether one or more "Footnote 6" policies are relevant to the determination of the application or appeal (limb (i));
- If there are no relevant "Footnote 6" policies so that limb (i) does not apply, the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and s.38(6));
- If limb (i) does apply, the decision-taker must consider whether the application of the relevant "Footnote 6" policy (or policies) provides a clear reason to refuse permission for the development;
- If it does, then permission should be refused (subject to applying s.38(6) as explained in paragraph 39 (11) to (12) above). Limb (ii) is irrelevant in this situation and must not be applied;

- If it does not, then the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and s.38(6)).

Whether the first part of paragraph 172 of the NPPF is a policy falling within the scope of paragraph 11(d)(i) of the NPPF

46. Mr Banner QC relied upon the effect of the NPPF that where limb (i) is engaged and is satisfied (ie. the proposal fails to pass that test), the "tilted balance" in limb (ii) is, as he put it, disapplied (see para. 20 of the Claimant's Statement of Facts and Grounds). He submitted that this consequence underscores the importance of adopting the correct approach for determining which policies may be relied upon under limb (i).

47. Mr Banner submitted that in a case such as the present one, where the application of limb (i) was applied to a single "Footnote 6" policy: -

> "For a policy in the NPPF to provide a "clear reason" for refusal, it has to impose a self-contained balancing exercise or test, e.g. exceptional circumstances or very special circumstances." (paragraph 27 of the Statement of Facts and Grounds).

He went on to say that the first part of paragraph 172 of the NPPF fails to satisfy that test because it merely requires "great weight" to be given to conserving and enhancing landscape and scenic beauty.

48. Essentially the same point was advanced in paragraph 8 of the Claimant's skeleton, albeit in slightly different language: -

> "….a policy which simply specifies a degree of weight to one particular factor is not capable of itself of providing a *"clear reason for refusal"*, since whether planning permission should be refused or allowed requires a balancing of all the considerations in favour and against the proposed development. The application of a policy is only capable of providing a "*clear reason for refusal*" without proceeding to the application of the tilted balance in NPPF para. 11(d)(ii) if that policy itself provides – in terms – that permission should (or should normally) be refused unless certain requirements or criteria are met."

49. Mr Banner QC accepts that the second part of paragraph 172 dealing with "major development" meets his suggested test because it not only specifies factors to be taken into account, but also states that permission should be refused "other than in exceptional circumstances and where it can be demonstrated that the development is in the public interest". Mr Banner QC submits that this "major development" policy qualifies to be applied under limb (i) because it refers to the carrying out of a balancing exercise and contains provisions which "constrain" how "the pros and cons" of a proposal are to be weighed against each other in that exercise. By contrast, Mr Banner QC submits that the first part of paragraph 172 does not qualify under

limb (i) because it does not state any test for a balancing exercise, and therefore cannot provide a clear reason for refusing the development proposed.

50. I do not accept these submissions which, with respect, are far too legalistic and fail to interpret the NPPF in a practical, straight forward way capable of being operated by decision-makers up and down the country.

51. It is necessary to read the policy in paragraph 172 as a whole and in context. Paragraph 170 requires planning decisions to protect and enhance valued landscapes in a manner commensurate with their statutory status and any qualities identified in the development plan. Paragraph 172 points out that National Parks, the Broads and AONBs have "the highest status of protection" in relation to the conservation and enhancement of landscapes and scenic beauty. Not surprisingly, therefore, paragraph 172 requires "great weight" to be given to those matters. The clear and obvious implication is that if a proposal harms these objectives, great weight should be given to the decision-maker's assessment of the nature and degree of harm. The policy increases the weight to be given to that harm.

52. Plainly, in a simple case where there would be harm to an AONB but no countervailing benefits, and therefore no balance to be struck between "pros and cons", the effect of giving great weight to what might otherwise be assessed as a relatively modest degree of harm, might be sufficient as a matter of planning judgment to amount to a reason for refusal of planning permission, when, absent that policy, that might not be the case. But where there are also countervailing benefits, it is self-evident that the issue for the decision-maker is whether those benefits outweigh the harm assessed, the significance of the latter being increased by the requirement to give "great weight" to it. This connotes a simple planning balance which is so obvious that there is no interpretive or other legal requirement for it to be mentioned expressly in the policy. It is necessarily implicit in the *application* of the policy and a matter of planning judgment. The "great weight" to be attached to the assessed harm to an AONB is capable of being outweighed by the benefits of a proposal, so as to overcome what would otherwise be a reason for refusal.

53. Interpreted in that straight forward, practical way, the first part of paragraph 172 of the NPPF is capable of sustaining a clear reason for refusal, whether in the context of paragraph 11(d)(i) or, more typically where that provision is not engaged, in the general exercise of development management powers.

