

ANGLIA RUSKIN UNIVERSITY

FACULTY OF ARTS, LAW AND SOCIAL SCIENCES

**THE MEANING AND INTERPRETATION OF SUSTAINABLE
DEVELOPMENT IN THE PLANNING FRAMEWORK:
HUMPTY DUMPTY HAS HIS SAY**

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A thesis in partial fulfilment of the requirements of Anglia Ruskin
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ABSTRACT
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The National Planning Policy Framework was adopted in March 2012, promoting sustainable development as a 'golden thread' running through the whole document. Since then, the concept of sustainable development has been a key or sole consideration in the determination of applications for planning permission. This research is a detailed consideration of that concept within and without the Framework.

The research begins by identifying the traditional understandings of the term from its use in international and national policy documents since 1972. It continues with an examination of sustainable development in the Framework to see if a meaning can be derived from analysing its language or from a detailed review of decisions taken where it is applied as a criterion. The research includes a comparative analysis of relevant planning appeal decisions and court judgments in the twenty months from formal adoption of the Framework.

Neither the appeal decisions nor the court rulings enable any reliable conclusions to be drawn on what sustainable development means within the Framework. They do show that the Secretary of State has an almost unfettered discretion to decide the meaning of sustainable development on a case by case basis without regard to its interpretation and definitions outside the Framework.

Sustainable development has no formally agreed or legally enforceable definition. Unless and until such a definition is secured, the Secretary of State and the courts will assign mutating meanings to the term on a case by case basis.

Key words: sustainable development, planning framework, sustainable.

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Chapter 1: Introduction and Context

“When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means
Just what I choose it to mean — neither more nor less.’”¹

In 2012 the Supreme Court considered the exercise by Dundee Council of its decision-making powers in the context of an application for planning permission for a superstore. The Council’s approach to the interpretation of its policies came in for particular criticism from Lord Reed. Drawing on Alice’s further adventures in Wonderland he remarked that “planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean”.²

While Carroll’s Wonderland is an unlikely legal source, words and their meaning are as important for the English planning system in 2017 as they were for Alice and Humpty Dumpty in their exchange some 140 years earlier.

This research focusses on two words - sustainable development – and a presumption in its favour in the particular context of the National Planning Policy Framework 2012 (‘the Framework’). It is an investigation of the use of those words in a specific context at a specific time, asking the following questions:

- What sustainable development is generally understood to mean outside the Framework;
- How sustainable development is defined and interpreted within the Framework;
- How sustainable development has been defined and interpreted in the practical application of the Framework;
- The role of the Secretary of State for Communities and Local Government (‘the Secretary of State’), and the courts in refining that meaning;
- The consequences for the English planning system in 2017;

The research is based on the following hypotheses:

- That the legal mechanisms related to the determination of planning permission, are constructed so that the meaning of sustainable development in the Framework is derived on a retrospective, case-by-case basis in actual decisions made;

¹ Lewis Carroll, *Through the Looking Glass* (Collins Classics 2010) 83

² *Tesco Stores Ltd v Dundee City Council* (Scotland) [2012] UKSC 13

- That Development approved as sustainable development within the terms of the Framework is not consistent with traditional or established understandings of the term;
- That this derived meaning is inherently unstable, and determined primarily by whatever the decision maker wants it to mean.

In a recent meeting of the Public Bill Committee for the Neighbourhood Planning Bill a new clause 9 was proposed. The purpose of the clause was to confirm that achieving long term sustainable development was the purpose of planning was. The clause included an explanation – including objectives - of what sustainable development meant in practice.³ The proposal was resisted by Gavin Barwell, the Minister for Housing and Planning, on the basis that it was not necessary to “write these things into legislation” because the goal was already met in both legislation and policy. He also stated that the Government wished to preserve the ability to amend ‘the NPPF definition’ in the future through policy.

The problem with this approach is that the Framework does not define sustainable development. Instead, paragraph 6 states that “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.”⁴ When sustainable development is ‘defined’ in this way, the outcome is that lawyers, not local authorities decide what it means in practice. The outcome is that simple policy terms such as ‘policies for the supply of housing’, become issues debated by the courts – in this case the Supreme Court in the ‘Hopkins Homes’ case due to be considered in February.⁵

The research argues that a legal, or at least measurable, definition of sustainable development is needed so such outcomes can be avoided.

This chapter sets the overall context and structure of the research. It outlines the origins of the English planning system and its interrelationship with planning law, introduces the key concerns of the research, reviews the literature relevant to those concerns, sets out the structure and scope of the work as a whole and summarises the methodological approaches employed.

1.1 Origins of Planning and Planning Law

³ Neighbourhood Planning Bill Public Committee (eighth sitting) 27 October 2016 col 284

⁴ Department for Communities and Local Government ‘National Planning Policy Framework’ (2012)

⁵ Suffolk Coastal District Council v Hopkins Homes Ltd & Anor [2016] EWCA Civ 168 due to be

If the primary concerns of planning are a conscious engagement with the environment and a desire to shape it in a way that benefits society as a whole; then they can, as Rydin proposes, be aligned with the origins of western civilisation as a whole⁶. However the birth of the modern English planning system is generally accepted as originating with Ebenezer Howard and his concept of the garden city in his seminal work *Garden Cities of Tomorrow*,⁷ while the first legislation giving conscious consideration to planning law is the 1909 Housing, Town Planning Act.

The 1909 Act introduced concepts that at the time were unprecedented in terms of public interference with the use of private land. It introduced the notion that a scheme for the development of private land might be legitimately prepared and approved by a public local authority whether or not that authority owned the land. The local population as a whole, as well as the individual land owner, could seek to control and direct the use and development of land applying commonly agreed design principles. All land could be considered a public as well as a private asset, and a vessel within which intangible rights such as 'amenity' were held for the benefit of the population as a whole. Local authorities were given regulatory powers, so that landowners' development ambitions could be restricted through the use of public powers. Such public intervention was intended to ensure that new developments were not only safe and healthy but also had some consistency with aesthetic aspirations for the area as a whole, by being anticipated in a larger scheme or plan for that area.

Between 1909 and the second world war, public powers to created such plans extended in their scope as their relevance to the countryside as well as the town was recognised, but the foundations of the modern planning system were established with the Town and Country Planning Act 1947. The 1947 Act established principles of development control that are familiar today. It assigned a statutory definition to the term 'development' encompassing both physical works in the form of building, mining, engineering or other physical operations, and changes of the use of buildings or other land so long as that change was material. The Act went on to require that where any works or uses fell within this definition, the development could not take place, or be allowed to continue, unless a formal consent - a planning permission - had been obtained for it. The consent process involved the submission and publication of a formal application, and formal consideration of whether or not that application should be approved. As Booth recognises, introduction of the need for planning

⁶ Yvonne Rydin, *The Purpose of Planning* (Policy Press 2011)

⁷ Ebenezer Howard, *Garden Cities of Tomorrow* (2nd Edition Dodo Press 2009)

permission created a form of public ownership in the development of land, and made the local authority the curator of that interest⁸. The decision was made by an officer of that authority or a committee made up of its members, and the person or body tasked with deciding whether or not to approve a planning application was required by law to apply a particular legal test.

If, as McAuslen proposes, planning law is an arena where ideologies of public interest, private property and the right to participation intersect⁹, the intersection is shown most starkly in the determination of planning applications where individual property owners are required to offer their development aspirations up to public scrutiny and debate, and have those aspirations approved and regulated by local or national government bodies. Section numbers have changed since 1947 but the principles have endured and still underpin the determination of all applications for planning permission on land in England.

1.2 The legal test

The current test for determining planning applications ('the legal test') is an amalgamation of sections from two different pieces of legislation. Section 70(2) of the Town and Country Planning Act 1990 requires the authority considering whether or not to grant planning permission should 'have regard to the provisions of the development plan, so far as material' while section 38(6) of the Town and Country Planning Act 2004 requires that these determinations should be made 'in accordance with the plan unless material considerations indicate otherwise'. As Booth recently noted, the legal test "of profound significance for the way in which spatial planning operates within the UK... inviting the decision-maker to determine what regard must be paid to those things that she or he does deem to be material"¹⁰

The words of the legal test have barely changed since 1947 but its operation always was, and remains, complex. The text operates as the locus for an intimate interaction of planning policy and law; a procedural scaffold enclosing a wide discretionary space within which a particular proposal is evaluated. It requires the decision maker to consider the application against a specific policy context comprising both the development plan policies relevant to the land and a wide range of relevant planning issues, where they are 'material' to the particular application.

⁸ Philip Booth *Planning by Consent* (Routledge 2003) 6

⁹ Patrick McAuslen *The Ideologies of Planning Law* (Pergamon Press Ltd, 1980)

¹⁰ Philip Booth, 'Planning and the Rule of Law' (2016) Vol 17 Planning Theory & Practice, 344

The legal test does not, and cannot define which policies apply in each case. It does not and cannot proscribe what weight is to be given by the decision maker to each policy or material consideration. It does not and cannot state where the merits of a particular application lie. Rather, the legal test enables a wide range of potential approaches to be taken to each application. The decision maker has a broad range of potential choices: which development plan policies to choose; which considerations are more or less material than the others, and how they should be weighed against each other in deciding whether or not to grant permission. In this process of balancing and assessment the weight given to policies, their impact in relation to particular applications is not fixed but can instead fluctuate depending on the writer, the reader and the physical and political context within which they are read and understood.

This interaction of policy considerations mutates according to the development proposed, the site it is proposed for and the particular policy context. This context can be altered by the introduction of new local and national policies, the publication of new planning guidance or a government statement to parliament. The focus and balance of this decision-making process can be fundamentally shifted through the introduction by government of overarching policy presumptions. These presumptions are highly significant for their impact on the legal test. They are required to be taken into account so that a lack of proper regard to them will invalidate the decision as a whole. They effectively require the decision-maker to adopt a particular bias in relation to the proposal even before the normal weighing process begins.

1.3 Sustainable Development

Sustainable development was first used as a term to describe a particular policy position in the report presented by Gro Harlem Brundtland to the UN General Assembly in 1987 ('the Brundtland definition').¹¹ In that context it was used to describe an approach to development where first world nations placed conscious limits on their growth so as not to compromise the growth potential of other societies and future generations. Since then the term has been widely used in international, national, regional and local policy contexts but has not acquired a legal or even formally recognised definition. The Brundtland definition is often referred to but thirty years after it was used for the first time there is still no generally agreed definition of what it is and no legal or enforceable standard.

¹¹ World Commission on Environment and Development 'Our Common Future' (OUP 1987)

In 2012 the National Planning Policy Framework was adopted as the central national planning policy document¹² introducing the concept of sustainable development into the heart of the planning process, as a 'golden thread' through the document and, in a metaphorical sense, the planning system itself. From March 2012 the question of whether a particular proposal represented sustainable development would always be a material consideration in the determination of planning applications. Moreover, where the existing development plan was 'absent, silent or out of date' then a presumption in favour of sustainable development had to be applied.

The creation and adoption of the Framework represented a prime opportunity to adopt one of the many definitions of sustainable development available and impose it as a standard, but the opportunity was lost. The Framework includes the text of the Brundtland definition, and imports key components of the most recent UK Strategy on Sustainable Development, but there is no single definition of the sustainable development for Framework purposes except for paragraph 6 where it is contrived to mean development that is consistent with the aims of the Framework itself.

Within the Framework, therefore, sustainable development is not so much a defined term but rather an evaluative touchstone. The question of whether or not a development is sustainable depends primarily on whether or not the development conforms to the Framework. However, the Framework itself is nearly 60 pages long containing a large number of policies and covering a very wide range of policy considerations. Conformity with the whole of the document is in most cases, impossible while the evaluation of such conformity is still a subjective concern, an evaluation of competing claims that is very much for the decision maker alone. The sustainability or otherwise of a proposal is thus decided on a case-by-case basis by each decision maker, depending on what part of the Framework the decision maker decides to refer to and the meaning and weight attributed to it.

1.4 Politics and Planning

Because the sustainability of a proposal depends largely on the discretion of the decision maker, the status of that person or organisation in the decision-making hierarchy is also significant. Most planning decisions are made by a local authority planning officer or committee - or where that decision is contested, on appeal by a planning inspector – but it is the Secretary of State who has the position of greatest significance as he is both the most significant actor in terms of policy setting and decision taking.

¹² Department for Communities and Local Government 'National Planning Policy Framework' (2012)

The determination of planning decisions is not only more complex than appears from the words of the legal text, it is also highly sensitive to the particular socio-political context within which it is produced and adopted. The Secretary of State's functions are driven primarily towards the promotion of a particular political agenda. He has the power to alter the policy context for determining an application without needing to enact any legislation through:

- The imposition of new planning policies through issuing new guidance such as the Framework or through informal, immediate alterations to online National Planning Policy Guidance, or simply by statements to parliament. New policies imposed by government in this way automatically become material considerations that must be taken into account in the planning process;
- The introduction of new policy presumptions such as the presumption in favour of sustainable development which are immediate material considerations requiring a particular bias to be adopted by the decision-making individual or body that operates in parallel with the legal test.

The Secretary of State is also the decision-maker on planning applications either through use of powers of 'call in' prior to the initial decision being taken or by 'recovering jurisdiction' of planning appeals from planning inspectors. In any of these cases the legal test is applied *de novo*, and there is a reconsideration of the merits of the application against both the development plan and material considerations, including the presumption in favour of sustainable development. For cases of any scale or significance it is the Secretary of State – the same entity responsible for production and adoption of the Framework – who makes that key evaluation.

Within the current decision-making hierarchy the Secretary of State is both a dominant actor in the making of planning policy and also the final arbiter of its meaning within the context of determining planning applications. Decisions made by the Secretary of State can be challenged only on the basis of legal or procedural defect, not on issues of planning judgment. So long as the legal test itself is observed, the courts will not intervene in the way in which sustainable development was defined, nor step in to impose their own understanding of the term.

1.5 Literature review

There is a wide range of material available on planning policy and planning law but little or nothing on this crucial intersection of the two disciplines. The field of planning is not short of critical, engaged self-reflection on what planning is and should be. There is a substantial amount of literature on what planning is about, and for, the legitimate scope of planning

policy – what it is, how it should be formed, developed and applied, and on planning theory - traditional and new definitions, and the link between planning theory and practice and other social policies.

Key texts from authors such as Healey¹³ Allmendinger¹⁴ and Rydin¹⁵ consider in breadth and depth the conceptual origins and range of scope of planning, ranging from its role in economics and politics, its connections to social theory and its influence over physical development. These authors consider the role of the planner: as a social and political agent, interpreter of issues, promoter of communicative processes, policy analyst, and advocate for a particular perspective on and reaction to proposals for development planning and control. They also consider the role of the planning system and produce a variety of theories about what that system is for and how it functions, including the complexity of power relations in the context of policy formulation and the ideologies underlying the system as a whole.

Planning law is a parallel discipline that operates as a constant regulatory framework and constraint for planning theory and practice. However, there is little or nothing in planning theory on the ideological foundations of planning law and no critical consideration of the intersection of law and policy in the determination of planning applications. As Philip Booth recently remarked: “the importance of law in the day-to-day exercise of planning powers is acknowledged, the extent to which law and legal process has shaped the objects and practice of planning is much less well understood.”¹⁶ In contrast to planning theory and policy, planning law is viewed as a value-neutral regulatory canon that cannot be questioned and is more often excluded from critical consideration. The nature and purpose of town planning can be defined from a variety of perspectives; planning law seems to exist in an abstract, unquestioned, parallel universe.

Rydin’s recent work: ‘the Purpose of Planning’ suggests that planning is a profession enduringly concerned and engaged with defining its role.¹⁷ Rydin proposes a range of ways of understanding the planning system: a form of collusive decision making (page 12); an interaction of governance networks (page 20); a space where conflict occurs (page 126). She does not mention the potential relevance of the legal test as the essential regulatory superstructure framing all decisions on planning proposals. She does not consider the role

¹³ Patsy Healey, *Collaborative Planning: Shaping Places in Fragmented Societies* (Palgrave Macmillan 2006);

¹⁴ Philip Allmendinger, *Planning Theory* (Palgrave Press 2002)

¹⁵ Yvonne Rydin, Y (2013) *The Future of Planning: Beyond Growth Dependence* (Policy Press 2013)

¹⁶ Philip Booth, ‘Planning and the Rule of Law’ (2016) Vol 17 Planning Theory & Practice, 344

¹⁷ Yvonne Rydin, *The Purpose of Planning* (Policy Press 2011)

of the planning lawyer as a participant in regulating this system in day to day decision making, as the advocate when issues are re-determined by government, or the courts as significant actors in confirming the scope of administrative authority or the weight and significance of planning policies. Allmendinger's most recent work includes a detailed account of the development of a neoliberal agenda from the 1980s onwards but does not factor in the role of presumptions in the legal test as points where the balance of power shifted strongly towards development and growth, thus promoting that very agenda¹⁸.

McAuslen suggests that the legal test for the determination of planning applications is viewed by planners as a covert weapon used by lawyers to insert themselves as unwanted visitors to the planning system.¹⁹ Whatever the reasons, there is relatively little consideration by planning academics on the operation of the presumption in favour of sustainable development in the Framework. For example, there is an entire journal dedicated to the topic of sustainable development yet between January 2012 and September 2016 not one article was written looking at the way in which that term was used in the Framework²⁰.

A comprehensive examination by the University of Cambridge Centre for Housing and Planning Research took the Framework into account but only in terms of its function as one of a range of potential planning constraints rather than questioning its validity as an evaluative criterion in the development consent process²¹. A number of technical reports on the Framework have been produced by planning practitioners. In March 2013 Savills produced a report assessing the impact of the Framework in terms of planning permissions issued²², and in 2014 three more reports came out – one from CPRE looking at the impact of the Framework on the countryside²³, another from Glenigan detailing the effect of the Framework on the residential market²⁴, and a third from Turley Associates looking at appeal statistics and how they were affected by the introduction of the Framework²⁵. These reports address the NPPF directly are useful in that they identify trends based on statistical analysis of the outcomes of applications and appeal decisions with some reference to particular

¹⁸ Philip Allmendinger *Neoliberal Spatial Governance* (Routledge 2016)

¹⁹ Patrick McAuslen *The Ideologies of Planning Law* (Pergamon Press Ltd 1980)

²⁰ Sustainable Development edited by Prof Richard Welford, University of Technology, Sydney

²¹ Gemma Burgess, Sarah Monk, Michael Jones, Professor Tony Crook, *Research on the nature of planning constraints* (Cambridge Centre for Housing and Planning Research 2014)

²² Savills, 'National Planning Policy Framework one year on' (2013)

²³ CPRE 'Community Control or Countryside Chaos?' (2014)

²⁴ Glenigan 'Residential Planning and the NPPF' (2014)

²⁵ Chris Pickup, 'The Impact of the National Planning Policy Framework on Decision Making' (Turley 2014)

judgments. However they produce data rather than argument and focus on outcomes rather than the processes behind them. They reveal the empirical impact of the Framework on decision making as a whole but never question its fundamental terms or ideological justification. There is no substantive critical analysis of the decisions themselves.

Legal practitioners have a different, but equivalently limited focus on planning issues, concentrating on the operation of the legal test in terms of how it is considered in case law but rarely considering or questioning the role or meaning of policy. Planning lawyers produce copious amounts of material in the form of reviews of individual cases or analysis of emerging legislation but tend to avoid reflection on the significance of their own role as advocate, interpreter, or arbiter. They focus on the legal substance of cases, summarising the key elements of significant judgments and occasionally question their future impact and rarely question its fundamental legitimacy by asking whether the law ought to be worded as it is or function as it does.

This is epitomised in the approach of the legal profession to the legal test, which has since its introduction generated a significant amount of case law, and associated comment from practitioners. The commentary is generally limited to summarising the treatment of the test in specific key cases and the way in which changes have been recognised, explained and reinforced in the associated case law rather than its evolution over the years. The perspective adopted tends to be analytical rather than critical, accepting the new presumption as a *fait accompli*, without detailed consideration of the ideological foundations or merits of the term or its potential effect on the planning system. The legitimacy of the legal test, and its effectiveness in actually delivering sustainable development, are rarely, if considered. McAuslen is the only author to engage extensively and exclusively with planning ideologies, his main work on this issue was nearly 40 years ago and has not been updated²⁶. Booth presents a considered summary of the history of the decision making process and a range of relevant issues such as the competing concerns of private and public interest, and the difficulty of interpreting policy terms such as amenity but this work again predates the framework and, indeed, the new Coalition government²⁷.

The meaning of the new presumption did attract some critical attention when the draft Framework was published. Howell was bullishly optimistic about the potential impact of the presumption²⁸ while Ellis was equivalently cautious and the only practitioner to question the

²⁶ Patrick McAuslen *The Ideologies of Planning Law* (Pergamon Press Ltd 1980)

²⁷ Philip Booth *Planning by Consent* (Routledge 2003)

²⁸ John Howell, 'Keynote Address Planning Conference' (2011) Volume 13 Journal of Planning &

merits of placing a mutable concept such as sustainable development as the driving principle behind planning decisions²⁹. However neither Ellis nor Howell have revisited their predictions following actual adoption of the document.

The operation of the legal test as modified by the Framework was the central theme at the national planning law conference in 2013 which took "Untangling the Golden Thread", as its theme, but as McAuslen's paper for that conference pointed out, none of the contributors engaged with the question of whether the Framework was 'just'³⁰. Contributors acknowledged the potential of the NPPF to effect radical change in what could be permitted, but no one questioned whether the government ought to be able to make such radical changes simply by inserting a introducing a new planning policy document into a sixty year old legal test. Hardly any of the materials available considered in any detail the interrelationship between planning law and policy. In particular there appeared to be no consideration of the extent to which policy aspirations, though secured through adopted plans, and supplementary planning documents, could be frustrated by the political nature of the development control process. Since that Conference Weeks has published one article noting that the presumption in favour of sustainable development has operated as a means for developers to bring forward unwanted development, contributed to the incidence of 'planning by appeal' and likely to promote growth rather than sustainable development. These points are though made within the context of an article on localism rather than as a critique on the Framework itself³¹.

There is a body of environmental law concerned with the definition and regulation of sustainable development in both the national and international arena, considering sustainable development as a legally-enforceable concept and as a criterion for the evaluation of developments. Authors such as Ross help to provide a context for the Framework by tracing the evolution of the concept of sustainable development into mainstream UK law and policy³². Segger and Khalfan consider sustainability in relation to international economic environmental and social law³³. Richardson and Wood engage with complex intersection of legal and policy issues relevant to sustainability³⁴. This should in

Environment Law OP4-8

²⁹ Morag Ellis, 'Green growth: do blue and yellow really make green?' (2011) Volume 11 Journal of Planning and Environment Law 1433-1446

³⁰ Patrick McAuslen, 'Towards a just planning system: the contribution of law' (2013) Journal of Planning and Environmental Law Volume 2 145-157

³¹ Paul Weeks, 'NPPF: two years in' (2014) May Property Law Journal 23-25

³² Andrea Ross, *Sustainable Development Law in the UK from rhetoric to reality?* (Earthscan 2012)

³³ Marie-Claire Cordonier Segger and Ashfaz Khalfan *Sustainable Development Law Principles, Practices and Prospects* (OUP 2004)

³⁴ Benjamin J Richardson and Stephan Wood *Environmental Law for Sustainability* (Hart 2006)

theory be directly relevant to the consideration of the same term in the Framework but none of them consider the concept of sustainable development within planning or examine the definition within the particular context of the Framework.

The only substantial body of work engaging with the concept of sustainable development in the specific context of the Framework has been generated by parliamentary committees and they have proved to be a useful ongoing source of literature on its evolution and impact. In 2011 both the Environmental Audit Committee and the Select Committee for Communities and Local Government carried out an inquiries and published two reports on the Framework^{35 36}. In April 2014 the Select Committee on Communities and Local Government set up an inquiry into the operation of the Framework in its first two years and published its report at the end of that year³⁷. These are more discursive in their approach than lawyers and actively and critically consider the function of the term sustainable development within the legal test, but are not, and are not intended to be a critical, detailed analysis of its effect.

1.6 The need for this research

In Chapter 6 of the 2014 report by the Select Committee on Communities and Local Government on the operation of the Framework concern was expressed at the lack of up-to-date data. In spite of the broad scope of potentially relevant materials the Committee was concerned that there were still some key areas, particularly in relation to the intersection of law and policy that remained under- or unexplored. The Committee was clear that national statistics on the provision of housing, while welcome, would be insufficient for this purpose and emphasised the importance of data collection in order to avoid making future policy decisions ‘in the dark’.³⁸ The Framework has generated a significant amount of attention from parliamentary committees. However no professionals or academics within the fields either of planning or environmental law have, as yet, carried out a detailed critical investigation into what the term sustainable development means as defined by the Framework or as applied to the determination of planning decisions.

This research aims to fill some of the space between between planning theory and legal analysis and is situated in the discursive lacuna between two professions: the planners who do not interrogate the operation of the legal test because they regard it as outside their

³⁵ Environmental Audit Committee, ‘*Sustainable Development in the National Planning Policy Framework*’ (HC 1480 2011)

³⁶ Communities and Local Government Committee, *The National Planning Policy Framework* (HC 1526 2011)

³⁷ Communities and Local Government Committee, *Operation of the National Planning Policy Framework* (HC 190 2014)

³⁸ *Ibid*, 54

legitimate scope of scrutiny and the lawyers whose scrutiny of the same test is limited to whether the procedural and legal requirements have been properly observed rather than the merits of the policies applied. It also aims to meet some of the need identified by the Committee by examining in detail the way in which the legal decision making process in planning introduction has been affected by the presumption in favour of sustainable development. The research is original because it focuses on the intersection of the legal test with its policy context and unique because it includes a linguistic deconstruction of the framework combined with a detailed examination of actual decisions taken over a substantial period of time.

1.7 Methodology

The research investigates the meaning and interpretation of sustainable development in the Framework through a variety of approaches:

- An examination of what the term sustainable development has traditionally been understood to mean by examining the words in their wider policy context from their 'Brundtland' origins and subsequent integration into international and national policy – in particular the 2005 Sustainable Development Strategy;
- An examination of the term sustainable development in the Framework itself; focusing on the syntactical use and linguistic positioning of the term in the first draft, consultation document and adopted policy;
- An empirical analysis of the way in which the term was considered within a defined range of individual planning appeal decisions made by the Secretary of State;
- A parallel assessment of the way in which the term was considered by the judiciary in the context of statutory appeals and judicial reviews of planning decisions.

The research is inherently inter-subjective, as it is concerned with the interpretation of a key term in a national policy document that is applied as part of a statutorily required legal test. At its heart this research is also a search for meaning and an exploration of how meaning is assigned and acquired; raising issues of syntax and the interrelationship of language and the power of those who use that language. As a result a mix of methodologies is employed: doctrinal research, socio-legal approaches, and analysis that is as empirical as possible given the data available.

Chapters 2, 6 and 7 involve a 'black letter' examination of relevant case law for the way in which specific topics are considered. Chapter 2 looks in detail at the cases associated with the operation of the legal test since its inception since 1947. Chapter 6 also examines case

law but is more forensic in its approach, focussing on a specific 20 month period to look at the treatment by the courts of the concept of sustainable development as defined and applied by the Framework. Chapter 7 also examines court judgments issued within a specific period, this time looking at each decision in turn for the way that the concepts of meaning and interpretation of language itself are treated.

Doctrinal research has its limits as a research method and this is particularly the case in relation to planning law where legal theory operates alongside a wide and constantly changing canon of local and national policy and politics. For this reason a broader socio-legal approach is employed in chapters 2, 3, 4 and 7. The relevance of this wider context is primarily to enable a more detailed examination of the policy context within which the legal principles are applied. In chapter 2, this comprises the planning policies created and adopted by government in the form of circulars, planning policy guidance, and statements to parliament, as well as the local policies adopted by councils in the form of local plans, and supplementary planning documents. In chapter 3 there is a detailed examination of the chronology of international and UK policies which have over time, defined sustainable development. These chapters also expand to the scope of the research to its wider socio-political context, drawing on a range of materials to propose that the concept of sustainable development is being remoulded in the context of planning decisions to create and promote a pro-growth, neo-liberal approach to the development of land. This socio-legal approach enables the Framework itself to be investigated as a piece of discourse as well as an emanation of policy and facilitates a light-touch process of textual deconstruction to show how the meaning of sustainable development is obscured rather than clarified through being included in that document.

Socio-legal approaches have been criticised by authors such as Hutchinson for their lack of rigour and empiricism.³⁹ Doctrinal research based on case law is also problematic in terms of empirical analysis because it is difficult to carry out a like-for-like assessment of judicial decisions: each case is different and each judge has his or her own way of addressing it. A more analytic approach is possible in appeal decisions made by the Secretary of State because these are highly formulaic, adopting an identical structure and often using identical language, to consider and decide on the planning appeals that come within his frame of reference. Chapter 5 takes advantage of this standardised, template-based decision-making

³⁹ Terry Hutchinson 'Doctrinal Research' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 16

tabulating, comparing and analysing the Secretary of State's decisions on a relatively like-for-like basis.

Both Oscola and Harvard were considered as referencing styles and in the first drafts of the research Harvard was used because of the amount of policy documents considered. Given the amount of judicial decisions, and their impact on the research as a whole, the Oscola referencing was the style finally chosen and applied.

1.8 Structure of Thesis

Chapter 2 is an in-depth analysis of the legal test itself. It begins with a review of its procedural and legal context before going on to a dissection of the legal test into its constituent elements, and looking in detail at each. This chapter focusses in particular on the significance of planning policy considerations in the exercise of the legal test and shows how, from time-to-time, policy presumptions are inserted and applied as an essential element of the legal test as it is applied by decision makers. It considers how presumptions in favour either of the plan or development have altered the way in which the test has been applied over the years and looks at the effect of those presumptions on the decisions made. It introduces and explores the historical tension associated with the dual functions of the Secretary of State as the Minister of State with responsibility both for making planning policy and for deciding how it should be applied in the determination of individual applications.

Chapter 3 explores the question of whether or not sustainable development has an 'ordinary and natural' meaning that is commonly accepted and if so what it is. Beginning with the use of the term in documents such as Carson's 'Silent Spring'⁴⁰ this chapter shows how the term sustainable development entered international policy vocabulary, identifies its origins in and evolution through English environmental law and policy and highlights the historic and enduring difficulties with achieving a widely accepted or applied interpretation. The chapter proposes that although there is evidence for a common understanding of what sustainable development means, the term is not formally defined and can easily be appropriated for particular purposes and used to support specific agendas. The chapter explores the extent to which this happened after the election of the Coalition government in 2011 showing how the concept of sustainable development was increasingly equated with economic growth rather than environmental protection while environmental impacts were presented as an exclusively financial development cost to be measured and offset.

⁴⁰ Rachel Carson, *Silent Spring* (Penguin 1962)

Chapter 4 looks at the use of sustainable development within the Framework itself and asks whether 'sustainable development' as contained within and defined by the specific context of the Framework, has any connections with established understandings of the term. This chapter analyses the Framework syntactically as a piece of text, looking at the key changes in structure and content that occurred between publication of the initial draft, the consultation draft and the adopted document. It focusses on the new presumption, beginning with a comparison of the way in which the term 'sustainable development' appeared and was defined in the initial version, subsequent consultation drafts and the adopted document. It dissects the text to show how the concept of sustainable development, and its derivatives ('development that is sustainable', 'sustainably', 'sustainable use' and 'unsustainable') are used within the current text, with the effect of draining meaning from rather than contributing meaning to the term.

This examination of the Framework shows how the way the term is used tends to obscure rather than clarify meaning, so that there is no definition of sustainable development within the Framework that can be objectively or rigorously applied to development proposals. It proposes that the Framework seems instead designed to produce a concept of sustainable development that is both mutable and malleable, that can be used to approve or refuse a wide range of development proposals depending primarily on the interpretative stance of the decision maker, and achieve different planning outcomes depending on the location, type and scale of development, and their context in terms of the local, or national bodies or individuals making the decision.

Chapter 4 explores the political concerns and power relations behind and operating through the evolution of the Framework. It assesses the Framework as a piece of discourse, a text that has emerged from and is defined and best understood with reference to, a particular political and economic context. The Framework is presented as the production of a particular political ideology created and interpreted by particular actors in a particular time, where land is seen primarily as a source of economic growth and its intrinsic, invaluable environmental role needs to be hidden or at least reduced in significance. The Framework is shown as operating both as a policy document and as a key element in a pro-growth political agenda where the concept of sustainable development has meaning imposed on it to serve in the promotion that agenda.

Chapter 5 is the first part of the analytical heart of the research. It involves an empirical analysis of planning decisions made by the Secretary of State over a specific period, looking on a case-by-case basis at decisions made by him on planning appeals where the legal test

was exercised 'de novo' and with reference to the new presumption in favour of sustainable development.

In each case the type of development, and the outcome of the decision making process was recorded, and then the decision were analysed for:

- How, if at all they defined sustainable development;
- Whether or not they referred to the three social, environmental and economic 'pillars' and the relative weight given to each one;
- The extent to which the Secretary of State intervened to override either the views of the local authority or the inspector.

These decisions represented a small proportion numerically of all of the decisions taken in relation to planning applications but were considered to be the most relevant for consideration because powers of call in and recovery apply only to developments that are of the greatest significance in terms either of scale, scope or impact and because of the dominant position of the Secretary of State in the planning system.

The temporal scope of the analysis of recovered and called in decisions was the twenty month period from the date when the new presumption came into full effect – ie 28th March 2013 to 31st October 2014. This was selected because it enabled the examination of significant number of planning decisions and case law while limiting the risk that the Government might remove the presumption in favour of sustainable development from consideration in planning applications. Because significant numbers of the decisions considered related to traveller developments and renewable energy the decisions were subdivided and analysed accordingly.

Chapter 6 is the next element of substantive analysis and examines decisions of the High Court (including the new specialist planning court), the Court of Appeal or the House of Lords involved in reviewing decisions made on planning applications by local authorities, the planning inspectorate or the Secretary of State. There was much greater diversity of style and structure in these judgments compared with the appeal decisions; the range of considerations was different in each case and both the style and content of each decision varied depending on the individual judge.

The purpose of this exercise was to analyse the rulings that considered its application by the Secretary of State for:

- Consideration of the meaning of sustainable development within the Framework;

- Comments on interpretation of the Framework generally;
- The extent to which the decision maker is considered to have misunderstood or misapplied the Framework.

The exercise began with a review of every case within the 20 month period reported in Baillii⁴¹. From these cases were selected those where the concept of sustainable development as defined and applied by the Framework were identified as of primary relevance. Each decision was then analysed for the extent to which the term was reconsidered, applied or interpreted to see if, from the range of cases considered, it was possible to reveal a coherent approach to the way in which the term should and should not be considered and applied.

Chapter 7 This chapter is primarily a summary of the research and a review of the original hypotheses in the light of the findings. It revisits the original hypotheses and draws together the findings in chapters 5 and 6, proposing conclusions in relation to:

- Whether the Secretary of State, through his decisions, clarified or confounded the meaning of sustainable development within the Framework;
- The extent to which this was investigated or challenged in judicial decisions;
- The extent to which the presumption in favour of sustainable development is operating as it was originally claimed it would

This chapter also investigates the way in which the courts consider the meaning and interpretation of language in relation to the review of planning decisions.

The research concludes with reflections on the implications of the new presumption for the planning system as a whole, with specific reference to the recent *East Staffordshire* decision.⁴²

⁴¹ British and Irish Legal Information Institute

⁴² *East Staffordshire Borough Council v Secretary of State for Communities & Local Government & Anor* [2016] EWHC 2973

Chapter 2: The legal test – Principles, Presumptions and Politics

Introduction

This research is concerned with the meaning of sustainable development within the specific context of the Framework, and focusses on the presumption in favour of sustainable development contained within that Framework as it is applied in the determination of development proposals.

This chapter is a detailed examination of the legal test which regulates those determinations. It begins with its historical origins and then sets out the current version in full. It examines each element of the legal test in turn, showing how an understanding of specific terms such as ‘development plan’, and ‘material considerations’ have evolved through consideration in the courts and how the operation of the test is influenced by changes to the governing legislation or through the introduction of new planning policy presumptions. It explores the historical tension associated with the interaction of legislation and policy with particular reference to the 2001 ‘Alconbury’ and the 2015 ‘West Berkshire’ cases. It concludes with a summary of the impact of the introduction of the Framework and its presumption in favour of sustainable development – a presumption which must as a result of the Framework either be taken into account as a material consideration or applied in favour of the development proposed.

2.1 Origins and context

Allmendinger proposes that there are three kinds of space within the planning system – territorial, relational and soft⁴³. This chapter proposes that there is a fourth space – discretionary, highly disputed, and boundaried by the words of the legal test. The planning decision-making process has always included the exercise of such a test. The legal test has legislative origins but has always had the effect of yoking law and policy together in a complex interactive process, noted by Booth as being “of profound significance for the way in which spatial planning operates within the UK”.⁴⁴

Section 14 of the 1947 Act required the local authority considering an application for permission for development to “have regard to the provisions of the development plan, so far

⁴³ Philip Allmendinger, *Neoliberal Spatial Governance* (Routledge 2016) p 164

⁴⁴ Philip Booth, ‘Planning and the Rule of Law’ (2016) Vol 17 Planning Theory & Practice, 344

as material thereto, and to any other material considerations.”⁴⁵ The current version of the legal test contains echoes of its 1947 origins but is an awkward conflation – well described as ‘cumbersome and clumsy’⁴⁶ – of two separate pieces of legislation:

- Section 70(1) of the Town and Country Planning Act 1990 (‘the 1990 Act’) requires the local authority to ‘have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations’⁴⁷;
- Section 38(6) of the Planning and Compulsory Purchase Act 2004 (‘the 2004 Act’) informs and modifies this by adding the additional requirement that: ‘if regard is to be had to the development plan...the determination must be made in accordance with the plan unless material considerations indicate otherwise.’⁴⁸

As Moys recently commented “whatever the 1990 Act has to say about the law on plan-making, this is only ever part of the picture. This is because of the vital role that planning policy, the software of the system, plays”.⁴⁹ The complexity of the test, the extent to which it involves the exercise of relatively subjective judgments by local authorities and the significance in both financial and community terms of the decisions taken in terms of their economic and social consequences have conspired to make this an enduringly dynamic, complex and controversial area of planning law. There is a substantial body of case law on every element of the test including the definition of the development plan; the meaning of material considerations and the relative weight to be given to each in the determination of individual applications.

Although the legal test itself has retained its essential content and structure since 1947, planning decisions do not occur in a legal vacuum. Planning decision-making is one of the key regulatory functions carried out by public bodies in England and has significant consequences both for the community and the land affected. As a result there are overarching requirements imposed by international and national law which must be observed if the decision is to survive judicial scrutiny. This wider procedural context has changed significantly in the last sixty years. The principal international change since 1947 is the European Communities Act of 1972 and the creation of a regulatory environmental superstructure over the planning process with the 1985 Environmental Impact Directive and

⁴⁵ Town and Country Planning Act 1947 (TCPA 1947) s14

⁴⁶ Sweet and Maxwell *Encyclopaedia of Planning Law and Practice*, vol 2, para 54.04

⁴⁷ Town and Country Planning Act 1990 s70(2)

⁴⁸ Planning and Compulsory Purchase Act 2004 s38(6)

⁴⁹ Clive Moys ‘Has the Town and Country Planning Act 1990 stood the test of time’ (2016) 5 JPL 447

its subsequent replacement Directives⁵⁰. This imposes a requirement on all applications for development consent to have their potential environmental impacts assessed and where possible mitigated before any such consent is granted. This assessment exercise is intimately connected with the decision to grant a planning application and occurs in parallel with it but remains a separate legal requirement which, as Chapter 3 will show, both decision makers and the English courts have been reluctant to recognise.

In terms of national law, two pieces of legislation have had a significant, and relatively unanticipated impact on planning: the Human Rights Act 1998⁵¹ and the Equality Act 2010⁵². The 2001 *Alconbury* case established that the system of planning appeals as a whole was compliant with Article 6⁵³, while cases such as *Buckley*⁵⁴ *Varey*⁵⁵ and *Chapman*⁵⁶ established that human rights considerations such as Article 1 of the First Protocol (the protection of property) and Article 8 (the right to respect for private and family life) must be taken into account in planning decisions involving members of this community and that the grant of planning permission would be invalidated if their rights were not taken into account.

The Public Sector Equality Duty was brought in by section 149 of the 2010 Equality Act and required public bodies to have due regard to the needs of members of the population who shared protected status when exercising any public function – for example, the duty is relevant to members of the gipsy and traveller community because they share the protected characteristic of race. Its relevance to planning case was established in *Harris*⁵⁷ and explored and confirmed in *Coleman*⁵⁸ where claims established that a lack of proper regard to the particular needs of specific communities in the determination of planning applications, resulted in a breach of the Equality Act and led to the permissions being quashed.

