Case No: CO/3750/2017

Neutral Citation Number: [2018] EWHC 633 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2018

Before :

MRS JUSTICE LANG DBE

- -

Between :

AMSTEL GROUP CORPORATION	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	
(2) NORTH NORFOLK DISTRICT COUNCIL	**Defendants**

- -
- -

Thomas Hill QC (instructed by **Pinsent Masons LLP**) for the **Claimant**
Estelle Dehon (instructed by **Legal Services**) for the **Second Defendant**
The **First Defendant** did not appear and was not represented

Hearing date: 27 February 2018

- -

Judgment

Mrs Justice Lang :

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant, made on his behalf by an Inspector on 5 July 2017, to dismiss the Claimant's appeal against the refusal, by the Second Defendant, to grant planning permission for a proposed development at Sculthorpe in Norfolk ("the Site").

2. On 29 September 2017, Gilbart J. ordered that the application for permission be adjourned to be listed in court as a rolled-up hearing, on the basis that Ground 4 (failure to have regard to the public benefit of the proposed new primary school), had considerable force.

3. In the light of Gilbart J.'s observations, the First Defendant decided not to contest Ground 4, and conceded that the decision should be quashed. The First Defendant continued to contest the other Grounds, for the reasons set out in the Summary Grounds of Resistance, but did not attend the hearing. The Second Defendant defended the claim on all Grounds.

Planning application and decisions

4. Sculthorpe is a small village, set in open countryside, some distance from Fakenham, the nearest large town. The Site is a large field in agricultural use, enclosed by ribbon development.

5. The Claimant's planning application was for: (i) full planning permission for an initial phase comprising 71 dwellings, new access road, and side roads, water attenuation ponds and drainage works, play areas, landscaping and associated works; and (ii) outline planning permission with all matters reserved for later phases comprising up to 129 dwellings, side roads, primary school, land for community resource centre, play areas, water attenuation ponds and drainage works, landscaping and associated works.

6. The Second Defendant refused planning permission on the following grounds:

   i) The proposed development was for a large scale housing estate on a site located in an area of open countryside which by virtue of its location and scale would be harmful to the character, appearance and intrinsic beauty of this part of the countryside, contrary to Policy SS2 of the Adopted Core Strategy and paragraph 17 of the National Planning Policy Framework ("NPPF 17").

   ii) Sculthorpe lacks local services or facilities and is too far from Fakenham to expect residents of the development to travel other than by private car, which would conflict with the aims of achieving sustainable development by minimising travel and encouraging modes of transport other than private car.

   iii) The application lacked sufficient information with regard to heritage assets of archaeological interest at the Site. By the date of the appeal, the Second Defendant and the Claimant had agreed that this issue could be addressed by planning conditions, and therefore it was no longer in issue.

iv) In the light of the statutory presumptions in sections 66 and 71 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("PLBCAA 1990"), the less than substantial harm to the character and appearance of the Sculthorpe Conservation Area and to the settings of the Grade II listed 4 Moor Lane and Grove Farmhouse, and the Grade II* listed Church of St Mary & All Saints are not outweighed by the public benefits of the proposal.

7. The Claimant appealed, pursuant to section 78 TCPA 1990. Just before the inquiry, the Claimant submitted in draft form a unilateral undertaking as a section 106 planning obligation. The undertaking was intended to commit the Claimant to providing land for community purposes; providing land for a new primary school and the required pupil contribution; providing accessible agricultural land and open space; incorporating a proportion of affordable housing, starter homes and custom and self-build housing; and making required financial contributions toward cycle infrastructure and a local library. The undertaking also included a commitment by the Norwich Diocesan board to construct a new primary school.

8. The Inspector, C.J. Ball DArch DCons RIBA IHBC, held an inquiry which lasted for 6 days and carried out an accompanied site visit. In his Appeal Decision ("AD"), he reached the following conclusions:

i) The main issues are (1) whether the Second Defendant could demonstrate a five year supply of deliverable housing land and the consequent policy implications; (2) the effect of the proposed development on the character and significance of a range of designated heritage assets; and (3) the impact of the proposal on local infrastructure and whether any adverse impacts could be effectively mitigated (AD 8).

ii) The local development plan consisted of the North Norfolk Core Strategy ("CS"), adopted in 2008, and the North Norfolk Site Allocations Development Plan Document ("SADPD"), adopted in 2011. The parties agreed that the policies relevant to the appeal were CS policies SS2, SS2, EN2 and EN8. The Council accepted that CS policy SS3 was out-of-date and did not rely on it (AD 9).

iii) The SADPD identified sites for development in accordance with the CS, concentrating housing development in principal settlements, secondary settlements and service villages. Fakenham is a principal settlement (AD 10).

iv) The Claimant, which has owned the Site for many years, proposed the addition of Sculthorpe to the list of service villages during the CS consultation period but the Examining Inspector concluded that would make the plan unsound (AD 13). Therefore it was not designated as a service village. It lies in the countryside, and is subject to CS policy SS2 which restricts development to small-scale development that requires a rural location, meets local housing needs and supports the rural economy (AD 17).

v) The CS and SADPD both pre-date the NPPF. The Claimant argued that the policies were out-of-date, so that the tilted balance in NPPF 14, in favour of granting planning permission, was engaged. However, applying footnote 9, the tilted balance does not apply in this appeal, where the proposal has to be

considered against the specific policy of conserving and enhancing the historic environment (AD 17).

vi) The Second Defendant had taken "a pragmatic, robust and convincing approach" to assessing its objectively assessed needs for market and affordable housing and could "convincingly demonstrate at least a 5 year supply of deliverable housing sites" (AD 18 to 47). Therefore NPPF 49 is not engaged and the tilted balance in NPPF 14 does not apply (AD 48).