54. Furthermore, there is no proper distinction to be drawn between the first part of paragraph 172 and other NPPF policies which Mr Banner accepted qualify as policies to be applied under limb (i), notably paragraphs 173 and 196 of the NPPF.

55. Paragraphs 173 of the NPPF dealing with the Heritage Coast provides: -

> "Within areas defined as Heritage Coast (and that do not already fall within one of the designated areas mentioned in paragraph 172) planning policies and decisions should be consistent with the special character of the area and the importance of its conservation. Major development within a Heritage Coast is unlikely to be appropriate, unless it is compatible with its special character."

56. The first sentence of paragraph 173 provides only two criteria for the determination of planning applications: consistency with the character of the Heritage Coast area and the conservation objective, and "the importance", the *weight*, to be attached to that objective. On the Claimant's argument, there is no express reference to a balance or to how any balancing exercise should be carried out. But the straight forward, common sense understanding of this policy is that development which is inconsistent with the character of a Heritage Coast area is harmful, the nature and degree of any harm being a matter of judgment in each case, and that conflict with the conservation objective is to be weighed as an "important" factor. Conclusions of this kind may sustain a reason for refusal. But, of course, it must go without saying that any countervailing factors, such as benefits of the proposal, must be taken into account, to see whether they outweigh the harm to the character of the area and the conservation objective.

57. Neither the express language of the first sentence, nor that of the second sentence (dealing with "major development"), in paragraph 173 of the NPPF come any closer to satisfying the test set by Mr Banner QC than the first part of paragraph 172. Moreover, for the purpose of disapplying under limb (i) the presumption in favour of sustainable development, there is no material difference between paragraph 173 of the current NPPF and its predecessor, paragraph 114 of the NPPF 2012, and so the analysis by Coulson J in Forest of Dean at [21]-[22] is analogous and lends further support to my conclusion.

58. In the section of the NPPF dealing with the protection of heritage assets, paragraph 196 (which is in the same terms as paragraph 134 of NPPF 2012) provides: -

> "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."

59. This policy does not identify the weighting to be given to "less than substantial harm" in the balance. Instead, the requirement to give "considerable importance and weight" to the "less than substantial harm" identified comes from s. 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. Even so, according to Mr Banner's argument, paragraph 196 fails to specify what the outcome of striking the balance should be. But in my judgment, as with the first part of paragraph 172 and also paragraph 173, the implication of these *weighted* balances coming down one way or the other is obvious; planning permission is either granted or refused.

60. Each of these polices involves the application of planning judgment in a straight forward manner. As a matter of law, none of them lacks any element necessary to found a freestanding reason for refusal of permission, or to engage paragraph 11(d)(i) of the NPPF. There is no legal justification for Mr Banner's suggested requirement that a policy must be linguistically self-contained. The Claimant's argument does not accord with the precepts in East Staffordshire at [50]. For these reasons, the main ground of challenge must be rejected.

61. For completeness, I should mention Mr Banner's submissions about the effect of the Claimant's argument. Having accepted that the first part of paragraph 172 of the

NPPF would be the only NPPF policy dealing with a "Footnote 6" subject which would fall outside the ambit of limb (i), he went on to submit that it would nevertheless be dealt with under limb (ii) (assuming that that provision is engaged). In other words, he says that the "great weight" to be attached to the objectives of, for example, an AONB, would still be taken into account as part of an overall planning balance. As far as it goes, that submission is correct. However, the balance under limb (ii) is tilted in favour of the grant of permission, which may run in the opposite direction to the objectives of AONB policy. Furthermore, that presumption is only overcome where the adverse impacts of granting permission would "significantly and demonstrably outweigh" the benefits of the proposal. I agree with Mr Moules that it is not a sensible reading of paragraph 172 to treat only "major development" proposals as falling within limb (i) and not lesser proposals. That kind of dichotomy is not to be found in the Heritage Coast policies (paragraph 173) or elsewhere in the application of paragraph 11(d) of the NPPF.

62. The Claimant did plead a challenge to the adequacy of the reasons given by the Inspector in his decision letter as an alternative to the main ground of challenge which I have already rejected. However, Mr Banner quite properly confirmed that if the court should reject the main challenge in this claim, then the reasons challenge would fall away, and he advanced no further argument on the point. In these circumstances, I need say no more about this aspect.

Conclusions

63. For all these reasons the claim is dismissed. The first part of paragraph 172 of the NPPF qualifies as a policy to be applied under limb (i) of paragraph 11(d) of the NPPF; it is also capable of sustaining a freestanding reason for refusal in general development control in AONBs, National Parks and the Broads.