There are additional overarching procedural requirements relating specifically to the planning process but separate to the legal test:

- Planning applications must be processed, consulted on and publicised in accordance with the requirements of the General Development Procedure Order;⁵⁹

⁵⁰ Council Directive 2014/52/EU of 16 April 2014 on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124

⁵¹ Human Rights Act 1998

⁵² Equality Act 2010

⁵³ *Alconbury* [2001] UKHL 23, [2001] 2 All ER 929

⁵⁴ *Buckley v United Kingdom* app no 20348/92 [1996] ECHR 39

⁵⁵ *Varey v United Kingdom* app no 26662/95 [2000] ECHR 692

⁵⁶ *Chapman v United Kingdom* app no 27238/95 [2001] ECHR 43

⁵⁷ *Harris, R (on the application of) v The London Borough of Haringey* [2010] EWCA Civ 703

⁵⁸ *Coleman, R (on the application of) v The London Borough of Barnet Council & Ors* [2012] EWHC 3725

⁵⁹ The Town and Country Planning (Development Management Procedure) (England) Order 2015 SI 2015/595

- Decisions made by planning committees must comply with the Local Government Act 1972 in terms of publication of minutes and committee documents;
- Committee members themselves need both to observe common law principle relating to bias as well as any specific requirements in the local authority's own constitution, as shown in the recent *Kelton* case.⁶⁰

Finally, there are additional requirements specific to any application that involves listed buildings or land within a conservation area. The Listed Buildings and Conservation Areas Act 1990 requires that, in addition to the legal test, where listed buildings are involved the decision maker must have "special regard" to the desirability of preserving the building or its setting or any features of special architectural or historic interest and in the case of buildings in conservation areas pay "special attention" to the "desirability of preserving or enhancing its character or appearance".⁶¹ This was recently considered in *North Norfolk* where Mr Justice Purchase referred to the "presumptive desirability" of preserving the setting of a listed building, and made it clear that consideration of historical merits of "should not be addressed as a simple balancing exercise but whether there is justification for overriding the presumption in favour of preservation."⁶²

2.2 The planning balance

The legal test includes a specific requirement to have regard to the development plan, but leaves the weight of that plans policies to be determined by the decision maker. That decision maker has a wide discretionary scope to balance the policies of the current development plan and other considerations specific to the particular application in question against each other to reach a decision that will either unlock or freeze the development potential - and financial value - of land.

The operation of the legal test has been legitimately described as 'a complicated juggling act performed on a unicycle balanced on a tightrope'⁶³. It is a complex decision making process where the decision maker has to carry out a delicate balancing exercise between formal policy requirements and the considerations unique to that application. The task of the body

⁶⁰ *Kelton v Wiltshire Council* [2015] EWHC 2853 (Admin)

⁶¹ The Planning (Listed Buildings and Conservation Areas) Act 1990, ss 66, 67, 72, 73

⁶² *North Norfolk District Council v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 279 (Admin) [66]

⁶³ Graham Warren, 'Housing – is it Sustainable' [1996] JPL Occ. Pap 24, 76

entrusted with applying the legal test was comprehensively summarised by Lord Clyde in the leading *City of Edinburgh* case⁶⁴:

“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. ... 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 require 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.”

Given the scope of the required decision-making exercise, and its complexity, it is hardly surprising that each one of the steps identified has proved problematic for decision makers and fertile ground for the courts, and the main areas of contention are summarised below.

2.3 The development plan and material considerations

The development plan is identified as the primary consideration in both elements of the current legal test and is the first issue for consideration under the steps identified by Lord Clyde in *City of Edinburgh*. The Housing, Town Planning Act of 1909 established the founding principles while the 1947 Act enabled each of the newly formed local planning authorities to survey its area and submit that survey to the Minister of Town and Country Planning with a “development plan”, indicating the manner in which they proposed that land in their area should be used.⁶⁵ Development plans are still formulated, assessed and adopted at a local level setting broad development aspirations and constraints against which new development is to be assessed, having regard to established design principles and matters of wider public interest such as health, amenity and infrastructure provision and without regard to individual land ownership ambitions.

It is clearly essential that the individual or body making the planning decision should be able to identify the relevant Development Plan for a particular application but the legal definition

⁶⁴ *City of Edinburgh Council v. Secretary of State for Scotland and Others* [1997] UKHL 38

⁶⁵ Town and Country Planning Act 1947, s5

of the Development Plan is contained in a mixture of statute and regulations^{66 67} and practice it has proved difficult for decision makers to distinguish development plan documents from the range of other planning policy documents available, with the process involved described by Justice Howell in *RWE Npower* as ‘an exploration of some of more obscure parts of the labyrinthine scheme governing planning in England’.⁶⁸

Once identified, the decision maker is required to ‘have regard’ to the provisions of the relevant development plan where they are material to the application in hand. Development plans are substantial documents setting out a broad range of formal policies is supported by extensive supporting and explanatory text on issues ranging from sites for new settlements to the quality and design of window frames. Plans are so broad in scope so that it is almost always possible to use their content to create and present legitimate arguments both in favour of, and against, the proposal at hand based. The decision maker must consider this wide and sometimes conflicting range of policy aims and ambitions, and decide whether or not a particular application is ‘in accordance with’ the plan. However there is no legal direction or government guidance on what ‘in accordance’ means.

The difficulty of the exercise was recently summarised in the 2012 *Tesco Stores* case where Lord Reed commented that “development plans are full of broad statements of policy, many of which may be mutually irreconcilable”.⁶⁹ Nevertheless, the decision maker is required to consider each application for its compliance with the plan ‘as a whole’, deciding which policies are relevant and taking into account the extent to which a particular proposal accords with them or not.

The process is neither simple nor static, and may be made more complex where the ‘development plan’ comprises more than one document. For example, development proposals in London must also take into account the strategic ambitions of the London Plan as well as the plan for the individual Borough. Nationally the situation has been made more complicated with the introduction of neighbourhood plans (NDP), which, when adopted, also qualify as the development plan for the area⁷⁰. Criticised as creating “an uneven geography of representation in favour of the better educated, well-off and more vocal social groups”⁷¹,

⁶⁶ Planning and Compulsory Purchase Act (PCPA) 2004 s38

⁶⁷ The Town and Country Planning (Local Planning) (England) Regulations 2012/767, r5

⁶⁸ *RWE Npower Renewables Ltd, R (on the application of) v Ecotricity (Next Generation) Ltd* [2013] EWHC 751

⁶⁹ *Tesco Stores Limited (Appellants) v Dundee City Council (Respondents)* (Scotland) [2012] UKSC 13 [19]

⁷⁰ Planning and Compulsory Purchase Act 2004 Act, s38(3)

⁷¹ Simin Davoudi & Paul Cowie ‘Are English Neighbourhood forums democratically legitimate?’ *Planning Theory and Practice* Vol 1 No. 4 562

they are drafted and produced by local communities and cover relatively small areas of land, but the scope of geographic coverage belies their overall influence and is increasing.

NDPs are technically required to be consistent with the local authority development plan for the area, but where that plan is under review, strategic policies in neighbourhood plans can be effective in preventing development as was established in *BDW Trading*.⁷² This position has been confirmed in a number of judgments since. In *Gladman Developments* Mr Justice Lewis confirmed that a neighbourhood plan could include strategic housing policies in the absence of such policies in an up to date local authority plan⁷³. This reasoning was followed in *DLA Delivery* where Mr Justice Foskett recognised that where a site's development potential was stagnating in the absence of a local authority development plan, the neighbourhood plan could help in 'unlocking' the site's potential⁷⁴. The Court of Appeal has not addressed the question of whether or not neighbourhood plan policies can prevail in the absence of a local authority development plan but it has confirmed that NDPs may contain strategic site allocations.⁷⁵

The 2014 Report of the Communities and Local Government Committee on the operation of the Framework noted this potential conflict and the resulting confusion, recommending that the Government carry out an immediate consultation on it⁷⁶. No such consultation has occurred. In the meantime the 2016 Neighbourhood Planning Bill will introduce further changes to the development plan process potentially including:

- Powers for the Secretary of State to direct two or more local planning authorities to prepare a joint plan and to invite a County Council to prepare a plan on behalf of a district authority;
- A new requirement for regular formal review of plans;
- Greater prescription on the content of local development documents.

Having identified the development plan, the relevant development plan policies, and considered whether or not the current application is in accordance with them, the next task facing the decision maker is to identify the full range of other considerations material to that

⁷² *BDW Trading Ltd (t/a Barratt Homes) & Anor v Cheshire West & Chester Borough Council & Ors* [2014] EWHC 1470 (Admin)

⁷³ *Gladman Developments Ltd, R (on the application of) v Aylesbury Vale District Council & Anor* [2014] EWHC 4323 (Admin)[58]

⁷⁴ *DLA Delivery Ltd, R (On the Application Of) v Lewes District Council* [2015] EWHC 2311 (Admin)[10]

⁷⁵ *Larkfleet Homes Ltd, R (on the application of) v Rutland County Council & Ors* [2015] EWCA Civ 597 [21]

⁷⁶ Communities and Local Government Committee, *Operation of the National Planning Policy Framework* (HC 2014-15, 29)

application, and then decide whether the initial decision-making inclination is either confirmed or confounded by them.

The concept of material considerations has been in place as a key element of the legal test since 1947. The leading case is still *Stringer*⁷⁷ which established that any consideration relating to the use or development of land could be 'capable' of being a material consideration in the assessment of an application for planning permission, though whether it was or not would depend on the particular proposal and its circumstances. This broad range of potential material considerations was, if anything, widened with the 1995 *Tesco* decision that established that regard must be paid by the decision maker to any consideration with 'some connection with the proposed development which is not de minimis'.⁷⁸

The understanding of what is or is not material can evolve over time and be modified so that considerations previously considered irrelevant become issues that ought to be taken into account. To this extent material considerations function as a social and political barometer reflecting both societal concerns and changes in political perspective. For example public health concerns previously seen as irrelevant have, with concerns about obesity and public health, gained status as material planning considerations, so that in *Copeland* the grant of permission for a change of use from grocery shop to fast food takeaway was invalidated because the council did not consider the proximity of the takeaway to a local school as a material consideration⁷⁹.

While the range and impact of what is material will not only differ from one case to another but may also evolve over time, some considerations will always be material and should never be ignored by the decision maker. The Habitats Directive establishes a European network of areas where the land in question is recognised as ecologically valuable and is safeguarded against potentially damaging developments⁸⁰. The Birds Directive establishes a similar European network of Special Protection Areas to guard against habitat loss and degradation that could threaten the conservation of wild birds⁸¹. Land that has particular ecological value may also be designated as a Site of Special Scientific Interest⁸². Aesthetic as well as environmental qualities are similarly protected. Land within National Parks is

⁷⁷ *Stringer v Minister of Housing and Local Government* [1971] 1 All E.R.65 [77]

⁷⁸ *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 [44]

⁷⁹ *R (Copeland) v London Borough of Tower Hamlets* [2010] EWHC 1845 (Admin)

⁸⁰ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L2016

⁸¹ Council Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds [2009] OJ L20

⁸² Wildlife and Countryside Act 1981

heavily constrained by its two statutory purposes: to conserve and enhance natural beauty, wildlife and cultural heritage and to promote opportunities for the understanding and enjoyment of their special qualities by the public⁸³ and land designated as an Area of Outstanding Natural Beauty is held for the primary purpose of the conservation and enhancement of the appearance of the land⁸⁴. Finally where land is designated as Green Belt by a local authority it is unlikely that any development will be allowed unless 'very special circumstances' can be shown.⁸⁵

All of these policy constraints are clearly material considerations where they apply in the determination of a planning application. Failure to take them into account, or to apply them incorrectly, in the decision making process will usually be sufficient to invalidate the decision.

The age and relevance of the development plan will always be a material consideration. Even though technically the development plan is the primary consideration, plan policies formulated under a different national or local context or an altered economic environment can quickly become out of date when the in the face of changing national policies such as the Framework. In such circumstances the principle established in *Simpson Corporation* applies; the local authority need not 'slavishly adhere' to the plan policies but may instead allow material considerations to weigh more heavily in the planning balance⁸⁶. The local authority whose adopted plan is out of date and/or inconsistent with emerging national policies, or its own local plan, must recognise and take that age and inconsistency into account, and where necessary give increased weight to more up-to-date policies, whether emerging nationally or through the development and adoption of a replacement plan. Paragraph 216 of the Framework confirms the principle previously established in guidance and case law: the nearer an emerging policy is to adoption, and the fewer unresolved objections remain, the greater weight it will have in the decision-making process.

Government policy, whether contained in the Framework, the online National Planning Policy Guidance, or and parliamentary white papers and ministerial statements, will always be material to a planning decision. Indeed the recent *Frack Free Balcombe* case confirmed that "national Planning Policy is par excellence a material consideration."⁸⁷ Other issues that are routinely considered to be material considerations when relevant to any application

⁸³ Environment act 1995, s61

⁸⁴ National Parks and Access to the Countryside Act 1995

⁸⁵ Department for Communities and Local Government *National Planning Policy Framework* (2012)

⁸⁶ *Simpson v. Edinburgh Corporation*, 1960 SC 313

⁸⁷ *Frack Free Balcombe Residents Association, R (on the Application of) v West Sussex County Council* [2014] EWHC 4108 (Admin) [22]

include: alternative potential uses for the land; the planning history of the site; the potential for creating a precedent for similar developments in the area; the availability of alternative sites for the use; relevant appeal decisions; and parallel statutory codes such as licensing of premises health and safety, and building control.

2.4 Presumptions

Allmendinger comments that “there has been an “off and on” presumption in favour of development within planning policy for many decades”.⁸⁸ Presumptions are an element of the legal test that both distinguish it from decision-making requirements in many other areas of law and add to the complexity of the process as a whole.

They can be applied either through changes in government policy or through alterations to legislation. When applied through statute – as with the presumption in favour of the development plan imposed through the Town and Country Planning Act 1990 they change the legal test itself. When applied through government policy they leave the words of the legal test untouched but influence its application in a fundamental way, by requiring a particular orientation to be applied by the decision maker. Generally, they make the delicate task of juggling development plan policies against material considerations even more complex and potentially hazardous for the decision maker.

The most common use of presumptions in the planning system is through changes in national policy to promote an orientation in favour of development. One of the earliest planning policy circulars published in 1922 stated that ‘The Minister considers that the presumption should always be in favour of the person who wishes to undertake development’.⁸⁹ There were subsequent iterations in Government Circulars of 1949, 1951, and in 1984 a new presumption was introduced by a Conservative government requiring decision makers to make decisions on planning permissions within an overarching bias in favour of approval⁹⁰, resulting in what Harrison has described as ‘a development spree which is now largely discredited.’⁹¹

The balance of presumptive power changed significantly in 1991 when a late amendment was proposed by the then Conservative government to the Planning and Compensation Bill,

⁸⁸ Philip Allmendinger, *Neoliberal Spatial Governance* (Routledge 2016) p 155

⁸⁹ Ministry of Health Town Planning (General Interim Development) Order 1922 Circular 368 29th January 1923

⁹⁰ Department of the Environment ‘Development Control’ (Circular 22/80 1980)

⁹¹ Michael Harrison ‘A presumption in favour of planning permission’ [1992] JPL February, 127

adding a statutory presumption in favour of the development plan. The relevant planning policy guidance note was also revised, producing an updated version of PPG1 in 1992⁹². The 1992 PPG confirmed that the change in the law introduced a presumption in favour of proposals consistent with the development plan. However it also retained the statement that the planning system “should operate on the basis that applications for development should be allowed.”

The resulting confusion was aptly described by Purdue as “The battle of the presumptions”.⁹³ The battle ended with the landmark *City of Edinburgh* case in 1997 and Lord Clyde’s ruling that: “...the development plan is no longer simply one of the material considerations...there is now a presumption that the development plan is to govern the decision on an application for planning permission.”⁹⁴ This judgment was reinforced with a revision of the relevant Planning Policy Guidance note (1997) confirming that “The Government is committed to a plan-led system of development control”⁹⁵ and given statutory force by the enactment of section 38(6) of the 2004 Act and the adoption of Planning Policy Statement 1 (2005).⁹⁶

The Coalition government of 2010 inherited a plan-led planning system and initially retained the presumption in favour of the development plan. They have made few changes to the legal test but the introduction of the Framework combined with the subsequent cancellation of Planning Policy Statement 1 and its replacement with online National Planning Policy Guidance (NPPG) has nevertheless fundamentally altered the planning balance, and arguably begun a new battle of the presumptions.

On one hand the Framework explicitly restated and reinforced the status quo of the legal test. Paragraph 11 states that applications should be decided in accordance with the development plan unless material considerations indicate otherwise. Paragraphs 12, 32 and 50 reinforce this position so that the development plan is preserved as the ‘starting point’ for decision making with the Framework as no more than a new material consideration. This has been supported in subsequent case law such as *Scrivens* where Mr Justice Collins explicitly confirmed that the Framework was a material consideration in planning terms but

⁹² Department of the Environment ‘Planning Policy Guidance (PPG) 1, General Policy and Principles’ (HMSO 1992)

⁹³ Michael Purdue ‘The Impact of section 54A’ [1994] JPL July, 403

⁹⁴ *City of Edinburgh Council v. Secretary of State for Scotland and Others* [1997] UKHL 38 [11]

⁹⁵ Department for the Environment Transport and the Regions PPG1, *General Policy and Principles* (1997), 40

⁹⁶ Department for Communities and Local Government (DCLG) Planning Policy Statement (PPS) 1 *Delivering Sustainable Development* (2005)

excluded it from having a status equivalent to development plans or even a National Policy Statement⁹⁷.

Even as a material consideration, the Framework is still a significant new factor. In *Solihull Metropolitan Borough Council v Gallagher Estates* the requirement in para 47 of the Framework that local plans must meet objectively assessed housing needs was described as a "radical change" from the preceding national policy in PPS3 so that the council's failure to acknowledge this change and give appropriate weight to the new policy invalidated the permission⁹⁸.

The most significant change to the planning system resulting from the introduction of the Framework is the new presumption in favour of sustainable development introduced through paragraph 14. Paragraph 14 creates a requirement that where the development plan is "absent, silent or relevant policies are out-of-date" then the presumption in favour of sustainable development will apply and will have greater weight than those policies.

In *Bloor Homes* Mr Justice Lindblom comprehensively explored and defined the circumstances in which the presumption might apply, ruling that:

- A development plan will be "absent" if none has been adopted for the relevant area;
- ...it may be "silent" because it lacks policy relevant to the project under consideration;
- ...relevant policies...may have been overtaken by things that have happened since it was adopted...

Labelling them as the 'three possible shortcomings' of a development plan, he was equally clear that any of them, if present, would impose a requirement, in the form of the presumption, that planning permission be granted⁹⁹. This echoes paragraph 14 itself which requires that when the presumption applies development plan policies and permission should be granted 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."

⁹⁷ *Scrivens v Secretary of State for Communities & Local Government* [2013] EWHC 3549 (Admin) [7]

⁹⁸ *Solihull Metropolitan Borough Council v Gallagher Estates Ltd & Anor* [2014] EWCA Civ 1610 [9]

⁹⁹ *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 754 (Admin)[45]

For the local authority who wants to retain strategic control over new development by retaining its own development plan rather than sustainable development as the primary consideration it is essential to have a new plan in place, that is compliant in all respects with the Framework – but this is difficult to achieve.

The adoption of a new development plan has always been a complex and lengthy process due to the extensive regulatory requirements that apply and the range of views that have to be taken into account. The adoption of a development plan that is compliant with the Framework is more difficult still, particularly in terms of meeting the requirement for an evidence-based 5 year assessment of housing needs. In addition, in order for a Framework-compliant development plan to be approved and adopted the local authority must show that: 1) the statutory duty to cooperate contained in section 110 of the Localism Act 2011 and section 33A of the Planning and Compulsory Purchase Act 2004 has been taken into account and complied with and 2) that the plan meets the criteria set out in the NPPG to show that it is ‘sound’¹⁰⁰.

The difficulty of getting plans adopted was considered in the 2014 report of the House of Commons Communities and Local Government Committee¹⁰¹. It noted that nearly three years after the introduction of the Framework, 40% of planning authorities did not have an adopted plan and only 21% of the plans adopted were made after the Framework came into place, and referred specifically to the District Councils Network and their reference to plan production as a game of ‘snakes and ladders’ where years of progress could be negated in the final stages of plan production with the publication of an unfavourable inspector’s report. Among the reasons proposed for this deficit were a lack of resources, the difficulty of meeting the duty to co-operate and compliance with the Framework requirements in terms of viability and maintaining a five year supply of housing land.

As a result although the legal test, including the presumption in favour of the development plan remains intact for many local authorities, the lack of a Framework-compliant plan renders their own development plan impotent and makes the presumption in favour of sustainable development the dominant – sometimes the only – policy consideration.

¹⁰⁰ NPPG ‘Examining Local Plans’ para 182

¹⁰¹ Communities and Local Government Committee, *Operation of the National Planning Policy Framework* (HC 2014-15, 190)

Allmendinger has proposed that the presumption simply echoed the “Thatcherite presumption in favour of development”¹⁰² but that presumption was one in favour of the particular development proposed at a particular time. This presumption is different, as it is in favour of a concept rather than a particular development. It is not in favour of the particular development proposed but in favour of all development that can be brought under the linguistic umbrella of sustainable development. It therefore allows much more freedom to the decision maker who can consider any development either sustainable or non-sustainable depending on the individual analysis of its benefits and impacts.

2.5 Politics

The Secretary of State for Communities and Local Government is the primary – some might say the most dominant – actor in the planning system both in terms of making policy and determining planning decisions. He is accountable to Parliament for his own acts and decisions and those of the civil servants in his department. He is entrusted with a wide range of executive functions, but the range and limits of his powers are fundamentally fluid and open to interpretation, restrained only by the terms of his appointment, the legislation relevant to the exercise of his powers, the law and custom of Parliament, and the willingness of the courts to enforce them.

The Secretary of State is empowered by statute to exercise a range of functions which are strictly legislative in terms of their formal content but encompass a wide discretionary scope in terms of actual decision making. This includes a range of executive functions in relation to planning, a number of which are directly relevant to this research.

- The Secretary of State is responsible for the formulation and application of national planning policy. He may call for new planning policy on any relevant topic and has the final say on its content. New policy guidance can also be introduced immediately through written statements to Parliament accompanied by amendments to the NPPG
- The Secretary of State also has significant powers of intervention in relation to individual development plans under the Planning and Compulsory Purchase Act 2004. He may direct the LPA to modify the plan and the authority must comply with any such direction unless they withdraw the plan¹⁰³. He can direct an authority to prepare a revision of its plan in accordance with a timetable set by him and has a

¹⁰² Philip Allmendinger, *Neoliberal Spatial Governance* (Routledge 2016) p 185

¹⁰³ Planning and Compulsory Purchase Act 2004 s21,22

wide default power if he considers that an LPA is failing to do anything necessary in connection with the preparation or adoption of a local plan¹⁰⁴.

- The Productivity Plan issued in July 2015 indicated the possibility of government intervention where plans were delayed with the Secretary of State stepping in to arrange “for local plans to be written, in consultation with local people.”¹⁰⁵ This proposal is now enshrined in the Neighbourhood Planning Bill and could easily be a legislative reality by early 2017.
- The Secretary of State is also the ultimate decision maker whenever he chooses to exercise that function in relation to any planning application. He may intervene directly in the planning decision-making process by inserting himself as the decision-maker in the following situations where the scope of this decision making power is his alone fettered only by judicial intervention (if it is sought).
 - He has the power to ‘call in’ an application for determination before a decision has been made¹⁰⁶. In these circumstances there will be a public inquiry chaired by a planning inspector who prepares a report on the case, including recommendations in relation to the decision to be made. The Secretary of State publishes that report along with his decision and reasons for agreeing or disagreeing with the recommendations. Call-in powers tend to change depending on the political context and where the government perceives that intervention is most needed;
 - The Secretary of State has a parallel power to step in as the decision maker during a planning appeal¹⁰⁷. Using these powers the Secretary of State can step into a planning inquiry at any point before a decision is issued as the decision maker in the place of the usual planning inspector. As with called-in applications, the planning inspector writes a report with recommendations for consideration by the Secretary of State but the Secretary of State makes the actual decision.

The Secretary of State is therefore the individual charged both with determining the content of planning policy, and then in deciding how it should be interpreted and applied to particular development proposals. A number of authors have expressed disquiet that the individual who determines the content of national planning policy should also be ultimately responsible for its interpretation and application. Graham notes that policy presumptions have the

¹⁰⁴ Planning and Compulsory Purchase Act 2004 s26(2) and s27

¹⁰⁵ HM Treasury ‘Fixing the foundations Creating a more prosperous nation’ 2015 CM 9098

¹⁰⁶ TCPA 1990 s77(1)

¹⁰⁷ TCPA 1990 s79

capacity to operate as ‘a device to ensure that weight was given’ to a particular policy objective¹⁰⁸. Healey acknowledges the value of the discretionary of this space but at the same time recognises that it depends on the skill of the decision maker and is vulnerable to being misused¹⁰⁹. Allmendinger recognises, that the way in which the planning system operates enables those placed highest in the underlying power structures of decision making to have the greatest power¹¹⁰.

The potential impact of the Secretary of State’s powers are increased by the new presumption. As seen above, the legal test already encloses a wide discretionary space. Where a development plan is ‘absent, silent or out of date’ the presumption in favour of sustainable development replaces consideration of development plan policies as the key concern for the decision maker. Although ‘development’ is extensively and rigorously defined in the planning law context¹¹¹, sustainable development has no equivalent definition in law or even policy. The presumption in favour of sustainable development creates a generalised bias in favour of any development that is considered sustainable and against any development that is not. The Secretary of State therefore has a much wider scope of decision making within the context of this presumption than he did previously

2.6 The role of the courts

The scope of the Secretary of State’s powers has been the subject of two landmark judgments: *Alconbury Developments* in 2001,¹¹² and the 2015 *West Berkshire*¹¹³ decision.

Alconbury centred on an application for a freight terminal and the central issue was whether the Secretary of State’s ability to step into and take over the planning decision making process constituted a ‘fair and public hearing’ compatible with Article 6(1) of the 1953 Human Rights Convention. The case raised the issue of whether the political nature of the appointment and its policy-making function meant that the Secretary of State lacked sufficient independence to make planning decisions at all, with the High Court initially ruling that he could not.

¹⁰⁸ Thomas Graham, ‘Presumptions’ JPL 1993, May, 426

¹⁰⁹ Patsy Healey, *Collaborative Planning: Shaping Places in Fragmented Societies* (Palgrave Macmillan; 2006 p218)

¹¹⁰ Philip Allmendinger, *Planning Theory* (Palgrave 2006 p196)

¹¹¹ Town and Country Planning Act 1990, s55

¹¹² *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23

¹¹³ *West Berkshire District Council Reading Borough Council v Department for Communities And Local Government* [2015] EWHC 2222 (Admin)

This judgment was overturned when the case reached the House of Lords. Their Lordships accepted that Article 6(1) applied to planning decisions and acknowledged that neither planning inspectors nor the Secretary of State were impartial or independent arbiters, but both were confirmed as appropriate decision makers in this context and the appeal process as a whole was confirmed as compatible with Article 6. The primary reasons for this were: 1) the decisions themselves were administrative in nature, involved the exercise of delegated power and not a judicial act; 2) the decisions were taken on grounds of policy and expediency, and so were for an executive rather than a judicial function of the government; 3) the courts in any case retained sufficient oversight with their capacity to intervene when required through the process of judicial review.

The decision to a certain extent clarified the extent to which the courts might interfere with planning judgment, and confirmed that it was limited to responsibility for oversight of the procedural aspects of the decision. So long as the courts retained this oversight function planning decisions, including those determined on appeal, would remain in compliance with Article 6(1), leaving the Secretary of State free to assess the planning merits, applying his particular policy considerations and preferences, whether or not motivated by the politics of the day. As Lord Clyde commented: "Planning matters are essentially matters of policy and expediency, not of law"¹¹⁴. If anything, Lord Clyde saw it as beneficial that there should be a 'central supervision' of the application of planning policy and identified the benefit, for the planning system as a whole, in having a politician with the ultimate responsibility for determining, as a matter of planning judgement, because this would achieve 'some overall coherence and uniformity in national planning'.¹¹⁵ This view was broadly welcomed by practitioners such as Robert McCracken 2001¹¹⁶ and Simon Bird¹¹⁷, and has not been challenged since.

Although the 'Alconbury' ruling remains unchallenged, the 2015 'West Berkshire' case re-addressed the issue of the Secretary of State's discretionary powers¹¹⁸.

On 28th November 2014 the Secretary of State made an alteration to the NPPG policy in relation to affordable housing through a Written Ministerial Statement in the House of

¹¹⁴ *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23 p159

¹¹⁵ *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23 p141, 159

¹¹⁶ Robert McCracken, 'Alconbury: the Lords light the lamp of judgment' JPL 2001 Jul, B17-22

¹¹⁷ Simon Bird and James Findlay, 'Alconbury a year on: Article 6 challenges face stiff uphill struggle' JPL 2002 Sep 1045-1050

¹¹⁸ *West Berkshire District Council Reading Borough Council v Department for Communities And Local Government* [2015] EWHC 2222

Commons so as to exclude smaller developments from their existing liability for making payments towards the provision of such housing¹¹⁹. The effect on local authorities, including those bringing the challenge, was to make related policies in their adopted development plans automatically 'out of date' for the purposes of paragraph 14 of the NPPF, even where, as in the case of the claimant Council, the plan was adopted in January 2015, after the date of the policy change. The decision to adopt the new policy was challenged on a number of grounds including unfair consultation, the failure to take material considerations into account, non-compliance with duties under the Equality Act 2010 and irrationality.

In the High Court the challenge was successful on all of the grounds including Ground 2: that the new policy was inconsistent with the statutory scheme of planning law and its purposes. Mr Justice Holgate began his consideration of this issue by reprising the 'Alconbury' decision, confirming that it was for the Secretary of State to determine planning policy objectives, that policy formulation was a matter for the Executive and that the merits of policy formulation were not for the courts to consider, but also stressing Lord Clyde's recognition of the value of the Secretary of State in maintaining a coherent policy framework. Mr Justice Holgate went on to highlight the impact of the new policy, noting (para 98) that it "effectively negates or 'trumps' local plan policies which do not accord with these new national policies" and that (para 80) the new exemption would reduce affordable housing provision with 'profound consequences' nationwide.

Mr Justice Holgate considered the nature of the Secretary of State's common law prerogative power to promulgate policy and noted that it must be exercised within 'the statutory framework for the planning and control of the use of land' including section 70(2) of the 1990 Act, and could not be used to frustrate that statutory scheme (para 115,117). Within this context, national policies should not be used to override local ones and there was no power to 'make policies *outside* the statutory local plan process (para 122, 123). Mr Justice Holgate also noted that the new policy would displace or override adopted policies and was not designed to work with them in any way (para p126, 133,134). He concluded that the proposed policy 'ignores or circumvents the presumption in favour of the development plan policies in section 38(6)' by replacing the usual process of weighing policies against each other with an overriding policy direction', was incompatible with the purpose of planning legislation and could compromise decisions made under it (para 134, 139, 140). This decision was overturned in the Court of Appeal but, as will be shown in chapter 7, the issue has not gone away.

¹¹⁹ HC Deb 28 Nov 2014 c55WS

Conclusion

The legal test for the determination of planning applications is far more complex in nature than is apparent from the bare text. The balancing process is unique to each proposal, and is technically for the decision-maker alone. The development plan is legally defined but can still be difficult to identify. Concepts such as 'material considerations' are not defined and mutate according to circumstance, including through alterations to legislation or by new central government policy, or through ministerial statements. The development plan must be identified and taken into account as a primary consideration, but it must also be weighed against the other considerations material to that decision. The weighing of the relative weight of development plan policies against material considerations is a concealed, complex, protean process that adapts to fit an ever-changing socio-political context and serve a variety of political ideologies, with politicians rather than planners or planning lawyers as the final arbiters in any such decision.

The scales of the planning balance are notionally tipped in favour of the plan but can easily be outweighed by material considerations depending on the particular proposal and its particular context. The legal test is currently required to be exercised in parallel with, and often in the shadow of the Framework presumption in favour of sustainable development. This presumption is always a significant material consideration in the determination of all planning applications, and in the case of those without a Framework-compliant development plan, the key determining consideration by which the application will stand or fall. As a result, the wording of paragraph 14 means that in many development proposals the presumption in favour of sustainable development is dominant over many, and sometimes all, development plan policies.

The Secretary of State is responsible for the creation, and adoption of the new presumption and has the legal capacity and the political will to intervene in the application of the new presumption in the determination of any planning application, either during the application process or within the context of an appeal against an initial refusal.

There is capacity for any person 'aggrieved' by that decision to apply to the court to have that decision reviewed or quashed, but this power of review is limited. Although as seen in 'West Berkshire' the courts are willing to intervene in specific circumstances, their powers of intervention are limited to investigating and regulating errors of law, and does not involve the exercise of planning judgment. The discretionary function remains the property of the

decision maker and, unless he acts perversely, the Secretary of State's decision making powers in terms of assessing planning merits, and assigning sustainability, are largely unconstrained.

The 1985 Gransden case established the principle that without a proper understanding of policy, decisions may lack legal validity: "if the body making the decision failed properly to understand the policy, then the decision would be as defective as it would be if no regard had been paid to the policy"¹²⁰. Lord Clyde recognised in the Alconbury decision that "The Secretary of State is not entirely free to make his own decision... He cannot act in an arbitrary way"¹²¹. Given the centrality of the concept of sustainable development within both the Framework and the legal process relating to planning decisions it is of primary importance to establish what sustainable development means in the context of the Framework and how it should be applied.

¹²⁰ *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, p519

¹²¹ *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23 p170

Chapter 3

Sustainable Development: evolution, regulation, definition

Introduction

As seen in the previous chapter, '*Gransden*' established the importance of decision makers understanding the policies they were applying and Mr Justice Lindblom subsequently confirmed in his '*Bloor Homes*' judgment that 'statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context'.¹²² Sustainable development became a key criterion for planning decisions in 2012 but was already in use as a familiar descriptive term in a range of international and national policies. This chapter examines the use of the term prior to and outside the context of the Framework to see whether it has a reliable, commonly understood, definition that can be taken as a starting point for an understanding the term as defined within it.

This chapter examines the linguistic evolution of sustainable development from its global origins in the 1960s through its use in European and national policy documents and its recent interpretation since the election of the Coalition and subsequent Conservative Governments. It reviews of the difficulties of enforcing environmental standards in planning law through regulation and concludes with a critical consideration of the current definitions proposed in English law and policy.

3.1 International Context

While it can be argued that the tension between the need to respect the environment while allowing for human growth and development is as old as society itself the publication of '*Silent Spring*' by Rachel Carson arguably marks the point when environmental issues entered modern global consciousness as a problematic aspect of development.¹²³ This seminal work identified and exposed the causal relationship between human activities such as the widespread use of pesticides and the unintended and unforeseen changes in the natural environment such as the loss of bird populations. It brought the environmental agenda into global consciousness; and introduced an understanding of sustainable development as inherently concerned with anticipating and preventing environmental damage.

¹²² *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 754 (Admin) [19]

¹²³ Rachel Carson, *Silent Spring* (Penguin 1962)

The next decade brought the issue into the forefront in a more direct way with environmental disasters such as the Santa Barbara oil spill, the creation of protest organisations such as Greenpeace and publication of qualitative forecasts of environmental harm such as ‘Limits to Growth’.¹²⁴ The 1972 Stockholm Declaration was the first international policy document that recognised the need to consider the environmental impact of development, balancing the benefits of development against its effects on the natural world¹²⁵.

The term sustainable development was used for the first time in the 1980 World Conservation Strategy¹²⁶, but was not defined. The first definition of sustainable development was that used by Gro Harlem Brundtland in the report ‘*Our Common Future*’ presented to the World Commission on Environment and Development to the UN General Assembly in 1987 (‘the Brundtland definition’). The extract most often quoted is her statement that “Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs”¹²⁷. This extract presents sustainable development as little more than a simple balancing of current and future needs, but the speech as a whole proposed that wealthier nations had a general responsibility to curb all forms of growth so that the less economically advanced populations would have more freedom to develop and acquire a more equitable share in world resources. In this context, sustainable development meant a fundamental international re-balancing of power between rich and poor.

As Christe and Schmidt recognize, the definition of sustainable development in the Brundtland report did not lay clear linguistic foundations for its future understanding “some definitions are too vague to allow clear instructions, e.g. the Brundtland definition”¹²⁸. Although the term has been used widely since, often using the Brundtland definition explicitly or implicitly, policies rarely acknowledge the full whole meaning and full implications of the term in its original context, and either offer no definition at all or propose a wide range of alternative definitions and goals instead.

The 1992 United Nations Conference on Environment and Development in Rio de Janeiro

¹²⁴ William W Behrens III, Jergen Randers, Dennis Meadows, Donella Meadows, *The Limits to Growth* (Universe Books 1972)

¹²⁵ United Nations Environment Programme *Declaration of United Nations Conference on the Human Environment* (UNEP 1972)

¹²⁶ International Union for Conservation of Nature and Natural Resources *World Conservation Strategy* (IUCN 1980)

¹²⁷ World Commission on Environment and Development *Our Common Future* (OUP 1987)

¹²⁸ Stephan Schmidt and Marius Christe “A Formal Framework for Conceptions of Sustainability – a Theoretical Contribution to the Discourse in Sustainable Development” (2012) Volume 20 Sustainable Development p 212

introduced Agenda 21 as a world action programme requiring integration of environmental social and economic factors and resources in development planning¹²⁹. Sustainable development is referred to frequently in the document and Principle 3 clearly owes its origins to the Brundtland definition with its statement that current rights of development should meet the needs of the future, but the term is not defined either in the main body of the report or in its Annex - the Rio Declaration on Environment and Development¹³⁰. The subsequent UN Framework Convention on Climate Change adopted Principle 4 'promoting sustainable development' but did not define it.¹³¹ A 1998 Report a committee of the United Nations General Assembly noted that "we have been particularly concerned during our enquiry to find the term sustainable used in a blanket way to refer to just about anything which the witness supports" but this did not result in a definition.¹³² The 2002 UN Summit on Sustainable Development (UN 2002) made the first reference to the three 'pillars' of sustainable development: social economic and environmental¹³³ and the UN Conference on Sustainable Development in Rio de Janeiro in June 2012 - 'Rio+20' included a commitment to meet internationally agreed goals – but as before, no definition.¹³⁴

During the same period, the term sustainable development was increasingly used in European as well as global policy documents but without developing or adopting a specific definition. The term was used in the 1994 Aalborg Charter as an aspirational concept on which to base living standards rather than a principle underpinning development proposals¹³⁵. The 2001 European Sustainable Development Strategy also referred to the term, this time explicitly relying on the Brundtland definition¹³⁶. The 'renewed' version of this document in 2009 again incorporated the Brundtland definition but also incorporated additional principles and objectives: "economic prosperity, social equity, environment protection and international responsibilities" while the supporting text for the document referred to four 'pillars': economic, social, environmental and global governance¹³⁷.

3.2 National Context

¹²⁹ United Nations Conference on Environment and Development (UNCED) 'Earth Summit Agenda 21' UN (1992)

¹³⁰ UNCED, 'Rio Declaration on Environment and Development' UN (1992)

¹³¹ United Nations Framework Convention on Climate Change UN (1992)

¹³² United Nations Select Committee on Environment, Transport and Regional Affairs '10th Report Housing' UN (1998)

¹³³ United Nations World Summit on Sustainable Development 'Johannesburg Declaration on Sustainable Development' UN (2002)

¹³⁴ United Nations Conference on Sustainable Development 'The Future We Want' UN (2012)

¹³⁵ European Commission 'Charter of European Sustainable Cities and Towns towards Sustainability' EC (1994)

¹³⁶ European Commission 'European Strategy for Sustainable Development' EU (2001)

¹³⁷ European Commission 'Review of the European Union Strategy for Sustainable Development' EU (2009)

Sustainable development was no more coherently developed in English policy documents than its international counterparts. Indeed there appears to have been some resistance to integrating planning and environmental issues at all. The speaker at the keynote address at the 1990 planning law conference referred to environmental considerations as ‘the “green” questions’¹³⁸, an editorial in the *Journal of Planning and Environmental Law* (‘JPL’) in 1992 cast doubt on whether sustainability would ‘play any real part in development decisions’¹³⁹ while a contemporaneous article by the Minister for Housing and Planning stated that the government would resist examination of individual decisions for their sustainability¹⁴⁰. The position changed quickly: in 1993 the Under Secretary of State for the Environment gave a speech noting with concern the lack of a satisfactory definition of sustainable development and proposing that it should incorporate two dimensions – domestic and international.¹⁴¹

The 1994 Sustainable Development Strategy alluded to environmental issues with a foreword stressing the need to be ‘sensitive to the intangibles’ and an introduction that recognised the national need to make ‘radical changes necessary to protect the world’¹⁴². This Strategy did not adopt a formal definition of sustainable development but did incorporate themes central to the Brundtland definition, noting the competing need to build prosperity through development in the present without compromising the needs of the future. It also identified four principles: 1) that decisions should be based on the best possible scientific information and analysis of risks; 2) that where there is uncertainty and potentially serious risks exist, precautionary action may be necessary; 3) that ecological impacts must be considered, particularly where resources are non-renewable or effects irreversible; 4) that cost implications should be “brought home directly to the people responsible”. In the same year, sustainable development was recognised by practitioners as a potential material consideration in planning decision-making¹⁴³.

¹³⁸ Baroness Blatch, ‘UK Planning Law Conference Keynote Address’ [1990] *Journal of Planning & Environment Law*, Occasional Paper 17

¹³⁹ Robert McCracken, *The development plan – master or servant?* (1992) *Journal of Planning & Environment Law* Occasional Paper 19, 90

¹⁴⁰ George Young *The development plan – master or servant?* (1992) *Journal of Planning & Environment Law* Occasional Paper 19, 3

¹⁴¹ Tony Baldry *Sustainable development* (1993) *Journal of Planning and Environment Law* November B 122

¹⁴² UK Government ‘*Sustainable Development: The UK Strategy*’ HMSO (1994)

¹⁴³ Paul Winter ‘*Planning and Sustainability: an examination of the role of the planning system as an instrument for the delivery of sustainable development*’ *Journal of Planning & Environment Law* [1992] Oct 883

Following the election of the Labour government in 1997, the sustainability agenda grew in significance through new policies, legislative references and the emergence of bodies specifically concerned with its delivery.