vii) NPPF 215 advises that due weight should be given to relevant policies according to their degree of consistency with the NPPF (AD 49):

a) CS policy SS1 and the SADPD are policies for the supply of housing which accord with the principle of genuinely plan-led development and carry significant weight (AD 49).

b) CS policy SS2 is intended to protect the countryside and is consistent with the NPPF principle of taking account of the role and character of different areas and recognising the intrinsic character of the countryside. It carries significant weight (AD 50).

c) CS policies EN2 and EN8, while not requiring the balancing exercise set out in the NPPF, are generally consistent with its policy of conserving and enhancing the historic environment. They carry significant weight (AD 50).

viii) The proposal conflicts with development plan policies which was a "particularly weighty consideration" against the proposal (AD 51).

ix) The proposal would cause harm to the setting of the Sculthorpe Conservation Area and three listed buildings, undermining their significance as designated heritage assets. That would conflict with CS policy EN8. Since the harm was only to the setting, cumulatively the harm would be less than substantial under NPPF 134 (AD 52 – 66).

x) The proposal would have a significant impact on local infrastructure, which has been addressed by conditions and a unilateral undertaking (AD 67 – 76). The construction of a new school, an area of community use, and access to open fields might be desirable but is not necessary to make the development acceptable in planning terms (AD 73 – 75). The affordable housing, contribution to library improvement, and school places could effectively mitigate adverse effects of the development but since they simply prevent harm, they attract no extra positive weight in support of the scheme (AD 76).

xi) The harm to heritage assets carries significant weight in the overall planning balance (AD 77). The development would bring clear public benefits, but they do not outweigh the harm. There is no convincing justification for the harm that would be caused to the significance of the designated heritage assets (AD 78).

xii) The clear aim of the plan-led system is to direct development to where it is needed. CS policy SS1 directs development to principal and secondary settlements and service villages. Sculthorpe lies in the countryside, and the proposal conflicts with CS policies SS1 and SS2 (AD 80).

xiii) The village has very few facilities and almost every journey would involve travelling elsewhere. The vast majority of journeys would be made by private car. That is not a sustainable approach to development (AD 81).

xiv) An argument can be made that the development would fulfil the economic and social roles of sustainable development but because of its rural location and the harm caused to heritage assets, it would not meet the environmental role (AD 83).

xv) Overall, the proposal conflicts with development plan policies intended to direct development to where it is needed, to protect the countryside and to safeguard the historic environment. The benefits of the proposal do not outweigh the harm it would cause and there are no material considerations sufficient to indicate otherwise (AD 84).

xvi) Alternatively, even if the tilted balance in NPPF 14 is engaged, the relevant policies would still carry considerable weight, because of their consistency with the NPPF, and the adverse impact of granting permission would significantly and demonstrably outweigh the benefits because of the harm to the designated heritage assets is so extensive (AD 82).

Legal and policy framework

(i) Applications under section 288 TCPA 1990

9. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

10. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

11. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

12. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath giving the judgment of the Supreme Court warned, at paragraph 23, against over-legalisation of the planning process. At [24] to [26], he gave guidance that the courts should recognise the expertise of the specialist planning inspectors and work from the presumption that they will have understood the policy framework correctly. Inspectors are akin to expert tribunals who have been accorded primary responsibility for resolving planning disputes and the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies. But issues of interpretation, appropriate for judicial analysis, should not be elided with issues of judgment in the application of that policy.

13. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

14. Two citations from the authorities listed above are of particular relevance to the disputed issues in this case.

    a) *South Somerset District Council*, per Hoffmann LJ at 84:

    "...as Forbes J. said in *City of Westminster v Haymarket Publishing Ltd*:

    > "It is no part of the court's duty to subject the decision maker to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph"

    The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy."

    b) *Clarke Homes*, per Sir Thomas Bingham MR at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

(ii) Decision-making

15. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

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

16. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters……
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is helpful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission….. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
>
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to

give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell J observed in *Loup v Secretary of State for the Environment* (1995) 71 P & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

17. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, per Lord Reed at [17].

(iii) The NPPF

18. The NPPF is a material consideration to be taken into account when applying section 38(6) PCPA 2004 in planning decision-making, but it is policy not statute, and does not displace the statutory presumption in favour of the development plan: *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, per Lord Carnwath at [21].

19. NPPF policies relevant to the determination of this application are as follows:

> "**Achieving sustainable development**
>
> ……
>
> 6. The purpose of the planning system is to contribute to the achievement of sustainable development. The policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system.
>
> 7. There are three dimensions to sustainable development: economic, social and environmental. These dimensions give rise to the need for the planning system to perform a number of roles:
>
> - **an economic role** – contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;
>
> - **a social role** – supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community's needs and support its health, social and cultural well-being; and
>
> - **an environmental role** – contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and

adapt to climate change including moving to a low carbon economy.

8. These roles should not be undertaken in isolation, because they are mutually dependent. Economic growth can secure higher social and environmental standards, and well-designed buildings and places can improve the lives of people and communities. Therefore, to achieve sustainable development, economic, social and environmental gains should be sought jointly and simultaneously through the planning system. The planning system should play an active role in guiding development to sustainable solutions.

9. Pursuing sustainable development involves seeking positive improvements in the quality of the built, natural and historic environment, as well as in people's quality of life, including (but not limited to):

- making it easier for jobs to be created in cities, towns and villages;
- moving from a net loss of bio-diversity to achieving net gains for nature; [*Footnote 6* Natural Environment White Paper, *The Natural Choice: Securing the Value of Nature*, 2011.]
- replacing poor design with better design;
- improving the conditions in which people live, work, travel and take leisure; and
- widening the choice of high quality homes.

…

The presumption in favour of sustainable development

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

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

that local planning authorities should have an up-to-date plan in place.

13. The National Planning Policy Framework constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications.

14. At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.

For **plan-making** this means that:

- local planning authorities should positively seek opportunities to meet the development needs of their area;

- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:

  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  - specific policies in this Framework indicate development should be restricted.

For **decision-taking** this means [unless material considerations indicate otherwise]:

- approving development proposals that accord with the development plan without delay; and

- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  - specific policies in this Framework indicate development should be restricted.

  [*Footnote 9* For example, those policies relating to …. designated heritage assets …..]

15. Policies in Local Plans should follow the approach of the presumption in favour of sustainable development so that it is clear that development which is sustainable can be approved without delay. All plans should be based upon and reflect the presumption in favour of sustainable development, with clear policies that will guide how the presumption should be applied locally.

……

Core planning principles

17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:

- be genuinely plan-led, empowering local people to shape their surroundings with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency;….."

"**Annex 1: Implementation**

211. For the purposes of decision-taking, the policies in the Local Plan … should not be considered out-of-date simply because they were adopted prior to the publication of this Framework.

215. .... due weight should be given to relevant policies in existing plans 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."

<u>Grounds of challenge</u>

20. The Claimant submitted that the Inspector's decision was flawed in the following respects:

i) Failure to review and assess the evidence in relation to achieving sustainable development and failing to refer to it as a "main issue".

ii) Failure to have regard to a material consideration, namely the application of paragraph 14 of the NPPF on the agreed basis that the Council's policy for the supply of housing was "out-of-date".

iii) Misdirection as to the interpretation and application of paragraph 134 of the NPPF.

iv) Failure to have regard to a main public benefit, namely the provision of a new primary school to meet the present and future requirements of the Diocese of Norwich.

v) Error as to the meaning and effect of section 106(9) of the TCPA 1990.

vi) Absence of any evidential basis upon which to discount the benefits of housing and affordable housing provision on the site.

vii) Failure to have regard to the Housing White Paper 2017 (not pursued at the hearing).

viii) Having regard to a non-existent and therefore non-material "agreement" as to the base data and reaching a conclusion for which there was no evidence in assessing the objectively assessed need and thereafter the five year housing land supply.

Conclusions

Ground 1: sustainable development

21. The Claimant submitted that the Inspector failed to address the "main issue" which he listed in his pre-inquiry note, dated 19 April 2017, namely, "whether, taken as a whole, the proposal would amount to sustainable development as described in the Framework". In AD 8, this was not included as one of the main issues in the appeal, and there was no explanation for its omission. The Claimant, through its planning witness Mr Simon Neate, gave detailed written evidence on the economic, social and environmental dimensions of sustainable development, much of which was unchallenged. Extensive submissions were made in closing by the Claimant's counsel under this heading.

22. I agree with the Defendants' submissions that, on a fair reading of the decision, the Inspector did give proper consideration to the issue of sustainable development, as described in NPPF 6 – 10. NPPF 7 identifies three dimensions of sustainability: economic, social and environmental.

23. The economic dimension was analysed and considered, in the discussion of population projections (particularly migration), employment forecasts and housing supply (AD 18 – 28); the benefits of the scheme in providing construction jobs and a wider choice of market housing (AD 78, AD 83); and transport for getting to work (AD 81).

24. The social dimension was considered in the discussion of housing need and supply (AD 18 – 47, AD 78); the impact of the development on local infrastructure, including the library and school (AD 67 – 76); and the lack of facilities in the village and means of transport to the nearest towns (AD 81).

25. The environmental dimension was considered in the discussion of heritage assets; the protection of the countryside and the character and appearance of the village (AD 52 – 66); and the lack of transport facilities, requiring reliance on the private car (AD 81). At AD 81 the Inspector concluded that since the vast majority of journeys would be made by private car, it was not a sustainable approach to development. The site was not an appropriate location for the third largest housing site in North Norfolk.

26. At AD 79, the Inspector applied the policies in NPPF 15 and the first bullet point of NPPF 17 that future development should be plan-led and that "Local Plans are the key to sustainable development….".

27. Finally at AD 83, the Inspector weighed up the respective limbs of sustainable development, and reached his conclusions on sustainability, stating:

> "83. An argument can be made that the development would fulfil the economic and social needs of sustainable development. However, because of the rural location, the failure to protect the countryside and the harm caused to a number of heritage assets, the proposal would not meet the environmental role. Since the 3 roles are mutually dependent, the proposal as a whole would not be sustainable development."

28. In my judgment, there was no basis for concluding that the Inspector failed to have regard to the evidence of Mr Neate, the Claimant's witness. I accept the submission of Ms Dehon, counsel for the Second Defendant, that his evidence was challenged in specific respects at the Inquiry, which she attended.

29. The Inspector notified the parties in advance of the Inquiry that he would treat as a main issue "whether, taken as a whole, the proposal would amount to sustainable development, as described in the Framework". However, he did not list sustainable development as a main issue in AD 8. Whereas the other three main issues which he identified each had a separate heading, his consideration of sustainable development was included under each of the three main issues, but not as a separate issue. In my judgment, it was within the Inspector's discretion as decision-maker to re-structure his written decision in this way, and to depart from the indication he made earlier. He may well have concluded that this was a more appropriate way in which to address the issue of sustainable development since it was a continuing theme, arising in respect of each of the other main issues. Since he gave proper consideration to both the evidence and the policy of sustainable development, the change to the main issues was a matter of form rather than substance.

30. I consider Ground 1 to be unarguable and accordingly I refuse permission.

Ground 2: Failure to have regard to, and apply, NPPF 14

31. The Claimant submitted that, since it was agreed that CS policy SS3 on Housing was out-of-date, the Inspector ought to have applied the tilted balance in NPPF 14. I accept the submissions of the Defendants that this criticism is not well-founded, for three reasons.