A sustainable development strategy was issued in 1999 which began by defining sustainable development as a 'simple idea of ensuring a better quality of life for everyone, now and for generations to come'¹⁴⁴. This implicit incorporation of the Brundtland definition was combined with the four objectives from the 1994 predecessor document, and recognised the need to include economic, social and environmental capital within its considerations. It also required application of the precautionary principle and updated the existing Sustainable Development Indicators ('SDIs') including social benchmarks such as educational qualifications and expected years of healthy life alongside environmental indicators such as air, noise and water quality. In the same year the final report of the Urban Task Force inserted its own criteria for defining a sustainable city and its own meaning for sustainable development in a planning context¹⁴⁵.

The 2003 paper "Sustainable Communities: Building for the Future" did not define sustainable development but instead included a specific list of factors that could be relied on in terms of bringing forward proposals that promoted sustainability within communities. This document came closer than any predecessors in terms of defining and recording what sustainability meant in practice¹⁴⁶. 2005 saw publication of a new Sustainable Development Strategy which referred to the Brundtland definition and added a new set of indicators, four new priorities and five new principles¹⁴⁷.

Planning policy documents were comparatively slow either to embed the concept of sustainable development, or include empirical environmental markers. Planning Policy Statement 23 presented environmental regulation and planning law as separate but complementary regimes¹⁴⁸ while Planning Policy Statement 1 referred to the Brundtland definition but recommended pursuing the four aims set out in the 1999 Strategy instead¹⁴⁹.

¹⁴⁴ Department of Environment, Food and Rural Affairs 'Better Quality of Life: A Strategy for Sustainable Development for the United Kingdom' HMSO (1999)

¹⁴⁵ Department of Environment Transport and the Regions 'Towards an Urban Renaissance' Final Report of the Urban Task Force HMSO (1999)

¹⁴⁶ Office of the Deputy Prime Minister 'Sustainable communities, building for the future' ODPM (2003)

¹⁴⁷ Department of Environment Food and Rural Affairs 'Securing the Future UK Government Sustainable Development Strategy' CM 6467 (2005)

¹⁴⁸ Office of the Deputy Prime Minister 'Planning Policy Statement 23: Planning and Pollution Control' HMSO (2004)

¹⁴⁹ Office of the Deputy Prime Minister 'Planning Policy Statement 1: Delivering Sustainable Development' HMSO (2005)

The decade following the 1997 election also saw the establishment of a number of organisations directly concerned with securing sustainable development. The Environmental Audit Committee was established in 1997 to examine government policies and programs in relation to sustainable development, without any definition of what that meant. The Sustainable Development Commission was established in 2000, basing its definition of the term on the Brundtland definition and recognising that the achievement of Sustainable Development required balancing environmental social and economic limits. This was followed in 2006 with the creation of the Sustainable Development Unit, basing its definition on the five principles in the 2005 Sustainable Development Strategy.

The integration of sustainable development into English policy between 1993 and 2005 seems to show a general will to engage with the concept but little or no ambition to produce a coherent, commonly used definition. If anything, the increasing use of the term was accompanied by a sustained diversification and increasing breadth in the scope of matters used to explain and define it, with additional principles and pillars emerging on an apparently ad-hoc basis. While the Labour government of 1997 did make sustainable development a key policy issue, it did not create any a stable notion of what the term meant. As Allmendinger notes “The government set out four aims for sustainable development in its 1999 strategy...it was unclear what such entreaties actually meant...If a proposal met some of these objectives and not others then was it sustainable development?”¹⁵⁰

The enduring absence of an agreed definition and the tendency for the term sustainable development to acquire multiple meanings meant that between 1962 and 2005 the impact of the concept of sustainable development diminished in terms of impact even as its use increased. As a result, although the term itself became increasingly familiar as something to aspire to, it was of little use as a benchmark against which developments could be tested.

Nevertheless, although no commonly agreed definition emerged, some key principles were established that contributed towards an emerging and generally accepted understanding of what sustainable development means. The Brundtland definition was often used as a starting point for defining the concept, with sustainable development generally understood as growth that met the needs of the present population without compromising the needs of future communities. Sustainable development was frequently associated with a general

¹⁵⁰ Philip Allmendinger ‘Neoliberal Spatial Governance’ Routledge 2016 p142

leaning towards an equitable, distribution or redistribution of resources – again remaining true to its Brundtland origins if not linguistically consistent with them. Although the principles and pillars were used to supplement the understanding of this key context differed according to context they consistently included references to social, economic and environmental elements, so that they can be included in the general conception of what sustainable development means.

3.3 Definitions after 2010

The Coalition government of 2010 inherited a concept of sustainable development that was loosely tethered to environmental issues but capable of taking on many other meanings. The Government had an ideal opportunity to clarify what it understood by the term, to include empirical and measurable benchmarks within it and to incorporate that understanding into new planning policies. The government certainly sustained a rhetoric of sustainable development but did not exploit the opportunity for new policies that included consistent and measurable definitions of the term. Instead, sustainable development was re-presented as associated primarily with the promotion of economic growth, while the environmental impacts of development were increasingly re-framed as exclusively financial costs that could be assessed and offset through financial contributions.

Within a year of the election sustainable development was already being defined in a way that was quite different from its policy origins and traditional understandings: a concept associated with economic growth – particularly in terms of planning. “Mainstreaming Sustainable Development” was published in 2011. This document proposed that development would be seen as sustainable if it contributed to growth and described sustainable development as: “making the necessary decisions now to realise our vision of stimulating economic growth and tackling the deficit”.¹⁵¹ The 2011 budget confirmed the government’s intention to create a national planning policy document that would include a presumption in favour of sustainable development ‘where the default answer to development is ‘yes’.¹⁵² The 2011 Natural Environment White Paper emphasizing that preserving designated nature improvement areas should not have the effect of ‘deterring’ sustainable development, introduced the notion that protecting the environment was a problematic issue in terms of development that could legitimately be outweighed by the need for development.¹⁵³

¹⁵¹ Department for Environment, Food and Rural Affairs ‘Mainstreaming Sustainable Development – The Government’s Vision and what this means in practice’ DEFRA (2011)

¹⁵² H M Treasury ‘Budget 2011’ TSO (2011) para 1.82

¹⁵³ Department for Environment, Food and Rural Affairs ‘The Natural Choice: securing the value of nature’ CM 8082 (2011) para 68

This repositioning of sustainable development as a driver for growth and environmental concerns as expensive impediments to that growth continued through the term of the Coalition government. In 2013 DEFRA announced a new centralised approach to sustainable development within all government policies and activities. This statement acknowledged the Brundtland definition to the extent that it mentioned the needs of future generations, but also stated that economic growth was the priority of sustainable development.¹⁵⁴ Two months later the government began a consultation on biodiversity offsetting that presented environmental issues as financial burdens and proposed ways that they might be offset rather than avoided, moving away from traditional representations of ecology as a special, non-renewable resource.¹⁵⁵ This process of offsetting was described by Secretary of State for Environment, Food and Rural Affairs in his speech to the Policy Exchange as a ‘trade-off between economic and social benefits and the natural environment, again reinforcing the notion of a market-based approach to environmental impacts’¹⁵⁶

The Coalition government also reduced the ways in which environmental benefits and detrimental impacts could be measured and recorded. As part of the pre-legislative scrutiny for the new Water Bill the Environment Food and Rural Affairs (EFRA) select committee issued a report recommending that the existing obligation to contribute to the achievement of sustainable development be replaced with a positive duty to secure it¹⁵⁷. The Water Bill was published in June 2013 with all references to sustainability replaced with a resilience duty concerned with guarding against flood risk rather than promoting environmental concerns.¹⁵⁸ In July 2013 the government published a new set of Sustainability Development Indicators, proposing that the existing 68 indicators be replaced with 12 ‘headline indicators’ and 25 ‘supplementary indicators’.¹⁵⁹

In terms of assessing performance against specific benchmarks, it was clear that the Government’s claim to be the “greenest ever” was not supported. In September 2014 the Environmental Audit Committee (‘EAC’) issued its fifth environmental scorecard for the UK Government, including empirical progress markers. Biodiversity, air pollution and flooding were all marked as ‘red risks’, all of the others were amber and not one was considered

¹⁵⁴ Department for Environment Food and Rural Affairs ‘Making sustainable development a part of all government policy and operations’ DEFRA (2013)

¹⁵⁵ UK Government ‘Biodiversity offsetting in England’ DEFRA (2013) para 40

¹⁵⁶ Owen Paterson ‘Speech to Policy Exchange’ (DEFRA 2013)

<<https://www.gov.uk/government/speeches/owen-paterson-speech-to-policy-exchange>> accessed 9th December 2016

¹⁵⁷ Environment Food and Rural Affairs Committee *6th Report: Draft Water Bill* (HC 2012-13, 674)

¹⁵⁸ Water Act 2014

¹⁵⁹ Department for Environment, Food and Rural Affairs London Sustainable Development Indicators PB13979 (2013)

satisfactory. The EAC also noted that the number of environmental taxes had dropped by 8.3% and commented that “there is still more to do to embed sustainable development across Government”.¹⁶⁰

In December 2014 the EAC issued its final report of that parliament, noting with concern that the Government was proposing to replace the 17 Sustainable Development Goals proposed with 6 ‘essential elements’. They called this shift a mistake that would exclude key aspects of the sustainable development framework - and included a recommendation that the government phase out subsidies for carbon intensive energy sources ‘rapidly’¹⁶¹. The Government’s response issued in February 2015 rejected the proposal of a new Framework in favour of a ‘green thread’ through all policies and stated that the best way of dealing with inequality was promoting a data revolution¹⁶².

The Coalition Government also abolished significant independent environmental reporting bodies. In July 2010 the Government announced its intention to withdraw funding from the Sustainable Development Commission and abolish the Royal Commission on Environmental Pollution¹⁶³. This was followed in August with the announcement of the abolition of the Audit Commission¹⁶⁴. In terms of maintaining an oversight and scrutiny function on environmental policy, only the Environmental Audit Committee survived, voicing its concern about the government’s approach to sustainable development in a number of different reports:

- In March 2011 the EAC issued its report on sustainability and the Localism Bill, expressing concern at the lack of a statutory definition of sustainable development and that in the absence of such a statutory definition, its core principles would not be represented.¹⁶⁵
- In June 2013 the report “*Embedding sustainable development: an update*’ noted the dissonance between the government’s environmental intentions and the lack of any specific criteria for assessing the sustainability or otherwise of development – referred to as ‘a pressing cause for concern’.¹⁶⁶

¹⁶⁰ Environmental Audit Committee *5th Report: An Environmental Scorecard* (HC 2013-14 215)

¹⁶¹ Environmental Audit Committee *7th Report: Connected World: Agreeing ambitious Sustainable Development Goals in 2015* (HC2013-14 452)

¹⁶² Environmental Audit Committee *11th Special Report: Connected World: Agreeing ambitious Sustainable Development Goals in 2015: Government Response to the Committee’s Seventh Report of Session* (HC 2014-15 1067)

¹⁶³ ‘Defra announces changes to arm’s length bodies’ <www.gov.uk/government/news> Accessed January 2016

¹⁶⁴ Department of Communities and Local Government ‘Audit Commission abolition on course to save taxpayers over £1 billion’ <www.gov.uk/government/news> accessed January 2016

¹⁶⁵ Environmental Audit Committee: *Sustainable Development in the Localism Bill* (HC2010-11 799)

¹⁶⁶ Environmental Audit Committee *Embedding sustainable development an update* (HC 2013-14 202)

- In the same month the EAC issued its report on 'Outcomes of the UN Rio+20 Earth Summit' criticising the absence of the Prime Minister from that summit, the lack of his presence at the committee hearings and highlighting the divergence between environmental aspirations and economic realities by noting that: 'the Treasury appears to view the environment as a block to economic development.'¹⁶⁷
- In November 2013, the EAC reported on sustainability and the Department for Business Innovation and Skills noted the absence of consideration of environmental impacts in key policy documents such as the Regional Growth Fund and recommended the development of sustainability strategies and effective sustainability reporting.¹⁶⁸
- In the same month the EAC reported on the proposals for biodiversity offsetting noting that 'the current system is not doing enough to promote and enhance biodiversity'.¹⁶⁹
- In September 2014, in its environmental scorecard report, the EAC specifically recommended more regulatory systems embedding sustainable development, a new environment strategy and an independent body – an 'office for environmental responsibility'.¹⁷⁰ However, this was emphatically rejected by the Government on the basis that sufficient external scrutiny was provided by the Committee itself¹⁷¹.

None of these reports appear to have made any difference to the Government's approach to sustainable development as a way to enable growth. The current Cabinet Office environmental policy document states that sustainable development 'means making the necessary decisions now to realise our vision of stimulating economic growth and tackling the deficit'¹⁷². A similarly pro-growth stance is demonstrated in the definition of sustainable development promoted in the licence for the new Strategic Highway Company which states that sustainable development 'means encouraging economic growth while protecting the environment'¹⁷³. At the same time environmental measures that might inhibit growth are eroded or removed. In March 2015, the Government removed the Code for Sustainable Homes which allowed councils to adopt their own sustainability standards as a planning requirement, as a planning requirement and instead transferred some of those standards

¹⁶⁷ Environmental Audit Committee *Outcomes of the UN Rio+20 Earth Summit* (HC 2013-14 200)

¹⁶⁸ Environmental Audit Committee *Sustainability in BIS* (HC 2013-14 201)

¹⁶⁹ Environmental Audit Committee *Biodiversity Offsetting* (HC 2013-14 750)

¹⁷⁰ Environmental Audit Committee *An Environmental Scorecard* (HC 2013-14 215)

¹⁷¹ Environmental Audit Committee *An environmental scorecard: Government Response* (HC 2014-15 822)

¹⁷² Cabinet Office 'Corporate Report Environmental Policy Statement' (2014)

¹⁷³ Department for Transport 'Strategic Highways Company Draft Licence' (DfT (2015))

into Building Regulations as “new national technical standards”¹⁷⁴ In July 2015 the Government withdrew from previous proposals to require all new homes to be carbon neutral from 2016¹⁷⁵

As well as continuing to reduce the scope of any empirical controls, the Government has continued to treat environmental impacts as financial costs to be reduced or offset, promoting what Barkemeyer et al have described as a ‘business interpretation’ of sustainable development that excludes consideration of equity “to focus instead on market mechanisms and technological change”.¹⁷⁶ The 2015 Infrastructure Act removed previous policy standards for provision of zero-carbon homes, replacing them with a general on-site carbon dioxide emission standard, and permitting the remainder of the zero carbon target to be achieved through off-site measures including payments into a fund investing in carbon-saving generally¹⁷⁷. The continued dominance of the Government’s approach is clearly visible in the evidence given by Rory Stewart to the Environment Audit Committee where he stressed the overall importance of “making sure that our money is spent as efficiently as possible” and promoted environmental improvements on the basis of the money they could generate: “if you look at investment in water quality, you put in £1 of investment, you would probably at the moment expect about £1.70 worth of benefit”¹⁷⁸

3.4 Environmental regulation

The government may be free to use the term sustainable development in a range of policy contexts and to ascribe different meanings to it but its actions are not entirely unfettered in terms of environmental controls on planning decisions. The European Communities Act 1972 provides that EU law will prevail over ‘any enactment passed or to be passed’ by the United Kingdom Parliament. European Directives give rights that can be asserted by individuals and that must be safeguarded by the courts. English courts must decide questions on the meaning and effect of any EU instruments in accordance with the principles laid down by the European Court of Justice and rulings of the ECJ must be given direct

¹⁷⁴ Department for Communities and Local Government ‘Planning update’ (March 2015)

<www.gov.uk/government/speeches/planning-update-march-2015> accessed on 19 January 2016

¹⁷⁵ 213 Philip Oldfield, ‘UK scraps zero carbon homes plan’ *The Guardian*, 10 July 2015

<www.theguardian.com/environment/2015/jul/10/uk-scraps-zero-carbon-home-target> accessed on 25 January 2016

¹⁷⁶ Ralf Barkemeyer Diane Holt Lutz Preuss and Stephen Tsang ‘What Happened to the ‘Development’ in Sustainable Development’ *Business Guidelines Two Decades After Brundtland* (2014) Sustainable Development 15

¹⁷⁷ Infrastructure Act 2015, section 37

¹⁷⁸ Environmental Audit Committee *The Government’s approach to Sustainable Development* (HC 2015-16) answer to Q60

effect even if incompatible with UK law. European environmental assessment processes in particular introduce and enforce rigorous empirical standards on the development consent process in England through Directives aimed at identifying, assessing and mitigating their environmental impacts.

EU requirements in terms of environmental assessment of decision-taking and plan-making are therefore of primary significance in both decision-taking and plan-making. Although they neither define nor enforce the concept of sustainable development, they are the only controls that require the formal recognition and mitigation of environmental damage and enable individuals to enforce those requirements where they are not complied with by government bodies.

The Environmental Impacts Assessment ('EIA') Directive was made in 1985 and required that when considering whether or not to grant a 'development consent' any decision-making body should first consider the scale of its environmental impact, require that impact to be assessed if significant, and consider ways to mitigate that impact before granting consent for the development in question.¹⁷⁹ In 1988, in a keynote address to the Planning and Environment Law Conference, the Under Secretary of State for the Environment said that "environmental concerns are not going to go away. A developer who promotes a major project without seriously addressing those concerns is simply asking for trouble".¹⁸⁰ In practice, not only developers but also local and central government bodies and the English courts were slow to recognise the scope and reach of the Directives or to integrate them properly into the existing processes. A raft of cases demonstrated that local authorities were failing to meet the Directive in almost every aspect: information supplied was insufficient for full environmental assessment¹⁸¹; the interpretation of thresholds was inaccurate¹⁸²; Directive requirements were wrongly applied in relation to phased developments¹⁸³; and the relationship between prior assessment and mitigation through planning conditions was misunderstood¹⁸⁴.

¹⁷⁹ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L192/27

¹⁸⁰ Secretary of State for the Environment 'Keynote address Planning and Environment law Conference' [1988] *Journal of Planning and Environment Law* 517

¹⁸¹ *R v. Rochdale Metropolitan Borough Council, ex p. Tew* [1999] 3 PLR 74

¹⁸² *R (Horner) v Lancashire County Council and another* [2005] EWHC 2273 (Admin)

¹⁸³ *Candlish, R (on the application of) v Hastings Borough Council* [2005] EWHC 1539 (Admin)

¹⁸⁴ *Anderson & Ors, R (on the application of) v City of York Council*, [2005] EWHC 1531 (Admin)

One case in particular - *Barker v London Borough of Bromley*¹⁸⁵ – stands out, not only because it involved a direct conflict between the EIA Directive and planning legislation in terms of the definition of a ‘development consent’ but also because it demonstrated the persistence with which the English courts resisted the importation of European concepts within the English system.

In 1997 an application was submitted for the redevelopment of Crystal Palace Park and permission was issued in March 1998, with certain issues ‘reserved’ for subsequent approval. No assessment of its environment affects was required by the Council or carried out by the developer. The subsequent reserved matters application revealed specific aspects of the development previously undisclosed including a multiplex cinema and large car park. Again, no environmental assessment was required or carried out. The grant of full permission was then challenged on the basis of non-compliance with the EIA requirements. The key area of dispute was the assertion that the reserved matters approval, though not defined as a planning permission in UK law at that time, did constitute a development consent for EIA purposes and therefore required a second formal assessment separate from any work done – or not done - on the initial consent. Both the High Court and Appeal Court disagreed with this assertion, and dismissed the challenges, but on appeal to the House of Lords it was decided to seek a ruling from the European Court of Justice.

The ECJ adopted the opposite approach to the English courts. It ruled that interpretation of the EIA Directive must be consistent with the originating principles of the EIA itself, even where this was in conflict with the enacting regulations. The need for assessment would be determined not by whether English law required it but whether or not the empirical scale and scope of the development brought it within the remit of the Directive, requiring its effects to be examined for their impact. Although in terms of the national planning regulations in effect at the time a ‘reserved matters’ application was not a planning permission, it was still a development consent for the purposes of the EIA Directive¹⁸⁶. The House of Lords ruled accordingly, noting (para 33) that the Government’s interpretation of the requirements was flawed: ‘the Secretary of State must accept responsibility for the defect.’ Changes in legislation followed, but not until 2008, nearly 10 years after the original claim.

The Strategic Environmental Affects Directive (‘the SEA Directive’), requires a similar assessment process to the previous EIA but in relation to ‘plans and programmes’ rather

¹⁸⁵ *R (Barker) v London Borough of Bromley*, [2006] UKHL 52

¹⁸⁶ Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293

than individual schemes¹⁸⁷. The SEA Directive requires all such proposals to be identified and to have their environmental effects assessed for their potential impact. However, as before, case law has exposed the Government's reluctance to embrace the principles underlying the SEA Directive where they delay or frustrate policy ambitions.

In May 2010 the Secretary of State issued to all local planning authorities in England a letter in which he stated the government's intention to abolish Regional Strategies and return decision making powers on housing and planning to local councils. This was followed by a Statement to Parliament of the intention to revoke Regional Strategies¹⁸⁸. Although the Secretary of State acknowledged that the intention could not be implemented formally without a change to primary legislation, nevertheless he maintained that "I am revoking Regional Strategies today in order to give clarity to builders, developers and planners." On the same day the Department for Communities and Local Government issued written advice for local planning authorities about the impact of this purported revocation. It was a significant change to a political 'programme' as it removed an entire tier of planning policy throughout England. However, the government did not carry out any formal assessment of the potential environmental impact of this change.

Cala Homes were in the process of seeking planning permission for a large residential development near Winchester. The designation was supported by the South East Plan - the Regional Strategy for that area - and the revocation of the Plan significantly changed the strategic planning context for their proposal. Cala Homes challenged the Government's decision on a number of grounds, including the requirement that the environmental impacts of the removal of a core piece of planning policy should have been assessed first. The challenge was successful. On 10th November Mr Justice Sales ruled that because the regional strategy in question could play a 'decisive role' in the determination of applications its immediate revocation could therefore also have an impact sufficient to require assessment. He agreed with the claimant that the action of the Secretary of State was indeed unlawful, in part because the decision was taken without the necessary consideration of whether the change was likely to have significant environmental effects, in breach of the SEA Directive and Regulations¹⁸⁹. The regional strategies were effectively reinstated and

¹⁸⁷ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] *OJ L 197*

¹⁸⁸ The Secretary of State for Communities and Local Government 'Written Ministerial Statement on Regional Strategies' 5 WMS 6 July 2010

¹⁸⁹ *Cala Homes (South) Ltd v Secretary of State for Communities and Local Government & Anor* [2010] EWHC 2866 (Admin)

the case functioned as a reminder of the potential for European directives to overrule national policy developments in certain cases.

‘Barker’ and ‘Cala Homes’ both show that the Government resists rather than embraces environmental regulation and continues to seek ways to reduce the burden of European regulatory requirements, as demonstrated by the Government’s response to the 2014 Technical Consultation confirming that legislative changes would aim to significantly reduce the range of proposals coming within the scope of the 2011 EIA regulations¹⁹⁰. The EIA and SEA Directives do not include any reference to sustainable development but arguably have done more to identify and limit environmental damage than any policy document promoting that concept.

3.5 A legal definition?

The notion of sustainable development has been part of English environmental and planning policy for 25 years and many different definitions have been used. The concept is, as Jones notes, “caught between political vagueness and legal ambition”.¹⁹¹ The definitions that exist do not impose binding responsibilities on the organisations that sign up to them. As Mr Letwin acknowledged in his evidence to the Environmental Audit Committee on 9th December 2015 even the most recently agreed Sustainable Development Goals have ‘absolutely no binding effect on any country’.¹⁹² Sustainable development is a term that has rhetorical impact but is in practical terms ineffective, due to the lack of an agreed definition and the absence of any related enforceable standards based on it. This final part of the chapter reviews recent attempts to find a formal, enforceable definition of the term.

The first attempt to legislate for sustainable development in England was the Local Government Act 2000 that included a duty to prepare community strategies that would promote a new discretionary ‘wellbeing’ power based on the promotion of economic, social and environmental concerns and ‘contribute to achieving sustainable development’¹⁹³. However it did not define the term itself within the legislation and no regulations or guidance were published on how the aim should be made real. Section 39 of the Planning and Compulsory Purchase Act 2004 specifically requires that the plan-making function be

¹⁹⁰ Department for Communities and Local Government ‘Government Response to the technical consultation on Environmental Impact Assessment Thresholds’ January 2015

¹⁹¹ Gregory Jones ‘The impact of environmental law on planning decision-making’ [2012] *Journal of Planning and Environmental Law* OP22-OP72

¹⁹² Environmental Audit Committee *The Government’s approach to Sustainable Development* (HC 2015-16)

¹⁹³ Local Government Act 2000, Section 4(1)

exercised so as to contribute ‘to the achievement of sustainable development’. It was recently referred to by Gavin Barwell in the public bill committee proceedings for the Neighbourhood Planning Bill as an adequate way of addressing the need to make sustainable development the legal purpose of planning.¹⁹⁴

The 2004 Act does not offer any definition of the term itself or any guidance as to what the exercise might mean in practice. Indeed, Wright has criticised this legislation for its use of “creative interpretations” rather than definitions¹⁹⁵. Nevertheless, there is enough substance in section 39 for it to have been formally considered in case law. In *IM Properties* - an application for judicial review of a decision to adopt a development plan¹⁹⁶ - Mrs Justice Patterson described the effect of the duty as importing strategic considerations about 21st century needs in relation to housing, economic growth and mitigating climate change. The same duty was also considered in *Calverton* by Justice Jay who noted that there was in fact no ‘express definition’ of the term in the Act (para 10) yet still engaged with the concept, taking into account the three dimensions – economic, social and environmental - into account, and asserted (para 13) that sustainable development represented ‘a balance’ between them¹⁹⁷.

On 3rd December 2015 the House of Commons Public Bill Committee considered an amendment proposed by the opposition which would insert a new clause 16 into the consideration of the Planning and Housing Bill¹⁹⁸. The clause had three main elements:

- Statutory recognition of the purpose of planning as “the achievement of long term sustainable development and place making”;
- Sustainable development defined as “managing the use, development and protection of land and natural resources in a way which enables people and communities to provide for their legitimate social, economic and cultural wellbeing while sustaining the potential of future generations to meet their own needs”;
- A range of factors to be taken into account by the local authority seeking to achieve sustainable development including: taking social environmental and economic interests into account when identifying land, contributing to culture and art, contributing to climate change, promoting open decision making and ensuring long term management of assets for the community.

¹⁹⁴ Neighbourhood Planning Bill Public Committee (eighth sitting) 27 October 2016 col 284

¹⁹⁵ Graham Wright ‘The meaning of words in the Planning and Compulsory Purchase Act 2004 - who is to be the master?’ [2008] *Journal of Planning and Environmental Law* 621

¹⁹⁶ *IM Properties and Lichfield DC* [2014] EWHC 2440

¹⁹⁷ *Calverton Parish Council v Nottingham City Council & Ors* [2015] EWHC 1078

¹⁹⁸ Housing and Planning Bill 3 December 2015 Committee Debate 13th sitting col 520

The proposition was a good one in that it was clearly based on Brundtland and at least attempted to define the term in some way. However the breadth of considerations included meant that this clause was not so much a definition of sustainable development as a catalogue of the considerations commonly associated with it. In any event, although the Government agreed that sustainable development was integral to the system of planning their response was that integration was achieved already through section 39 of the 2004 Planning and Compulsory Purchase Act and the Framework so that there was no purpose in adopting anything prescriptive in legislation.

The most recent attempt to create a statutory definition of sustainable development was the Committee stage of the Neighbourhood Planning Bill. Amendment 19 proposed the inclusion of a sustainable development test for all planning conditions.¹⁹⁹ The opposition also proposed, as it had for the Housing and Planning Bill, the inclusion of a new clause 19 stating that the purpose of planning was ‘the achievement of long-term sustainable development and placemaking’ and using the same definition as it had for the Housing and Planning Bill.²⁰⁰ The Government’s response echoed that given less than a year previously – which was to refer to section 39 of the 2004 Act and the presumption in favour of sustainable development in paragraph 14 of the Framework, with the Minister noting that “we have had this debate before” and as before both amendments were withdrawn²⁰¹.

There is only one statutory definition of sustainable development in place. The Wellbeing of Future Generations (Wales) Act was given royal assent on 29th April 2015. Sustainable Development is defined as “the process of improving the economic, social, environmental and cultural well-being of Wales ... in accordance with the sustainable development principle, aimed at achieving the wellbeing goals”.²⁰² The sustainable development principle is set out in section 5, incorporates the Brundtland definition and sets out a range of issues to be taken into account including well-being objectives, and well-being goals. The wellbeing goals are set out in a table and include resilience, health and a vibrant culture. As with the definition proposed for the Housing and Planning Bill the aims of the definition cannot be faulted but are so wide and aspirational that it is difficult to see how its compliance will ever be monitored or, more crucially, enforced.

¹⁹⁹ Neighbourhood Planning Bill Debate 25 October 2016 column 177

²⁰⁰ Neighbourhood Planning Bill Debate 27 October 2016 column 283

²⁰¹ Neighbourhood Planning Bill Debate 27 October 2016 column 285

²⁰² Wellbeing of Future Generations (Wales) Act 2015 s2

Conclusion

It is thirty years since the Brundtland definition of sustainable development entered policy consciousness. There is a resulting Brundtland-based, understanding of what the term means remains, what Elliot refers to an “idea of sustainable development” that “forms a staple part of most debates about environment and development”²⁰³

The problem remains that there is still no single, formally acknowledged definition of the term in either planning or environmental law or policy. As many commentators including Millichip²⁰⁴, Segger and Khalfan (2004 p4)²⁰⁵, Richardson and Wood (2006 p13)²⁰⁶ and Samuels²⁰⁷ have observed, sustainable development is a concept rather than a descriptive term, a textual hook onto which meaning can be hung rather than a proscriptive term against which proposals can be measured. Rather than acquiring meaning over time the words sustainable development have become a definitional space bloated with a wide range of policy aspirations that can contain all meanings or none. While the text itself retains an historic hinterland of association with the environmental agenda adding a sheen of green to the policies it inhibits, the term itself has become a catch-all term available to be applied to a multiplicity of policy aspirations.

Where no definition is more valid or lasting than any other, definitions can be created and imposed on the term by the author using them and used to support a particular agenda rather than adhere to any traditional concept of sustainable development. The Coalition government maintained a rhetoric of sustainability and continued to use the words sustainable development as it began a policy shift towards equating sustainability with growth and environmental issues as financial burdens, while resisting the imposition of any quantitative reports and benchmarking.

The current Government has continued with the same approaching, including the rhetoric of sustainability in its policies but doing little to secure the proper analysis and mitigation of actual environmental impacts while policies continue to re-frame environmental impacts as purely economic impacts. The concept of sustainable development has though been repositioned as concerned with delivering economic prosperity rather than protection of the

²⁰³ Jennifer Elliott *An introduction to sustainable development* (Routledge 2014)

²⁰⁴ Denzil Millichip ‘Sustainability: a long-established concern of planning’ [1993] *Journal of Planning & Environment Law*, 1111

²⁰⁵ Marie-Claire Cordonier Segger and Ashfaz Khalfan, *Sustainable Development Law Principles Practices, & Prospects* (OUP 2004)

²⁰⁶ Liz Sharp and Tim Richardson ‘Reflections on Foucauldian Discourse Analysis in Planning and Environmental Policy Research’ [2001] *Journal of Environmental Law and Policy* 193

²⁰⁷ Alec Samuels ‘Sustainable Development: what is it?’ [2013] *Journal of Planning & Environment Law*, 1374

natural environment. In the meantime the environmental impacts of development have been repositioned as purely financial burdens capable of being fully compensated by the same means – or even having the potential to create profit. It is hard to disagree with Allmendinger's view that a "'Treasury view' of the role of UK planning continues to underpin and justify arguments to dismantle planning controls...gaining greater sway under the coalition between 2010 and 2015"²⁰⁸

The Environmental Audit Committee is effective in documenting the concerns of environmental organisations at the way in which environmental policy is being redefined and implemented. Its most recent report concerns sustainability and the Treasury²⁰⁹ and concludes that the Treasury is "arguably the most important department for ensuring the Government meets its environmental obligations" (76) but takes inadequate account of environmental long-term benefits.

The Environmental Audit Committee remains active in its role of monitoring and reporting on environmental sustainability and there are three current, relevant inquiries. The first, set up in July 2015 is into the Government's approach to sustainable development generally²¹⁰. As part of its call for evidence, the Committee 'consciously adopted' a definition of sustainable development, promoting environmental protection, support for low carbon energy and a general aim of improving wellbeing. The second is an inquiry on EU/UK Environmental Policy set up in October 2015 "to assess the extent to which EU environmental objectives and policies have succeeded in tackling environmental issues in the UK."²¹¹ Finally, an inquiry on the role of HM Treasury in relation to sustainable development and environmental protection was set up in December 2015²¹². It asked for evidence to be submitted on a number of questions including whether HM Treasury is taking enough account of the long term environmental impacts of its appraisal methods and whether there is sufficient understanding of the interrelationship of growth and environmental policies. However, the Environmental Audit Committee has no power to enforce these recommendations, its reports are not widely publicised and the Government is free to disregard their content and recommendations.

²⁰⁸ Philip Allmendinger *Neoliberal Spatial Governance* Routledge 2016 p3

²⁰⁹ Environmental Audit Committee Sustainability and HM Treasury (HC 2016-17 181)

²¹⁰ Environmental Audit Committee *The Government's approach to Sustainable Development* (HC 2015-16)

²¹¹ Environmental Audit Committee *Assessment of EU/UK environmental policy* (HC 2015-16)

²¹² Environmental Audit Committee *Sustainability and HM Treasury Inquiry* (HC 2015-16)

The EIA and SEA Directives remain the only functional environmental controls because they are empirically rigorous in terms of measuring and mitigating environmental harm and have power to overturn decisions that are non-compliant. The Great Repeal Bill of 2017 will disengage the authority of the European Communities Act over English law, including the authority of both the EIA and SEA directives which could result in the deconstruction of both regulatory systems.

Within the specific context of planning law, 'development' has an enforceable legal definition whose meaning has been refined over time, largely through case law. It is clear from existing and proposed legislation that it is possible to define sustainable development and it is also clear from the environmental benchmarking system that it is also capable of being encoded and measured. The government continues to resist the introduction of any statutory concept of sustainable development or robust evaluative criteria. Sustainable development in planning law therefore remains defined primarily by the Framework rather than legislation and the next chapter of this research turns its attention to that document.

Chapter 4: Sustainable Development in the Framework

Introduction

Chapter 2 examined in detail the legal test which must be applied to all proposals for planning permission, where the merits of a particular proposal are considered against relevant development plan policies and a range of considerations material to that proposal. The Framework is always one of those material considerations but where the development plan is 'absent, silent or out of date' the presumption in favour of sustainable development will prevail over the development plan.

Chapter 3 was concerned with the meaning of sustainable development outside the Framework. It reviewed the original Brundtland definition of the term and the diversity of definitions it has acquired since its first use. It proposed that the term is still generally associated with the need to reduce environmental impacts and to ensure that current growth does not compromise future societal needs but that since the election of the 2010 Coalition government sustainable development has been increasingly associated with delivering economic growth while environmental impacts are presented as solely economic costs. It also noted that there are no empirical enforceable standards associated with the term and just one legal definition.

This chapter is concerned with the meaning and interpretation of the words sustainable development as they are used linguistically in the Framework. It reviews the political context within which the Framework was conceived and produced. It traces the evolution of the document from manifesto promise through to production of the first draft, its progress through formal consultation and on to official adoption in March 2012. Referring to the initial draft as 'Proposal', the July 2011 consultation document as 'Consultation' and the formally adopted document as 'Framework' respectively, it looks at the text of each one in detail, comparing and contrasting key differences in terms of structure between them generally but in particular how each one uses and defines the term 'sustainable' and 'sustainable development'. This analysis is supplemented by Tables 1-6 detailing the use of the words 'sustainable development' and 'sustainable' within each of the documents considered.

The Chapter also considers the extent to which the Framework functions as political discourse as well as planning policy. It includes a review of literature on the Framework since its inception, from parliamentary committees, legal and planning practitioners and academics, and concludes with consideration of the current review of the Framework itself.

4.1 Context

The Coalition Government of 2010 inherited an established suite of national planning policy documents, including Planning Policy Guidance notes Planning Policy Statements and National Policy Statements. Each one was relatively lengthy, involving detailed consideration of individual planning policy topics, updated on an ad hoc basis according to need. They were criticised on the basis that they were unwieldy, liable to go out of date quickly and created an overall policy position that tended towards incoherence.

On 20th December 2010 Greg Clark, the then Minister of State for Decentralisation and Planning, formally announced a general review of planning policy including the creation of a new, document that would set a concise and strategic context for planning in England: the National Planning Policy Framework²¹³. Greg Clark also established a 'Practitioners Advisory Group' (PAG) commissioning four external professionals to produce the first draft of this document: Pete Andrew, Director of Land and Planning, Taylor Wimpey UK; Simon Marsh, Acting Head of Sustainable Development, RSPB; Cllr Gary Porter, Leader of South Holland District Council and then Chair of LGA Environment and Housing Programme Board; and John Rhodes, Director of Quod planning consultancy. This group submitted its initial proposal to the Government on 20th May 2011 and a consultation draft was issued by the Government in July 2011. The consultation ran until 25th November, 2011 and a summary of consultation responses and an impact assessment were published in July 2012.

The Framework was introduced to Parliament the House by Greg Clark, on 27th March 2012 and brought into immediate effect²¹⁴. Its three 'fundamental objectives' were stated as follows:

- To put unprecedented power in the hands of communities to shape the places in which they live;
- To better support growth to give the next generation the chance that our generation has had to have a decent home, and to allow the jobs to be created on which our prosperity depends; and
- To ensure that the places we cherish - our countryside, towns and cities - are bequeathed to the next generation in a better condition than they are now.

4.2 Proposal

²¹³ HC Deb 20 December 2010 Col 144WS

²¹⁴ HC Deb 27 March 2012 Volume 542 Col 1337

According to the (now unavailable) website of the Planning Advisory Group its aim was to reach ‘a consensus on what planning policy would be required to deliver sustainable development’²¹⁵. The document that emerged was described as explicitly not a statement of government policy, but rather a ‘major contribution to the debate’. Much of its content was nevertheless reproduced in the later consultation, including the presumption in favour of sustainable development, described for the first time as a ‘golden thread’ running through the policy as a whole.

The Proposal does not contain a contents page and has little formal organisation or structure compared to traditional planning policy documents but can broadly be divided into three sections:

- The first is an introduction including, under the heading of ‘Objectives for the planning system’ a definition of sustainable development, and a summary of the role of the Framework. The section insists that the growth should decoupled from its association with negative environmental consequences and is clear that growth is the ‘principal function’ of the planning system;
- The next section is headed ‘Delivering sustainable development’, and begins by setting out the principle of the presumption in favour of sustainable development presented as the ‘golden thread’ of the planning system as a whole. It then establishes eight core planning principles including the need for plans to take ‘market signals’ into account, and for growth to be focussed in locations which are or could be sustainable. A page of ‘Business Requirements’ is set out as one of the specific elements of the Local Plan, alongside more traditional elements such as environment and heritage. This section ends by setting out key principles relating to conditions, 106 obligations and enforcement, and is followed by a very short summary in paragraph 16 of the Secretary of State’s power of call in, to be exercised only ‘in exceptional circumstances’;
- The remainder of the document sets out a summary of planning policy principles under 10 different headings: Business and Economic Development, Transport, Communications Infrastructure, Minerals, Housing, Design, Green Belt, Climate Change, Natural and Local environment, Waste Management and Heritage.

Tables 1 and 2 set out in detail exactly how the words ‘sustainable development’ and

²¹⁵ National planning policy framework (NPPF) practitioners advisory group website <<http://www.nppfpractitionersadvisorygroup.org>> accessed 2nd February 2014

'sustainable' are used in this document. The words appear frequently and a number of definitions are used but it is not clear whether any are intended to make up a formal definition or whether any one takes preference to the others.

Sustainable development is defined for the first time in the introduction section. This definition is linguistically close to the Brundtland definition and explicitly references Brundtland in the footnotes. The introduction section also introduces the notion of sustainable development as having three roles – social, economic, and environmental.

Page 6 adds to the range of meaning by describing sustainable development in terms of its implications rather than its ingredients, governing how plans are prepared, proposals decided and policies treated. It then introduces a set of core planning principles which are essential for a planning system to deliver sustainable development without defining what sustainable development is. Under the heading 'Local plans' on page 7 there is the statement that development plans should aim to achieve sustainable development, and that this means policies consistent with the Framework. Page 7 goes on to use sustainable development as the goal of local plans without explaining how it would be tested.

Development management, considered from page 14 onwards, is also presented as having the delivery of sustainable development as its central focus, but in this context sustainable development means 'not to hinder or prevent' development. Pages 14 and 15 stress the centrality of the presumption, which appears, when the term is cross referenced with its implications on page 6 solely to mean that proposals should be approved and development needs met.