32. First, the Inspector expressly recorded, at AD 9, that the Council did not rely on CS policy SS3 as it promoted a housing supply based on the withdrawn Regional Spatial Strategy for the East of England. He made no further reference to it in the decision. Since it was not relied upon, and played no part in the decision, it was not a "relevant" out-of-date policy which triggered the application of the tilted balance in the second limb of NPPF 14.

33. The second reason is that the Claimant could not rely upon the second limb of NPPF 14 in any event. It provides that the tilted balance in the second limb does not apply where "specific policies in this Framework indicate development should be restricted". Examples are given in footnote 9, including policies relating to designated heritage assets. The Inspector therefore found that the tilted balance in NPPF 14 did not apply in this appeal, where the proposal had to be considered against the specific policy of conserving and enhancing the historic environment (AD 17). It would only have come into play if the Inspector had found in the Claimant's favour when applying the test under NPPF 134 (see below at paragraph 43).

34. Finally, the Inspector expressly addressed what his position would have been if the tilted balance in NPPF 14 had applied and concluded that he would have dismissed the appeal (AD 82). As the outcome for the Claimant would have been the same in any event, this ground cannot form the basis of a successful claim to quash the decision.

35. I consider Ground 2 to be unarguable and accordingly I refuse permission.

Ground 3: Misdirection as to the interpretation and application of NPPF 134.

36. The Claimant submitted that the Inspector misdirected himself on the proper interpretation and application of the NPPF to the designated heritage assets. When applying NPPF 134, he wrongly gave each incidence of harm "considerable importance and weight" as a matter of law (AD 77). He gave "significant weight" to the harm to heritage assets at AD 78, which unlawfully "skewed the scales" in the planning balance. The failure to take into account the benefits of the new school also skewed the balance (see Ground 4). The flawed approach to the balancing exercise was particularly important as its result, if favourable to the Claimant, is relevant to the applicability of NPPF 14 and the tilted balance.

37. I turn first to consider the relevant legal principles and policy. Section 66(1) PLBCAA 1990 provides:

> "66. General duty as respects listed buildings in exercise of planning functions

(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

38. Section 72(1) PLBCAA 1990 provides:

> "72. General duty as respects conservation areas in exercise of planning functions
>
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any [functions under or by virtue of] any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

39. National policy on "Conserving and enhancing the historic environment" in section 12 of the NPPF is to be interpreted and applied consistently with the statutory duties under the PLBCAA 1990. Paragraphs 131 to 135 state:

> "131. In determining planning applications, local planning authorities should take account of:
>
> - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
>
> - the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
>
> - the desirability of new development making a positive contribution to local character and distinctiveness.
>
> 132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm

to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.

133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:

- the nature of the heritage asset prevents all reasonable uses of the site; and
- no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
- conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
- the harm or loss is outweighed by the benefit of bringing the site back into use.

134. 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 securing its optimum viable use.

135. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

40. In *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137, Sullivan LJ reviewed the authorities and gave authoritative guidance on the application of the statutory duties, saying:

> "16 What was Parliament's intention in imposing both the section 66 duty and the parallel duty under section 72(1) of the Listed Buildings Act to pay "special attention … to the desirability of preserving or enhancing the character or

appearance" of conservation areas? It is common ground that, despite the slight difference in wording, the nature of the duty is the same under both enactments. It is also common ground that "preserving" in both enactments means doing no harm: see *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, per Lord Bridge at page 150.

17 Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?

18 Lang J analysed the authorities in paragraphs [34] – [39] of her judgment. In chronological order they are: *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303; *South Lakeland* (see paragraph 16 above); *Heatherington (UK) Ltd. v Secretary of State for the Environment* (1995) 69 P & CR 374; and *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 WLR 759. *Bath* and *South Lakeland* were concerned with (what is now) the duty under section 72. *Heatherington* is the only case in which the section 66 duty was considered. *Tesco* was not a section 66 or section 72 case, it was concerned with the duty to have regard to "other material considerations" under section 70(2) of the Town and Country Planning Act 1990 ("the Planning Act").

19 When summarising his conclusions in *Bath* about the proper approach which should be adopted to an application for planning permission in a conservation area, Glidewell LJ distinguished between the general duty under (what is now) section 70(2) of the Planning Act, and the duty under (what is now) section 72(1) of the Listed Buildings Act. Within a conservation area the decision-maker has two statutory duties to perform, but the requirement in section 72(1) to pay "special attention" should be the first consideration for the decision-maker (p. 1318 F-H). Glidewell LJ continued:

> "Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight…. As I have said, the conclusion that the development will neither enhance nor preserve will be a consideration of

> considerable importance and weight. This does not necessarily mean that the application for permission must be refused, but it does in my view mean that the development should only be permitted if the decision-maker concludes that it carries some advantage or benefit which outweighs the failure to satisfy the section [72(1)] test and such detriment as may inevitably follow from that."

20 In *South Lakeland* the issue was whether the concept of "preserving" in what is now section 72(1) meant "positively preserving" or merely doing no harm. The House of Lords concluded that the latter interpretation was correct, but at page 146E-G of his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms:

> "There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria."

21 In *Heatherington*, the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of the Planning Act (since repealed and replaced by the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004). However, Mr. David Keene QC (as he then was), when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the *Bath* case (above), and said that the statutory objective "remains one to which considerable weight should be attached" (p. 383).

22 Mr. Nardell submitted, correctly, that the Inspector's error in the Bath case was that he had failed to carry out the necessary balancing exercise. In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less

than substantial harm to the setting of the heritage assets. Mr. Nardell submitted that there was nothing in Glidewell LJ's judgment which supported the proposition that the Court could go behind the Inspector's conclusion. I accept that (subject to grounds 2 and 3, see paragraph 29 et seq below) the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell LJ's judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight."

23 That conclusion is reinforced by the passage in the speech of Lord Bridge in *South Lakeland* to which I have referred (paragraph 20 above). It is true, as Mr. Nardell submits, that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in *Bath*. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight."

24 While I would accept Mr. Nardell's submission that *Heatherington* does not take the matter any further, it does not cast any doubt on the proposition that emerges from the *Bath* and *South Lakeland* cases: that Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise.

25 In support of his submission that, provided he asked the right question – was the harm to the settings of the listed buildings outweighed by the advantages of the proposed development – the Inspector was free to give what weight he chose to that harm, Mr. Nardell relied on the statement in the speech of Lord Hoffmann in *Tesco* that the weight to be given to a material consideration is entirely a matter for the local planning authority (or in this case, the Inspector):

> "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State." (p.780H).

26 As a general proposition, the principle is not in doubt, but *Tesco* was concerned with the application of section 70(2) of the Planning Act. It was not a case under section 66(1) or 72(1) of the Listed Buildings Act. The proposition that decision-makers may be required by either statute or planning policy to give particular weight to certain material considerations was not disputed by Mr. Nardell. There are many examples of planning policies, both national and local, which require decision-makers when exercising their planning judgment to give particular weight to certain material considerations. No such policies were in issue in the *Tesco* case, but an example can be seen in this case. In paragraph 16 of his decision letter the Inspector referred to Planning Policy Statement 22 Renewable Energy (PPS22) which says that the wider environmental and economic benefits of all proposals for renewable energy, whatever their scale, are material considerations which should be given "significant weight". In this case, the requirement to give "considerable importance and weight" to the policy objective of preserving the setting of listed buildings has been imposed by Parliament. Section 70(3) of the Planning Act provides that section 70(1), which confers the power to grant planning permission, has effect subject to, inter alia, sections 66 and 72 of the Listed Buildings Act. Section 70(2) requires the decision-maker to have regard to "material considerations" when granting planning permission, but Parliament has made the power to grant permission having regard to material considerations expressly subject to the section 66(1) duty.

27. …..

28 It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE9.4 and HE 10.1 should ignore the overarching statutory duty imposed by section 66(1), which properly understood (see *Bath*, *South Somerset* and *Heatherington*) requires considerable weight to be given by decision-makers to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings. That general duty applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance. If the harm to the setting of a Grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of

> planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed.
>
> 29 For these reasons, I agree with Lang J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision…."

41. Sullivan LJ's analysis was followed by the Court of Appeal in *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243, and has been generally applied in other cases, including those involving NPPF 134. In *R (Leckhampton Green Land Action Group Ltd) v Tewkesbury BC* [2017] EWHC 198 (Admin), Holgate J. said, at [49]:

> "It is plain from the *East Northants* decision and *Mordue* that para.134 of the NPPF does *not* involve an unweighted normal balancing exercise ….. the balancing exercise required by para 134 is to give effect to the presumption *against* granting permission for development which harms the setting of a listed building. Under para. 134 there is a tilt in favour of the preservation of that setting. How much weight to give to the harm to the setting of a listed building and to that tilt is, of course, a matter for the decision-maker. But where a proposal would result in harm to the setting of a listed building, the "Barnwell Manor" tilt in s.66(1) (and in the NPPF – see for example para.134), leans in the opposite direction to the presumption in Paragraph 14 of the NPPF in favour of the grant of planning permission."

42. Even where relevant policies in the development plan are out-of-date, the tilted balance in the second limb of NPPF 14 does not apply where "specific policies in this Framework indicate development should be restricted". Footnote 9 includes the example of policies protecting heritage assets.

43. If, on application of the statutory duties in the PLBCAA 1990, and NPPF 134, the decision-maker decides in favour of the proposed development, notwithstanding the restriction, then the tilted balance in NPPF 14 may apply in the overall assessment of the planning balance, taking into account all factors (*Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 421 (Admin), per Coulson J. at [37]; *Leckhampton* per Holgate J., at [47]).

44. In this appeal, the designated heritage assets were the Sculthorpe Conservation Area, the Grade II listed 4 Moor Lane and Grove Farmhouse, and the Grade II* listed Church of St Mary & All Saints.

45. In my judgment, the Inspector correctly directed himself in accordance with sections 66(1) and 72(1) of the PLBCAA 1990, and NPPF 132 to 134, as set out above. He identified as a main issue the effect on the proposed development on the character and significance of a range of designated heritage assets (AD 8). He said, at AD 53:

> "53. The parties also agree that it is the impact of the setting of all these assets that is in question. While s66.1 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (PLBCA) requires me to have special regard to the setting of the listed buildings, there is no such legal requirement for the setting of the CA. Nonetheless Framework 132 confirms that the significance of any heritage asset can be harmed by development within its setting and CS policy EN2 requires that development proposals should demonstrate that their location, scale, design and materials will protect, conserve and, where possible, enhance among other things the special qualities and local distinctiveness of the area and the setting of, and views from, conservation area."

46. The Inspector then applied the relevant legal and policy tests (including CS EN2) to each designated heritage asset in turn, conducting a detailed assessment, at AD 54 to 65. His overall assessment was at AD 66:

> "I have found that the proposal would cause harm to the setting of the CA and to the settings of 3 listing buildings, undermining their significance as designated heritage assets. That would conflict with CS policy EN8. Since there would be no harm to the CA or the buildings themselves, I consider that, cumulatively, the harm would be less than substantial."