Transport policies are mentioned on page 22 as important in facilitating sustainable development but not how. In relation to the Green Belt, local authorities are advised to show what the consequences of new green belt would be for sustainable development, with the implication that such proposals would hamper its achievement and need, therefore, to be justified.

The position is no clearer in relation to the use of 'sustainable' on its own. It is used to describe economic growth on page 18, and again at 21, where it is also used to describe rural tourism with no explanation of its meaning in either context. Sustainable economic growth and sustainable economic development are both referred to on page 22 but as policy aspirations rather than empirical goals. Sustainable communities are listed as a key objective of housing policies and various ways are proposed on page 33 of achieving this.

Minerals – an irreplaceable resource - are described on page 27 as ‘essential to support sustainable growth’ while on page 29 a raft of policies supporting the capture and storage of non-renewable resources are listed under a heading promoting sustainable use of energy. In contrast the section on page 43 that deals with renewables, and the entire policy section on the natural environment, are not referred to as a sustainable resource.

4.3 Consultation

The Consultation document has more formal structure than the Proposal and begins with a foreword from Greg Clark, the Minister of Planning²¹⁶. There are three initial sections headed ‘Delivering sustainable development’, ‘Plan-making’ and ‘Development Management’ followed by detailed policies on a range of matters set out under three further headings: ‘Planning for prosperity’, ‘Planning for people’ and ‘Planning for places’. The Proposal requirement for an assessment of economic development needs is dropped from the Consultation, as is the paragraph on waste but text is added on health and wellbeing, viability and deliverability. The paragraphs in the Proposal about how the presumption is to be applied are removed but text is added on local development orders, neighbourhood planning and community right to build.

In terms of defining what sustainable means and what sustainable development is the consultation document is no more coherent than the Proposal and the detailed analysis is set out in Table 3 and 4.

The Foreword states twice that the purpose of planning is to help achieve sustainable development’. In an apparent allusion to the Brundtland definition it states that sustainable means ‘ensuring that better lives for ourselves don’t mean worse lives for future generations’. The Foreword goes on to say that Sustainable Development is ‘about change for the better...positive growth’, that development which meets this criterion should ‘go ahead without delay’ and that the presumption in favour of sustainable development is the basis for ‘every plan and every decision.’ The Introduction refers to the economic, social and environmental aspects of planning and stresses the centrality of the presumption in favour of sustainable development as the ‘golden thread’ running through the document.

Within the Core Principles, paragraph 19 bullet point 2 presents planning as driving forward development and directing all decision makers to ‘assume that the default answer to

²¹⁶ DCLG ‘Draft National Planning Policy Framework’ (July 2011)

development proposals is 'yes' – a principle imported from the 2011 Budget²¹⁷. In the Plan-making section a similarly positive approach is required towards local plans, with the assumption that 'development needs should be met'. The Consultation also emphasises the need for the planning application process to recognise the presumption in favour of sustainable development – presented in this context as inherently connected with a positive approach to development proposals.

The Draft then goes on to set out policies specific to a number of areas grouped in three headings. Under 'planning for prosperity' the word 'sustainable' is used nine times without its meaning, either generally or within that context, being explained, though again the need to apply the presumption is stressed. In the context of 'plan-making' achieving sustainable development is described as meaning meeting objectively assessed housing needs. Under 'Planning for places' applying the presumption in favour of sustainable development means not requiring applicants to demonstrate a need for renewable or low-carbon energy and approving applications where impacts can be mitigated.

Within the sub section on green belt, there is a requirement to consider the consequences for sustainable development of decisions on where to locate new development, without any indication of which locations are more sustainable than the others. Under the sub-heading of 'natural environment' applying the same presumption means meeting objectively assessed development needs, but under the same heading it is acknowledged that development affecting sites protected by the Birds or Habitats Directive would not be sustainable.

The Consultation considers sustainable communities as a discrete area of policy and states that they involve the creation of new built environments. In rural areas, proximity to services promotes sustainable development and good design is also seen as a 'key element' in achieving sustainable development. The Consultation is completed by a new, glossary section. This does not define sustainable development but makes reference to the 'whole range' of surface water flood management methods within the definition of sustainable drainage system and includes a definition of sustainable transport modes.

4.4 Framework

The Framework follows the Consultation version closely, and begins with a foreword and

²¹⁷ H M Treasury 'Budget 2011' TSO (2011) para 1.82

introduction. Under the heading of 'Achieving sustainable development' there is an introduction to the concept generally, and the presumption in favour of sustainable development in particular. It sets out a number of core planning principles before setting out policies in relation to more discrete areas, including separate sections on development plans and decision-taking. The section on sustainable communities is rebranded as 'promoting healthy communities' and a new Exception Test is introduced in relation to developments on the flood plain, allowing such developments to go ahead where flood risks are outweighed by 'wider sustainability objectives.' The introductory text in the Draft on housing policies is removed.

Many of the responses to the Consultation included requests for clarity on the definition of sustainable development, for explicit links with the 2005 Sustainable Development Strategy, for explicit equivalence on the three dimensions and for specific types of development to be listed that were or were not sustainable.²¹⁸ In spite of these requests, the definitions and interpretations of sustainable development and sustainable remain diffuse and opaque in the adopted document and a detailed analysis is set out in Tables 5 and 6.

In the foreword, the initial definition of sustainable – 'ensuring that better lives for ourselves don't mean worse lives for future generations' acknowledges the influence of Brundtland, yet sustainable development is also described as 'change for the better...about positive growth' and as the purpose of planning as well as the 'basis' for plans and planning decisions. There is a new, shorter, general introduction that contains no reference to sustainable development as a concept but instead simply states what the status of the document is both in terms of policy hierarchy and within the legal test for determining permissions.

The main body of the text is headed 'Achieving sustainable development' and begins with a word for word rendering of the Brundtland definition, the reintroduction of the three dimensions listed in the Proposal, and the addition of the five principles from the 2005 Sustainability Strategy. Paragraph 6 introduces a new definition of sustainable development as any development that is in broad conformity with the Framework. Page 3 states that achieving sustainable development relies on meeting all three dimensions, and uses sustainable development as a heading in the section introducing the new presumption. Page 4 contains paragraph 14, a detailed definition of the presumption itself, referring to it firstly as a 'golden thread running through plan making and decision taking' before setting out what the presumption in favour of sustainable development 'means' in terms of the

²¹⁸ DCLG 'National Planning Policy Framework summary of consultation responses' (July 2012)

exercise of each of those functions, and then stressing in paragraph 15 that where development is sustainable it should be approved without delay.

Within the core general policies, sustainable development is used in a range of ways. In the Draft, the development plan must 'aim to achieve' sustainable development; in the Framework local plans are promoted as the main way of delivering it. Sustainable Development is described as something that transport policies will facilitate (para 29) and that infrastructure should support (para 31). It is one of the considerations in assessing new large scale developments (para 52), the sort of development that can be promoted in rural areas (para 55) and a 'key aspect' of good design (para 56). It is something that must be taken into account in terms of the consequences of development in the Green Belt (para 82 and 84). It is something that plans must deliver and have as their prime objective including promoting the three dimensions it comprises (para 150-152). Paragraph 173 states that viability and costs must be taken into account when pursuing sustainable development and it is referred to in paragraph 183 as the type of development that neighbourhoods need and can shape and direct and whose delivery should be fostered by local planning authorities (para 186). Sustainable development is part of the decision making context for housing applications (para 49,197), and is excluded from applying where developments require assessment under the Bird or Habitat Directive (para 119).

The use of the word 'sustainable' is no more coherent. It is used to promote a range of topics including:

- to define the kind of economic development that planning should 'drive and support' (para 17);
- the kind of economic growth that the government will ensure that the planning system will support (para 19);
- the kind of communities whose needs should be taken into account among the planning merits of a particular proposal (para 22);
- the kind of transport solutions that should be maximised (para 29);
- the type of transport mode that should be facilitated (para 30) taken account of (para 32) and maximised (para 34);
- the type of community that should be created through new homes (para 50);
- that way in which shops, facilities and services should develop (para 70);
- the kind of development pattern that should be promoted (para 84);
- a consideration to be taken into account as threatened by floor risk (para 100);
- the kind of economic growth that can be supported through minerals development

(para 142);

The final sections are concerned with plan-making and decision taking. Both Local Plans and Neighbourhood plans are presented as key to delivering sustainable development. The three dimensions are mentioned but attention must also be paid to viability and cost issues.

None of these documents define sustainable development clearly or reliably and none of them are clear on how a development should be assessed for its conformity with the Framework as a whole. The Proposal locates the definition of sustainable development within its economic social and environmental roles, but the Consultation disconnects the definition of sustainable development from these traditional anchors and aligns it with a more general pro-growth agenda. The Framework follows the Consultation, so that while sustainable development is in textual terms a thread running through the whole document the Brundtland definition is textually and conceptually isolated from it. These deficiencies did not go unremarked and the next section of the chapter summarises reactions from academics and practitioners in the field, and the outcomes of parliamentary scrutiny.

4.5 The Framework as discourse

Keller states that text can be seen as discourse when the production of the text is connected with the hierarchy of knowledge behind it and the people engaged in the process²¹⁹. He argues that no text appears or can be properly understood without regard to its wider social and cultural context and subtext, the dominant narratives within and from which the text is produced and by which it is informed and given meaning.

Analysing the Framework as discourse considers it as contributing to a particular political agenda as well as providing guidance on planning policies. It requires seeing the document in the context of its wider social and political ideologies. This is an appropriate approach: Allmendinger proposes that although land is a concrete reality but it is overlaid with constructions such as the green belt that operate as socially produced ideas of what land is for²²⁰ while Sharp and Richardson recognise, this approach can usefully be applied to planning and environmental policy because it enables the policy to be read within the specific socio-political context by and through which it was produced.²²¹

²¹⁹ Reiner Keller, *Doing Discourse Research An Introduction for Social Scientists* (Sage 2013) p 20

²²⁰ Philip Allmendinger, *Planning Theory* (Palgrave Press 2002) 12

²²¹ Liz Sharp and Tim Richardson, 'Reflections on Foucauldian discourse analysis in planning and environmental policy research' (2000) *J. Environ. Policy Plann* 3: 193-209

In terms of context the Planning Framework can be presented as a document supporting a wider agenda primarily concerned with delivering growth, as well as a piece of policy guidance. Allmendinger traces the evolution of what he terms 'neoliberal spatial governance' from its origins in the 1980s through New Labour and the Coalition government of 2010 and into the current conservative administration, presenting the phenomenon as unashamedly market-oriented yet made politically palatable through a gloss of "public interest legitimacy".²²² The 'development first' approach of the 1981 Conservative government was delivered through a presumption in favour of development. Although it was subsequently replaced by a plan led approach, the need for land to deliver financial benefits remained on the political agenda as can be seen in the 2006 commissioning of Kate Barker – an economist and not a planner – by the Labour Government to carry out a comprehensive review of the system²²³. The subsequent Barker Report recommended updated policy on planning for economic development, and inclusion of policies to support economic growth in all development plans.

The Coalition Government continued to promote a growth agenda in parallel with a re-presentation of the notion of sustainable development as concerned with delivering that growth. The linguistic repositioning - referred to by White as a 'neoliberal mobilisation' of sustainable development.²²⁴ is examined in greater detail in Chapter 3, but began with the pre-election green paper 'Open Source Planning' that an explicit bias in favour of growth through the new housing and commercial development, introduced a new planning presumption and described it as a 'right to build homes and other local buildings'.²²⁵ It found support in the first Budget statement stated the Government's intention to introduce a presumption in favour of sustainable development 'where the default answer to development is 'yes'²²⁶.

The Framework was a planning policy document, but created to promote a particular kind of planning with a particular motivation. Rydin called it 'a clear expression of the logic of growth-dependent planning'²²⁷ while Simon Marsh, one of the original authors of the first draft of the Framework, acknowledged when questioned by the Communities and Local Government Select Committee that "this is what the presumption in favour of sustainable

²²² Philip Allmendinger, *Neoliberal Spatial Governance* Routledge 2016 p 88

²²³ Kate Barker *Barker Review of Land Use Planning* December 2006

²²⁴ Aidan White 'Resisting the Growth Clamp' [2012] *Planning Theory & Practice*, 503

²²⁵ Conservative Party *Open Source Planning* (Green Paper Policy Green Paper 14 February 2010) p110

²²⁶ HM Treasury *Budget 2011* (HC 836 para 1.82)

²²⁷ Yvonne Rydin *The Future of Planning: Beyond Growth Dependence* (Policy Press 2013) 24

development was intended to do: deliver more homes”²²⁸. Although it removed the ‘default yes’ approach present in both the Proposal and the Consultation versions of the Framework, the Framework remained clear that planning “does everything it can to support economic growth.” It did not include previous acknowledgements of the need to take account of the environmental quality of land when considering its development, and references to supporting a low carbon future. It included the Brundtland definition of sustainable development but isolated it within the text rather than integrating it as a central policy concern.

Analysing the Framework as discourse also requires the status of the authors to be considered. Foucault asserts that the function of the author is inherently linked to the processes that “articulate the universe of discourses”²²⁹ Keller argues that the significance of the authors or ‘actors’ responsible for producing a text cannot be ignored in terms of augmenting its power to create or impose meaning, and that the more power these authors have, whether that be in terms of economic or political capital, social or political status, knowledge and qualification or the significance (acknowledged or unacknowledged) of their position, the greater the potential for that text to have an impact²³⁰. Lombardi et al also describe the influence of such key actors as ‘a powerful factor, possibly determinant’²³¹.

The Framework was promoted as providing ‘a practitioner’s perspective on what the National Planning Policy Framework should contain’ and four named individuals – rather than the usual anonymous civil servants - were commissioned to produce the first draft²³². The individuals tasked with production of the Proposal were: Pete Andrew, Director of Land and Planning, Taylor Wimpey UK; Simon Marsh, Acting Head of Sustainable Development, RSPB; Cllr Gary Porter, Leader of South Holland District Council and then Chair of LGA Environment and Housing Programme Board; and John Rhodes, Director of Quod planning consultancy.

Councillor Porter was the leader of the Conservative group of the Local Government Association from 2011 and described himself as having Eric Pickles – the then Secretary of

²²⁸ Communities and Local Government Committee *Operation of the National Planning Policy Framework* (HC 190 December 2014) Q205

²²⁹ Michel Foucault *The Foucault Reader* (Paul Rabinow ed, Penguin 1991)

²³⁰ Reiner Keller, *Doing Discourse Research An Introduction for Social Scientists* (Sage 2013) p 79

²³¹ Rachel Lombardi, Libby Porter, Austin Barber and Chris D.F. Rogers ‘*Conceptualising Sustainability in UK Urban Regeneration: a Discursive Formation*’ (2010) *Urban Stud* 48:273

²³² ‘Overview’ *National planning policy framework (NPPF) practitioners advisory group website Overview* <<http://www.nppfpractitionersadvisorygroup.org>> accessed 2nd February 2014

State for Communities and Local Government - 'on speed dial'²³³, Pete Andrew's principal responsibility at Taylor Wimpey was stated as overseeing land acquisition for development purposes while John Rhodes headed, and still heads, a planning consultancy that lists a number of major developers (Argent, Brookfield Europe, Hammerson Plc, Lend Lease, and Stanhope) as well as the Home Office among his Quod Planning clients. The group was thus dominated by individuals who were either actively allied with the current political agenda or primarily motivated by market forces so that financial rather than environmental concerns were always likely to be the primary consideration behind the document's production. Only Simon Marsh had a background in local government as a planning officer, whose independent post-publication observation on the draft Framework was that the notion of sustainability remained a concept that was simply 'tacked on to quieten the greenies'.²³⁴

As a piece of discourse the Framework can be seen as produced to promote and enable a new political agenda; drafted by the development industry for its own purposes and adopted to contribute to the establishment of a particular socio-political-economic context for development.

4.6 Critical reaction

In terms of comment from planning practitioners Rydin considered sustainable development in the context of the Framework within her recent work on the purpose of planning but did not engage in any detail with the problem of defining the term within the Framework no doubt because, as she acknowledged, the text of her work was finalised before the Consultation was published.²³⁵ Hugh Ellis criticised the Framework as inadequate in the way it articulated the concept of sustainable development and for its neglect in omitting the definition of sustainable development contained in the 2005 Sustainable Development Strategy²³⁶. Allmendinger's most recent work also criticised the Framework for its lack of clarity in relation to sustainable development, pointing out that the term was in some places used to promote economic growth and in others to support environmental considerations. He also noted that the document as a whole reads as though there were a number of

²³³ 'Gary Porter the man with three hats and south holland tinted spectacles' *Spalding Guardian* (29 April 2013) <www.spaldingtoday.co.uk/news/latest-news/gary-porter-the-man-with-three-hats-and-south-holland-tinted-spectacles-1-5044518> accessed 12th March 2016

²³⁴ Simon Marsh 'This isn't the planning policy that I drew up' *Daily Telegraph* (15th September 2011) <www.telegraph.co.uk/earth/hands-off-our-land/8765316/Hands-off-our-land-This-isnt-the-planning-policy-that-I-drew-up.html> accessed 14th April 2014

²³⁵ Yvonne Rydin *The future of planning Beyond growth dependence* (Routledge 2013)

²³⁶ Hugh Ellis 'The English planning system: in glorious expectation of the life to come' [2014] J.P.L. 2014 OP4

authors with different agendas writing separate parts of the text²³⁷.

The property profession responded to the Framework with an analytical rather than a critical approach. A year after the NPPF came into force Savills looked at decision-making on appeals comparing the position before and after adoption of the Framework and demonstrated that it was easier to obtain consent post adoption. They also noted that of the 11,669 new homes approved, 87% of the decisions were made by the Secretary of State.²³⁸ CPRE brought out its own research in 2014, looking at 58 appeal decisions in the 11-month period since the beginning of April 2013, of which two thirds were granted. This report also noted that almost half of the decisions were decided by the Secretary of State and that the majority of these were approved²³⁹. Turley associates subsequently carried out a 2 year analysis of appeal decisions recording noting that the chance of success of a proposal at a planning inquiry had increased by 50% in the two years since the Framework was introduced²⁴⁰.

In terms of comment from an environmental policy context, Ross set out a detailed analysis of the coalition government's approach to sustainable development generally but her work predated the formal adoption, or implementation of sustainable development as presumption operating within all planning decisions and did not consider it in that context.²⁴¹ Devine's article in *Environmental Law and Management* considered the concept of sustainable development in the Framework and raised a number of criticisms.²⁴² The definition of sustainable development was referred to as 'clumsy and reductionist', the requirement for the sustainability of a proposal to be assessed for conformity with the Framework as a whole was deemed "unworkable...substantially untenable'. The article concluded that the Framework failed to integrate sustainable development into UK legislation and that the economic aspects of sustainability were promoted at the expense of the social and environmental.

There was some comment from planning lawyers. Morag Ellis questioned the underlying motives of the NPPF and the presumption in favour of sustainable development even before

²³⁷ Philip Allmendinger *Neoliberal Spatial Governance* (Routledge 2016) p197

²³⁸ Savills 'National Planning Policy Framework One Year On' (Savills 2013)

²³⁹ CPRE 'Community Control or Countryside Chaos the effect of the National Planning Policy Framework two years on' (CPRE 2014)

²⁴⁰ Turley Associates 'The Impact of the National Planning Policy Framework on Decision Making (Turley 2014)

²⁴¹ Andrea Ross *Sustainable Development Law in the UK From rhetoric to reality?* (Routledge 2012)

²⁴² Owen Devine 'Is the 'presumption in favour of sustainable development' compatible with being the 'greenest government ever'?' [2014] 26 *Environmental Law and Management* 1-2 6

the Framework was adopted²⁴³. These criticisms were echoed by Dowden and Hawkins in the same year, criticising the Framework for its lack of a clear definition of sustainable development and noting the potential as a result for this either to lead to growth in new developments or make it more difficult for new developments to come forward²⁴⁴. One year on from adoption, Bird produced a comprehensive review of all of the significant the cases considered by the courts in the context of the new Framework since its implementation and was one of the few practitioners to focus on new presumption.²⁴⁵ He questioned whether a fair balance was struck between the social, economic and environmental elements. He noted that the Framework had the potential to implement a very liberal approach to development, and that the result might be approvals of developments that are anything but sustainable in terms of established understandings of the word. Bird also remarked on the power of and potential for the Secretary of State to decide what sustainable development meant on a case-by-case basis, suggesting that sustainable development could be reimagined in this context to become “synonymous with what is necessary or desirable in the public interest”.

Parliamentary Committees have produced the most sustained critical analysis of the Framework and the new presumption. The Parliamentary Committee on Communities and Local Government began an inquiry on the Planning Framework in October 2011 and published its report two months later²⁴⁶. This raised concerns including its lack of clarity, the risk that the document might facilitate unsustainable development, the over-emphasis on economic viability and the ‘conflation’ of economic growth and environmental sustainability. A separate report published on the same day by the Environmental Audit Committee (UK Parliament 2011) noted that the draft NPPF did not achieve a balance between the three pillars of sustainable development, and that the NPPF could encourage unsustainable development.²⁴⁷

In April 2014 The Communities and Local Government Select Committee launched an inquiry into the operation of the National Planning Policy Framework and published its report in December that year. Paragraph 6 questioned whether the NPPF was indeed delivering

²⁴³ Morag Ellis ‘Green Growth: do blue and yellow really make green?’ [2011] *Journal of Planning & Environmental Law*, 1433

²⁴⁴ Malcolm Dowden, Jen Hawkins ‘Could a presumption in favour of sustainability have the opposite effect’ [2011] *New Law Journal* 161

²⁴⁵ Simon Bird ‘The NPPF in practice: panacea, pariah or placebo?’ [2013] *Journal of Planning & Environment Law* OP 82

²⁴⁶ Communities and Local Government Committee *The National Planning Policy Framework* (HC 1526 December 2011)

²⁴⁷ Environmental Audit Committee *Sustainable Development in the National Planning Policy Framework* (HC1480 December 2011)

sustainable development and referred to a body of evidence which indicated that ‘the NPPF is, in fact, leading to unsustainable development’. One of the problems it highlighted was that greater emphasis seemed, in practice, to be attributed to the economic dimension of sustainable development than to the environmental and social. The first recommendation was that paragraph 6 - the statement that the policies in paragraphs 18 to 219, taken as a whole, constitute the Government’s view of what sustainable development means in practice – should be removed, and that the page 2 definition – clearly referencing Brundtland – should “stand on its own.” The Government response, published in February 2015, rejected that recommendation, stating instead that it was for the planning system to look for environmental, social and economic gains, depending on the particular development in its specific context²⁴⁸.

Conclusion

The Framework was in some ways a much-needed development in planning law and policy, consolidating and abbreviating a set of policies that had become too unwieldy and diverse for effective use in the determination of applications. It also presented a prime opportunity to merge environmental and planning policy agendas by defining sustainable development in a way that was both true to its Brundtland origins but also precise so that it was capable of being demonstrably met – or not – by development proposals.

The foreword to the Framework claims that it “sets out clearly what could make a proposed plan or development unsustainable’ but the evidence of the text demonstrates otherwise. There is no reliable or consistent definition of sustainable development within the Framework; rather the diversity of uses and definitions obscures rather than informs and the concept of sustainable development haemorrhages, rather than acquires, meaning. Page 2 of the document alone uses the same words in a five different ways:

- as an aspirational heading;
- as a term defined by Brundtland;
- as a concept supported by five principles in the 2005 Sustainable Development Strategy;
- as the purpose which the planning system is designed to achieve; and
- as comprising three – social, economic and environmental – dimensions.

²⁴⁸ CLG Committee *Inquiry into the operation of the National Planning Policy Framework* Government response (CM 9016 February 2015)

The position was well summarised in Dr Ellis' evidence to the Parliamentary Committee in 2014: "the definition of sustainable development in the NPPF is completely incoherent and does not recognise any of the established definitions."²⁴⁹

The Framework was promoted as a planning policy document introducing the notion of sustainable development as a 'golden thread' running through the whole document. Although the text is saturated with those words it does not define them and by isolating the Brundtland definition from the main text the Framework excludes this definition from the range of possibilities available. The essence of the Brundtland definition is the conscious restriction on growth by affluent societies to enable emerging societies to enjoy growth of their own, yet paragraph 14 states that sustainable development means 'approving development proposals that accord with the development plan without delay;' – an overtly pro-growth stance. The term 'sustainable development' is potentially textual camouflage for the approval of developments that are far from sustainable according to traditional meanings and intentions behind the term.

The Framework was not just a planning policy but the product of a particular political agenda in a specific socio-economic context where the needs of the economy in general and the development industry in particular were seen as dominant over those of the environment. The choice of authors for the original Proposal disrupted the normal processes and authorial oversight associated with the production of a new policy; making it an explicit product of a market rather than government. Practitioners have drawn valid comparisons between it and the development-led planning of 1980s dominated by a presumption in favour of development.

There is however a crucial difference between the 1980 presumption in favour of development and the Framework presumption: the former is in favour of 'development' which has a legal definition and refers to the particular proposal under consideration; the latter is in favour of sustainable development generally. Sustainable development as defined by the Framework facilitates the approval, or refusal, of a wide range of developments depending on what part of the Framework the decision maker decides to refer to, and the meaning and weight attributed by that decision maker. In this context, in order to decide whether a particular proposal is or is not sustainable development, the decision maker - whether that be planning officer, planning committee, planning committee or the Secretary of State – must

²⁴⁹Communities and Local Government Committee *Operation of the National Planning Policy Framework* (HC 190 December 2014) Q122

consider whether it meets the aims and ambitions of each and every Framework policy. Both the practitioner and the decisions makers who determine them are presented with a cornucopia of self-referential, Framework -specific definitions which they must untangle and apply to the proposal before them.

In December 2015 the Government began a consultation on a fundamental review of the Framework²⁵⁰. One of the topics it addresses is 'supporting sustainable new settlements' and the purpose of planning is re-stated as achieving sustainable development'. However the paragraph 6 definition of sustainable development looks likely to remain. Paragraph 6 of the Framework states that that the framework itself, 'taken as a whole' is the government's 'view of what sustainable development means.' It is this Framework-specific, rather than the Brundtland definition of sustainable development that forms the central principle of both plan making and decision taking functions. Both the applicant, and the decision maker are in a definitional no-mans-land when it comes to sustainable development. They have a very wide scope of policies from which either to assert that a development is sustainable and ought to be approved, or to claim that it is not and refuse it. Compliance with the document 'as a whole' is in most cases simply not possible.

The Secretary of State is the final decision maker on applications of any substance, complexity or prominence. One - perhaps the only - way of understanding what the Secretary of State considers to be sustainable development is to look at the individual decisions made under the Framework by the Secretary of State to determine if it is possible to derive some consistent sense of what is, or is not, sustainable development from them. The next chapter is therefore concerned with a detailed analysis of a selection of planning decisions taken over a 20 month period, to see if a definition of 'sustainable development' for Framework purposes, can be derived from the decisions taken in purported compliance with the term.

²⁵⁰ CLG *Consultation on Proposed Changes to National Planning Policy* December 2015

Chapter 5 – Sustainable Development and the Secretary of State

Introduction

The previous chapter demonstrated that the Framework does not so much define sustainable development as produce a variety of definitional options, underpinned by requirement that sustainability of a development proposal is demonstrated primarily through conformity with the Framework. The sustainability or not of a particular development is therefore highly dependent on whether the decision maker believes it to be in conformity with the Framework, with the decision-makers judgment questioned only when the assessment process is procedurally flawed or legally invalid.

Although a large number of development proposals are considered daily by a wide range of decision-making individuals and committees, and although 90% of planning appeals are determined by Planning Inspectors, all decisions are effectively overseen by the Secretary of State. He is the individual who both selects and considers the decisions with the greatest significance in the planning process and who has the final say on how the merits of each decision are to be applied. Where sustainable development is either a material consideration or a presumption to be applied, the Secretary of State thus also has the final say as to how that presumption is applied and what the term means in practice for planning.

This chapter looks in detail decisions taken over a defined period by the Secretary of State. It begins by looking at the powers of call in and recovery themselves and the criteria applied by Government before they are exercised. Its central focus is a review of the analysis of actual planning decisions made by the Secretary of State over a specific 20 month period. Under those powers and with the Framework and its presumption in favour of sustainable development applicable to each one.

The focus is on one aspect of each decision – how, if at all, the notion of sustainable development is considered and/or defined to see if a definition of sustainable development – or even a consistent approach to its interpretation - can be derived as emerging from them. It summarises the methodology involved, explains the content of the four tables of results and ends with a summary of the extent to which decisions made by the Secretary of State are subject to judicial review, with reference to leading cases and recent case law.

5.1 Powers of call in and recovery

Section 77 of the 1990 Act allows the Secretary of State to take over or 'call in' a planning application at any time up to the granting of planning permission by directing that certain applications be referred to him at first instance instead of being dealt with by local planning authorities. The local planning authority completes the preliminary work processing and makes a preliminary decision indicating whether or not it is minded to grant planning permission. The application is then considered by a member of the Planning Inspectorate who will fully investigate and report on the application to the Secretary of State, including a recommendation as to whether to refuse or approve it. The Secretary of State publishes the Inspector's report with his decision and must have regard to it but has a wide discretion to adopt or depart from its recommendations.

The criteria for use of call-in powers are generally referred to as the "Caborn principles" because they were first announced by the then Planning Minister, Richard Caborn, in response to a PQ on 16 June 1999²⁵¹. These are applications that:

- may conflict with national policies on important matters;
- could have significant effects beyond their immediate locality;
- give rise to substantial regional or national controversy;
- raise significant architectural and urban design issues; or may involve the interests of national security or of foreign Governments

These criteria have been amended as follows:

- on 26 October 2012 they were widened to include the applications which "may have significant long-term impact on economic growth and meeting housing needs across a wider area than a single local authority."²⁵²
- On 16th September 2015 the Government announced that it would actively consider calling in applications for oil and gas where a planning authority was identified as underperforming²⁵³.

Section 79 of the 1990 Act is a parallel power to the section 77 call in power relating to applications and allows an equivalent level of intervention in planning appeal decisions. The section allows the Secretary of State to direct that jurisdiction over an appeal is 'recovered' so that the appeal decision is made in his name rather than by an inspector appointed on his behalf. In practice, as with called-in decisions an Inspector considers the appeal documents in full and produces a report setting out the main issues, the case made for each party,

²⁵¹ HC Deb 16 June 1999 col 138WS

²⁵² HC Deb 26 Oct 2012 col 72WS

²⁵³ HC Deb 16 September 2015 col 201WS

findings of facts, an evaluation of the planning merits of the proposal, including conditions and obligations, and conclusions and recommendations as to how the proposal should be decided. As with called-in decisions the Secretary of State includes this report with his decision and must take it into account but the actual decision is his and his alone. He is generally free to decide what weight he gives to each element of the Inspector's report, to allow or dismiss the application which is the subject of the appeal and to vary the contents of conditions and obligations.

As with use of call-in powers the Secretary of State has a broad discretion to decide whether or not to recover a planning appeal; the Secretary of State can direct that he should recover the decision making function in relation to any appeal 'if he thinks fit',²⁵⁴ though reasons must be given, and the power to recover jurisdiction lasts through the whole decision making process. The criteria for the use of recovery powers are established and amended through ministerial statements setting out which types of development could be recovered, and why. Until recently the position was relatively static and based on the statement made on 30 June 2008, when the then Secretary of State set out the circumstances in which he would consider recovering appeals as follows²⁵⁵:

- proposals for development of major importance having more than local significance;
- proposals giving rise to substantial regional or national controversy;
- proposals which raise important or novel issues of development control, and/or legal difficulties;
- proposals against which another Government department has raised major objections or has a major interest;
- proposals of major significance for the delivery of the Government's climate change programme and energy policies;
- proposals for residential development of over 150 units or on sites of over 5 hectares, which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities;
- proposals which involve any main town centre use or uses where that use or uses comprise(s) over 9,000m² gross floorspace (either as a single proposal or as part of or in combination with other current proposals) and which are proposed on a site in an edge-of- centre or out-of-centre location that is not in accordance with an up-to-date development plan document;

²⁵⁴ Town and Country Planning Act 1990 Schedule 6 para 3(1)

²⁵⁵ HC Deb 30 June 2008 col 44WS

- proposals for significant development in the Green Belt;
- major proposals involving the winning and working of minerals;
- proposals which would have an adverse impact on the outstanding universal value, integrity, authenticity and significance of a World Heritage Site;

Since election of the Coalition government in 2011 the criteria have been formally extended by the current government on a number of occasions.

- In October 2012 an additional criterion was added: applications which ‘may have significant long-term impact on economic growth and meeting housing needs across a wider area than a single local authority’²⁵⁶.
- In July 2013 recovery powers were extended to include traveller sites in the green belt²⁵⁷ and in January 2014 it was announced that this practice would continue beyond the original six months proposed.²⁵⁸
- On 10 October 2013 the Secretary of State announced that he would temporarily expand the criteria, for six months, to include recovering appeals for renewable energy development²⁵⁹. On 9 April 2014 the Secretary of State announced that he would continue to consider for recovery appeals for renewable energy developments for a further 12 months²⁶⁰.
- On 10 July 2014 the Secretary of State announced that he would like to “consider the extent to which the Government’s intentions are being achieved on the ground”, in relation to the neighbourhood planning regime introduced under the Localism Act 2011. The recovery criteria was subsequently amended to include: proposals for residential development of over 10 units in areas where a qualifying body has submitted a neighbourhood plan proposal to the local planning authority: or where a neighbourhood plan had been made²⁶¹.
- In July 2016 the criteria for consideration of recovery of planning appeals was extended to included proposals for residential development of more than 25 dwellings in an area where a qualifying body had submitted a plan.²⁶² This was extended for a further six months in December 2016.²⁶³

²⁵⁶ HC Deb 26 Oct 2012 col 72Ws

²⁵⁷ HC Deb 1 July 2013 col 24WS

²⁵⁸ HC Deb 17 Jan 2014 col 35WS

²⁵⁹ HC Deb 10 Oct 2013 col 31WS

²⁶⁰ HC Deb 9 Apr 2014 col 13WS

²⁶¹ HC Deb 9 July 2015 col 7WS

²⁶² HC Deb 7 July 2016 col 74WS

²⁶³ HC Deb 12 December 2016 col346WS

5.2 Parameters of analysis

The primary focus of this chapter is a detailed examination of planning decisions made by the Secretary of State under his powers of call in and recovery for the 20 months from the date that the Framework came into effect including specific consideration of:

- the relative weight given to social, environmental and economic concerns;
- how the terms 'absent, silent, or... out of date' have been interpreted in relation to the development plan;
- whether any particular kinds of development proposals have consistently been regarded as sustainable;
- whether it is possible to see any consistency evident in his approach to interpreting and/or applying the concept of sustainable development in this context;
- whether it is possible to derive a reliable definition of sustainable development from the decisions made.

The source of the data was the Government's own records of such decisions, published online in the form of a letter on the Secretary of State's behalf with the relevant inspector's report attached. The decisions lend themselves to comparative analysis because they follow a standard format that appears to be based on a uniformly-used decision making template. In each case the heading sets out the relevant statutory provision, the name of the applicant/appellant, the address of the property and the planning application reference number. The first paragraph is usually a summary of the decision reached including a reference to the inspector's assessment and report, and details of the public inquiry if relevant. The remainder of the letter follows a relatively standard format identifying the relevant issues, how they were considered, and the outcome.

The results of the analysis are contained in tables seven to ten at the end of the research. The fields recorded were: 1) the appeal reference and the date of the decision; 2) the development in question; 3) the reason given – if any - for calling in the application; 4) the Inspector's recommendation 5) the Secretary of State's decision and 6) a summary from the text of the extent to which the concept of sustainable development was considered, interpreted or applied, either in the context of the presumption in favour of sustainable development, or generally.

The original intention was to analyse the decisions as a whole, making a division only between those decided under 'call in' and 'recovery' powers. However, it became clear that

the Secretary of State was using his powers – particularly those of recovery – to ensure that he was the final decision maker in relations to two particular types of development:

- Proposals by members of the gipsy and traveller communities for pitches for caravans, grazing and other uses associated with the traveller lifestyle;
- Proposals relating to renewables developments – specifically wind turbines.

There was a strong indication that the Secretary of State had made a conscious decision to use his powers of intervention in relation to these two specific types of application, even where the development in question was small in scale such as a single caravan or wind turbine. It was decided to subdivide the data so that appeal decisions for travellers and renewables developments were separately recording, leaving the remaining decisions bundled together under the heading of 'residual' developments although the primary division between call in and recovery was maintained.

5.3 Call – in decisions

The data from these decisions is recorded in Table 7. In each case the table records the appeal reference, the nature of the development, the reason for the call-in, the Inspector's recommendation and the Secretary of State's decision. In addition, the table records the extent to which sustainable development was considered, defined and interpreted by the Secretary of State.

There are only 9 decisions made within the chosen period under the call-in powers. In terms of types of development, most are significant either in terms of scale or impact on the community, with the exception of number 7 where it is difficult to understand why the proposal for one house, however termite-ridden, should have attracted this much attention. Potential conflict with national policy was the reason for call in on three of the decisions and on another potential cross-border controversy; in the majority of cases no reason was given.

In terms of sustainable development, five of the nine decisions show some awareness of the presumption but there was no evidence of a coherent approach either to its meaning or the application of the presumption. In four of the decisions the term was not mentioned at all. The economic dimension of sustainability was seen as important in the decision 1 and all three dimensions were seen as being undermined in decision 9 whereas for decision 3 restaurant all three were satisfied, but the dimensions were only mentioned in three of the nine cases. Generally, it is not possible to derive any clear trends from it except that in all cases the Secretary of State agreed with the Inspector's decision.

5.4 Recovered decisions: travellers

Traditionally, jurisdiction over appeals relating to traveller developments is recovered by the Government only when developments are large in scale or particularly controversial but from 1st July 2013 the power of intervention was extended to all decisions of any scale relating to traveller sites in the green belt.²⁶⁴ The statement confirmed that scrutiny was being extended so that the Secretary of State could consider the extent to which “Planning Policy for Traveller Sites” was meeting the Government’s policy intentions. In a written ministerial statement to Parliament on 17 January 2014 Brandon Lewis, The Parliamentary Under-Secretary of State for Communities and Local Government announced that the Secretary of State remained concerned about the issue and intended to continue ‘to consider for recovery’ appeal decisions of this type.²⁶⁵

Table 8 is a list of all the appeal decisions recovered by the Secretary of State relating to traveller developments. Of the total of 171 recovered appeal decisions considered, 73 were in relation to traveller developments and in most cases of the reason given for recovery is that it represented a proposal for development by Travellers in the Green Belt though in three cases the recovery was due to substantial regional or national controversy and one because it was development in a national park.

In terms of the actual developments under scrutiny, physical operations applied for included applications for permission for caravans, mobile homes, utility blocks, hardstanding for parking, cesspits, oil tanks, stable blocks, landscaping, and fences. The changes of use requested included stationing of caravans, caravan sites of various sizes, use of land for grazing and/or parking motor vehicles and general storage. In most cases the development proposed was small in scale; in some cases involving a single pitch, or caravan/mobile home.

In nearly half (32 of 73) of the cases the Secretary of State disagreed with the inspector’s recommendation to permit development and refused permission or reduced the scope of the permission recommended to be granted. In all of the remaining cases, the Secretary of State agreed with the Inspector’s recommendation to refuse the grant of planning permission, except one where the appeal was allowed. The approach of the Secretary of

²⁶⁴ HC Deb 1 July 2013 col 24WS

²⁶⁵ HC Deb 17 Jan 2015 col 34WS

State was therefore in most cases to refuse the development, even where this was against the Inspector's recommendation.

Every decision included a heading: 'Policy Considerations' and the Framework was referred to as a material consideration taken into account in each case. There was no formal acknowledgment of paragraph 14 of the Framework or any mention of the presumption in favour of sustainable development. The actual decisions themselves contained little evidence that the concept of sustainable development was considered in any detail. There was relatively little attention given, in the Secretary of State's decisions, of sustainability considerations generally and hardly any explicit consideration of the presumption, or its three dimensions. Beyond the standard paragraph in every decision stating that the Framework had been taken into account, there was no consistency among the decisions as to how sustainability generally and the presumption in particular were weighed in the process. Within a total of 73 decisions, only 12 mentioned sustainability or sustainable development. Location and accessibility were taken into account most often when assessing sustainability and other factors included access to education, healthcare, shops and in one case the ability to integrate with the community.

It was not possible to identify, from the cohort of decisions considered a standard approach to either the meaning or interpretation of the concept of sustainable development in relation to this type of application. However, given that the Secretary of State refused most applications even where the Inspector had recommended otherwise these decisions appear to suggest that traveller developments in the Green Belt are inherently unsustainable.

5.5 Recovered decisions: renewables

As with the decisions involving travellers from the summary of all appeal decisions, a subset of data was created comprising only decisions relating renewables proposals, detailed in table nine. Of the 171 recovered decisions scrutinised, 31 were in relation to these types of development and most related to between 1 and 10 turbines. The same, limited number of fields was used as for traveller developments: the Inspectorate's own reference for the decision, the date of the decision, the type of development in question, the reason given for calling in the application and the extent to which either the new presumption in favour of sustainable development, or sustainable development itself, were considered.