47. In his "Conclusions", the Inspector said as follows:

> "77. I have found that the development of the site would lead cumulatively to less than substantial harm to the significance of the Sculthorpe Conservation Area and 3 listed buildings as designated heritage assets. As Framework 134 makes clear, 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. 'Less than substantial' does not necessarily mean insignificant and each incidence of harm, as a matter of law, must be given considerable importance and weight. Together, the 4 incidences of harm carry significant weight in the overall planning balance.
>
> 78. The development would bring clear public benefits, including construction jobs, a wider choice of market housing and an early, and 'above policy', provision of affordable housing to meet a pressing need. However, that need is being addressed through the Local Plan process and the affordable houses would not be in the more populous settlement locations

> where they are most needed. On balance, giving significant weight to the identified harm to heritage assets, I consider that the public benefits do not outweigh that harm. I find no clear and convincing justification for the harm that would be caused to the significance of the designated heritage assets."

48. I do not agree with the Claimant's submission that the Inspector misdirected himself in law in AD 77 by stating that "each incidence of harm, as a matter of law, must be given considerable importance and weight". On my reading of the decision, the Inspector was directing himself in accordance with Sullivan LJ's guidance in the leading case of *East Northants* where after reviewing the authorities, he said "Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise…".

49. In my judgment, the Claimant was mis-reading the decision when he alleged that the Inspector did not proceed to make his own assessment of the weight to be accorded to the harm to heritage assets. On my reading, the Inspector assessed the harm in relation to each asset individually. He then made a cumulative assessment of the harm as "less than substantial", under NPPF 134, as it affected settings but did not harm the buildings themselves. He correctly directed himself that "less than substantial" did not necessarily mean "insignificant" and he accorded "significant weight" to the harm in the balancing exercise. This was a planning judgment with which this Court ought not to interfere, applying *Hopkins Homes*.

50. I consider Ground 3 to be unarguable and accordingly I refuse permission.

Ground 4: failure to have regard to the public benefit of a new school

51. The Claimant submitted that the Inspector erred in failing to have regard to the benefits of a new primary school in Sculthorpe, and to take them into account when carrying out the balancing exercise.

52. The proposed development included a new primary school in Sculthorpe to be built on part of the Site. It would replace the existing village school which was in a different part of the village and run by the Norwich Diocesan Board of Finance Ltd ("the Diocese"). It was the subject of a planning obligation by the Claimant, which the Inspector summarised as follows:

> "**Planning obligation**
>
> 7. Just before the inquiry the appellant submitted in draft form a unilateral undertaking as a s.106 planning obligation….In final form the undertaking is intended to commit the appellant to providing land for community purposes; providing land for a new primary school and the required pupil contribution; providing accessible agricultural land and open space; incorporating a proportion of affordable housing, starter homes and custom and self-build housing; and making required financial contributions towards cycle infrastructure and a local

> library. The undertaking includes a commitment by the Norwich Diocesan Board to construct a new primary school."

53. The Inspector summarised the terms of the planning obligation in relation to the school at AD 72:

> "72. The appellant undertakes to transfer a school site to the Diocese, which undertakes thereupon to construct a new 0.5 Form Entry primary school. The appellant confirms the availability of funding. The required education contribution of £372,609 would be paid to the Council for release to the Diocese towards the cost of constructing the school. If the school is not built within 3 years, there is a provision for using the contribution to increase the capacity of the local schools."

54. The cost of building the new school was to be met by the Diocese, in the sum of about £2.5 million. The Claimant's financial contribution - £372,609 - was intended to meet the adverse impact of the development which the Inspector recorded at AD 69:

> "69. The Council identified a need for more primary school places and for library improvements to serve the increase in population. The development would generate a considerable number of children of school age ….local primary school places are at or near capacity. Contributions would be required to increase capacity at Sculthorpe Primary School and Fakenham Infants School to accommodate the 50 children of primary school age generated by the development."

55. Under the terms of the unilateral undertaking, if the Diocese did not build the new school within three years, the Council could pass the Claimant's contribution to the County Council for the purpose of creating new pupil places to provide sufficient capacity within existing or new schools for pupils residing in the development.

56. The Inspector was required to assess the unilateral undertaking in accordance with section 106(1) TCPA 1990 and the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations").

57. Section 106(1) TCPA 1990, as amended, provides:

> "Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (… "planning obligation") enforceable to the extent mentioned in subsection (3) -
>
> a) restricting the development or use of the land in any specified way;
>
> b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> c) requiring the land to be used in any specified way; or

d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically."

58. By subsection (3), a planning obligation is enforceable by the authority identified in the section 106 deed, in accordance with subsection (9)(d).

59. The CIL Regulations were made pursuant to section 205(1) Planning Act 2008 The major part of the CIL Regulations introduced a fixed infrastructure levy on new developments. Regulation 122 had a different purpose, providing a statutory limitation on the use of planning obligations, in the following terms:

> "122. Limitation on use of planning obligations
>
> (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development.
>
> (3) In this regulation—
>
> "planning obligation" means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation; and
>
> "relevant determination" means a determination made on or after 6th April 2010—
>
> (a) under section 70, 73, 76A or 77 of TCPA 1990 of an application for planning permission; or
>
> (b) under section 79 of TCPA 1990 of an appeal."

60. The NPPF provides:

> "Planning conditions and obligations:
>
> 203. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

> 204. Planning obligations should only be sought where they meet all of the following tests:
>
> • necessary to make the development acceptable in planning terms;
>
> • directly related to the development; and
>
> • fairly and reasonably related in scale and kind to the development.
>
> 205. Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.
>
> 206. Planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects."

61. The National Planning Policy Guidance states:

> "Planning obligations mitigate the impact of unacceptable development to make it acceptable in planning terms. Obligations should meet the tests that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. These tests are set out as statutory tests in the Community Infrastructure Levy Regulations 2010 and as policy tests in the National Planning Policy Framework."