A number of different reasons were given for recovery of jurisdiction:

- 'The proposal is of major significance for the delivery of the Government's climate change programme and energy policies'. This was used in relation to a range of developments including turbines, biomass plants, and solar farms;
- 'To enable him to consider the extent to which the new practice guidance.. is meeting the Government's intentions'. This was used for developments involving a small number of turbines;
- 'Because it involves a renewable energy development'. This was used in appeals relating to one or two turbines and a solar park;
- In one case the reason given for recovery was that they 'involve proposals against which another Government department has raised major objections or has a major interest';
- In another the reason was simply that '6 turbines could be held to have an impact beyond the local area';
- In three cases no reason was given.

As with traveller developments the Secretary of State generally used his powers of intervention to refuse permission even where the inspector's report recommended approval. Of the 31 decisions considered, only 5 were approved, and in 10 of those cases the Secretary of State's decision to refuse overruled the inspector's recommendation to approve. In November 2014 Renewables UK wrote to the Royal Town Planning Institute²⁶⁶ pointing out that in relation to renewables decisions:

- 52 projects had been subject to intervention by the Secretary of State since the summer of 2013;
- This was 85% of the total number of appeals for this kind of development;
- Of the 24 projects where a decision had been made, 21 were refused, 7 of these against Inspector recommendation;

Renewables developments can be broadly characterised as a class of development that enables the generation of power without drawing on finite natural resources. In the sense that they meet some of the needs of the present population without compromising the needs of others, they can be proposed as inherently sustainable in Brundtland terms. However, the decisions made no reference to Brundtland and did not reveal a common approach to sustainable development. In most cases the concept was not considered at all. Of the five developments where it was mentioned, one mentioned consistency with planning policies, two had a reference to the planning balance falling in favour of the proposal, and one stated

²⁶⁶ Renewable UK open letter to Trudi Elliot, CEO of the RTPI 21 November 2014

that because the development is in conflict with development plan policies, the presumption in favour of sustainable development was ‘triggered’, but went no further.

This is a surprising outcome primarily because renewables are a class of developments that enable the generation of energy with minimal environmental cost, contributing to meeting the energy needs of the present population without compromising those of the future. They are entirely consistent with a Brundtland notion of sustainable development as growth that does not deplete natural resources but leaves them intact for the populations of the future. In addition renewables were supported by a range of national policies. The UK Renewable Energy Strategy 2009 anticipated more than 30% of energy being generated from renewables, and that ‘much of this will be from wind power’²⁶⁷. The 2011 Overarching National Policy Statement (‘NPS’) on renewables recognised that they were an abundant source of low cost energy, stating in paragraph 3.4.1 that “the UK has committed to sourcing 15% of its total energy (across the sectors of transport, electricity and heat) from renewable sources by 2020 and new projects need to continue to come forward urgently to ensure that we meet this target”²⁶⁸. The NPS for Renewable Energy 2011 had a section dedicated to onshore wind projects, recognising them (para 2.7.1) as “the most established large-scale source of renewable energy in the UK”²⁶⁹.

However, a closer examination of the policy context shows that these decisions can be seen as part of the evidence demonstrating a policy shift away from this type of development from 2011 onwards. The Framework considers renewable energy only briefly under the section 10 heading of climate change where planning is described as having a ‘key role in...supporting the delivery of renewable and low carbon energy”. Paragraph 97 recommends maximising renewable energy development but the Technical guidance published in parallel with the Framework does not deal with the issue of renewable energy at all. It has a general heading of ‘adapting to climate change’²⁷⁰ but the only formal ‘programme’ listed is the National Adaptation Programme²⁷¹.

The 2013 written Ministerial Statement on ‘Local Planning and onshore wind’ continued the trend, expressing concern that decisions on wind farms were being made without adequate

²⁶⁷ HM Government *The UK Renewable Energy Strategy* (CM7686 July 2009)

²⁶⁸ Department for Environment and Climate Change (DECC) *National Policy Statement for Energy* (EN-1 The Stationery Office July 2011)

²⁶⁹ DECC *National Policy Statement for Renewable Energy Infrastructure* (EN-3 The Stationery Office July 2011)

²⁷⁰ DCLG *Technical Guidance to the National Planning Policy Framework* (DCLG March 2012)

²⁷¹ Environment Agency *Adapting to Climate Change: Advice for Flood and Coastal Erosion Risk Management Authorities* (Environment Agency April 2016)

regard to local wishes²⁷². The subsequent Written Ministerial Statement on renewable energy published in April 2014 announced a new requirement for compulsory pre-application consultation for certain onshore wind applications and confirmed the government's intention to continue with its involvement in the decision making process in order to ensure the promotion of local interests²⁷³. The online National Planning Policy Guidance was updated in June 2015 to confirm that planning applications for wind turbines should not be approved unless the proposed development site was in an area identified as suitable for wind energy.²⁷⁴ That guidance also recognised that heritage assets were at risk of 'substantial harm' from wind turbines.²⁷⁵ In February 2015 Tim Yeo, Chairman of the Energy and Climate Change Committee wrote to the Secretary of State asking him to clarify the Department's policy towards onshore wind²⁷⁶. The response confirmed that planning policy in relation to wind turbines had been "openly changed...to ensure that proper weight should be given to the protection of England's valuable landscape and heritage²⁷⁷".

The outcome of the policy shift is evident in these decisions as the Secretary of State consistently came to the view that the protection of cultural and aesthetic resources was more 'sustainable' in terms of conformity with the Framework than a development's potential to reduce environmental impact or contribute to low carbon energy production. Although environmental benefits were recognised, and even acknowledged as contributing towards the achievement of sustainable development, these applications were generally refused when they were considered to have a harmful effect on the landscape, particularly if that landscape included features of historic or architectural importance.

5.6 Recovered decisions: residual

In many ways the decisions under this heading, set out in table 10, are the type and scale of decision traditionally seen as traditional territory for the exercise of powers of call in and recovery – medium or large in scale, and/or generating a significant amount of local interest or controversy and/or raising policy considerations of more than local significance. Of the 67 decisions, 56 were residential, or contained a significant residential element, and

²⁷² HC Deb 6 June 2013 Col 114WS

²⁷³ HC Deb 9 Apr 2014 Col 13WS

²⁷⁴ National Planning Practice Guidance *Renewable and Low Carbon Energy* (Paragraph: 005 Revision date 18th June 2016)

²⁷⁵ National Planning Practice Guidance Paragraph: 019 Reference ID: 5-019-20140306 Revision date 6th March 2013

²⁷⁶ Energy and Climate Change Committee letter to Eric Pickles from Tim Yeo 10th February 2015

²⁷⁷ DCLG letter to Tim Yeo from Eric Pickles 6th March 2015

substantial in size - between 100 and 500 units. The range of uses in the remaining cases included waste facilities, schools, retail and leisure uses, and one proposal for redevelopment of a listed cinema as a church.

The Secretary of State's decision letter followed the same standard format as the others with the second paragraph setting out the reason for recovery of the decision-making function. Because of the predominance of medium-large scale residential developments, in most cases the reason for recovery was that the proposal involved residential development of more than 150 units on a site of over 5 hectares. Other reasons for recovery included:

- proposals for development of major importance having more than local significance;
- proposals giving rise to substantial regional or national controversy;
- proposals which raise important or novel issues of development control and/or legal difficulties;
- proposals against which another Government Department has raised major objections or has a major interest;
- proposals which involve any main town centre use or uses (as set out in paragraph 1.8 of PPS6) where that use or uses comprise(s) over 9,000m⁽²⁾ gross floor space
- proposals for significant development in the green belt;

The Secretary of State disagreed with the Inspector on 11 cases. He overrode the recommendation to refuse 3 times and to grant 8 times, demonstrating a slightly but not significantly more restrictive attitude in terms of applying the planning balance. Where the Secretary of State did not agree with the Inspector, so that permission was refused in the light of a recommendation to grant, this was either on the grounds of impact on the green belt or non-compliance with a neighbourhood plan.

In terms of sustainable development each decision included a standard 'Policy Considerations' heading and in every decision the Framework was listed within the relevant material considerations taken into account. As with the other decisions, there was little evidence of the Secretary of State considering what sustainable development meant or how compliance with it should be assessed. There was almost no evidence of conscious engagement with or application of the concept of sustainable development in relation to its Brundtland origins and not much consistency between decisions on how the concept ought to be applied or tested. In many cases the development was simply summarised as being 'sustainable' without any explanation of why the term was used or how it was defined.

Vague terms such as ‘sustainability credentials’ and ‘sustainability spectrum’ were used without being explained.

This cohort of decisions did however demonstrate more awareness of the ‘three dimensions’ of sustainable development, with the social, economic, and environmental aspects all acknowledged and occasionally assessed on an individual basis. In one case a development was described as ‘relatively sustainable’ but failing in terms of design and in another sustainability was seen as dependent on the developer establishing a connectivity scheme. In addition, where the local authority could not demonstrate a 5 year supply of land for housing, the development plan was disregarded as being out of date and the presumption in favour of sustainable development was routinely applied. In practice, this resulted in the Framework policies replacing development plan policies in relation to housing supply, and where an application was providing new housing it was held to be sustainable development on this basis alone.

5.7 Judicial intervention

The Secretary of State’s decision-making capacity is broad and the Courts are, as recognised by Leigh and Casely-Hayford, ‘notoriously loath’ to interfere with it²⁷⁸. Nevertheless the government’s guidance in relation to propriety and planning makes it clear that Planning ministers, including the Secretary of State, are under a duty to behave ‘quasi-judicially’ in the decision-making procedure²⁷⁹. The Secretary of State must be seen to be fair in the handling of evidence and to maintain an objective approach to the consideration of the planning issues. The reasons for a decision must be intelligible and adequate, enabling parties to understand why the appeal was decided as it was and what conclusions were reached on the main issues²⁸⁰. When these requirements are not met the courts will intervene and a number of leading cases help to 1) establish the standard of decision making required, 2) demonstrate the general reluctance of the courts to intervene, and 3) give examples of circumstances where they have.

²⁷⁸ Kevin Leigh, Margaret Casely-Hayford ‘The birth of the Human Rights Act: the death of the planning call-in procedure?’ [2001] J.P.L. 7-11

²⁷⁹ DCLG *Guidance on Planning Propriety Issues* (DCLG February 2012)

²⁸⁰ *South Bucks District Council & Anor v. Porter* [2004] UKHL 33 [2004] 4 All ER 775, [2004]

Bloor Homes is a recent, and currently the leading case in terms of setting the parameters for judicial scrutiny of planning decisions. In paragraph 19 Mr Justice Lindblom identified ‘seven familiar principles’ to be applied in all cases²⁸¹ :

- Decisions are interpreted with a reasonable degree of flexibility and not every argument needs to be considered;
- The reasons must be intelligent and sufficient, but while they should not leave significant issues in doubt, only the central issues must be considered;
- The weight to be assigned to any material planning consideration is “within the exclusive jurisdiction of the decision-maker.
- Planning policies should not be interpreted in the same way as legislation or contractual provisions;
- It is important to review the decision considering what the decision maker thought the important issues were;
- Just because a policy is not mentioned does not mean that it was ignored;
- Consistency is important but not required in all cases.

In *Persimmon Homes*²⁸² Mr Justice Sullivan considered the Secretary of State’s discretion in relating to deciding whether or not to intervene in a decision. He confirmed that this discretion was “very wide indeed” and could only be questioned if it was, in all the circumstances, irrational, noting that a party seeking a challenge to this type of decision faced a “well nigh impossible task”. Mr Justice Holgate considered the scope of the Secretary of State to disagree with a previous decision of an Inspector in the more recent *St Albans* case²⁸³. There were two applications and two appeals. In the first case, the Secretary of State confirmed the Inspector’s decision to refuse, but when a second application was made, the Secretary of State decided to grant permission for the development. Mr Justice Holgate agreed that the previous decision was material, and that consistency was important, but stressed that the decision maker must also exercise his own judgment and could disagree with a previous decision, even on a very similar development, so long as valid reasons were given and therefore did not interfere with the decision itself.

These cases confirm the breadth of the Secretary of State’s decision-making discretion but there are others that serve to define its limits.

²⁸¹ *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 754

²⁸² *R (Persimmon Homes Ltd) v Secretary of State for Communities And Local Government* [2007] EWHC 1985

²⁸³ *St Albans City and District Council v Secretary of State for Communities And Local Government & Ors* [2015] EWHC 655 (Admin)

Fox Land involved a challenge to the Secretary of State's decision to grant permission for a residential development against the Inspector's recommendation²⁸⁴. This decision was quashed on the basis that although the principle of the disagreement with the Inspector was clear, no reasons for that disagreement were given. In particular, the Secretary of State had failed to have regard to another decision on a nearby site, described as an 'unfortunate failure...a striking omission' by Mr Justice Gilbert. An appeal against this decision was subsequently dismissed by the Court of Appeal with Lord Justice Pill confirming (para 19) that "Further analysis was required by the Secretary of State of the situation that had arisen before making his decision"²⁸⁵. A similar lack of reasoning resulted in another Secretary of State decision being quashed in *Lark Energy*²⁸⁶. In this case, involving a solar farm, the assessment of planning merits in relation to two key policies was described as being so different from the original decision that it created an obligation to explain the approach. Mr Justice Lindblom concluded that the reasons left 'genuine doubt' that the decision had been made in compliance with the legal test.

In *Woodcock Holdings* the permission granted following an appeal determined by the Secretary of State was also quashed with Mr Justice Holgate identifying a number of defects in the decision: there was no apparent weighing of the disbenefits and merits of the scheme; no reasons were given for the reduced weight applied to one policy; there was 'sparse reasoning' given for discounting the emerging neighbourhood plan on the grounds of prematurity and criteria that were required to be applied were either poorly explained or not applied at all²⁸⁷. A similarly robust approach was taken by Justice Lewison in the *Horada* case²⁸⁸. Justice Lewison acknowledged the superiority of the Secretary of State's powers in paragraph 36 of the judgement: "the inspector proposes; the Secretary of State disposes" but considered (paragraph 49) that the reasons were insufficient "the reader of the decision letter would have had to have been not only well-informed but also psychic to have extracted from the two laconic sentences of paragraph [15] the elaborate chain of reasoning upon which Mr Banner relies".

²⁸⁴ *Fox Strategic Land and Property Limited v Secretary of State for Communities and Local Government & Cheshire East Council* [2012] EWHC 444

²⁸⁵ *R (on the application of Fox Strategic Land and Property Ltd) v Secretary of State for the Communities and Local Government and another* [2012] EWCA Civ 1198

²⁸⁶ *Lark Energy Ltd v Secretary of State for Communities And Local Government & Anor* [2014] EWHC 2006

²⁸⁷ *Woodcock Holdings Ltd v Secretary of State for Communities And Local Government & Anor* [2015] EWHC 1173

²⁸⁸ *Horada & Ors v Secretary of State for Communities and Local Government & Ors* [2016] EWCA Civ 169

There have also been challenges to the Secretary of State's decision making discretion in the specific areas of both travellers and renewables development.

The Secretary of State's decision to recover appeals relating to traveller sites in the green belt was successfully challenged in the *Moore* case²⁸⁹. It concerned an application for change of use of land to a Caravan Site comprising one pitch, one mobile home and one caravan" on land at North Cudham in Bromley. Planning permission was refused and an appeal was lodged. Just seven days before the inquiry was due to be heard the decision making function was recovered by the Secretary of State. His decision – to refuse permission – was challenged in June 2014 with the Equality and Human Rights Commission ('EHRC') as an intervening party and on a number of grounds.

- The singling out of a category of decisions in this way was a breach of the Public Sector Equality Duty ("PSED") imposed on the Secretary of State by s 149 of the Disability Act 2010;
- There was a breach of Articles 6 and 8 of the European Convention of Human Rights ("ECHR");
- There was abuse of power and unlawful bias and the Secretary of State acted contrary to his declared policy without giving reasons.

The case was considered by Mr Justice Gilbart who quashed the decision on a number of grounds. His decision included the following findings:

- By September 2013 all appeals relating to traveller sites in the Green Belt were being recovered (para 35,39);
- Use of recovery powers in this way under the heading of significant development in the green belt was difficult to justify (para 74);
- The policy approach adopted created a clear disparity between traveller and non-traveller developments(para 65);
- Substantial delay had been created in the decision-making process: "In the experience of this judge, waiting for a decision for 12 months is only to be expected in the cases of very substantial development indeed."

Mr Justice Gilbart went on to rule that the practice of calling in all cases related to this community was directly discriminatory (para 125), that the change in the call in policy had the effect of causing significant delay in the decision making process (para 76), and that as a result there had been a clear breach both of the Public Sector Equality Duty, and of Article 6 of the Convention on Human Rights (para 135, 150).

²⁸⁹ *Moore & Anor v Secretary of State for Communities And Local Government* [2015] EWHC 44 (Admin)

The scrutiny to which the decisions were exposed may still have been part of the reason why the Government subsequently confirmed its intention to ‘de-recover’ appeals for traveller developments in the green belt where a decision had not been reached.²⁹⁰ Nevertheless it is notable that Mr Justice Gilbart did not dispute the fundamental entitlement of the Secretary of State to use the call-in powers in the way that he had – it was the lack of compliance with resulting procedural and legal requirements that was at issue. The unwillingness of the courts to intervene with the Secretary of State’s decisions was confirmed in the subsequent *Connors* case where Mr Justice Lewis refused to accept that there was “any evidence, still less any firm evidence, that there is differential treatment in the outcome of appeals in relation to Gypsy and Traveller sites in the Green Belt as compared with non-Gypsy and Traveller appeals”²⁹¹.

None of the challenges to renewables decisions were successful. *Wind Prospect* is the leading example of challenges to refusals for renewables developments, where the Secretary of State’s decision to refuse permission for 6 wind turbines, against Inspector recommendation, was challenged on a number of grounds, including that of failure to give adequate reasons and failure to apply his own policies²⁹². Mrs Justice Lang ruled that the Secretary of State was the primary decision maker, that the Inspector’s report functioned as no more than a ‘starting point’ for the process and noted in paragraph 45 that the Secretary of State was “entitled to substitute his planning judgment for that of the Inspector”. She specifically rejected the proposition that the decision letter ought properly to be a ‘coherent reasoned rebuttal’ and declined to impose any standard on the Secretary of State in terms of his reasons.

Conclusion

Although most planning decisions are made by planning officers, planning committees and the planning inspectorate, the Secretary of State is the most significant decision maker in the system. There is no sign that he will limit or reduce the current powers of intervention; if anything it looks as if the scope of his powers will continue to expand.

The 171 decisions made under the recovery powers, and the 9 further called in decisions represent each and every formal opportunity for the Secretary of State to exercise his

²⁹⁰ HL5936 *Travellers: Caravan Sites*: Written question 23 March 2015

²⁹¹ *Connors & Ors v Secretary of State for Communities and Local Government & Ors* [2014] EWHC 2358

²⁹² *Wind Prospect Developments Ltd v Secretary of State for Communities And Local Government & Anor* [2014] EWHC 4041 (Admin)

decision making powers in relation to planning applications over a the 20 month period following the introduction of the Framework and its presumption in favour of sustainable development.

Some propositions can be made based on the analysis carried out:

- The primary evaluative exercise carried out in most cases was very much a traditional ‘merits-based’ weighing of planning issues, based either on compliance with the development plan or with the NPPF;
- The concept of sustainable development may be a ‘golden thread’ running through national planning policy but it was not explicitly considered in every decision, and rarely considered as a stand-alone issue;
- Traveller developments in the green belt, renewables developments that create unacceptable impact on the landscape or heritage assets and housing in the green belt or in contravention of a recently adopted local plan appeared, in Framework terms at least, to be regarded as inherently unsustainable.
- The powers of recovery were used to restrict particular types of development, including even very small scale proposals such as individual caravans, and renewables proposals with impeccable environmental credentials and a significant bedrock of policy support;
- So long as all relevant procedural and legal requirements are observed the breadth of discretion available to the Secretary of State was not be restricted by the Courts.

The analysis of these decisions did not reveal either a coherent or consistent approach by the Secretary of State to the presumption in favour of sustainable development, what it meant or how it should be applied. The term – if used at all – was simply a label applied once the planning assessment had been carried out rather than a determinative criterion. Despite the breadth of their content and the length of the time period under consideration, the decisions do not make any significant contribution to showing what the Secretary of State means when he uses the term sustainable development.

The next chapter considers whether a similar analysis of court decisions offers any greater insight.

Chapter 6 Sustainable Development and the Judiciary

Introduction

In the 2001 *Alconbury* case, Lord Clyde referred to the concept of sustainable development as ‘essentially a matter of governmental strategy’.²⁹³ Twelve years later the Framework placed sustainable development at the heart of the legal test for decision making. As Booth recognises, the judiciary, has an “enormous impact” on the planning system, primarily through exercising its function of reviewing planning decisions.²⁹⁴ Although the legal test has been in place since 1947 and examined in some detail at the highest level on a number of occasions, the way in which that legal duty is to be applied, and the scope of the decision-making discretion within it, remains a live issue. The primary concern of this chapter is the role of the judiciary in relation to the interpretation of sustainable development in the Framework and it comprises:

- A summary of the circumstances in which planning decisions come before the court, and the scope and limits of judicial scrutiny in relation to planning cases;
- A detailed analysis of a significant number of planning cases, including a summary of the methodology applied, a review of the most relevant statements made by individual judges and an assessment of the findings;
- A summary of the current position including an updated summary of recent case law.

6.1 Powers of Judicial Review

Judicial review is used to describe the two ways in which planning decisions come before the court: through the use of a planning-specific appeal mechanism built into the planning legislation – often also referred to as a ‘statutory appeal’, and through the traditional route of judicial review where any public decision can, if challenged, be scrutinised by the courts. Statutory appeal is the route used in relation to decisions of planning inspectors and the Secretary of State, while judicial review is most often used by individuals who want to challenge the decisions of local planning authorities.

When the Secretary of State considers a development proposal either as a result of a calling in an application or an appeal he takes the role of the primary decision maker tasked with

²⁹³ *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* [2001] UKHL 23

²⁹⁴ Philip Booth “The Control of Discretion: Planning and the Common Law Tradition [2007] *Planning Theory* Vol 6(2): 127–145

applying the legal test 'de novo'; essentially a re-testing of the planning merits of a particular proposal at a particular time and within a particular policy context. The Secretary of State must take previous decisions made in relation to similar applications into account as material considerations and be seen to be take them into account but they are not binding.

The role of the courts is fundamentally different; *Newsmith* established that an application to the courts "is not an opportunity for a review of the planning merits of an Inspector's decision"²⁹⁵ The courts are concerned only with the procedural and legal aspects of the decision-making process and seek to determine only whether or not the alleged legal or procedural defects are so significant that the decision itself must be quashed and remitted back for reconsideration. Principles established in previous relevant case law are always included, including substantial amounts of the actual texts of those judgments, so that key issues such as the presumption in favour of sustainable development acquire a legal genealogy, and a particular narrative. Moreover, judgments of a superior court are automatically binding on the court below.

Statutory appeals are regulated by section 288 of the 1990 Planning Act. It states: "(1) If any person...is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds: (i) that the action is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section." The time limits are four or six weeks depending on the decision being challenged. Judicial review is a general principle of common law rather than statute- a right established over time giving all individuals the right to challenge the lawfulness of public authority decisions. It is regulated by Part 54 of the Civil Procedure Rules. The time limit is six weeks 'after the grounds to make the claim first arose'.

Both processes require that the claimant establish that he or she has sufficient interest in the case to bring the action and that the claim itself has some merit. Rule 54(f) defines the interested party as "any person (other than the claimant and defendant) who is directly affected by the claim;" and the issue was considered in detail in *Zurich Assurance* where Mr Justice Sales stressed that the concept was 'open textured' and depended primarily on fundamental concepts of 'justice and substance'²⁹⁶. The requirement to establish the merits of the case was introduced by the Criminal Justice and Courts Act 2015 allowing the judge

²⁹⁵ *Newsmith, R (on the application of) v Secretary of State for Environment, Transport & the Regions* [2001] EWHC 74 (Admin)

²⁹⁶ *Zurich Assurance v Winchester* [2014] EWHC 758

dealing with the application for permission for an application to proceed, to consider whether the outcome would have been “substantially different” if the matter of complaint had not happened. As a result of the 2015 Act Judges are also now able to rule that third parties should pay their own legal costs, and to make leave dependent on the applicant showing how the matter will be funded.

The claimant must establish that the decision maker misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety and a number of cases have established the parameters of valid judicial intervention in public decision making generally.

One fundamental principle, generally referred to as “Wednesbury unreasonableness” was established by Lord Green in 1948: 'It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.'²⁹⁷ The 1976 '*Fairmount*' case established the principle that each party should have equal opportunity to see or hear all of the relevant evidence, and be given the opportunity to comment on it²⁹⁸. '*Seddon Properties*' established that the decision maker must not act perversely in the sense of making a decision that no one could reasonably have reached that decision based on those particular facts and in that particular decision-making context²⁹⁹. *Newsmith* also set out principles that if not observed would create a significant risk of the decision being considered illegal:

- Acting on no evidence;
- Wrong interpretation of a statute;
- Taking into account matters which were not relevant;
- Not taking into accounts matters which were relevant;
- Errors of law.

Hopkins Homes contains a recent and comprehensive, statement of the principles courts apply to planning decisions³⁰⁰:

- The statutory rules governing planning appeal procedures are relevant but not a 'complete code'; fairness is a 'flexible concept';

²⁹⁷ *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] K.B.223

²⁹⁸ *Fairmount Ltd v. Secretary of State for the Environment* [1976] 1 WLR 1255

²⁹⁹ *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26

³⁰⁰ *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 132 (Admin)

- Procedural unfairness resulting in prejudice to a party is a 'good' ground for quashing a decision;
- Parties should know the case they have to deal with and be given a reasonable opportunity to produce evidence in relation to it
- The main parties should deal with all relevant issues raised by third parties in the course of consideration of the appeal
- Where there is a significant change in the position of one party, all other parties ought to be able to comment on it.

Planning decisions – and the reports they are based on – are frequently scrutinised by the courts and general principles have been established on what may and may not be reviewed by the courts. The author, and the decision makers, are assumed to have some local and theoretical knowledge is assumed but planning reports – whether written by officers for a local authority planning committee or inspectors in the course of an appeal - will not be held to the same interpretative standards as legislation.³⁰¹ In *Save Britain's Heritage*³⁰² it was established that reasons should be 'proper, intelligible and adequate' but *South Somerset*³⁰³ confirmed decisions should not be assessed as though the authors were writing examination papers, while in *South Buckinghamshire DC v. Porter*³⁰⁴ the court required only that the reasons given for a planning decision should not misunderstand policy or make irrational conclusions.

The breadth of discretion afforded to the decision maker in the assessment of the planning merits of a proposal is firmly protected by the judiciary and stated clearly in the 1995 *Tesco* case: "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".³⁰⁵ In terms of how that discretion should be exercised, and how the decision maker should demonstrate compliance with it the leading case is still *City of Edinburgh* from 1997³⁰⁶. The key paragraph is set out in full in Chapter 2 and is often quoted in relevant cases; it remains the most explicit prescription of the legal duties of the decision maker and the extent of that decision maker's discretionary scope. The 2012 *Tesco Stores* case³⁰⁷ revisited and to a certain extent updated *City of Edinburgh* with an

³⁰¹ *Zurich Assurance Ltd v Winchester City Council & Anor* [2014] EWHC 758 (Admin)

³⁰² *Save Britain's Heritage v No. 1 Poultry Ltd* [1991] 1 WLR 153,

³⁰³ *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.84

³⁰⁴ *South Buckinghamshire DC v. Porter* [2004] 1 WLR [36];

³⁰⁵ *Tesco v Secretary of State for the Environment* [1995] 1 WLR 759, [780]

³⁰⁶ *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 WLR 1447

³⁰⁷ *Tesco Stores Ltd v Dundee City Council* (Scotland) [2012] UKSC 13 (21 March 2012)

authoritative reassertion of the procedural principles applying to all planning decisions with which all planning decisions should comply: Policy statements should be interpreted objectively (para 18); Individual judgments could be applied where policies conflicted (para 19) and this could include concepts such as 'suitability' (para 21). Nevertheless the decision maker was still expected to 'proceed on a proper understanding' of the policies it was applying (para 17) and a failure to do so could undermine the validity of the decision (para 23). Recent cases such as *BDW Trading Ltd*³⁰⁸ have confirmed that only the decision maker can in the end decide which development plan policies are to be taken into account, what weight will be attributed to them, and how to evaluate particular proposals in the light of policies that compete or conflict.

As well as clarifying and affirming the discretionary space allowed to decision makers the 2012 *Tesco* decision also established its boundaries, stating that a failure to understand and/or apply policies would be regarded as a legal defect in that it would amount to having regard to an immaterial consideration. It is equally clear that decisions will be overruled by the courts where they 'can be said to be unreasonable in the *Wednesbury* sense'³⁰⁹ or are otherwise in breach of legal or procedural requirements. In *Hampton Bishop* the judge acknowledged the scope of the decision-maker's discretion, but ruled that this could not remove the basic requirement of deciding whether or not the proposal was in conformity with or breach of the development plan³¹⁰.

6.2 Analysis of decisions

This chapter is primarily concerned with the way in which the courts have contributed to an understanding of the concept of sustainable development in the framework through detailed scrutiny of actual rulings issued in relation to planning decisions brought before them for consideration.

As with the Secretary of State decisions the analysis covers a 20 month period, but the methodology was adapted in view of the type of data examined. Appeal decisions are based on a standard template and relevant planning policy issues are considered using similar or identical text each time. They are generally no more than 5-10 pages in length and a

³⁰⁸ *Secretary of State for Communities and Local Government v BDW Trading Ltd (t/a David Wilson Homes (Central, Mercia and West Midlands))* [2016] EWCA Civ 493

³⁰⁹ *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin).

³¹⁰ *Hampton Bishop Parish Council, R (On the Application Of) v Herefordshire Council* [2013] EWHC 3947 (Admin)

relatively consistent approach is taken to the range of issues considered. They are therefore well suited to being summarised in a table and analysed on a like-for-like basis. Court judgments are also template – based in the sense that there is a consistent initial format, listing the case reference, the name of the judge or judges, the advocates for each side and the individual parties. Compared to appeal decisions these judgments are complex, highly nuanced texts that examine the relevant issues in depth and with significant regard to their legislative and case law context. The way in which individual judges examine and decide on the procedural and legal issues can differ widely depending on the facts and circumstances of that particular case, and the knowledge and linguistic idiosyncrasies of individual judges. It is not possible to reduce judgments to their component parts or analyse them in the same way as appeal decisions.

Some methodological consistency was nevertheless applied as follows:

- The 20 month period ran from 1st September 2013 to 31st May 2015 beginning six months later than that chosen for appeal decisions to allow time for challenges to be made to those decisions;
- All data was sourced from the British Institute of Legal Studies ('Balli') database;
- All tiers of the court system were included: the Administrative division of the High Court, the Court of Appeal and the Supreme Court;
- The scope of the investigation included every court decision scrutinising the legal and procedural aspects of the application of the legal test – whether through judicial review or statutory appeal;
- The results were only examined where they related to a determination under the legal test and reported when the issue of sustainable development was specifically raised and considered;
- In each case the full court reference, the date and the name of the judge were included, together with any specific references to sustainable development.

The results are summarised in table 11. References to particular cases in this chapter have the number of the case in table 11 added in brackets for ease of reference.

6.3 Outcome of analysis

During the 20 months in question, the first case which specifically referred to the concept of sustainable development in the Framework and the presumption in its favour was

*'Hunston'*³¹¹ (1), an appeal against an Inspector's decision to grant permission for a care home in St Albans. The case was primarily concerned with the application of the Green Belt policies in the Framework, and the inspector's decision was ruled to be wrong in law because those policies were incorrectly applied. Mr Justice Pelling noted in his summary of the Framework recognition that the previous national policy context had been replaced by the NPPF and described the 'key purpose' of the NPPF as achieving sustainable development. Although in the same paragraph he mentioned that this included the need to apply all of the three dimensions of sustainable development equally, and also noted that the presumption was a golden thread running through the document, he did not attempt to create or apply his own definition, simply stating that the Framework was now a material consideration, stating the relevant legal principles to be applied and stating that in the absence of an up to date plan the presumption applied. Although Mr Justice Pelling attempted no definition of sustainable development, this case was subsequently considered by the Court of Appeal ³¹² (8) where Lord Justice Keene reflected that the process of simplifying planning policy had created a 'diminution of clarity (para 4), which inhibited the judicial process: "I have not found arriving at "a definitive answer" to the interpretative problem an easy task, because of ambiguity in the drafting". Paragraph 14 was referred to but not considered further.

Later the same month came the *'Fordent'*³¹³ (2) decision, again considered by Mr Justice Pelling, concerned with an Inspector's decision to refuse planning permission for a caravan and camping site. In paragraphs that virtually replicated those of the previous ruling, Mr Justice Pelling set out the three dimensions of sustainable development and its role as a 'golden thread' in the process. The Inspector's consideration of the economic dimension was held to be sound but although Mr Justice Pelling had stated in this and the previous decision that all three dimensions had to be taken into account he specifically declined to question how weight had been attributed.

October 2013 brought two more decisions involving the consideration of sustainable development. *Wakil* ³¹⁴(3), was the first time Mr Justice Lindblom considered the concept of sustainable development in the Framework. He noted that there were differences between

³¹¹ *Hunston Properties Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 2678 (Admin)

³¹² *St Albans v Hunston Properties Ltd, R (On the Application Of) & Anor* [2013] EWCA Civ

³¹³ *Fordent Holdings Ltd v Secretary of State for Communities and Local Government & Anor* [2013] EWHC 2844 (Admin)

³¹⁴ *Wakil (t/a Orya Textiles) & Ors v London Borough of Hammersmith and Fulham* [2013] EWHC 2833 (Admin)

the definition of sustainable development in the draft and adopted Frameworks but neither regarded the changes as significant or assessed the validity of either definition. He also noted that the way in which sustainable development was defined made it particularly relevant to housing policies and housing supply. Given that the words “policies for the supply of housing” within the context of the Framework are due to be considered by the Supreme Court in February 2017 this was an insightful and prophetic statement.

Two days later Mrs Justice Lang issued her judgment in ‘*William Davis*’³¹⁵ (4), an appeal against a Secretary of State’s decision to refuse planning permission for a residential development, primarily on the basis that the NPPF had been misapplied, including the specific contention that the presumption in favour of sustainable development was not applied. Mrs Justice Lang recognised that the Framework was a material consideration, and recited paragraph 14 in full. She agreed that the presumption in favour of sustainable development applied only to development that was ‘found to be sustainable development’ (para 37), going on to say that ‘It would be contrary to the fundamental principles of NPPF if the presumption in favour of development in paragraph 14 applied equally to sustainable and non-sustainable development.’ Mrs Justice Lang implicitly accepted in this case that development proposals were capable of being characterised as sustainable development – or not - and that there was an abstract concept of sustainable development separate from that set out in the Framework. However she did not give any consideration to what this might or might not be. Instead she noted that the Secretary of State had concluded that this particular development was not sustainable development and neither concurred nor disagreed with this conclusion, referring to it simply as ‘quintessentially a planning judgment.’

The *Scrivens*³¹⁶ case (5) considered in November 2013 can be distinguished from all of the other cases considered because it is the only one that explicitly sought to impose a traditional notion of sustainable development, overtly wedded to environmental concerns, in place of the definitions offered by the Framework. Mr Scrivens had submitted a planning application for the construction of ‘autarkic’ houses – self-sufficient dwellings that were not dependent on finite resources. He claimed that these houses were consistent with ‘the true meaning and extent of sustainable development’ because they were not dependent on any finite source of energy, water or other support. Although the case involved challenges to a number of different planning decisions, all were based on the fundamental assertion that that the inspectors involved in the decisions failed to approach or apply the concept of

³¹⁵ *William Davis Ltd & Anor v Secretary of State for Communities and Local Governments & Anor* [2013] EWHC 3058 (Admin)

³¹⁶ *Scrivens v Secretary of State for Communities & Local Government* [2013] EWHC 3549 (Admin)

sustainable development properly. Mr Scrivens insisted that these houses were essentially sustainable because of their compliance with what he claimed as five key requirements which he referred to as ‘the Pentalogy’:

- A basic definition of sustainability which means that nature's resources must not be used faster than they can be replenished naturally.
- The definition of sustainable definition contained in Resolution 42/187 of the United Nations General Assembly defining sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs.
- The pressing need to prepare for a Low Carbon Future – defined as when hydrocarbon reserves are exhausted in or around 2060.
- The requirements in the Carbon Change Act 2008 for an 80% reduction in CP2 emissions from the 1990 level by 2050.
- The general need to mitigate and adapt to the effect of Climate Change required by Treaties, Directives, Acts and the NPPF.

The challenge also sought to apply the definition of sustainable development in the Renewed EU Sustainable Development Strategy 10917/96 – adopting an approach based on the original Brundtland definition.

By framing his development proposal as inherently sustainable and asking for it to be approved on that basis, Scrivens invited the Judge – in this case Mr Justice Collins – to engage with the meaning of sustainable development and its application in the context of planning decisions. Justice Collins acknowledged that the EU Sustainable Development Strategy (10917/06) was a material consideration, and that it contained a definition of sustainable development derived from Brundtland. He also referred to the requirement under s 39 of the 2004 Act for local authorities to exercise plan making functions with the aim of contributing to sustainable development. However, Mr Justice Collins declined to accept that any of the definitions proposed by Mr Scrivens should be regarded as determining the concept of sustainable development generally or binding on the way that the term should be defined or applied in a planning context. He specifically declined (para 15) either to accept the ‘Pentalogy’ definition of sustainable development or to apply his own “I was invited to indicate what should be the definition of sustainable development if not the Pentalogy. I do not think that it is desirable that I should attempt to do that. What is sustainable in any particular circumstance will depend on a number of material factors”.

Mr Justice Collins noted the inclusion of the 'Brundtland' definition in the Framework, referred to the three dimensions listed in paragraph 7 and set out paragraph 14 in full. He also noted that the need for high quality design and the intrinsic character of the countryside were of 'particular relevance'. However rather than adopting the EU, Brundtland-based definition of sustainable development, he preferred to apply an approach consistent with paragraph 6 of the Framework. He was clear that low energy developments would not necessarily qualify as sustainable in Framework terms if the development was also in breach of green belt or landscape qualities or did not represent good design, or had adverse economic effects. He rejected any notion that the 'Pentology' defined sustainable development conclusively and exclusively for NPPF purposes and in paragraph 19 described as 'unquestionably correct' the way in which the Inspector weighted the benefits of the scheme against its impact on the character and appearance of the area. He was also clear that in a planning context landscape and design considerations were factors that could themselves be seen as having an impact on future generations and could legitimately be taken into account.

Mr Justice Collin's unquestioning adoption of a Framework-specific definition of sustainable development was consistent with the previous decisions and indeed with the requirements of the Framework itself. However, he stated that regard needed to be given to the objective of achieving sustainable development in deciding every application, and that where the plan making function was not exercised with the objective of contributing to the achievement of sustainable development, such plans would not 'prevail' if they frustrated the achievement of sustainable development in Framework terms. Neither of these statements sit easily with Mrs Justice Lang's previous ruling that the presumption would apply only to development that was already found to be sustainable.

The next two cases mentioning sustainable development in the context of the Framework were both considered by Mr Justice Lewis. In *Cotswold*, (6) – concerning a proposal for residential development - Justice Lewis recited the Paragraph 6 definition of sustainable development and the three dimensions but did not engage directly with them. Instead he focussed on the interpretation of paragraph 47 of the Framework and the extent to which the proposals conformed to its requirements to establish sustainable development in Framework terms.³¹⁷

³¹⁷ *Cotswold District Council v Secretary of State for Communities And Local Government & Anor* [2013] EWHC 3719 (Admin)

*Corbett*³¹⁸ (7) was an application for judicial review of the decision of Cornwall County council to grant planning permission for five wind turbines. Submissions made included assertions that there were material differences between the draft Framework and final document (para 24) so that the final document reduced the emphasis on economic growth and increased the need to protect the environment especially the countryside. Mirroring the approach taken by Lindblom in *Wakil*, Mr Justice Lewis acknowledged that there were differences between the definition of sustainable development in the emerging and adopted Frameworks, but ruled that there was no change material to this particular development. He reasserted the principle that the Framework was not designed to change the substance of national planning policy by instituting a principle in favour of energy policies over others, instead proposing that the government's central purpose was achieving 'sustainable economic growth' – achieving this in the Framework through including an economic role within the three dimensions.

It is clear from this decision in particular that there was no appetite within the judiciary to investigate the meaning of the Framework with reference to its predecessor drafts or to assign any particular emphasis or importance to any one of the three dimensions. In a detailed rebuttal of the proposition that the NPPF represented a shift in government policy in relation to energy developments Mr Justice Lewis concluded that "there is, in my judgment, no material change between the planning policies contained in the earlier national planning policy guidance, and in particular those dealing with the encouragement of appropriate renewable energy schemes, and the later Framework." In relation to sustainable development in particular he again concluded "there is no material difference between the relevant applicable policies in the Draft Framework and the Framework."

*Hampton Bishop*³¹⁹ (9) was a proposal for Hereford Rugby club to relocate its premises and to fund that relocation through an associated residential development, outside the development boundary of the town. The parish council applied for the decision to grant planning permission to be reviewed, and asserted a number of grounds including misapplication of the legal test. The case was considered by Mr Justice Hickinbottom including specific consideration of the issue of sustainable development. He acknowledged that the development plan for the area included its own definition of sustainable development that meant: "avoiding or minimising adverse effects on the environment whilst providing necessary dwellings and employment together with appropriate infrastructure, services,

³¹⁸ *Corbett, R (on the application of) v Cornwall Council* [2013] EWHC 3631 (Admin)

³¹⁹ *Hampton Bishop Parish Council, R (On the Application Of) v Herefordshire Council* [2013] EWHC 3947 (Admin)

transport and amenities." He referred to paragraphs 6 and 14 of the Framework, and ruled that the concept of sustainable development was to be approached in the same way as decision makers traditionally approached development plans: as an exercise in weighing of development plan policies against each other, and reconciliation of different policies which might conflict with each other, with the balance in the end being for the decision maker. This decision appears to establish that the Framework approach to sustainable development would be preferred even when another definition, contained in a relevant development plan, was available.

*North Norfolk*³²⁰ (10) involved a proposal for a wind turbine, where an Inspector had allowed an appeal against a Council's decision to refuse permission. Mr Justice Purchase stated that the 'construction' of development plan policy was for the court, but went on to propose that all such development plan policies should be 'construed as providing for support and consideration in the context of sustainable development and climate change, taking account of the wide environmental, social and economic benefits of renewable energy gain.' Mr Justice Purchase diverged from the approach taken by his colleagues in his consideration of this decision, by using policies in the relevant development plan as well as the Framework to assess whether the development was sustainable.

*Barrow on Soar*³²¹ (11) was decided by Mr Justice Collins in February 2014, and this followed the approach taken in *Cotswold*, referring to paragraph 47 of the Framework, confirming that where there was a deficit in housing supply the plan would be regarded as out of date and the presumption would be engaged, so that the application would be assessed primarily in terms of its conformity with the Framework rather the development plan. Mr Justice Collins also confirmed that early completion of a development was not an essential element of its sustainability in Framework terms.

Mr Justice Stewart engaged with the notion of sustainable development for the first time in the *Trafford* (11) case involving a renewable energy plant.³²² In a departure from decisions taken by other members of the Administrative Court, he did not set out either the paragraph 6 definition or the paragraph 14 presumption, but instead considered the paragraphs of the inspector's decision letter that was the subject of the challenge that dealt with sustainability.

³²⁰ *North Norfolk District Council v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 279 (Admin)

³²¹ *Barrow Upon Soar Parish Council v Secretary of State for Communities & Local Government & Ors* [2014] EWHC 274 (Admin)

³²² *Trafford Borough Council v (Secretary of State for Communities & Local Government & Anor* [2014] EWHC 424 (Admin)

In addition, this judgment included an entire appendix headed “Whether the Proposal Would Be Sustainable Development?” and involved an analysis of the supply of waste wood, explicitly relying on the conclusions produced to conclude in paragraph 631 that “the proposal constitutes a sustainable form of development.” Of all the cases within the scope of analysis this is the only one to carry out such an assessment of sustainability based on empirical analysis of environmental considerations, demonstrating that it is certainly within the potential scope of a judge’s remit to depart from a definition of sustainable development as limited by paragraphs 6 and 14 of the Framework.

The approach adopted by Mr Justice Stewart was not followed by Mr Justice Foskett when he considered *Langton Homes*³²³ (13) who instead adopted the more usual approach to a challenge based on an assertion of misapplication of the presumption. Although neither paragraphs 6 or 14 were mentioned his assessment of the decision making process was as an exercise of planning judgment where sustainability equated to conformity with the Framework – i.e. very much conforming to the approach set out in paragraph 6. He concluded that this was done correctly so that the challenge did not succeed.

Mr Justice Hickinbottom considered the issue of sustainability in general in the *Plant* case (14) decided in early March 2014.³²⁴ He recognised that an individual development plan policy could be concerned with sustainable development, but insisted that the most appropriate approach in terms of assessing sustainability of planning proposals was one which considered the development in its full local and national policy context.

March 2014 also brought Mr Justice Lindblom’s judgment in *Bloor Homes* (15), a challenge to an inspector’s decision to dismiss an appeal against the refusal by Hinckley and Bosworth Borough Council of permission for a residential housing development³²⁵. Mr Justice Lindblom’s analysis of the way in which the presumption ought to be applied was consistent with previous decisions, simply stating that the sustainability or otherwise of the proposal against the extent to which it conformed to paragraphs 18- 219 of the Framework. However, in what was a characteristically full and considered judgment, Justice Lindblom included in paragraphs 44 to 55 of his ruling a detailed analysis of the terms ‘absent’, ‘silent’ and ‘out of date’ in paragraph 14 of the Framework, an analysis which has been referred to and relied on a number of times since by various judges. In terms of the presumption itself he paid no regard either to the Brundtland definition or the three dimensions, even though although the

³²³ *Langton Homes Limited v Secretary of State for Communities & Local Government & Anor* [2014] EWHC 487 (Admin)

³²⁴ *Plant, R (On the Application Of) v Pembrokeshire County Council & Anor* [2014] EWHC 1040 (Admin)

³²⁵ *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 754

three dimensions had been brought up at the Inquiry. Indeed, when considering sustainable development Mr Justice Lindblom stated in paragraph 159 that its significance had been exaggerated and ruled that the inspector was not required to carry out assessment than he had already done of whether the harm of the proposals “significantly and demonstrably” outweighed the benefits.

In *Brown*³²⁶ (16) an application for judicial review of a Council’s decision to grant permission for an air freight terminal, Mr Justice Collins maintained an approach that was consistent with paragraph 6 of the Framework, assessing sustainable development primarily in terms of conformity with the development plan. It is clear from paragraph 56 of the judgment that in spite of his preference for this approach in the *Scrivens* judgment Mr Justice Collins was beginning to find fault with the paragraph 6 approach, in particular in relation to sustainable development “The word sustainable in the NPPF is not defined; the reader has to work through some 200 paragraphs which indicate what particular matters can be taken into account.” In the subsequent *Earl Shilton* (17) case Mr Justice Hickinbottom’s judgment also noted (para 40) that there was in fact no definition of sustainable development in the Framework but otherwise followed established patterns by confirming that the policies in paragraphs 18-219 were the basis for an exercise of planning judgment to assess sustainability³²⁷.

April 2014 also saw the Court of Appeal Judgment in *Hopkins Developments*³²⁸ (18), concerning a proposal for residential development of land in Wincanton. This was the first time that the Court of Appeal was asked to rule on a case, originally decided in June 2013,³²⁹ specifically involving the Framework and its presumption in favour of sustainable development. Sustainability was noted as a problematic concept but the Court did not give any specific consideration of the meaning of sustainable development – simply restating its position as a ‘golden thread’ running through the NPPF. Generally, the Court of Appeal judges considered only issues of procedural fairness in terms of evidential submissions, concluding that there was no irregularity as the Appellant had had a reasonable opportunity to make submissions.

³²⁶ *Brown v Carlisle City Council* [2014] EWHC 707

³²⁷ *Earl Shilton Action Group, R (on the application of) v Hinckley and Bosworth Borough Council & Ors* [2014] EWHC 1764

³²⁸ *Secretary of State for Communities and Local Government v Hopkins Developments Ltd* [2014] EWCA Civ 470

³²⁹ *Hopkins Development Ltd v Secretary of State for Communities and Local Government & Anor* [2013] EWHC 1783

The *Lark Energy* case (19) in June 2014 challenged the Secretary of State's decision, against an inspector's recommendation, to dismiss an appeal against refusal of planning permission for a solar farm, on the basis that the increase in the amount of renewable energy generated by the appeal scheme did not outweigh the additional harm caused to the character and appearance of the area³³⁰. Mr Justice Lindblom considered the assertion that the Secretary of State failed to apply the presumption in favour of sustainable development in paragraph 14 of the NPPF and consider it in relation to the emphasis on renewable energy in paragraphs 97 and 98 of the same document. He acknowledged that the decision made no formal reference to the presumption, but ruled in paragraph 63 of the judgment that this was not an error of law: 'The policy in paragraph 14...does not give Lark Energy an additional ground of challenge.'

The case of *FCC Environment* (20) also involved a renewables application for a wind farm decision, and was considered by Mr Justice Stewart. One of the grounds of challenge was that inadequate reasoning had been provided to support the contention that the development was not sustainable, and that that the development had been assessed as unsustainable simply because of its effect of the landscape³³¹. Mr Justice Stewart did not agree that this was an illegitimate approach. Instead, he stressed in paragraphs 37 and 38 the importance of the framework-specific definition of sustainable development in paragraph 6 of the NPPF and the need to assess sustainability in terms of the Framework as a whole: "This ground proceeds on a mistaken premise...The policies in paragraphs 18 – 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system."

In *Wynn-Williams* (21) Mr Justice Elvin considered the application of the presumption in detail and ruled that the primary concern was the extent to which the proposals accorded with the development plan.³³² Once that exercise had been completed, the presumption could be applied. Sustainable development was only to be considered in terms of the Framework itself and that consideration was a planning judgment.

In *Redhill Aerodrome* (22) Mrs Justice Patterson considered an application for a runway and stressed the need to interpret policies in the context of context of the Framework as a

³³⁰ *Lark Energy Ltd v Secretary of State for Communities And Local Government & Anor* [2014] EWHC 2006

³³¹ *FCC Environment v (1) Secretary of State for Communities And Local Government (2) East Riding of Yorkshire Council* [2014] EWHC 2035

³³² *Wynn-Williams, R (on the application of) v Secretary of State for Communities and Local Government* [2014] EWHC 3374

whole³³³. She ruled that the Framework introduced a different policy context, and that the Inspector had ‘erred’ in taking non-Green Belt harm into account. This decision was overturned by the Court of Appeal in a decision issued in October (24), with Lord Justice Sullivan noting that the Framework, while promoting sustainable development, still operated to control development in the Green Belt at least as carefully as it had been controlled previously³³⁴.

Mr Justice Lewis ruled in *Cheshire East* (24) that sustainable development required consideration of three ‘aspects’: social, economic and environmental allowing significant discretion in how that analysis was applied³³⁵. In the subsequent *Morris* decision (25) Mr Justice Collins returned to a definition of sustainable development that relied on Brundtland commenting in paragraph 12 on its definition as one which ‘stems from, I think, a UN indication relating to climate change’. He also expressed some resistance to the notion of assessing sustainable development in relation to the whole of the Framework³³⁶.

Mr Justice Lindblom considered the *Crane*³³⁷ case in February 2015. This involved a challenge to the decision to dismiss an appeal against refusal of planning permission for a residential/leisure development and required parallel consideration of the presumption in favour of sustainable development in the Framework, the emerging neighbourhood plan and an out of date local plan. He began by confirming that the Framework presumption in favour of sustainable development was a material consideration to be given some weight. In this case however it was assessed as outweighed by conflicting policies in an emerging neighbourhood plan. He confirmed that the Framework would not ‘displace’ the statutory presumption but that in considering the question of sustainable development, ‘the decision-maker is required...to consider every relevant policy in the NPPF’ so that the presumption was ‘not irrefutable’.

Mrs Justice Lang’s decision in *Cheshire East* (27) was decided in the same month; a challenge to an Inspector’s decision to allow an appeal against the Council’s refusal of permission for residential development³³⁸. Among the grounds was the assertion that the

³³³ *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government & Ors* [2014] EWHC 2476

³³⁴ *Secretary of State for Communities and Local Government & Ors v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386

³³⁵ *Cheshire East Council v Secretary of State for Communities and Local Government & Ors* [2014] EWHC 3536

³³⁶ *Morris, R (on the application of) v Wealden District Council* [2014] EWHC 4081 (Admin)

³³⁷ *Crane v Secretary of State for Communities and Local Government & Anor* [2015] EWHC 425 (Admin)

³³⁸ *Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor* [2015] EWHC 410 (Admin)

Inspector failed to understand or correctly apply the requirement of sustainable development in paragraph 14 of the NPPF. Mrs Justice Lang began the consideration of these issues with reference to her own Judgment in *William Davis*, specifically the principle that the presumption in favour of sustainable development should only apply to development that was sustainable and that the decision maker should consider both the ‘description’ of sustainable development in paragraphs 6 to 10 of the Framework and the ‘guidance’ in paragraphs 11 to 149. She went on to describe protection and enhancement of the natural environment as a ‘key dimension’ of sustainable development. However she also ruled that the assessment of sustainability should be a balancing exercise involving a range of factors and a planning judgment reached on the individual circumstances. The Inspector’s decision was quashed, but no defect was identified in the interpretation of sustainable development.

The final four cases considered within the selected time period considered the presumption in favour of sustainable development in slightly different ways. In *Phides* (28) Mr Justice Lindblom considered the presumption in some detail, in particular how explicit the consideration of housing policies ought to be if they were to demonstrate compliance with paragraph 14 of the Framework.³³⁹ He upheld the decision and dismissed the challenge, ruling in favour of a ‘broad view’; requiring only a general weighing of benefits and impacts, assessed against the Framework as a whole. In *BDW Trading* (29) the development plan was up to date and Mr Justice Hickinbottom ruled that the dominant presumption would be that in favour of the development plan, with the presumption as a material consideration only³⁴⁰. In *Wenman*, (30) Mrs Justice Lang maintained an approach consistent with her previous rulings: the presumption in favour of sustainable development could only apply when the development was sustainable³⁴¹. She ruled that a detailed assessment of policies was required but concluded that on the whole the Inspector was ‘entitled to make a free-standing assessment of the sustainability of the proposed development.’ Finally, in *Woodcock* (31) Justice Holgate ruled that the concept of sustainable development should not be assessed only against adopted, but also emerging development plans and that in the case of a deficit of land for houses, the presumption could ‘weigh against’ restrictive housing supply policies³⁴².

³³⁹ *Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government & Ors* [2015] EWHC 827

³⁴⁰ *BDW Trading Ltd (t/as David Wilson Homes (Central, Mercia and West Midlands)) v The Secretary of State for Communities and Local Government & Anor* [2015] EWHC 886

³⁴¹ *Wenman v The Secretary of State for Communities and Local Government & Anor* [2015] EWHC 925

³⁴² *Woodcock Holdings Ltd v Secretary of State for Communities And Local Government & Anor* [2015] EWHC 1173

6.4 Recent case law

At the end of the 20 month period, and despite a number of cases raising the issue of the application of the new presumption, the position of the judiciary was far from clear. In particular they had not reached an agreed position on whether the definition of sustainable development should be restricted to the assessment of a proposal's conformity with the development plan or if wider considerations could be applied.

A number of significant cases have been decided since June 2015 that also consider the Framework and its presumption in favour of sustainable development. Rather than providing clarification on this question, they provide further evidence that the judiciary is far from reaching a stable position on how it should properly approach the concept.

- In paragraph 10 of the *Malvern Hills* ruling in July 2015 Mr Justice Hickinbottom stated that sustainable development “is to be defined in terms of development which meets the needs of the present without compromising the ability of future generations to meet their own needs”,³⁴³
- In paragraph 10 of *Cheshire East* in March 2016 Mr Justice Jay described sustainable development as “a ‘concept...seeking to secure the attainment of a proper balance... a “trade-off between competing *desiderata*”. He explicitly rejected the proposition that a development would have to be shown to be sustainable before paragraph 14 was applied³⁴⁴;
- In the *Wychavon* judgment issued in March 2016 Mr Justice Coulson noted in paragraph 41 of his judgment that there were a ‘number’ of paragraphs in the Framework referring to sustainable development and that paragraph 14 did not offer a “true definition” but rather “an explanation of the *effect* of the presumption;”³⁴⁵
- In the *Lee Valley* Court of Appeal case issued in April 2016 Lord Justice Lindblom stated that the “presumption in favour of sustainable development” can operate in favour of “sustainable economic development” and that “the three dimensions are also not without their relevance.”³⁴⁶
- In *East Staffordshire*, a judgment issued on 22 November 2016 Mr Justice Green noted that paragraph 14 of the Framework had been applied in ‘different and

³⁴³ *Malvern Hills District Council v Secretary of State for Communities and Local Government & Anor* [2015] EWHC 2244

³⁴⁴ *Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor* [2016] EWHC 571

³⁴⁵ *Wychavon District Council v Secretary of State for Communities and Local Government & Anor* [2016] WLR(D) 158, [2016] PTSR 675, [2016] EWHC 592

³⁴⁶ *Lee Valley Regional Park Authority, R (on the application of) v Epping Forest District Council & Anor* (Rev 1) [2016] EWCA Civ 404

inconsistent ways” and been the subject of conflicting decisions.³⁴⁷ He noted that the *Wychavon* case had proposed a “broad and overarching presumption in favour of the approval of sustainable developments. Mr Justice Green went on to note the existence of the Brundtland definition, the five principles contained in the 2005 Sustainable Development Strategy, the three dimensions of sustainable development contained in the Framework itself. He addressed the competing assertions of the parties as to the scope of the presumption in favour of sustainable development, specifically whether it was limited to developments that were compliant with paragraph 14 or whether there was a ‘residual discretion’ allowing a development to be considered sustainable even where it was not compliant with paragraph 14. The judgment concluded that despite paragraph 14 of the Framework, when interpreting the concept of sustainable development, there was a ‘residual discretion’ to incorporate other definitions and understandings of the term. Paragraph 38 also stated that “the concept of “*sustainable development*” is predominantly implemented *via* the Local Plan”.

- In paragraph 116 of *Barker Mill* judgment issued three days later Mr Justice Holgate gave the view that the presumption in favour of sustainable development was “solely contained within paragraph 14 of the NPPF”.³⁴⁸ He rejected the wider interpretation applied in *Wychavon* and *East Staffordshire* and in paragraph 126 described any reliance on the phrase “golden thread” to justify wider considerations as “wholly misconceived”.
- Mr Justice Gilbert’s decision in the *Muller* case was issued on the same day and paragraph 15 is clear that he was following Holgate rather than Green: I do not accept that one needs to approach paragraph [14] of NPPF on the basis that it may permit the exercise of a residual discretion...There is no need to add a gloss “to that long established legal principle. Unhappily the judge in that case does not appear to have had Suffolk Coastal put before him... practitioners should cease to confuse policies of the SSCLG (or LPAs) which describe what qualifies as sustainable development with policies which define particular circumstances in which a presumption in favour of sustainable development applies.”³⁴⁹

Conclusion

³⁴⁷ *East Staffordshire Borough Council v Secretary of State for Communities & Local Government* [2016] EWHC 2973

³⁴⁸ *Barker Mill Estates (Trustees of) v Test Valley Borough Council & Anor* [2016] EWHC 3028 (Admin)

³⁴⁹ *Muller Property Group v Secretary of State for Communities And Local Government* [2016] EWHC 3323

In a 1993 speech to a workshop of the Local Government, Planning and Environmental Bar Association, the Under Secretary of State for the Environment recognised that “As lawyers, we need to be precise with words. We need to know the definitions of the terms we are using”.³⁵⁰ Planning decisions are brought before the courts on a range of grounds but often include the assertion that the presumption in favour of sustainable development has not been properly applied. In the course of evaluating whether or not this is the case the judge reviewing the case is implicitly asked to decide what the term means and whether or not that meaning was correctly understood by the decision maker.

The analysis revealed an initial reluctance on the part of the judiciary to intervene and interpret the term sustainable development at all. Most of the judges, considering a challenge based on misapplication of the paragraph 14 presumption in favour of sustainable development, simply asked whether the approach adopted by the decision maker was compliant with paragraph 14 of the Framework. If it was they were unlikely to interfere with it on the basis that the judgment involved was for the decision maker who retained a broad discretion to give different policies different weight at different times. To this extent the judiciary did not consider the meaning of sustainable development at all; they simply asked whether the presumption was applied in the way that it is required to be.

However, this was not the approach applied every time. The cases examined demonstrate that a range of approaches have been applied to the notion of sustainable development since the Framework was adopted and that this diversity of approaches shows no sign of reaching an agreed position. The ‘paragraph 14’ approach is dominant but the Brundtland definition, and the three pillars of social, environmental and economic considerations still make their interpretative presence felt. Judges may adopt either the broad approach of Collins in *Trafford*, and assess sustainability based on a forensic assessment of environmental impacts, or the narrow approach of Holgate in *Barker Mill*. There is an ongoing and unusually public debate between members of the judiciary about whether or not the definition of sustainable development in the Framework does or does not include ‘residual discretion’ to consider issues other than conformity with the Framework.

This enduring state of irresolution has provoked comment from practitioners. Humphreys noted that “The proper application of para.14 has given rise to inconsistent decisions in the

³⁵⁰ Tony Baldry “The Seven Lamps of Sustainability”, the Government's strategy for working towards sustainable development in Britain” speech to a workshop of the Local Government, Planning and Environmental Bar Association on October 2, [1993] *Journal of Planning and Environmental Law* JB121-124

High Court...the position remains unclear”³⁵¹ Bowes noted in his summary of the year’s case law in the same journal that “*Wychavon* is seemingly irreconcilable with *Cheshire East*”³⁵² while Ground, in his summary of current issues commented: “Even after four years the Courts have not definitively led on the meaning of the presumption”³⁵³

The courts do not reconsider the planning merits of a particular decision, or interfere with the decision in relation to the weight attributed to competing plan policies, or to individual material considerations. It is not therefore surprising that they did not propose or impose a legal definition of sustainable development. They have supported and reinforced the concept of a discrete, framework-specific definition of sustainable development so that in the context of planning proposals decision makers can legitimately define it in a way that is entirely separate from other policy based definitions of the same words. It is surprising that the judiciary has not, nearly five years on from the introduction of the Framework, provided a consistent view on how the concept ought properly to be approached by decision makers. Indeed the *Muller* decision and the two decisions following demonstrate that the judiciary is in a stage of open dispute on whether or not the Framework provides an exclusive definition of sustainable development or whether there is scope for other definitions to be considered.

Neither a detailed examination of the Framework itself nor a review of the decisions made by the Secretary of State following its adoption show what the Government understands sustainable development to mean or how it should be applied. Chapter 5 concluded that the Secretary of State applied the presumption in favour of sustainable development in a way that muddled its meaning and purpose. Chapter 6 concludes that the judiciary are unlikely to provide the clarity that decision makers need.

³⁵¹ Richard Humphreys QC ‘Sustainable development: does the NPPF paragraph 14 ensure that future generations can meet their own needs?’ *Journal of Planning & Environment Law* 2016, 750-755

³⁵² Ashley Bowes ‘A review of the year’ *Journal of Planning & Environment Law* 1195-1204

³⁵³ Richard Ground ‘Legal Update: the key issues emerging from the cases in the last year’ *Journal of Planning & Environment Law* OP 114 –OP128

Chapter 7 Sustainable Development: the Humpty Dumpty approach

Introduction

This research is concerned with the meaning of sustainable development, in particular the presumption in favour of sustainable development in the Framework. The research began with the following hypotheses:

- That the legal mechanisms related to the determination of planning permission, are constructed so that the meaning of sustainable development in the Framework is derived on a retrospective, case-by-case basis in actual decisions made;
- That Development approved as sustainable development within the terms of the Framework is not consistent with traditional or established understandings of the term;
- That this derived meaning is inherently unstable, and determined primarily by whatever the decision maker wants it to mean.

The primary purpose of this chapter is to review the work done so far, and then review these hypotheses in the light of its findings. It also reflects on two issues that have a particularly important role in the determination of applications for planning permission:

- The exercise of discretion by planning decision-makers, and how the exercise of that discretion at a local level is increasingly subject to government intervention;
- The way in which the judiciary contributes to the meaning and interpretation of language in planning decisions

7.1 Review

Chapter 1 set out the general context for the research including a brief summary of the interaction of the English planning system with its legislative context from the 1909 Act onwards. It highlighted the significance of the legal test for determining applications, the way in which that test preserves a discretionary space for individual decision makers to consider particular development proposals, and how this space is affected by changes in planning policy, and the introduction from time to time of presumptions in favour of development or relevant plan policies. Chapter 1 went on to introduce the concept of sustainable development generally, its particular role as a policy presumption in planning decisions since 2012, and the potential difficulties of using a term of this kind within the context of planning decisions. It concluded with a review of the available literature, noting a

relative lack of detailed consideration of the use of the term sustainable development within the specific context of the Framework and as applied in planning decisions.

Chapter 2 was a detailed examination of the legal context for decision making on planning applications under section 38(6) of the Planning Act 2004 and section 70(2) of the Planning Act 1990. It showed how the words of the legal test function as part of the legal and procedural superstructure setting a framework for planning decisions, but that the essence of planning decisions is a discretionary exercise of planning judgment where the merits of a particular development proposal are considered and weighed by a planning officer, planning committee or planning inspector rather than lawyers. Chapter 2 went on to dissect the decision-making process in detail showing, with reference to the 1995 *City of Edinburgh* decision how the decision maker is required to balance law, policy, and all other material considerations relating to a development proposal in order for a decision to be legally and procedurally compliant. Chapter 2 explored how the introduction from time to time of presumptions – sometimes in favour of development, sometimes in favour of the development plan – introduce a mandatory bias to the planning process in favour either of local plan policies or the particular development proposed. It showed how the Secretary of State, through the introduction of such a presumption such as that in favour of sustainable development, could legitimately constrain the discretionary scope of local decision makers and the consequent importance of understanding its meaning.

Chapter 3 was the first of three chapters searching for the meaning of sustainable development and was concerned with what could be called the ‘ordinary and natural’ meaning of the term, established before the Framework was adopted and existing outside it. It began with the historical origins of modern environmental concerns, and showed how those concerns were initially incorporated in international and national policy documents. It identified the first use of the term sustainable development in an international policy context in 1972, and showed how it diffused into European, UK and English policy, used in some contexts as a way of stressing the importance of acknowledging and mitigating environmental impacts and in others more as a textual gloss.

This chapter showed that although the term was widely used in a number of policy contexts it was never given a formal definition and that as a result policies began to acquire a rhetorical appearance of environmental concern without including substantive provisions that would measure or limit environmental impacts. It also noted that although by 2005 there was a Sustainable Development Strategy in place there was hardly any planning policy that recognised the term, incorporated it as a planning goal or defined it for planning purposes. It

nevertheless concluded that the term was still generally understood to mean consciously restricted growth including the mitigation of environmental impacts.

Chapter 3 also considered the role of the Coalition government in relation to sustainable development, in particular its claim to be ‘the greenest government ever’.³⁵⁴ It showed that despite this claim the Coalition government abolished a number of organisations concerned with securing sustainable development, replaced the 2005 Sustainable Development Strategy with an approach that it referred to as ‘mainstreaming’ sustainability, promoted sustainable development as a concept associated primarily with economic growth, while environmental impacts were presented as economic burdens.³⁵⁵ The subsequent Conservative government continued to use the term sustainable development in a number of policy contexts, but resisted proposals to include a specific definition in legislation, despite an established precedent in the Wellbeing of Future Generations (Wales) Act 2015.

Chapter 4 also looked at the meaning of sustainable development, but this time in the specific context of the Planning Framework. It focussed on the actual language of the document, reviewing the original proposal, the consultation version and the final Framework document adopted in March 2012. It noted that although the concepts of sustainable development was heralded as the ‘golden thread’ running through the document and promoted as a key factor in the determination of every application for planning permission, the document was drafted in such a way as to obscure rather than clarify the meaning of sustainable development. The traditional Brundtland definition was included within the text but not actually used, the principles of the 2005 Sustainable Development Strategy were mentioned but not relied on and although three ‘dimensions’ - economic, social and environmental – were included, there was no guidance on how they should be weighed against each other. Instead the Framework proposed a range of meanings that reduced rather than contributed to clarity – the Foreword alone proposing five different ways of understanding the term as 1) the purpose of planning 2) not compromising the future at the expense of the past 3) growth 4) positive growth 5) requiring development to go ahead without delay.

Chapter 4 noted the concern raised by practitioners, academics and Parliamentary committees about the lack of definition and considered the extent to which the absence of a

³⁵⁴ James Randerson, ‘Cameron: I want coalition to be the ‘greenest government ever’ (2010), *The Guardian*, (London 14th May) www.guardian.co.uk/cameron-wants-greenest-government-ever accessed 31st July 2016

³⁵⁵ DEFRA ‘Mainstreaming sustainable development – The Government’s vision and what this means in practice’ (Defra, 2011)

definition enabled the promotion of a pro-growth agenda and the government's wider political aims rather than sustainable development as it was traditionally understood. It concluded that because sustainable development in the context of the Framework was achieved primarily through compliance with the Framework, the meaning of the term in this context would in practice be decided by the decision maker, and on a case by case basis.

Chapter 5 was a detailed analysis of planning decisions made by the Secretary of State to see if a general meaning of sustainable development could be derived through an examination of its consideration by the Secretary of State on a case by case basis. It collated and compared 20 months of recovered and called-in planning decisions made by the Secretary of State and looked at each one of them for how the Framework presumption in favour of sustainable development was considered and applied. The results showed that the Framework was mentioned as a material consideration in each decision, and that most decisions also mentioned the new presumption in favour of sustainable development. The decisions did not however consider the meaning of sustainable development in any depth. They analysed the proposal against the Framework policies as required by Paragraph 6 and assessed the proposal as sustainable or not based on the analysis but very few referenced or considered the concept of sustainable development in its wider sense. The exercise also showed that the Secretary of State's powers of recovery and call in were being used to intervene in appeals involving traveller and renewables development, usually resulting in refusal, suggesting that these types of development were regarded as inherently unsustainable in Framework terms.

Chapter 6 was also a detailed analysis of decisions to see what they might reveal about the meaning of sustainable development in the Framework. It examined all of the court judgments issued over a 20 month period that were concerned with planning issues and that considered the concept of sustainable development in the context of the Framework. The courts appeared to grapple with the concept of sustainable development more than the Secretary of State, but they did not clarify its meaning or even what approach should be taken to interpretation. In most cases the primary consideration was whether the decision maker had properly evaluated compliance with the Framework as required by paragraph 6 of the Framework. Unless the decision maker's analysis in this context was legally or procedurally defective, the courts tended not to interfere with the outcome of that exercise. The chapter also showed that on the whole the courts would not generally intervene in the discretionary aspects of the decision and in most cases explicitly declined to investigate the meaning of sustainable development.

Although all decisions depended in theory on a proper understanding of the meaning of sustainable development, the term was never defined nor did the judiciary seek to find or impose one. Rather the courts seemed satisfied with a meaning that would fluctuate depending on the particular development, its particular planning context and the individual planning judgment of the decision maker. In addition, the analysis of case law revealed an increasing uncertainty in the approach to sustainable development generally. A review of the case law from June 2015 to December 2016 demonstrated a continuing lack of clarity or consistency on how the concept of sustainable development was considered, and culminated in an overt dispute between Mr Justice Green who recognised a ‘residual discretion’ in the interpretation of sustainable development and Mr Justice Gilbart and Holgate who continued to promote an interpretation of sustainable development based solely on the conformity of a proposal with the Framework.

7.2 Planning and discretion

The enduring failure to find a meaning for sustainable development is due partly to the etymological origins and socio-political context of the term itself. The words are widely used outside the context of planning decisions, where their meaning is assumed or imposed rather than understood through reference to a standard interpretation.

In the context of the Framework there is an additional barriers to deciding on the meaning and interpretation of sustainable development. The paragraph 14 presumption combined with the paragraph 6 ‘meaning’ ensure that the words must function as an evaluative criterion within a discretionary test whose scope is extremely widely drawn. Planning law permits and preserves a wide discretion to the planning decision maker in the application and weighing of any particular planning proposal against its policy context and the courts are enduringly reluctant to interfere in this exercise of planning judgment, especially where the discretion is exercised by the Secretary of State.

The breadth of discretion was summarised in the 1995 *Tesco* case where Lord Keith confirmed (para 24) that a local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all"³⁵⁶ It was reinforced by the Supreme Court in the 2012 *Tesco* case³⁵⁷ where Lord Reed confirmed

³⁵⁶ *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759

³⁵⁷ *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13

(para 18) that it was for the local authority to judge which 'broad' statement of policy should be favoured when it was impossible to reconcile one with another, and how to apply the language of the development plan to a 'given set of facts'. The principles were recently restated in *Bloor Homes* where Justice Lindblom confirmed that "Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way".³⁵⁸

While the courts are enduringly unwilling to interfere with the exercise of decision-making discretion in planning decisions, the Secretary of State is not. Although the Secretary of State's decision-making discretion remains unfettered, he is also empowered to restrict the decision-making discretion of local authorities through the introduction of new legislation and new policies, and those policies can, as confirmed by the 2001 *Alconbury* case, legitimately be influenced by the political aspirations and policies of the relevant administration.³⁵⁹

This power is increasingly being exercised through written ministerial statements and this practice was called into account with the *West Berkshire* in July 2015.³⁶⁰ The case concerned a Written Ministerial Statement made by the Secretary of State in November 2014 which excluded developments of a certain size/scale from affordable housing obligations³⁶¹. This was challenged by a number of local authorities led by West Berkshire, with one of the central issues for consideration being the issue of whether or not the Secretary of State's power to impose policy in this way was inconsistent with the statutory planning regime as a whole. In the High Court, Mr Justice Holgate ruled that the new policy was 'improper because, in effect, it purports to override relevant policies in the statutory development plan... and the need to carry out the weighing process' (para 134) and quashed the policy on that basis.

The decision was reconsidered by the Court of Appeal in May 2016 who overturned Justice Holgate's decision. Like Justice Holgate, the Court of Appeal focussed on the tension between the principles that 1) a decision-makers discretion in the application of plan policies should not be fettered and 2) the general freedom of a policy maker such as the Secretary of State to express his policies without acknowledging exceptions. However they concluded that a statement made in this way did not frustrate the 'statutory scheme' for planning as

³⁵⁸ *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754

³⁵⁹ *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23

³⁶⁰ *Secretary of State for Communities and Local Government v West Berkshire District Council & Anor* [2016] EWCA Civ 441

³⁶¹ HCWS50 28 November 2014, vol 558, col 53WS

articulated in s38(6) and s70(2) of the 1990 Act and that once this was accepted, the specificity of the language used to change the policy was not “unobjectionable”.

This decision has attracted criticism from senior planning law practitioners, with Bowes commenting that the decision lacked “an appreciation of the reality of planning decision taking”³⁶² while Ground went slightly further noting that it represented “a very non-interventionist approach to regulating policy making” leaving the Secretary of State’s powers “extremely widely drawn”.³⁶³ In his 2016 article on the “West Berkshire” decision John Pugh Smith asked “does the statutory under-girding of the plan-led development system provided by Section 38(6) of the Planning and Compulsory Purchase Act 2004 still have structural integrity faced with so many greater material considerations resulting from, now, Ministerial Statements finessing the NPPF”³⁶⁴.

This is a very good question. The Court of Appeal ruling in *West Berkshire* appears to establish that the Secretary of State can make significant changes to national planning policy, that have serious implications for local authority plans and planning, without warning, consultation or consideration of the wider procedural context. Another Written Statement was issued in Parliament less than a month ago and it is already the subject of preliminary court proceedings.

Gavin Barwell, the Minister of State for Housing and Planning and Minister for London made the statement to the House on 12th December. In it he introduced a raft of new policies in relation to housing supply and neighbourhood plans confirming that:

- neighbourhood plans should not be deemed to be out-of-date unless there is a significant lack of land supply for housing in the wider area;
- development plans should not be deemed out of date where:
 - The written ministerial statement was less than two years old, or;
 - The neighbourhood plan had been part of the development plan for two years or less;
 - The neighbourhood plan allocated sites for housing; and
 - The local planning authority could demonstrate a three-year supply of deliverable housing sites.

³⁶² Ashley Bowes, “A review of the year” *Journal of Planning and Environmental Law* 2016, 1195-1204

³⁶³ Richard Ground, “Ch-Ch-Changes” *Journal of Planning and Environmental Law*, OP 114-OP128

³⁶⁴ John Pugh-Smith ‘Only a partial victory?’ (2016) *Local Government Lawyer*
<http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=27172%3Aonly-a-partial-victory&catid=63%3Aplanning-articles&Itemid=31> accessed on 20th August 2016

There was no prior consultation or warning that the Statement would be issued, yet it was introduced with the intention that it would apply to “decisions made on planning applications and appeals from today.”³⁶⁵

On 30th December, Eversheds solicitors issued a pre-action protocol letter to the Government Legal Service; the required first stage for any legal challenge.³⁶⁶ It is a class action on behalf of land promotion companies, national and regional house builders and challenges the written ministerial statement on the grounds that 1) there was a legitimate expectation of consultation but none was carried out; 2) that the policy itself was irrational and unreasonable; 3) that there was no compliance with the public sector equality duty. These are virtually identical to the grounds of challenge in *West Berkshire*; if the claim proceeds, and if it is successful in the High Court, it is likely, given the Court of Appeal decision in *West Berkshire*, that the matter will be resolved by the Supreme Court.

7.3 Meaning and Interpretation in theory

If the scope of decision-making discretion is a complicating factor in the search for the meaning and interpretation of sustainable development in the Framework, the question of who assigns meaning and takes on the primary interpretative function is also far from clear generally. Since the legal test requires the assessment of development proposals against a range of planning policies, the meaning or effect of the wording of those policies is often called into question, with Lord Clyde making it clear in the *City of Edinburgh* case that a decision would be open to challenge where there was a failure to interpret plan policies properly³⁶⁷. In theory, the judiciary interfere only where the judgment applied in the assessment of policy compliance is ‘irrational or perverse’.³⁶⁸ They may assign meaning but only the planning decision makers exercise planning judgment or interpret the policies. In practice the distinction is without substance, the courts regularly operate as linguistic as well as legal arbiters, and judges regularly interpret and assign meaning to text.

The 2012 Tesco Stores case³⁶⁹ is a prime example of this – and the leading judgment on interpretation generally. It involved an application by Asda for a superstore on a derelict

³⁶⁵ HCWS346 12 December 2016 Vol 618

³⁶⁶ John Geoghegan “Legal Threat to Government’s Move to Strengthen Neighbourhood Plans <http://www.planningresource.co.uk/article/1419675/legal-threat-governments-move-strengthen-neighbourhood-plans> accessed 7th January 2017

³⁶⁷ *City of Edinburgh Council v. Secretary of State for Scotland and Others* [1997] UKHL 38,

³⁶⁸ *Tesco Stores Ltd v Secretary of State for the Environment & Ors* [1995] 1 WLR 759

³⁶⁹ *Tesco Stores Ltd v Dundee City Council (Scotland)* [2012] UKSC 13

factory site. The Council acknowledged granted permission on the basis that the conflict with existing development plan policies was outweighed by other material considerations. The decision was challenged based on a claim that the local authority had interpreted "suitable" as "suitable for the development proposed by the applicant" rather than "suitable for meeting identified deficiencies in retail provision in the area". The whole case therefore rested on the meaning - and interpretation - of the word 'suitable' in a particular context. Lord Reed (para 19) established that:

- The court had a role in interpreting planning policies, in the interests of securing consistency and direction in the exercise of discretionary powers;
- Policy was not to be interpreted in the same way as statute but should always be "interpreted objectively in accordance with the language used, read as always in its proper context";
- The application of policy to a set of facts required the use of planning judgment but should not be irrational or perverse.

This ruling was supplemented by the 'Bloor Homes' 2014 decision where Lindblom recited what he referred to as 'seven familiar principles'³⁷⁰ to be applied in interpreting inspector's decision including:

- Matters of planning judgment are for the decision maker and not the courts;
- Planning policies are not to be 'construed' in the same way as a statute but may be interpreted by the courts 'objectively...in accordance with the language used and in its proper context';
- Consistency in interpretation is important but not essential.

The 2012 Tesco decision restated a familiar distinction between meaning and interpretation – allocating responsibility for interpretation to the planning decision maker and reserving the attribution of meaning to the court. In paragraph 21 for instance, Lord Reed was clear that the concept of 'suitability' was not a planning issue but required a purely linguistic construction of meaning within context. In paragraph 35 he went on to say that this exercise of textual interpretation, and the attribution of meaning, was for the courts and not the planning decision maker: "The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority." In making this distinction, Lord Reed appeared to be relying primarily on Brooke LJ in *Derbyshire County Council*³⁷¹ who

³⁷⁰ *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 754 (Admin)

³⁷¹ *R v Derbyshire County Council, Ex p Woods* [1997] EWCA Civ 971

established that where there was a dispute about the meaning of words in a policy document the court should determine the meaning 'as a matter of law'.

7.4 Meaning and interpretation in practice

The difficulties of using legal minds to evaluate planning policies are as real now as in 1980 when Lord Diplock commented that "Policy... is a protean word and much confusion in the instant case has, in my view, been caused by a failure to define the sense in which it can properly be used"³⁷². Hutton asserts that "unless the text is puzzling on its face, the judge is unlikely to embark on an in-depth philological investigation"³⁷³ but Emmerson has separately noted that judges will impose meaning both on policy considerations such as 'any other harm' and also more substantive terms such as Framework paragraphs 89 ('building') and 90 ('mineral extraction')³⁷⁴. As Keene³⁷⁵ recognises the distinction between the meaning and interpretation and the division of responsibility between the decision maker and the courts is not always drawn clearly or consistently – for example Justice Lindbloom in *Bloor Homes* stated in the fourth of the seven familiar principles that "the proper interpretation of planning policy is ultimately a matter of law for the court".³⁷⁶

The issue is problematic, firstly because the distinction itself rests on shaky syntactical foundations. The Oxford English Dictionary³⁷⁷ distinguishes the terms as follows:

- Meaning: "What is meant by a word, text, concept or action"
- Interpretation: "The action of explaining the meaning of something."

It is difficult to discern any significant or meaningful difference between these two functions, and almost impossible to understand what they meaning in terms of distinguishing between the function of the decision makers and the courts in the consideration of development proposals. Given that the research is concerned primarily with the way in which the words sustainable development are interpreted and applied in a particular policy context, it is important to understand what the distinction means in practice.