62. In *R (Welcome Break Group Limited) v Stroud District Council* [2012] EWHC 140 (Admin), Bean J. said:

> "48 There is nothing novel in regulation 122 except the fact that it is contained in a statutory instrument. Its wording derives from Departmental Circular 05/05, which in turn was the successor to previous circulars such as 16/91. Circular 16/91 required that the obligation to be imposed as a condition should be "necessary to the grant of permission" or that it "should be relevant to planning and should resolve the planning objections to the development proposal concerned."
>
> 49 In the *Tesco* case Lord Hoffmann dealt with a submission by counsel for Tarmac, the developer in competition with Tesco, that Tesco's offer to build a link road if permission were granted was not material within the terms of Circular 16/91 "because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable". Lord Hoffmann went on:

> "The test of acceptability or necessity suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision. How is the court to decide whether the effect of a planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable? Whether it would have been unacceptable must be a matter of planning judgment. It is, I suppose, theoretically possible that a Secretary of State or local planning authority may say in terms that he or it thought that a proposed development was perfectly acceptable on its merits but nevertheless thought that it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining his permission. If that should ever happen, I should think the courts would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the courts in an investigation of the planning merits. The criteria in Circular 16/91 are entirely appropriate to be applied by the Secretary of State as part of his assessment of the planning merits of the application. But they are quite unsuited to application by the courts."

> 50 In my judgment this passage remains good law under the 2010 Regulations. So too does the ratio of the *Tesco* case. An offered planning obligation which has nothing to do with the proposed development apart from the fact that it is offered by the developer is plainly not a material consideration and can only be regarded as an attempt to buy planning permission. However, if it has some connection with the proposed development which is more than *de minimis* then regard must be had to it. The extent, if any, to which it affects the decision is a matter entirely within the discretion of the decision-maker."

63. In my view, the Inspector correctly directed himself in accordance with these provisions when he concluded as follows:

> "73. The new school is intended to accommodate not just the children from the new development but also those currently attending the existing village primary school, so that it would replace the existing school. While it has some restrictions, the existing school is not failing (it is currently labelled 'Good' by Ofsted), and that particular provision goes beyond what is necessary. Thus the provision of a new school would not be

> directly related to the development and would not be fairly and reasonably related to it in scale and kind. Since the capacity of local schools can be increased to accommodate the requirement for additional school places, the construction of a new school is not necessary to make the development acceptable in planning terms.
>
> 74. ….
>
> 75. While a new school, an area of land for community use and access to open field for dog-walking and the like might be desirable, it has not been demonstrated that they are necessary in planning terms. They have evidently been offered as an inducement to make the scheme more attractive but they do not meet the tests of CIL Regulation 122 or comply with Framework 204. I have not therefore taken them into account."

64. In AD 73 and AD 75, the Inspector was making a series of planning judgments with which this Court cannot interfere. First, that the new school was not necessary to make the development acceptable in planning terms because that could be achieved by a financial contribution towards additional school places (which the Claimant was offering). Second, that the new school was being offered as an inducement to make the proposal more attractive. Once the Inspector had decided that the new school was not necessary to make the development acceptable in planning terms and was being offered as an inducement to make the proposal more attractive, he was prevented by regulation 122(2) of the CIL Regulations from treating it as "a reason for granting planning permission for the development".

65. It was common ground before me that the Inspector also had to give separate consideration to the benefits of the new school, as it was part of the proposed development. He had to weigh them in the balance under NPPF 134 and in assessing the overall planning balance. The Second Defendant submitted that the Inspector duly did so in AD 76, where he said:

> "While I have doubts about the validity of the deed of undertaking, the 'front-loaded' provision of affordable housing would be a clear benefit of the scheme, The contribution towards library improvement and, perhaps by a circuitous route, an eventual contribution to additional school places could both effectively mitigate adverse effects of the development but, since they would simply fulfil policy expectations in preventing harm, they attract no extra positive weight in support of the scheme."

66. Regrettably I have concluded that the Inspector fell into error here. On my reading of AD 76, he did correctly weigh in the balance the Claimant's potential contribution to additional school places for the 50 pupils generated by the development, but he did not also weigh in the balance the benefits of a new school, which on the evidence, could provide improved and enlarged facilities, thus benefiting existing pupils as well as new ones. At the end of AD 75, he expressly stated that he had not taken the new school into account. I consider that once he had decided that it did not come within

regulation 122(2) of the CIL Regulations, he excluded it entirely from consideration, instead of also assessing it as a benefit when applying the test under NPPF 134 at AD 78, and in making his overall assessment at AD 84.

67. The weighing of benefits against harm is quintessentially a planning judgment for the decision-maker. I am not in a position to make the assumption that the outcome would have been the same had the Inspector adopted the correct approach.

68. For these reasons, permission is granted on Ground 4. The application under section 288 TCPA 1990 is granted on this ground, and the decision must be quashed.

Ground 5: error as the meaning and effect of section 106(9) TCPA 1990

69. The Claimant criticised the Inspector's decision at AD 71 and AD 76, where he expressed doubts about the validity of the unilateral undertaking because of the status of the Diocese. I refer to my account of the terms of the undertaking under Ground 4 above.

70. It is clear from the terms of section 106(1) TCPA 1990 (set out above) that a party to a unilateral undertaking must have an interest in land. By subsection 106(9), the deed must identify the land in which the interest is held. The Inspector therefore correctly stated the law at AD 71 and AD 76 and his citation of *Southampton City Council v Hallyard Ltd* [2008] EWHC 916 (Ch) was apt. The Inspector rightly observed that the Diocese did not have an interest in the land and no interest was disclosed in the deed.