³⁷² *Bushell v Secretary of State for the Environment* [1980] UKHL 1 [1981]AC

³⁷³ Chris Hutton *Language, meaning and the law* Edinburgh University Press, Edinburgh, 2009 p85

³⁷⁴ Heather Emmerson 'The NPPF – what does it mean?' [2014] Local Government Lawyer
<http://localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=20013%3Athe-nppf-what-does-it-mean&catid=63&Itemid=31> accessed 7th August 2016

³⁷⁵ David Keene, 'Recent trends in judicial control' *Journal of Planning and Environmental Law* 1998, Occ Pap 26, 30-37

³⁷⁶ *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 754 (Admin)

³⁷⁷ <https://en.oxforddictionaries.com/>

This part of the chapter reviews and reports on an analysis carried out on a selection of decisions on planning cases looking specifically at the way the judges considered the issue of meaning and interpretation of language. The parameters of this examination were as follows:

- It included the cases reported on in Chapter 6 – i.e. those issued between 1st October 2013 and 31st May 2015;
- It extended the scope of investigation for a further year - from 1 June 2015 to 31st May 2016 to provide a more up to date position and to extend the range of data considered;
- All tiers of the court system were included: the Administrative division of the High Court, the Court of Appeal and the Supreme Court;
- The results were only examined where they related to a determination under the legal test, and where the court specifically considered the question of ‘meaning’ and ‘interpretation’.

The results are summarised in table 12. A total of thirty nine cases are listed and where they are referred to in this chapter their number in the table is inserted in brackets for easy referencing.

The 2012 “Tesco” case was a frequent starting point (referred to in seventeen of the cases considered) for considerations of meaning and interpretation because it was a House of Lords decision. Eleven of those cases re-used its distinction between the role of the decision maker and the courts, re-stating the principle, often on a word-for-word basis, that interpretation, or construction of planning policy was for the courts, while nine also stated that meaning was to be attributed by the decision maker, the body or individual exercising planning judgment.

In a number of cases the courts both offered and imposed their understanding of the meaning of particular words:

- In *Bloor Homes*,⁽¹⁰⁾ the meaning of ‘silent’ in relation to a development plan was considered by Lindblom J: who at one point stated that the meaning of the term should be interpreted objectively and yet went on to attribute his own meaning in that particular context: “The term “silent” in this context does not convey some universal and immutable meaning... silence in this context must surely mean an absence of relevant policy...in my view a plan containing general policies for development

control that will enable the authority to say whether or not the project before it ought to be approved or rejected ... could hardly be said to be silent³⁷⁸;

- The question of need was considered twice in *Mole Valley* (12). In the High Court Justice Haddon Cave had extensively (paragraphs 89-106) considered the meaning of 'need' in this context, imposing his own definition of the word and quashed the grant of the permission partly on the basis that need, as so defined, had not been demonstrated³⁷⁹. However the court of appeal acknowledged that there was more than one possible meaning of the term: "the word "need" has a protean or chameleon-like character... and is capable of encompassing necessity at one end of the spectrum and demand or desire at the other"³⁸⁰;
- An equivalent diversity of approaches was demonstrated in *Redhill Aerodrome*, where in the High Court (14) Justice Patterson, gave a considered account of the meaning of 'any other harm' as contained in paragraph 88 of the Framework.³⁸¹ When the case reached the Court of Appeal (15) that decision was overturned and the court stated that the process that the original judge's interpretation of the text led to 'imbalances in the weighing process'³⁸² adding that (para 18) 'the works in paragraph 88 should not be construed in isolation and must be construed in the context of the Framework as a whole';
- A number of other cases involved judges considering and deciding on the meaning of a number of different words
 - In 'Lark Energy' the meaning of the term "given this"³⁸³; (13)
 - In 'Ashburton' the word 'generally' in the context of a policy³⁸⁴ (16);
 - In 'Phides' a clear distinction was drawn between a "requirement" and a "target"³⁸⁵(18);
 - In 'Old Hunstanton' the meaning of "local"³⁸⁶ (28);

³⁷⁸ *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor* [2014] EWHC 754

³⁷⁹ *Cherkley Campaign Ltd, R (on the application of) v Longshot Cherkley Court Ltd* [2013] EWHC 2582

³⁸⁰ *Cherkley Campaign Ltd, R (on the application of) v Mole Valley District Council & Anor* [2014] EWCA Civ 567

³⁸¹ *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government & Ors* [2014] EWHC 2476

³⁸² *Secretary of State for Communities and Local Government & Ors v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386

³⁸³ *Lark Energy Ltd v Secretary of State for Communities And Local Government & Anor* [2014] EWHC 2006

³⁸⁴ *Ashburton Trading Ltd v Secretary of State for Communities And Local Government & Anor* [2014] EWCA Civ 378

³⁸⁵ *Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government & Ors* [2015] EWHC 827

³⁸⁶ *Old Hunstanton Parish Council v Secretary of State for Communities and Local Government & Ors* [2015] EWHC 1958

- In 'Milwood Land' the meaning of 'intention'³⁸⁷(26);
- In Thornhill and St Modwen the meaning of 'now'³⁸⁸ (31) ³⁸⁹ (39)
- In Williams the the meaning of 'affect' and, the way in which the concept of beauty should be applied³⁹⁰ (38).

A number of cases considered the meaning of particular development plan policies. In 'Pertemps investments' (29) the judge considered the application of policy P17 at some length and ruled that the inspector's misconstruction amounted to an error of law³⁹¹. A similarly instructive approach was taken in 'Nicholson' (30) to the interpretation of REM 10³⁹², in 'Gallagher' (36) to policy Bicester 13³⁹³ and to DL 20 in 'Cheshire East'³⁹⁴(37).

The judiciary continue to assign meaning to, and interpret the meaning of, disputed text in planning decisions, most recently Mr Justice Green in *East Staffordshire*.³⁹⁵ His ruling, concerned primarily with the reach of the paragraph presumption in favour of sustainable development, also engaged in some detailed analysis of the meaning of words – and indeed the meaning of meaning as follows:

- (para 28) paragraph [14] did not lay down a hermetically sealed analysis which eschewed flexibility in all respects;
- (para 36) a construction which furthers predictability and transparency based on adherence to the Local Plan is one which is to be preferred;
- (para 39) the contents of the Impact Assessment are admissible as one source of guidance to an interpretation of the NPPF;
- (para 40) "means" ...is to be treated as "equates to" or "must lead to" or some other proxy phrase...
- The reference to the "golden thread" ... is merely a metaphor...it cannot be used to support a conclusion that the presumption has a broader "at large" operation.

³⁸⁷ *Milwood Land (Stafford) Ltd v Secretary of State for Communities and Local Government & Anor* [2015] EWHC 1836

³⁸⁸ *Thornhill Estates Ltd v Secretary of State for Communities and Local Government & Ors* [2015] EWHC 3169

³⁸⁹ *St Modwen Developments Ltd v Secretary of State for Communities and Local Government & Anor* [2016] EWHC 968

³⁹⁰ *Williams, R (on the application of) v Powys County Council & Anor* [2016] EWHC 480

³⁹¹ *Pertemps Investments Ltd v Secretary of State for Communities And Local Government & Anor* [2015] EWHC 2308

³⁹² *Nicholson, R (on the application of) v Allerdale Borough Council & Ors* [2015] EWHC 2510

³⁹³ *JJ Gallagher Ltd & Ors v Cherwell District Council & Anor* [2016] EWHC 290

³⁹⁴ *Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor* [2016] EWHC 571

³⁹⁵ *East Staffordshire Borough Council v Secretary of State for Communities & Local Government & Anor* [2016] EWHC 2973

It is clear from this analysis that a wide range of relatively innocuous words and phrases have the capacity to generate a significant volume of case law when they are part of a planning policy. The phrase that has the greatest current significance is “policies for the supply of housing” in paragraph 49 of the Framework. The phrase is significant because where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites, paragraph 49 makes all policies that qualify as ‘policies for the supply of housing’ automatically ‘out of date’, and the decision maker must apply the presumption in favour of sustainable development over the relevant development plan policies.

The issue of the meaning of this phrase – and the scope of the policies to which it applies - was considered in a Court of Appeal ruling by issued in March 2016 relating to two conjoined appeals from the High Court³⁹⁶. The leading judgment was given by Lord Justice Lindblom who noted (para 20) that the issue had been considered in seven separate cases since 2013 resulting in “two or three distinctly possible interpretations”(para 21). The ruling included a summary of the interpretative approaches taken, so that differentiation could be made between “the “narrow” interpretation...the “wider” or “comprehensive” interpretation” and “...the so-called “intermediate” or “compromise” interpretation.” Counsel representing the local authorities argued for a narrow approach while those acting on behalf of the developers contended for a ‘wider’ construction.

Lord Justice Lindblom referred to the 2012 ‘Tesco’ decision and established the Court’s position in relation to the interpretation of policy as being “faithful to the words of the policy, read in their full context and not in isolation from it.”(para 25). He then went on to dissect the words themselves in detail:

- (Para 33): The word "for" is one of the more versatile prepositions in the English language. It has a large number of common meanings. These include, according to the Oxford Dictionary of English, 2nd edition (revised), "affecting, with regard to, or in respect of".
- (para 33) A "supply" is simply a "stock or amount of something supplied or available for use" – again, the relevant definition in the Oxford Dictionary of English. The "supply" with which the policy is concerned, as the policy in paragraph 49 says, is a demonstrable "five-year supply of deliverable housing sites". Interpreting the policy in this way does not strain the natural and ordinary meaning of the words its draftsman has used.

³⁹⁶ *Suffolk Coastal District Council v Hopkins Homes Ltd & Anor* [2016] EWCA Civ 168

- (para 34) The "narrow" interpretation of the policy, in which the words "[relevant] policies for the supply of housing" are construed as meaning "[relevant] policies providing for the amount and distribution of new housing development and the allocation of sites for such development", or something like that, is in our view plainly wrong.

Lord Justice Lindblom ruled in favour of the wider approach so that the concept of "policies for the supply of housing" now potentially expands to policies relating to the Green Belt, countryside, landscape, conservation or cultural heritage or (para 33) "whose purpose is to protect the local environment in one way or another by preventing or limiting development." Nevertheless, the issue remains unresolved. Permission was given to appeal the decision, and it is now due to be considered by the Supreme Court in February 2017.

7.5 Humpty Dumpty and the Masters of Planning

Alice's encounter with Humpty Dumpty in Wonderland, in particular her rejection of his assertion that "When I use a word, '... it means just what I choose it to mean -- neither more nor less" has featured more prominently in issues of legal interpretation than Lewis Carroll could ever have anticipated.³⁹⁷ During the parliamentary committee debates on the Housing and Planning Bill Lord Greaves reflected "This is not Humpty-Dumpty land. Words actually have a meaning and, when it comes to the law, words have more of a meaning than they do in chat in the pub or on breakfast-time television"³⁹⁸. In the *Redhill* decision Lord Justice Sullivan reflected that "The Framework means what it says, and not what the Secretary of State would like it to mean"³⁹⁹ and in the *RSPB* case Lord Justice Sullivan's judgment at paragraph 21 included the observation that the conservation policies in question, though not statutory, nevertheless were not subject to arbitrary interpretation: "they mean what they say, and do not mean what the Secretary of State, or for that matter, Natural England or the RSPB, might wish that they had said"⁴⁰⁰.

The next lines of the dialogue are never reported. Alice challenges Humpty Dumpty's assertion, questioning "whether you can make words mean so many different things." His response suggests that the better question is "which is to be master". Hutton proposes that

³⁹⁷ Lewis Carroll, *Through the Looking Glass* (Collins Classics, 2010)

³⁹⁸ HC Deb 9 Feb 2016 Col 2133

³⁹⁹ *Secretary of State for Communities and Local Government & Ors v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386

⁴⁰⁰ *The Royal Society for the Protection of Birds v The Secretary of State for Environment Food And Rural Affairs & Ors* [2015] EWCA Civ 227

power structures operate to impose order on “the conceptual chaos of language”⁴⁰¹ and this question is certainly relevant to the English planning system where a high position in the decision-making hierarchy brings with it the power to assign meaning to words on an ad hoc basis in much the same way as Humpty Dumpty suggests.

If what really matters in relation to the meaning of sustainable development is the status of the person who applies the policy, there are two ‘masters’ of the meaning of sustainable development in the Framework: the Secretary of State and the judiciary

The Secretary of State may propose, adopt and amend national planning policy through a range of measures including issuing new policy documents, changes to the National Planning Policy Guidance and through Ministerial Statements. *West Berkshire* has both confirmed and if anything increased the scope of the Secretary of State’s powers in relation to planning policy. By using these powers to set new policy, and change existing policy local plan policies affected become automatically ‘absent, silent or out of date’ for paragraph 14 purposes, bringing the presumption in favour of development automatically into play. He can use his powers of call in and recovery to insert himself as the decision maker in a wide range of planning proposals. Once in position as the decision maker he is free to apply and interpret his own policies and will be the final arbitrator of any dispute as to how the term sustainable development is interpreted and applied.

Although *Padfield* established that statutory discretion should be exercised so as to promote the policy or objectives of the legislation⁴⁰², *Alconbury* acknowledged and preserved the right of the Secretary of State to promote a political agenda through planning decisions: “He is not independent. Indeed it is not suggested that he is.”⁴⁰³ In terms of sustainable development the Secretary of State may determine its meaning on a case by case basis and with regard only to the conformity of a particular proposal with his own policy, disregarding all of the ‘ordinary’ meanings of sustainable development established in the wider national and international policy context.

In the *Barker Mill* decision Mr Justice Holgate criticised the legal profession for promoting particular “interpretations of policy” for judges to consider on the basis that those interpretations were “strained”, resulted in “excessive legalism”, required the courts to listen to “exegetical analysis” and were against the principles of interpretation of policy set out in

⁴⁰¹ Chris Hutton *Language, meaning and the law* Edinburgh University Press, Edinburgh, 2009 p5

⁴⁰² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

⁴⁰³ *Alconbury* 142

the 2012 *Tesco* case.⁴⁰⁴ Nevertheless, the Judiciary, as seen above, often promote strained interpretations themselves and are no strangers to textual analysis. They regularly consider a wide range of planning cases that often include challenges based on misapplication or misinterpretation of the paragraph 14 presumption in favour of sustainable development. There are frequent references to the distinction between meaning and interpretation but in practice the judiciary scrutinise, review and correct previous interpretative exercises and will engage in detailed examination of the meaning of specific words when this becomes central to the outcome of a particular case. Brierly has commented on the tendency of judges to investigate the meaning of text rather than the purpose of the policy⁴⁰⁵ and in *Cranage* Mr Justice Davies noted that this was unusual and ‘by no means of course mirrors the approach ordinarily otherwise adopted by the courts in other civil contexts’.⁴⁰⁶

When assigning meaning or offering interpretation judges often refer to abstract notions of linguistic norms. In paragraph 18 of the 2012 *Tesco* decision – the leading case on interpretation - Lord Reed states that the words in policy statements should be interpreted ‘objectively in accordance with the language used, read as always in its proper context’. In paragraph 25 he refers to something he calls a ‘natural reading’ of a policy. In paragraph 35 he refers to a reading of the words that is ‘objective and in accordance with the proper context.’

This approach is a common one in planning decisions. Of the 39 cases considered in Table 12, 9 refer to a “proper/sensible” approach, seven to a ‘proper understanding’, five to a ‘natural use of language’, 2 to a ‘correct approach’ and 1 to a ‘proper construction’. This pragmatic approach to interpretation may be essential where, as in the 2012 *Tesco* decision it resolves a long and expensive dispute. However, it is a narrow basis for interpretation as it rests on the assumption that there is an authoritative, and commonly understood canon of ‘meaning’ which exists, albeit in an abstract form and simply needs to be applied. It ignores the extent to which language is produced and finds its meaning from a shifting political-linguistic context and pays no regard to the potential evolution of meaning through use external forces. And it never questions who decides what the established canons of meanings should contain. The ‘St Modwen’ case refers to a ‘bespoke approach’ to interpretation but the tailors in question are a small and distinct group of judges in the High

⁴⁰⁴ *Barker Mill Estates (Trustees of) v Test Valley Borough Council & Anor* [2016] EWHC 3028

⁴⁰⁵ John Brierly ‘What’s wrong with Planning – and is it about to be fixed? A crie do Coeur’ [2012] *Journal of Planning and Environmental Law* 534

⁴⁰⁶ *Cranage Parish Council & Ors v First Secretary of State & Ors* [2004] EWHC 2949 (Admin)

Court, Appeal Court and Supreme Court. They are not representative either of the English population as a whole or the particular community where specific developments are located yet often theirs is the last word on whether a proposal is, or is not sustainable development and ought therefore to be permitted.

Conclusion

The primary purpose of this chapter was to revisit the original hypotheses and consider whether, taking into account the research as a whole, it was possible to reach any conclusion about the meaning of sustainable development in the Framework.

The first hypothesis appears to be supported. Apart from some rogue decisions by judges such as Mr Justice Green, sustainable development for planning purposes is assessed primarily as paragraphs 6 and 14 of the Framework require it to be. Development that is in conformity with the Framework is presumed to be sustainable, development that is not compliant is not. Sustainability is assigned on a case by case basis and there is no absolute standard.

The second hypothesis is also supported. Sustainable development existed as a concept long before the Framework and there is an established, Brundtland-based understanding of what it means, as Humphreys acknowledges: “The widely used definition of sustainability, in terms of development, over the last 25 years has been: ‘Development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.”⁴⁰⁷ Paragraph 6 of the Framework purports to state what sustainable development ‘means’ in a planning context but offers a process rather than a definition, a floating concept, applied primarily to describe development proposals that are compliant with the Framework rather than inherently sustainable in the traditional sense. The Framework uses the same words, but sustainable development in this context is not the same as sustainable development outside it.

The meaning of sustainable development is thus specific to the particular proposal which is the subject of that evaluative process. A comprehensive, retrospective analysis of decisions made by the Secretary of State demonstrated little specific consideration of the concept and hardly any consistency of approach. If anything, as the term was used in an increasingly

⁴⁰⁷ Richard Humphreys QC ‘Sustainable development: does the NPPF paragraph 14 ensure that future generations can meet their own needs?’ *Journal of Planning & Environment Law* 750-755

broad range of contexts its actual meaning was diluted rather than distilled. Although the judiciary often both assign meaning to words in a planning context and offer interpretations of individual words, they tend not to assign any consistent meaning to the term sustainable development itself, and pay little regard to the 'ordinary ad natural' Brundtland-based meaning of the words, beyond an occasional rogue reference to residual discretion.

The third hypothesis brings us back to Humpty Dumpty. The principle of interpretation most often referred to from *Tesco* is that the planning authority does not live in the world of humpty dumpty and cannot make a development plan policy mean what it wants it to mean. After a significant and sustained process of analysis of both appeal decisions and planning case law it does seem that the Secretary of State free to decide which developments are, or are not, compliant with the Framework. The courts rarely intervene with the Secretary of State's decision making process, restricting their scrutiny to considering the way in which the proposal has been weighed for consistency and conformity with the Framework itself. He is a de facto Humpty Dumpty.

The research has supported the hypotheses, leaving the concept of sustainable development without a stable or reliable meaning. The final part of this thesis considers the implications for the planning system generally and whether there are any more palatable alternatives.

Planning in Wonderland

Summary

On 20th December 2010 the Minister of State at the Department for Communities and Local Government announced plans to publish “a simple and consolidated national planning framework that covers all forms of development and sets out national economic, environmental and social priorities”⁴⁰⁸. This document would also include a presumption in favour of sustainable development, as part of a “strong basis for economic growth.”

Unlike all previous presumptions - in favour either of a specific development plan or of a particular development - this presumption applied to any development considered ‘sustainable’. It imported an evaluative criterion into the legal test that – unlike the concept of development – had no formal or enforceable definition. The term ‘sustainable development’ did have a strong historical association with concern for protection of the natural environment and improvement of global prospects for less prosperous nations. The presumption in favour of sustainable development was intended to act as a golden thread running through the Framework. Instead it planted an inherent tension between the Framework’s overt intention of establishing a policy foundation for national economic growth and a policy presumption that came with its own hinterland of environmental concerns and conscious growth restriction.

This research was undertaken with the aim of exploring that tension, to understand as fully as possible what the new presumption meant in the particular context of the Framework. The research began with a summary of the existing legal test for the determination of planning decisions including the role of policy presumptions. The origins and development of the concept of sustainable development in international, national and UK policy were explored to establish the ‘ordinary and natural’ meaning of the term. The proposal, draft, consultation, and adopted versions of the Framework were scrutinised for their use, in a purely linguistic sense, of the term sustainable development. The research explored the practical effect of the new presumption through a detailed analysis of a substantial cross-section of planning appeal decisions and court judgments, to see if there was any consistency in terms of assessing sustainability, whether there were any commonly used interpretative methods and the extent to which notions of sustainable development within the context of the Framework conformed to established understandings of that term.

⁴⁰⁸ HC Deb 20th December 2010 Col144WS

The research did not uncover a consistent definition or even widely accepted understanding of what sustainable development meant in the context of the Framework. The Framework refers to three dimensions of sustainable development and even recites the Brundtland definition, but customises the concept of sustainable development through the intersecting consequences of the requirements of paragraphs six and fourteen. The sustainability or otherwise of a proposal is assessed primarily on whether it is consistent with the Framework. Appeals are determined on a case-by-case basis with no consistent evaluative standards applied so that assessment of sustainability is a qualitative, individual exercise entirely dependent on the unique combination of the proposal, its locality and the planning policy context. The judiciary, unwilling to interfere with the decision maker's discretionary scope, also generally limit their consideration of sustainable development to whether or not conformity with the Framework has been properly considered.

The research did reveal a number of ways in which the claims made for the Framework when it was introduced were not upheld in practice.

The 2010 statement introducing the Framework stated that it would be “used as a mechanism for delivering Government objectives only where it is relevant, proportionate and effective to do so”. Chapter 4 revealed a strong selection bias in the use of call in and recovery powers by the government to intervene in the decision making process relating to renewables and traveller developments – even in some cases for proposals involving a single caravan. Government powers of intervention have since the introduction of the Framework been used more frequently, in relation to a wider scope of applications and appeals, and arguably to greater effect, reducing significantly the prospects of any traveller or renewables developments being approved on appeal.

The 2010 statement said that “The framework will be: localist in its approach, handing power back to local communities to decide what is right for them”. In theory, there are a very wide range of actors involved in the planning process including planning officers, local authority members, and the community affected. Technically, all should have a say in whether or not a development is sustainable. In practice, particularly in relation to larger scale and more contentious proposals, the assessment of sustainability can easily be taken out of the hands of the local authority, by the use of the Secretary of State's powers of recovery or call in. The result is that in relation to a proposal of any significance, the exercise of planning judgment, including the determination of whether or not the proposal constitutes sustainable

development in the terms set out in the Framework, is carried out by a planning inspector or the Secretary of State himself.

The 2010 statement said that the Framework would provide “clear policies on making robust local and neighbourhood plans and development management decisions.” As chapters 6 and 7 show, because sustainability is assessed based primarily on conformity with the Framework a number of Framework policies, most notably paragraph 4, have proved very difficult to interpret so that a simple phrase such as ‘policies for the supply of housing’ is now set to be interpreted by the Supreme Court.

The meaning of sustainable development remains the most opaque policy area of all. There is an inherent tension between the concept of sustainable development as it is traditionally understood and its use as the bedrock for a policy intended to function as a “strong basis for economic growth.” Sustainable development for planning purposes is defined primarily in terms of its conformity with a pro-growth document - part of what Allmendinger has referred to as a system is “rigged to promote growth”⁴⁰⁹ The Framework refers to three dimensions of sustainable development and even recites the Brundtland concept, but the essence of the concept - the need to restrict the growth of some world populations to preserve environmental capacity for others - is rarely acknowledged or applied. The environmental or social impacts of a particular decision are easily ignored in favour of perceived economic benefits, usually linked to creation of jobs or housing. Nevertheless, echoes of Brundtland remain, as is shown in the current war of words between High Court judges over whether the words include an element of residual discretion.

Scope for further research

There are three areas of related research that could usefully be undertaken but are beyond the scope of this work.

Central government influence over the planning system appears to be increasing in scope and significance. The government seems increasingly keen to use its powers to alter policy through written ministerial statements and influence local decision making through call in and recovery powers. There also seems to be an increasing central appetite for the use of powers to intervene in the plan-making process – for example a new power under the 2016 Housing and Planning Act was used to intervene in Birmingham City plan process and the

⁴⁰⁹ Philip Allmendinger *Neoliberal Spatial Governance* Routledge p18

emerging Neighbourhood Planning Bill includes powers to direct County Councils to make plans on behalf of their districts. This is combined with an increasing tendency to encourage the emergence of planning at a neighbourhood level. The emerging Neighbourhood Planning Bill includes proposals making it easier to adopt and modify these plans and to ensure that they are considered in the decision-making process. The tension between these two movements – and the implications for the local authorities in the middle – would be an interesting area of future study, particularly in view of the likely challenge to the most recent ministerial statement on neighbourhood plans.

Another area worth further consideration is the impact of Brexit on the planning system. The EIA Directive currently requires the environmental assessment of development proposals and is the only empirical control of this kind on planning proposals. Once the Great Repeal Act is brought in the government will be able to choose whether to re-impose these controls and if that re-imposition should be on a national, regional or local basis. In a political context where the ‘cost’ of growth is already resisted, there may be little if any appetite to replicate them when they are no longer required. The Environmental Audit Committee noted in April 2016 that “if the UK were free to set its own environmental standards, it would set them at a less stringent level than has been imposed by the EU”.⁴¹⁰ Post-referendum, Caroline Lucas expressed her concerns more directly: “it is all very well importing all of this EU law into national legislation but then who plays the part of the Commission?” Given that the answer provided by Rob Cooke (Director of Biodiversity National England) was “we have the Supreme Court. Whether that is the appropriate mechanism I do not know I am afraid” this is an area that will benefit from extended scrutiny as the Great Repeal Bill makes its way through parliament.

Finally, in December 2015 the Government began a review of the Framework itself through a consultation that proposed a range of changes including a new definition of affordable housing, increased density standards around commuter hubs and ‘sustainable new settlements’.⁴¹¹ The Government’s response to the outcome of the consultation is likely to be published at the same time as the Government’s response to the report of the Local Plans Expert Group⁴¹² and in parallel with a Housing White Paper. That White Paper may well include a new presumption, this time in favour of housing on suitable brownfield land.⁴¹³

⁴¹⁰ Environmental Audit Committee, *EU and UK Environmental Policy Third Report* (HC 537 2016)

⁴¹¹ Department for Communities and Local Government ‘Consultation on Proposed Changes to Planning Policy December 2015

⁴¹² Neighbourhood Planning Bill Public Bill Committee Gavin Barwell evidence 18 October 2016

⁴¹³ Government Response to the Report of the House of Lords Select Committee on the Built Environment, November 2016, CM 9347

It is not at all clear how, or if any of these changes will affect the presumption in favour of sustainable development but it is certainly worth monitoring.

Conclusion

The 1980s were dominated by the ‘planning by appeal’ approach facilitated by the introduction of a presumption in favour of development and supported by a growth-focussed political agenda aimed at delivering economic recovery. In 2017 England is once again struggling to recover from a sustained period of economic depression, not entirely unlike that of the 1980s. Once again the property sector, in particular the housing market, is seen as a key mechanism for delivery, not only of new homes but also of economic recovery and growth. Once again the orientation of the planning system has been shifted by the introduction of a presumption. The legal test for deciding planning permissions has survived that 30 years with few changes to its text. In the meantime, the policy context within which it operates has come full circle. However, the new presumption is not – as it was previously – a presumption in favour of a particular development, but a presumption in favour of any development – so long as it is sustainable as that term is defined in the Framework.

The Framework is a relevant, material consideration in the determination of each and every application for planning permission. The meaning of ‘sustainable development’ within the Framework is being considered daily as the benchmark for whether or not planning permission should be granted in relation to a wide range of proposals by planning officers, planning committees, planning inspectors, and the secretary of state. The term has many meanings in the planning context – and none. The definitional possibilities of sustainable development are ring-fenced by the content of the Framework itself and whether a development is considered sustainable is entirely dependent on the constantly mutating interaction between the development proposed, local circumstances and the policy context. The presumption in favour of sustainable development can be used to restrict or permit planning permission for a wide range of developments, with little regard either to previous local or national policy approaches or traditional understandings of sustainable development. This undermines, rather than preserves the Brundtland principles from which the term sustainable development has evolved.

In the 2012 *Tesco* case Lord Reed asserted that “planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like

it to mean”⁴¹⁴. This may or may not be true in relation to local authorities and development plans; in relation to sustainable development, the combination of the wide discretion available to the decision maker and the vague, contingent way in which that term is defined and employed in this particular context facilitates what can only be described as a ‘Humpty Dumpty’ approach to decision making. As the maker of policy, and with the scope to insert himself as decision maker into any planning consent process, the Secretary of State is the ‘master’ of the relevant discretionary space, the decision maker “sitting at the apex of the planning system”.⁴¹⁵ Securely perched at the top of the decision-making hierarchy the Secretary of State is indeed the master of planning and able to adopt a Humpty Dumpty approach to the meaning of sustainable development.

In December 2014 The Communities and Local Government Select Committee published its report on the NPPF. The first recommendation was that paragraph 6 - the statement that the policies in paragraphs 18 to 219, taken as a whole, constitute the Government’s view of what sustainable development means in practice – should be removed, and that the page 2 definition – clearly referencing Brundtland – should “stand on its own.” The Government response, published in February 2015, rejected that recommendation, stating instead that it was for the planning system to look for environmental, social and economic gains, depending on the particular development in its specific context⁴¹⁶. The government also rejected opposition proposals for statutory definitions of sustainable development in the committee proceedings prior to enactment of 2016 Housing and Planning Act and currently underway for the Neighbourhood Planning bill.

The government shows no appetite for changing the current definition of sustainable development in the Framework or for adopting a new definition in any of the emerging legislation. A definition is nevertheless required. There are already two legislative examples – section 39 of the 2004 Act or section 2 of the Wellbeing of Future Generations (Wales) Act 2015. Alternatively the Government could adopt sustainable development goals for planning that would enable a sustainable development ‘scorecard’ to be produced for proposed developments.

It seems unlikely that the Government will introduce either a statutory definition of sustainable development or any kind of empirical analysis of the sustainability of particular

⁴¹⁴ Tesco Stores Ltd v Dundee City Council (Scotland) [2012] UKSC 13 (21 March 2012) para 19

⁴¹⁵ Clive Moys “Has the Town and Country Planning Act 1990 stood the test of time? J.P.L. 2016, 5, 447-456

⁴¹⁶ CLG Committee *Inquiry into the operation of the National Planning Policy Framework* Government response (CM 9016 February 2015)

proposals. Unfortunately this leaves judges, rather than policy makers and communities, as the individuals who consider and rule on the meaning of sustainable development. Even more unfortunately this seems likely to produce outcomes like that of paragraph 53 of Mr Justice Green's judgement in *East Staffordshire* and set out on below in full.⁴¹⁷

'The third material error in the Inspector's Decision is that he found that the proposal was a "sustainable development" as that term is defined in the NPPF. I do consider this to be an error essentially for the reasons set out above in relation to the second error: The Inspector has not explained why the Proposed Development is "sustainable" when it *prima facie* is inconsistent with significant policies in the Local Plan. There is one aspect of the argument that has caused me some hesitation. The Inspector says that the proposal was a "sustainable development". This is expressly set out in the second sentence of paragraph [40] of his Decision (see paragraph [18] above). I agree with Mr Justice Jay in *Cheshire* at paragraph [24] where he states that the point of paragraph [14] is to lead decision makers "... *along a tightly defined and constrained path, at the end of which the decision must be: is this sustainable development or not?*". The reference to "or not" is a reference to the binary outcome of the paragraph [14] process. But that conclusion is not decisive because (as was also recognised by Mr Justice Jay) it is accepted that there is a discretion outside of paragraph [14]. It is therefore, in principle, open to a decision maker to approve a proposal which is not, technically speaking, "sustainable development" within the meaning of paragraph [14]. In all probability *if* a development was approved outside the scope of paragraph [14] it would have to be "sustainable" else it is hard to see how or why it could or would have been properly approved. Mr Choongh for the Developer gave an illustration of a site that might he argued theoretically fall outside of a Local Plan but would nonetheless be "sustainable". He hypothesised a scenario whereby ten sites were initially submitted to the authority as possible sites for development. Each of these sites was eminently sustainable in a physical sense. However the authority chose only 8 of the 10 sites upon the basis that only 8 sites were needed when set against the present economic and policy based assessment of housing need. It was argued that this would not, without more, indicate that sites 9 and 10 were "unsustainable". They would have been rejected for reasons other than their intrinsic "sustainability". As such, he argued that paragraph [14] could not lead, inexorably, to a conclusion that any proposal inconsistent with the Local Plan was for a site which was necessarily unsustainable. However, counsel for both the Local Authority and Secretary of State declined to pin their forensic colours to an endorsement of this proposition. Both considered that it would be highly unlikely that a development on an unplanned site would be acceptable or "sustainable" and they pointed out that under paragraph [7] NPPF a site might well be defined as unsustainable for a variety of micro or macro-economic, social or environmental reasons such that Mr Choongh's example they considered begged more questions than it answered. I see some force in this argument but it does not wholly explain how one categorises a development which is inconsistent with a Local Plan yet is still, quite properly, to be approved: would such a development not, *ex hypothesi*, be sustainable?

If this is indeed the 'meaning' of sustainable development then the planning system is indeed heading for Wonderland.

⁴¹⁷ *East Staffordshire Borough Council v Secretary of State for Communities & Local Government & Anor* [2016] EWHC 2973

Table 1: use of ‘sustainable development’ in Framework proposal

P3: means development that meets the needs of the present without compromising the ability of future generations to meet their own needs
P3:the core principle underpinning planning
P3: recognises the importance of ensuring that all people should be able to supply their basic needs
P3: means planning for prosperity
P3: means using the planning system to promote strong vibrant communities
P3: means using the planning system to help tackle climate change
P5: the National Planning Policy Framework...will play a key role in supporting sustainable development
P6: Heading: Delivering sustainable development
P6: presumption in favour of sustainable development... a golden thread running through both plan making and decision taking
P 6: applying the presumption in favour of sustainable development in this context will mean...
P6 : principles are key to building a planning system that makes the best use of land to deliver sustainable development
P7 : development plans must aim to achieve the objective of sustainable development
P7 : documents...should only be necessary...where their production can help to bring forward sustainable development
P14: development management and plan making...should recognise the presumption in favour of sustainable development
P15: local planning authorities should apply the presumption in favour of sustainable development
P22:Transport Policies...facilitating sustainable development
P37: If proposing a new Green Belt, local planning authorities should..show what the consequences of the proposal would be for sustainable development
P38: the need to promote sustainable patterns...consider the consequences for sustainable development ...ensure consistency with the Local Plan strategy for meeting identified requirements for sustainable development

Table 2: use of ‘sustainable’ in Framework proposal

P3:Planning has a key role in securing and delivering a sustainable future
P3: planning system must play an active role in guiding development to sustainable solutions
P4: enabling the delivery of the homes, infrastructure and work places that the country needs in a sustainable way is the principal function of the planning system
P18: the government is committed to securing sustainable economic growth
P18 to help achieve sustainable economic growth, the government’s objectives are...
P21: Local planning authorities should support sustainable growth...sustainable rural tourism
P22: infrastructure necessary to support sustainable economic growth
P22: local authorities should consider whether the opportunities for sustainable transport have been taken up
P22: the need to encourage increased delivery of homes and sustainable economic development
P27: minerals are essential to support economic growth
P27 : The government’s objective for the planning system is to...facilitate sustainable use of energy materials
P29 : (Heading) facilitate sustainable use of energy materials
P32 : government is seeking to: create sustainable inclusive and mixed communities
P33 : (heading) create sustainable communities
P33: to create sustainable and inclusive communities, local planning authorities should...
P52: local planning authorities should recognise that the ability to move waste by more sustainable modes can justify an extension of the proximity principle

Table 3: Use of “Sustainable development” in Framework consultation

<p>Foreword:</p> <p>The purpose of planning is to help achieve sustainable development</p> <p>Sustainable development is about change for the better</p> <p>Sustainable development is about positive growth</p> <p>A presumption in favour of sustainable development that is the basis for every plan, and every decision</p> <p>In order to fulfil its purpose of helping achieve sustainable development, planning must not simply be about scrutiny</p>
P1: Taken together, these policies articulate the Government's vision of sustainable development
P4: At the heart of the planning system is a presumption in favour of sustainable development..
P4: All plans should be based upon and contain the presumption in favour of sustainable development
P7: Development plans must aim to achieve the objective of sustainable development...including the presumption in favour of sustainable development
P13: Neighbourhood plans will be ...subject to the presumption in favour of sustainable development
P15: The primary objective of development management is to foster the delivery of sustainable development
P15: The relationship between development management and plan making should be seamless and both should recognise the presumption in favour of sustainable development
P16: In assessing and determining development proposals, local planning authorities should apply the presumption in favour of sustainable development
P19: In considering applications for planning permission, local planning authorities should apply the presumption in favour of sustainable development
P31: The presumption in favour of sustainable development means that Local Plans should be prepared on the basis that objectively assessed development needs should be met
P31: To promote sustainable development, housing in rural areas should not be located in places distant from local services
P33: good design...is a key element in achieving sustainable development

P43: local planning authorities should apply the presumption in favour of sustainable development
P46: Plans should allocate land with the least environmental or amenity value where practical, having regard to other policies in the Framework including the presumption in favour of sustainable development
P48: when determining planning applications in accordance with the Local Plan and the presumption in favour of sustainable development, local planning authorities should aim to conserve and enhance biodiversity

Table 4: Use of “Sustainable” in Framework consultation

P1: Planning has a key role in securing a sustainable future
P4: Development likely to have a significant effect on sites protected under the Birds and Habitats Directives would not be sustainable
P18: The Government is committed to securing sustainable economic growth
P18: To help achieve sustainable economic growth, the Government's objectives are
P20: Planning policies should support sustainable economic growth..support the sustainable growth of rural businesses
P21: The transport system needs to be balanced in favour of sustainable transport modes
P21: The planning system should therefore support...sustainable modes of transport
P21: the provision of viable infrastructure necessary to support sustainable economic growth
P21: planning policies and decisions should consider whether the opportunities for sustainable transport modes have been taken up
P22: planning strategies should protect and exploit opportunities for the use of sustainable transport modes
P30: Everyone should have the opportunity to live in high quality, well designed homes, which they can afford, in a community where they want to live. This means...creating sustainable, inclusive and missed communities.
P35: (Heading) Sustainable Communities
P35: planning policies and decisions should...ensure that established shops, facilities and services are able to develop and modernise in a way that is sustainable
P48: development likely to have a significant effect on sites protected under the Birds and Habitats Directives would not be sustainable under the terms of the presumption in favour of sustainable development
P58: (definition) Sustainable Drainage Systems cover the whole range of sustainable approaches to surface drainage management
P58: (definition) Sustainable transport modes: any means of transport with low impact on the environment including walking and cycling, green or low emission vehicles, car sharing and public transport

Table 5: Use of “sustainable development” in Framework

<p>Foreword:</p> <p>Sustainable development is about change for the better</p> <p>sustainable development is about positive growth</p> <p>presumption in favour of sustainable development that is the basis for every plan</p> <p>in order to fulfil its purpose of helping achieve sustainable development, planning must not simply be about scrutiny</p>
<p>P2: broad principles of sustainable development...sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs...five ‘guiding principles’ of sustainable development</p>
<p>P2: 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</p>
<p>P2: there are three dimensions to sustainable development</p>
<p>P3: to achieve sustainable development, economic, social and environmental gains should be sought jointly and simultaneously</p>
<p>P3: pursuing sustainable development involves seeking positive improvements</p>
<p>P3: plans and decisions need to take local circumstances into account, so that they respond to the different opportunities for achieving sustainable development.</p>
<p>P3: (heading) the presumption in favour of sustainable development</p>
<p>P4: at the heart of the National Planning Policy Framework is a presumption in favour of sustainable development</p>
<p>P4: policies in local plans should follow the approach of the presumption in favour of sustainable development...all plans should be based upon and reflect the presumption in favour of sustainable development</p>
<p>P9: Transport policies have an important role to play in facilitating sustainable development</p>
<p>P9: local authorities should work with neighbouring authorities and transport providers to develop strategies for the provision of viable infrastructure necessary to support sustainable development</p>
<p>P13: Housing applications should be considered in the context of the presumption in favour of sustainable development</p>
<p>P13/14: new settlements...local planning authorities should consider whether such opportunities provide the best way of achieving sustainable development</p>

P14: to promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities
P14: good design is a key aspect of sustainable development
P19: if proposing a Green Belt, local planning authorities should...show what the consequences of the proposal would be for sustainable development
P20: when drawing up or reviewing Green Belt boundaries local planning authorities should...consider the consequences for sustainable development
P20: when defining boundaries, local planning authorities should ensure consistency with the local plan strategy for meeting identified requirements for sustainable development
P28: the presumption in favour of sustainable development does not apply where developments requiring appropriate assessment under the Birds or Habitats Directives is being considered.
P37: Local Plans are the key to delivering sustainable development
P37: Local plans must be prepared with the objective of contributing to the achievement of sustainable development
P37: local planning authorities should seek opportunities to achieve each of the economic, social and environmental dimensions of sustainable development
P41: pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking
P43: neighbourhood planning gives communities direct power to...deliver the sustainable development they need
P44: neighbourhood plans will be able to shape and direct sustainable development
P45: local planning authorities should approach decision-taking in a positive way to foster the delivery of sustainable development
P46: in assessing and determining development proposals local planning authorities should apply the presumption in favour of sustainable development