71. The Claimant conceded that this was the position. The Claimant would only transfer to the Diocese the portion of the Site intended for the construction of the new school if and when planning permission was given. The Claimant submitted that the obligations entered into by the Diocese were enforceable in contract only, but this did not invalidate the deed made by the Claimant.

72. I agree with the First and Second Defendants that the Inspector did not decide that the deed was invalid; he was merely airing his concerns about it, and in my view he was entitled to do so. I share his concerns and I consider that the validity of the deed should have been addressed by the Claimant at the Inquiry. I make no ruling about its validity as it is not necessary to do so. It is clear from the decision that the Inspector did not discount the unilateral undertaking when making his planning decision.

73. For these reasons, I consider Ground 5 to be unarguable and accordingly I refuse permission.

Ground 6: absence of any evidential basis upon which to discount the benefits of housing on the site

74. In Ground 6, the Claimant criticised the sentences underlined below in AD 78, which read:

> "78. The development would bring clear public benefits, including construction jobs, a wider choice of market housing and an early, and 'above policy', provision of affordable housing to meet a pressing need. However, that need is being addressed through the Local Plan process and the affordable houses would not be in the more populous settlement locations where they are most needed. On balance, giving significant weight to the identified harm to heritage assets, I consider that the public benefits do not outweigh that harm. I find no clear and convincing justification for the harm that would be caused to the significance of the designated heritage assets."

The Claimant submitted that the existing Core Strategy adopted in 2008 had not delivered the houses needed and the new local plan was at early stages and was not treated as a relevant emerging policy. Therefore it was inaccurate to state that housing need was being addressed through the Local Plan process.

75. On my reading of AD 78, the Inspector was here using a shorthand to encapsulate his detailed findings at AD 29 – 57 that the Second Defendant could "convincingly demonstrate at least a 5 year supply of deliverable housing sites". Of the sites in dispute at the Inquiry, the majority were allocated in the SADPD and/or had planning permission. Whilst the Inspector's shorthand was not entirely accurate, the Claimant was nit picking in seeking to mount a legal challenge to the decision on the basis of this sentence.

76. The Claimant's second criticism was that the Inspector's finding that the affordable housing would not be in the populous settlement locations where they were most needed was unsupported by evidence. He pointed to Mr Neate's evidence on behalf of the Claimant that the number of people in need of affordable housing who wished to live in Sculthorpe exceeded the number which was likely to be provided by the appeals process and there was insufficient affordable housing in the more populous locations such as Fakenham.

77. The Inspector heard detailed evidence on housing requirements and supply, including affordable housing. The evidence was disputed. According to the Second Defendant, the Claimant's witness accepted the Second Defendant's evidence that there were four families on the Housing Needs Register for Sculthorpe. This ground is attempting to re-open the evidential dispute which was before the Inspector, which is impermissible.

78. In my judgment, the Inspector's conclusions on the issue of affordable housing are not open to legal challenge, even though the Claimant disagrees with them. The Inspector repeatedly acknowledged the need for affordable housing in the area and the benefit of the affordable housing which the proposed development would provide: see, for example, AD 7, 16, 18, 38, 67, 70, 76, 78 and 83. However, the Inspector made a planning judgment that a large scale housing development in Sculthorpe conflicted with the development plan objectives of delivering housing growth to larger population settlements with better facilities and transport, and that overall this proposal was not sustainable development. He was supported in that view by the examining inspector's conclusion that Sculthorpe was unsuitable for large scale housing development which could also prejudice the delivery of planned development

at Fakenham (AD 13). His exercise of planning judgment on this issue is not open to legal challenge.

79. For these reasons, I consider Ground 6 to be unarguable and accordingly I refuse permission.

Ground 8: having regard to a non-existent agreement as to the base data and reaching a conclusion for which there was no evidence in assessing the objectively assessed need and five year housing land supply

80. In Ground 8, the Claimant submitted that the Inspector materially misdirected himself when he said in the opening sentence of AD 23: "There is no dispute between the parties that there is an over-estimation of local population increases". The Claimant referred to the evidence which it adduced and the submissions which it made on this issue, and submitted that the Inspector's conclusions were flawed because he made a fundamental mistake about an agreement when there was none.

81. On reading AD 22 - 28, I have no doubt that the Inspector was well aware of the dispute between the parties as to the reliability of population data, including unattributable population change and migration estimates. The Inspector summarised the Claimant's submission that the Office of National Statistics ("ONS") figures were robust, at AD 24, and addressed the evidence. The Inspector was clearly persuaded by the Second Defendant's evidence and submission that the ONS estimates were too high, in light of the census figures, which were significantly lower.

82. In my view, AD 23 is an example of poor drafting rather than a material misdirection or misunderstanding of the evidence. It closely reflects the case presented by counsel for the Second Defendant in her closing submissions at paragraphs 16 and 17 where she referred to "two simple and agreed central points to UPC" (unattributable population change). It was indeed an undisputed fact that the ONS estimates of a population growth of around 6,000 persons between 2001 and 2011 were significantly higher than the census figures of around 3,200 persons. However, as the Inspector made clear in the next paragraph AD 24, the Claimant's case was that the ONS figures were statistically robust and could be relied upon.

83. I am satisfied that the Inspector well understood the agreed and disputed issues between the parties and gave proper consideration to them. He was entitled to reach the conclusions which he set out in AD 26 - 28. Poor drafting is not a basis for a successful legal challenge.

84. For these reasons, I consider Ground 8 to be unarguable and accordingly I refuse permission.

Summary of conclusions

85. For the reasons set out above, permission is refused on Grounds 1, 2, 3, 5, 6 and 8. The Claimant withdrew Ground 7. Permission is granted on Ground 4. I have upheld the Claimant's challenge on Ground 4, and therefore the application under section 288 TCPA 1990 is granted and the decision must be quashed.