Table 6: Use of “sustainable” in Framework

Foreword: Sustainable means ensuring that better lives for ourselves don't mean worse lives for future generations
Foreword: development that is sustainable should go ahead without delay
P4: development which is sustainable can be approved without delay
P5: planning should...proactively drive and support sustainable economic development
P6: The Government is committed to ensuring that the planning system does everything it can to support sustainable economic growth
P7: applications for alternative uses of land or building should be treated on their merits having regard to...the relative need for different land uses to support sustainable communities
P9: different policies and measures will be required...to maximise sustainable transport
P9: local authorities should...support a pattern of development which, where reasonable to do so, facilitates the use of sustainable modes of transport
P10: plans and decisions should take account of whether...the opportunities for sustainable transport modes have been taken up
P10: plans and decisions should ensure development that generate significant movement are located where the need to travel will be minimised and the use of sustainable transport modes can be maximised
P11: high quality communications infrastructure is essential for sustainable economic growth
P13: To deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable inclusive and mixed communities..
P17: planning policies and decisions should.. ensure that established shops, facilities and services are able to develop and modernise in a way that is sustainable
P19: the need to promote sustainable patterns of development
P23: where climate change is expected to increase flood risk ..some existing development may not be sustainable in the long term
P32: minerals are essential to support sustainable economic growth
P57: (definition) Sustainable transport modes: any efficient, safe and accessible means of transport with overall low impact on the environment

Table 7: Call-in decisions

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
1	APP/L2250/V/10/2131934 APP/L2250/V/10/2131936 10/4/13	Runway extension and 'starter extension' to the north/ south runway". Passenger terminal and car park	Proposals may conflict with national policies on important matters.	Grant	Grant	35: the core planning principle set out at NPPF paragraph 17 for planning to proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs is of particular relevance.
2	APP/W2275/V/11/2158341 11/7/2013	Extension of Quarry; variation of conditions	Proposals may conflict with national policies on important matters.	Grant	Grant	26: whilst there are a number of other considerations to be weighed in the balance, there is no reason why the scheme should be considered unsustainable
3	APP/E3715/V/12/2179915 7/8/13	Restaurant, Business, hotel, leisure with associated car parking and landscaping	Proposals may conflict with national policies on important matters.	Grant	Grant	Page 2 heading "Development plan and sustainable development" 9: proposal would...accord with the 3 dimensions to sustainable development set out in paragraph 7 of the Framework (IR8.45).
4	APP/M2270/V/10/2126410 APP/M2270/V/10/2127645 1/5/14	Demolition of three listed structures	No reason given	Grant	Grant	Not mentioned
5	APP/N5660/V/13/2205181 APP/N5660/V/13/2205182 APP/N5660/V/13/2205183 APP/N5660/V/13/2205185 5/6/14	Mixed use development of offices residential retail leisure community uses and transport infrastructure	No reason given	Grant	Grant	Not mentioned
6	APP/G2815/V/12/2190175 11/6/14	Home and garden centre, retail units, restaurant, lakeside visitor centre,	No reason given	Grant	Grant	13. key policies and provisions in the adopted development plan are out of date...applying paragraphs 18 to 219 of the Framework as a

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
		outline application for the erection of a hotel, crèche and leisure club				whole, the proposal amounts to sustainable development
7	APP/X1118/V/13/2201290 13/6/14	demolition of existing and the erection of 1 new dwelling together with refurbishment of an existing annexe,	No reason given	Refuse	Refuse	Not mentioned
8	New Barnfield, Hatfield PP/M1900/V/13/2192045 8/7/14	demolition of existing library buildings and construction and operation of a Recycling and Energy Recovery Facility (RERF)	proposal involved matters giving rise to substantial cross boundary or national controversy	Refuse	Refuse	Not mentioned
9	APP/K5030/V/13/2205294 8/7/14	office and retail with associated servicing and access	None given	Refuse	Refuse	33: the application would ...seriously undermine any economic, social or environmental benefits otherwise arising from the development, such that the proposal would not represent sustainable development

TABLE 8: Recovered Appeals: Travellers

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
1	APP/C1950/C/12/ 2171233 APP/C1950/C/12/ 2171238 APP/C1950/A/12/ 2171238 10/4/13	Enforcement: use of land for 5 caravans and hard standing,	Major development in Green Belt	Refuse	Refuse	Not considered
2	APP/C3620/A/12/ 2169062, 2169066 2169068; APP/C3620/C/12/ 2172090, 2172094, 2172095, 2172099, 2172104, 2172106, 2172116 2172145 10/4/13	Caravan pitches, utility buildings, pitches for mobile homes, paddocks, associated hard standing and buildings	Major development in Green Belt	Grant	Grant	Not considered
3	APP/G1630/C/12/ 2180596 APP/G1630/C/12/ 2180598 10/7/13	Enforcement: residential caravan use, parking, storage, hard standing walls piers fencing lights	Significant development in Green Belt	Refuse	Refuse	Page 6 heading Sustainable Location ... the site is not ideally located to encourage the use of modes of transport other than the private car...occupiers would be primarily reliant on a private motor car for most journeys
4	APP/Q3630/A/12/ 2169543 11/7/13	Extension of mobile home site for 28 pitches.	Significant development in Green Belt	Grant	Grant	
5	APP/G5180/A/11/ 2154680 Croydon Road Keston 14/8/13	Residential gypsy site, fencing and hard standing	Significant development in Green Belt	Grant	Refuse	Heading 'Sustainability and accessibility ...site is in a generally accessible location ...no objections to either scheme on grounds of sustainability or accessibility
6	APP/R0660/A/12/ 2183629 Spinks Lane Knutsford 22/8/13	Site for 3 mobile homes, 3 caravans, hard standing	Significant development in Green Belt	Refuse	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
7	APP/E3715/C/11/ 2153638 APP/E3715/C/11/ 2154137 APP/E3715/A/11/ 2153749 27/8/13	Enforcement: use of the land for residential caravan site	Significant development in green belt	Grant	Refuse	Heading of 'sustainability'...the site is reasonably well located with regard to accessibility, and that there would be some other sustainability benefits arising from the development,
8	APP/P0240/A/12/ 2179237 27/8/13	Application for 6 caravans ancillary buildings and hard standing	Significant development in green belt	Grant	Grant	Not mentioned
9	APP/J1915/C/11/ 2165291 APP/J1915/C/11/ 2165292 APP/J1915/A/11/ 2168447 29/8/13	Enforcement: change of use to caravan site for 3 mobile homes, 3 caravans, hard standing	Significant development in green belt	Refuse	Refuse	Heading of "Sustainability"... 'site ...would provide many other sustainable benefits.. can be afforded modest weight'
10	APP/J1915/C/10/ 2133783; 2133788; 2133790; 2133791; 2133859; 2133863; 2133866; 2133868; 2133869; 2133871; 2133873; 2133875; 2133876; 2133877; 2133878; 2133883; 2133884; 2168537 4/9/13	use of the site for mobile homes and caravans keeping animals, construction of stable building, hard standing	Significant development in green belt	Refuse	Refuse	"Sustainability" heading Para 22 ' the site occupies a highly sustainable location in respect of access to services and facilities and is a location that is potentially conducive to integration of gypsies and travelers with the settled community'
11	APP/J1915/C/12/ 2179609 Esbies Estate 4/9/13	Enforcement: mobile home	Significant development in green belt	Refuse	Refuse	Not mentioned
12	APP/H1515/C/12/ 2180289, 90, 91, 92, 93, 94, 95, 96 & 97 18/9/13	Enforcement: change of use to residential caravan site.	Significant development in green belt	Grant	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
13	APP/H1515/A/12/ 2173169 18/9/13	Change of use to provide pitch for traveller family.	Significant development in green belt	Grant	Refuse	Para 14 ' reliance on the car, the distance to services and the deterioration of the track all count against the proposal in terms of achieving a sustainable form of development
14	APP/V1505/A/11/ 2156547	Change of use of land from grazing to residential and stabling	proposals giving rise to substantial regional or national controversy	Refuse	Refuse	Not mentioned
15	APP/T3725/A/13/ 2192556 22/10/13	Change of use to 9 pitch traveler site and associated remedial works	Significant development in green belt	Refuse	Refuse	Not mentioned
16	APP/L3625/A/12/ 2188747 30/10/13	Change of use to house and caravan site	Significant development in green belt	Grant	Refuse	Not mentioned
17	APP/L3625/A/12/ 2188740 30/10/13	Change of use to caravan site	Significant development in green belt	Grant	Refuse	Not mentioned
18	APP/Q4625/A/13/ 2195328 21/11/13	Change of use of land for residential caravans	Significant development in green belt	Grant	Refuse	27...deficiencies are more than outweighed by other factors of sustainability;
19	APP/A0665/A/12/ 2181449 19/12/13	Change of use to caravan site	Significant development in green belt	Refuse	Refuse	13. ... the site is in a sustainable location and that considerable weight should be attached
20	APP/J1535/A/12/ 2177311 & APP/J1535/C/12/ 2181659 16/1/14	Enforcement: stationing of caravans hard standing	Significant development in green belt	Grant	Refuse	Not mentioned
21	APP/P5870/A/13/ 2191403 22/1/14	Replacement bungalow	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
22	APP/X4725/A/13/ 2197675 28/1/14	Change of use from grazing to 10 gypsy caravan pitches	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
23	APP/V1505/C/12/ 2172410,2172413 , 2172414 and 2172415 29/1/14	Use of site for residential purposes	Substantial regional or national controversy	Quash all notices	Quash one, uphold others	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
24	APP/Y3425/A/13/ 219 5269 11/2/14	Change of use to mobile homes and hard standing	Significant development in Green Belt	Refuse	Refuse	Not mentioned
25	APP/Q3630/C/12/ 2181871 and APP/Q3630/A/12/ 2181860 18/2/14	Enforcement: mobile home and use as gypsy pitch	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
26	APP/M0655/A/12/ 2177362 27/2/14	Change of use to showmen's family quarters,	Traveler site in the Green Belt	Grant	Grant	Not mentioned
27	APP/P0119/A/12/ 2178088 5/3/14	Replacement dwelling	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
28	2187806 and 2183467 5/3/14	Enforcement: use of site for residential caravan and two mobile homes	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
29	APP/R4408/A/12/ 2180999 23/4/14	Residential caravans	Significant development in green belt	Refuse	Refuse	Not mentioned
30	PP/X1355/A/12/2 173888 23/4/14	Replacement of single storey with 2 storey house	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
31	APP/R4408/A/12/ 2181184 29/4/14	Residential caravan site for 3 families	Significant development in Green Belt	Grant	Refuse	Not mentioned
32	APP/H1840/A/12/ 2170076 29/4/14 29 April 2014	1 mobile home and caravan for one family	Significant development in Green Belt	Grant	Grant	Not mentioned
33	APP/G2245/A/12/ 2185283 30/4/14	Use of site for mobile home caravan and building	Significant development in Green Belt	Refuse	Refuse	Not mentioned
34	APP/E2734/A/13/ 2200726 APP/E2734/C/13/ 2193766 22/5/14	Use of land as a private gypsy site for one family	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
35	APP/A0665/A/12/ 2187406 27/5/14	Change of use to caravan site for 3 gypsy families	Significant development in the Green Belt.	Grant	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
36	APP/H4315/C/12/2174652 28/5/14	Residential development	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
37	APP/N0410/A/12/2185586 3/6/14	Two Gypsy and Traveler pitches	Traveler site in the Green Belt	Refuse	Refuse	
38	APP/F4410/A/13/2208605 3/6/14	Change of use to site for two Traveler families	Significant development in the Green Belt.	Refuse	Refuse	Not mentioned
39	APP/Q5300/A/13/2198024 5/6/14	Change of use to caravan site for one traveler family	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
40	APP/K0425/A/11/2159978 APP/K0425/A/12/2183066 5/6/14	Change of use for traveler site including 2 mobile homes and 2 caravans	Traveler site in the Green Belt	Grant	Grant	Not mentioned
41	APP/F4410/A/13/2208600 10/6/14	Application for change of use to keeping horses and residential	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
42	APP/M1005/C/12/2180387 & APP/M1005/C/12/2180391 12/6/14	Use of land for residential caravan	Traveler site in the Green Belt	Refuse	Refuse	Heading: Whether the appeal site represents a sustainable location
43	APP/K3415A/12/21778761 18/6/14	Application for residential occupation for traveler family	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
44	APP/Y3615/A/12/2180027 1/7/14	One additional pitch on an existing 6 pitch site	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
45	APP/B5480/C/13/2201240 1/7/14	Enforcement: 2 mobile homes	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
46	APP/B5480/C/12/2177932 and 2181567 1/7/14	Enforcement: 4 gypsy and traveler pitches	Traveler site in the Green Belt	Refuse	Refuse	Not mentioned
47	APP/Y3615/C/2206135 and APP/Y3615/A/13/2206124 8/7/14	Enforcement: change of use from woodland to caravan site	Traveler site in the Green Belt.	Refuse	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
48	APP/M3645/A/13/ 2193478 9/7/14	Cchange of use to a gypsy and traveler caravan site with one pitch	Traveler site in the Green Belt	Grant	Grant –	15. the proposed site would provide easier access to health, education and other essential services ... site would be economically sustainable...site would be sustainable
49	APP/R2330/A/13/ 2203895 15/7/14	Change of use of land for the keeping of horses and as a residential caravan site	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
50	APP/M0655/A/13/ 2191920 25/7/14 25 July 2014	Enforcement: change of use for stationing of caravans for residential occupation by travelers	Significant development in the Green Belt.	Grant	Grant	Not mentioned
51	APP/R5510/C/13/ 2192003/04 29/7/14	Enforcement: use of land for mobile home and touring caravan for residential purposes	Traveler site in the Green Belt.	Grant	Refuse	Not mentioned
52	APP/N2739/A/12/ 2176525 30/7/14	Use as traveler site	Traveler site in the Green Belt.	Refuse	Refuse	Not mentioned
53	APR/R1845/A/12/ 2183527 30/7/14	Enforcement: stationing of caravans for residential purposes	Traveler site in the Green Belt.	Grant	Refuse	Not mentioned
54	APP/E3715/A/13/ 2192742 5/8/14	Change of use of land to a private gypsy caravan site comprising one static and one mobile caravan	Significant development in the Green Belt.	Grant	Grant	Not mentioned
55	APP/P2365/C/12/ 2179831 and APP/P2365/A/12/ 2177366 5/8/14	Enforcement: residential caravans	Traveler site in the Green Belt.	Grant	Refuse	Not mentioned
56	APP/D0650/A/13/ 2196163 24/9/14	use of site for keeping horses and caravan	Significant development n the Green Belt	Refuse	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
57	APP/K0235/A/12/ 2187276 1/10/14	Change of use to caravan site hard standing and landscaping	High level of objections, planning history and controversy	Grant	Refuse	Not mentioned
58	APP/W3710/A/12/ 2181556 1/10/14	Change of use to residential caravan site 3 caravans, 2 static homes; two transit pitches and hard standing	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
59	APP/W3005/A/13/ 2208844 20/10/14	Residential caravan site for 3 pitches hard standing and new access	Significant development in the Green Belt	Refuse	Refuse	Not mentioned
60	APP/E3715/A/13/ 2192798 20/10/14	Two mobile homes, one day room and hard standing	Significant development in the Green Belt	Grant	Refuse	Not mentioned
61	APP/Y9507/A/13/ 2203067 23/10/14	Change of use of to a traveler site	Traveler site in South Downs National Park.	Grant	Refuse	...the proposal is broadly consistent with the wider sustainability objectives in the PPTS...proposal would have an adverse effect on the character and appearance of the area, contrary to the... environmental dimension of sustainability
62	APP/R5510/A/13/ 2196141 27/10/14	Use of the land as a gypsy and traveler caravan site and for the keeping horses	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
63	APP/T0355/A/13/ 2205599 30/10/14	Change of use of land to use as a residential caravan site for 8 gypsy families	Significant development in the Green Belt	Refuse	Refuse	Sustainability... the site is not contrary to the requirement to be sustainable economically, socially and environmentally ... a neutral factor in the planning balance
64	APP/J3720/A/12/ 21805707 30/10/14	Change of use to gypsy site 3 mobile homes, 3 caravans,.	Traveler site in the Green Belt	Grant	Reduce time limits	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
65	APP/U2235/A/12/ 2178069 15/11/14 Land at Nettlestead Maidstone Kent	Stationing 4 mobile homes storage of 4 touring caravans hard standing,	Traveler site in the Green Belt	Grant	Reduce time limits	Not mentioned
66	APP/H1840/A/13/ 2192787 5/11/14	Application for change of use of land for stationing 1 caravan	Traveler site in the Green Belt	Grant	Reduce time limits	Not mentioned
67	APP/R0660/A/13/ 2198596 11/11/14	Application for use of land for stationing caravans on 1 pitch	Significant development in the Green Belt	Grant	Refuse	Not mentioned
68	APP/N1920/C/13/ 2198021 10/11/14	Enforcement: use of land for stationing caravans and mobile homes	Significant development in the Green Belt	Grant	Refuse	Not mentioned
69	APP/G2245/A/13/ 2206402 11/11/14	Change of use to traveler site	Significant development in the Green Belt	Grant	Refuse	Not mentioned
70	APP/A0665/A/14/ 2213546 12/11/14	Enforcement: change of use from agricultural use to residential caravan site.	Traveler site in the Green Belt.	Refuse	Refuse	Not mentioned
71	APP/P1940/A/13/ 2209705 20/11/14	Change of use to residential caravan site	Traveler site in the Green Belt	Grant	Refuse	Not mentioned
72	APP/Q3630/C/12/ 2184256, 2124259, 2184257, 2184258 & 2184254 26/11/14	Enforcement: use of land for stationing mobile home and use as traveler pitch	Traveler site in the Green Belt.	Grant	Refuse	Not mentioned
73	APP/L3245/A/12/ 2179881 27/11/14	Change of use gypsy and traveler caravan site comprising one mobile home and two touring caravans	Traveler site in the Green Belt.	Grant	Refuse	Not mentioned

TABLE 9: Recovered Appeals: Renewables

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
1	APP/F5540/A/12/ 2174323 15/5/2013	20MW biomass fuelled renewable energy plant with associated development	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Grant	Government's planning policies offer strong support for an increase in generating capacity from renewable sources...the proposal constitutes a sustainable form of development
2	APP/E0915/A/12/ 2170838 and APP/E0915/A/12/ 21777996 23/5/13	Six wind turbines and nine wind turbine generators,	Another Government department has raised major objections/ has a major interest.	Grant	Refuse	Not mentioned
3	APP/D0515/A/12/ 2181777 and APP/A2525/A/12/ 2184954 9/10/13	Six wind turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Refuse	Refuse	Not mentioned
4	APP/T3535/A/13/ 2193543 16/10/13	24MW solar farm and associated infrastructure	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Refuse	Not mentioned
5	APP/Z0923/A/13/ 2191361 4/12/13	6 Wind turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Refuse	Refuse	Not mentioned
6	APP/Y0435/A/10/ 2140401; APP/K0235/A/11/ 2149434; APP/H2835/A/11/ 2149437 17/12/13	12 turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Refuse	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
7	APP/MO993/A/12/2185234 28/1/14	1 turbine	Secretary of State announcement 10/10/13	Refuse	Refuse	Not mentioned
8	APP/Q9495/A/12/218858 11 Feb 2014	1 wind turbine	Secretary of State announcement 10/10/13	Refuse	Refuse	Not mentioned
9	APP/X1545/A/12/2174982 APP/X1545/A/12/2179484 APP/X1545/A/12/2179225	7 wind turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Grant	...it would be sustainable development to which the presumption in favour set out in Framework would apply
10	APP/V3310/A/12/2186162 25/2/14	4 wind turbines	No reason given	Grant	Refuse	Not mentioned
11	APP/Y2430/A/13/2191290 4/3/14	9 wind turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Refuse	Not mentioned
12	APP/D0840/A/12/2189476 14/4/14	1 wind turbine	Renewable Energy Development	Grant	Grant	...the proposal would be sustainable development to which the presumption in favour set out in Framework would apply
13	APP/G0908/A/13/2191503 18/4/14	1 wind turbine	Secretary of State announcement 10/10/13	Grant	Refuse	Not mentioned
14	APP/N2739/A/13/2204642 15/5/14	1 wind turbine	Secretary of State announcement 10/10/13	Refuse	Refuse	Not mentioned
15	APP/E2001/A/13/2190363 21/5/14	9 wind turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
16	APP/J3530/A/13/ 2193911 22/5/14	Solar park	Renewable Energy Development	Refuse	Refuse	Not mentioned
17	APP/Y2736/A/13/ 2201109 27/5/14	10 wind turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Refuse	Not mentioned
18	APP/P2935/A/13/ 2193153 29/7/14	2 wind turbines	Renewable Energy Development	Refuse	Refuse	Not mentioned
19	APP/Y0435/A/12/ 2186522 29/7/14	5 wind turbines	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Refuse	Not mentioned
20	APP/V3310/A/13/ 2197449 31/7/14	4 wind turbines	Secretary of State's announcement 10/10/13	Refuse	Refuse	Not mentioned
21	APP/Y2003/A/12/ 2180725 31/7/14	10 wind turbines	No reason	Refuse	Refuse	the development is...contrary to the development plan...presumption in favour of sustainable development in the Framework is not triggered
22	APP/P2935/A/13/ 2194915 31/7/14	5 wind turbines	Renewable Energy Development	Refuse	Refuse	Not mentioned
23	APP/D2510/A/13/ 2200887 28/8/14	3 wind turbines	No reason	Refuse	Refuse	Not mentioned
24	APP/F2605/A/12/ 2185306 25/9/14	2 wind turbines	Renewable Energy Development	Refuse	Refuse	Not mentioned
25	APP/B3030/A/12/ 2183042 29/9/14	3 wind turbines	Renewable Energy Development	Grant	Grant	Not mentioned
26	APP/J3720/A/13/ 2193579 1/10/14	4 wind turbines	Renewable Energy Development	Refuse	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
27	APP/E2001/A/13/ 2207817 15/10/14	6 wind turbines	Impact beyond the local area	Refuse	Refuse	Not mentioned
28	APP/A3010/A/13/ 2201459 21/10/14	biomass fuelled combined heat and power plant	Proposal of major significance for delivery of the Government's climate change programme and energy policies	Grant	Grant	against the policies in the Framework as a whole, the proposal represents a sustainable form of development
29	APP/L2630/A/13/ 2207755 27/10/14	4 wind turbines	Renewable Energy Development	Grant	Refuse	Not mentioned
30	APP/Y2810/A/13/ 2203312 17/11/14	One wind turbine	Renewable Energy Development	Grant	Refuse	Not mentioned
31	APP/B3030/A/13/ 2208417 19/11/14	2 wind turbines	Renewable Energy Development	Refuse	Refuse	Not mentioned

TABLE 10: Recovered Appeals: Residual

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
1	APP/W4515/A/12/ 2175554 8/5/13	residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... the proposal would have acceptable sustainability credentials ... the appeal scheme would represent a sustainable form of development.
2	APP/U4230/A/12/ 2170252 8/5/13	Residential, leisure, retail	Development of major importance having more than local significance	Refuse	Refuse	Not mentioned
3	APP/X2410/A/12/ 2173673 14/5/2013	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... the presumption in favour of sustainable development set out in paragraph 14 of the Framework is engaged ... while there are harmful aspects ...these have to be weighed against the very substantial contribution to housing needs ... the presumption in favour of sustainable development should be the decisive factor.
4	APP/U5930/E/11/ 2165344 APP/U5930/A/11/ 2165348 APP/U5930/A/12/ 2183662 22/5/13	Change of use for religious purposes	Proposals giving rise to substantial regional or national controversy.	Refuse	Refuse	Not mentioned
5	APP/Z2260/A/11/ 2163595 13/6/13	Retail and residential	Town centre use in a development of over 9,000 square metres gross floor space in an out-of-centre location	Grant	Grant	Not mentioned
6	APP/C1435/A/12/ 2186147 18/6/13	residential	Residential development of over 150 units, or on sites of over 5 hectares	Refuse	Refuse	Not mentioned except in heading: "whether the proposal would be a sustainable form of development"

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
7	APP/W4705/A/11/ 2161990 APP/W4705/A/11/ 2162739 APP/W4705/E/11/ 2162736 19/6/13	Residential, infrastructure	Residential development of over 150 units, or on sites of over 5 hectares	Refuse	Refuse	16... the proposal represents a sustainable form of development
8	APP/M1520/A/12/ 2177157 26/4/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Allow	Refuse	Not mentioned
9	APP/W4515/A/12/ 2186878 3/7/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	...there is no fundamental reason to disagree with the assessment of the appellant that the proposal would represent sustainable development
10	APP/Z2830/A/12/ 2183859 14/7/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	14...the presumption in favour of sustainable development ... is engaged...failure to demonstrate a 5 year supply of deliverable housing sites is a matter to which substantial weight must be accorded.
11	APP/J4423/A/12/ 2178393 18/7/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... proposal would comply with CS policies CS64 and CS65 and would be a sustainable form of development for which there is a presumption in favour
12	APP/R0660/A/12/ 2187264 18/7/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	Not mentioned
13	APP/N1160/A/12/ 2169472 5/8/13	Mixed use and residential	Residential development of over 150 units, or on sites of over 5 hectares	Refuse	Refuse	... the scheme would not amount to sustainable development and would conflict with the relevant CS policies and the Framework (IR15.82).
14	APP/A0665/A/11/ 2167430 29/8/133	Residential	Substantial regional or national controversy	Refuse	Grant	...the scheme may be placed on the positive end of the sustainability spectrum (IR200).

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
15	APP/W4515/A/12/ 2175554 3/9/13	Residential	Not mentioned	Grant	Grant	Not mentioned
16	APP/P1133/A/12/ 2188938 10/9/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	the “presumption in favour of sustainable development” set out in the Framework applies and permitting the proposed development would take a positive step forward towards addressing the District’s current shortfall in housing provision which would outweigh the harm caused in other respect
17	APP/G3110/A/13/ 2195679 11/9/13	Change of use from D2 to use class D1	Development of major importance having more than local significance .	Grant	Grant	Not mentioned
18	APP/H1705/A/12/ 2188125 APP/H1705/A/12/ 2188137 11/9/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	Not mentioned
19	APP/E5900/A/12/ 2178920 23/9/11	Business and residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	Not mentioned
20	APP/C3105/A/12/ 2184094 23/9/11	Residential	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Grant	The scheme represents sustainable development which would make a significant contribution towards addressing the undersupply of housing in the District.
21	APP/C3105/A/13/ 2189896 23/9/13	Residential	To enable consideration at the same time as three other appeals	Grant	Grant	...represents sustainable development which would make a significant contribution towards addressing the undersupply of housing in the District

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
22	APP/C3105/A/12/ 2189191 23/9/13	Residential	To enable consideration at the same time as three other appeals	Grant	Grant	...represents sustainable development which would make a significant contribution towards addressing the undersupply of housing in the District
23	APP/C3105/A/12/ 2178521 23/9/13	Residential	To enable consideration at the same time as three other appeals	Grant	Grant	...represents sustainable development which would make a significant contribution towards addressing the undersupply of housing in the District
24	APP/H0738/A/13/ 219538 26/9/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	Not considered
25	APP/V0728/A/13/ 2190009 26/9/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	...appeal scheme represents sustainable development making a contribution to the undersupply of housing including housing for a variety of types of households
26	APP/B3410/A/13/ 2189989 3/10/13	Residential and local centre	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	.. proposal can be regarded as a sustainable development, and under the Framework there is a presumption in favour of granting permission
27	APP/R0660/A/10/ 2141564 17/10/13	residential	Residential development of over 150 units, or on sites of over 5 hectares	Refuse	Grant	... purpose of the planning system is to contribute to the achievement of sustainable development... requires decision makers to take a positive attitude to development proposals ... identifies three dimensions ... appeal proposals would fulfill an economic role ...it would fulfil an important social role...the appeal proposals represent sustainable development.

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
28	APP/M2325/A/13/ 2192188 APP/M2325/A/13/ 2196027 7/11/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	When assessed against the Framework as a whole, he concludes the schemes would comprise sustainable development
29	APP/B3410/A/13/ 2197299 12/11/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	...satisfied that the appeal site is in a sustainable location for housing development
30	APP/W3710/A/13/ 2192451 & APP/W3710/A/13/ 2195969 14/11/13	Canal marina and residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Refuse	Not considered
31	APP/A0665/A/12/ 2179410 & APP/A0665/A/12/ 2179374 18/11/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... impact in combination or individually would not significantly and demonstrably outweigh the benefits of the proposals...the proposals represent sustainable development
32	APP/E2340/A/13/ 2195745 26/11/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Refuse	Refuse	... the scheme is relatively unsustainable because of failings with the design approach...the adverse impacts of the scheme...significantly and demonstrably outweigh the identified benefits...would not meet the tests as regards the presumption in favour of sustainable development.
33	APP/M2325/A/13/ 2196027 26/11/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	Not mentioned
34	APP/H0900/A/12/ 2187327 12/12/13	Disposal of nuclear waste	Development of major importance having more than local significance.	Refuse	Refuse	...development would represent a substantial financial interest ...needs to be balanced against the harm...little of no social benefit .. few sustainability benefits.

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
35	APP/F0114/A/13/2191952 18/12/13 Bath	Retail and business	Town Centre use more than 9,000 sq. m in an edge-of-centre or out-of-centre location	Refuse	Refuse	Not mentioned
36	APP/E5900/A/13/2203743 21/1/14	Free school	Development of major importance having more than local significance.	Grant	Grant	Not mentioned
37	APP/T2350/A/13/2194601 23/1/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Refuse	Refuse	... no 5-year housing land supply...planning permission should be granted for a housing scheme if that can be judged sustainable...minor to moderate objections...not sufficient to outweigh the presumption in favour of sustainable development...adverse impacts of allowing the appeal proposal would significantly and demonstratively outweigh the benefits
38	APP/MO655/A/13/2203059 4/2/14	School	Development of major importance having more than local significance.	Grant	Grant	Not mentioned
39	APP/B3410/A/13/2193657 12/2/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	...the appeal site is in a sustainable location for housing development;
40	APP/T2350/A/13/2190088 20/2/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... planning balance falls strongly in favour...accords with the policies in the Framework including the presumption.
41	APP/F0114/A/13/2195351 4/3/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Refuse	... the appeal site, being relatively close to the centre of the village, cannot be said to be unsustainable

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
42	APP/F0114/A/13/ 2199958 5 th March	Residential	Significant development in the Green Belt.	Refuse	Refuse	Not mentioned
43	APP/J3720/A/13/ 2202101 and APP/J3720/A/13/ 2205529 5/3/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	Not mentioned
44	APP/X2410/A/13/ 2196928 & APP/X2410/A/13/ 2196929 8/4/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	...overall, the scheme represents a suitable and sustainable development where other material considerations outweigh the limited development plan conflict.
45	APP/A1530/A/13/ 2195924 16/4/14	Stour Valley Visitor Centre	Substantial regional or national controversy.	Refuse	Refuse	... site cannot be considered to be in a sustainable location ...the scheme is in an inherently unsustainable location
46	APP/F2415/A/12/ 2183653 17/4/14	Residential and sports	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Refuse	...Paragraph 185 of the Framework states that.. neighbourhood plans will be able to shape and direct sustainable development...
47	APP/T2350/A/13/ 2197091 22/4/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... planning balance falls strongly in favour of the proposal...it accords with the policies in the Framework including the presumption in favour of sustainable development.
48	APP/D3830/A/13/ 2198213 and 2198214 1/5/14	Care home and residential	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Grant	... it is a sustainable form of development capable of meeting the housing need of the District ... proposals are sustainable forms of development entitled to the presumption in favour of development.
49	APP/V1505/A/13/ 2204850 17/6/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Refuse	Refuse	Not mentioned

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
50	APP/B2002/A/13/ 2203957 19/6/14	residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... proposal accords with policies in the Framework including the presumption in favour of sustainable development.
51	APP/H1840/A/13/ 2202364 2/7/14 Long Marston	residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... appeal scheme should be regarded as being in accordance with paragraph 17 of the Framework as being a location which can be made sustainable... appeal scheme would contribute to the achievement of the environmental role of sustainable development.
52	APP/H1840/A/13/ 2199085 APP/H1840/A/13/ 2199426 2/7/14	residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... Appeal A scheme is sustainable in terms of economic, environmental and social benefits
53	APP/B1930/A/09/ 2109433 14/7/14	Strategic rail freight interchange	More than local significance, development within Green Belt	Grant	Grant	Not mentioned
54	APP/L2630/A/13/ 2196884 7/8/14 Norfolk	Housing	Because of court judgment 18 February 2014 on the case of Barnwell Manor Wind Energy Limited v Northamptonshire District Council	Refuse	Refuse	...site is appropriately located in relation to services and facilities but would fail to protect the natural and historic environment...as such the weight afforded to the provision of sustainable development is limited
55	APP/D3830/A/12/ 2189451 4/9/14	Housing	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Refuse	... main consideration in this case is whether the proposal constitutes sustainable development within the context of the Framework.

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
56	APP/D3830/A/13/ 2203080 4/9/14	Housing	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Grant	...whether the proposal constitutes sustainable development ... represents a sustainable form of development which accords with the emerging NP
57	APP/D3830/V/14/ 2211499 4/9/14	Housing	Proposal includes matters which may conflict with national policies on important matters. .	Refuse	Refuse	... proposal fails to satisfy the environmental dimension of sustainable development as set out in the Framework
58	APP/Y3940/A/13/ 2200503 8/9/14 Wiltshire	Residential	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Refuse	Not mentioned
59	APP/E5900/A/12/ 2186269 16/9/14	Concrete batching plant	Another Government department has raised major objections or has a major interest.	Refuse	Refuse	Not mentioned
60	APP/N0410/A/14/ 2215541 17/9/14	Change of use to school	Development of major importance having more than local significance.	Refuse	Grant	Not mentioned
61	APP/H1705/A/13/ 2205929	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	...planning balance falls strongly in favour of the proposal and the adverse impacts do not come close to significantly and demonstrably outweighing the benefits ...proposal benefits from the presumption in favour of sustainable development

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
62	APP/B1930/A/13/ 2207696 13/10/14	residential	Significant development in the Green Belt	Grant	Grant	Environmental Role ... in respect of location and movement to a low carbon economy, the sustainability of the appeal site is positive....Social Role...proposed housing would contribute to the support, strengthening and vibrancy of the local community... Economic Role...proposal would enhance the economy of the community by the creation of jobs
63	APP/M0655/A/13/ 2201665 23/10/14	Landfill extension	Significant development in the Green Belt	Refuse	Refuse	Not mentioned
64	APP/Y3940/A/13/ 2206963 27/10/14	Residential	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Refuse	... it would represent a sustainable form of development...does not consider that the benefits of the scheme significantly or demonstrably outweigh its adverse impacts
65	APP/Z2260/A/14/ 2213265 29/10/14	Residential	Proposals raise important or novel issues of development control and/or legal difficulties	Grant	Grant	... provision of housing, including family and affordable dwellings, and the school and community facilities, would all contribute positively to the social role of sustainable development and that the activity of developing the site would also contribute to the economic role...the scheme amounts to sustainable development
66	APP/K2420/A/13/ 2208318 18/11/13	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Grant	... scheme amounts to sustainable development

	Appeal Ref and date	Development	Reason	INS	SoS	Sustainable Development
67	APP/J0405/A/13/2205858 20/11/14	Residential	Residential development of over 150 units, or on sites of over 5 hectares	Grant	Refuse	... proposal would provide sustainable homes that would have economic, social and environmental benefits ...absence of a 5 year housing land supply...resulting social benefits attract significant weight in favour of the development...the relevant housing policies in the Winslow Neighbourhood Plan are out of date... presumption in favour of sustainable development in the Framework means that the appeal should be allowed

TABLE 11 Case Summaries: Sustainable Development

1	<p>Name: Hunston Properties Ltd v Secretary of State for Communities and Local Government [2013] EWHC 2678</p> <p>Date: 5/9/13</p> <p>Judge: Pelling</p> <p>Development: Residential, care home and associated facilities</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Reference to paragraph 6 of the Framework, including the three dimensions, and stressing need to focus on all of them (12) • Acknowledged that the presumption was applicable in this case (27, 29) • Primarily concerned with application of the Framework as a whole (29)
2	<p>Name: Fordent Holdings Ltd v Secretary of State for Communities and Local Government & Anor [2013] EWHC 2844</p> <p>Date: 26/9/13</p> <p>Judge: Pelling</p> <p>Development: Caravan and camping site</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Reference to paragraph 6 of the Framework, including the three dimensions, and stressing need to focus on all of them (6) • Some consideration of the weight to be given to economic considerations (36 - 39)
3	<p>Name: Wakil (t/a Orya Textiles) & Ors v London Borough of Hammersmith and Fulham [2013] EWHC 2833</p> <p>Date: 9/10/13</p> <p>Judge: High Court, Admin, Justice Lindlom</p> <p>Development: mixed use redevelopment</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Considered whether publication of the final version of the Framework should have resulted in reconsideration of the whole issue; • NPPF “the authentic expression of the present administration's planning policy for England” (107) • “Although the Government's definition of sustainable development was refined after the consultation on the draft NPPF, the change was of no significance” (113) • Noted paragraph 49 and link between sustainable development and housing (114)
4	<p>Name: William Davis Ltd & Anor v Secretary of State for Communities and Local Governments & Anor [2013] EWHC 3058</p> <p>Date: 11/10/13</p> <p>Judge: Justice Lang</p> <p>Development: residential and associated development</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • “the Inspector and the Secretary of State directed themselves correctly by asking the question whether the proposed development was "sustainable development (37)...quintessentially a planning judgment”(38). • “paragraph 14 NPPF only applies to a scheme which has been found to be sustainable development. It would be contrary to the fundamental principles of NPPF if the presumption in favour of development in paragraph 14 applied equally to sustainable and non-sustainable development” (37)

5	<p>Name: Scrivens v Secretary of State for Communities & Local Government [2013] EWHC 3549</p> <p>Date: 11/11/13</p> <p>Judge: Collins</p> <p>Development: 'autarktic' or self-sufficient dwelling</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • applicant relied on the definition in the Renewed EU Sustainable Development Strategy (10917/06), and on the 'Brundtland' definition in <i>Resolution 42/187 of the United Nations General Assembly</i> • "in deciding any individual application for planning permission, regard must be had to the objective of achieving sustainable development and, if the existing plans do not meet the requirements of s.39, they will not prevail if in such a case the need to achieve sustainable development would be frustrated" (7) • "the concept is very wide and is not necessarily limited to particular concerns about energy" (10). • "What is sustainable in any particular circumstance will depend on a number of material factors" (15). • stressed the need to consider present economic needs and the effect of 'unsightly' developments on future generations (16) • stressed the need for a 'judgment' to be applied within the context of the NPPF enabling the Inspector to have regard to issues other than those identified (17) • "energy considerations do not constitute a trump card"(19)
6	<p>Name: Cotswold District Council v Secretary of State for Communities And Local Government & Anor [2013] EWHC 3719</p> <p>Date: 27/11/13</p> <p>Judge: Lewis</p> <p>Development: outline planning permission for residential development</p> <p><u>Consideration of Sustainable Development</u></p> <p>"The material considerations relevant to any planning application include the Framework... Paragraph 6 explains that the purpose of the planning system is to contribute to sustainable development and the policies set out in paragraphs 18 to 219 of the Framework constitute the Government's view of what sustainable development in England means in practice for the planning system. Paragraph 7 explains that there are three dimensions to sustainable development: economic, social and environmental. The social dimension includes "supporting strong, vibrant healthy communities by providing the supply of housing required to meet the needs of present and future generations" (9)</p>

7	<p>Name: Corbett, R (On the Application Of) v Cornwall Council [2013] EWHC 3958 (Admin)</p> <p>Date: 12/12/13</p> <p>Judge: Lewis</p> <p>Development: five wind turbine generators at Higher Denzell Farm, St Mawgan Cornwall.</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Considered whether the application should have been formally reconsidered following adoption of the Framework because of differences between the draft and final document • “the critical issue is whether or not there is a material change between the earlier relevant policies and the later policies” (27), • in relation to renewable energy there was not (29, 32, 33, 39) • sustainable development had “three broad roles or components, an economic role to contribute to building a strong economy, a social role to support strong, vibrant and healthy communities and an environmental role”(30)
8	<p>Name: St Albans v Hunston Properties Ltd, R (On the Application Of) & Anor [2013] EWCA Civ 1610</p> <p>Date: 12/12/13</p> <p>Judges: Lord Justice Kay, Lord Justice Ryder, Lord Justice Keene</p> <p>Development: 116 dwellings, a care home and facilities</p> <p><u>Consideration of Sustainable Development</u></p> <p>“I have not found arriving at “a definitive answer” to the interpretative problem an easy task, because of ambiguity in the drafting... it would seem sensible for the Secretary of State to review and to clarify what his policy is intended to mean.”(4)</p>
9	<p>Name: Hampton Bishop Parish Council, R (On the Application Of) v Herefordshire Council [2013] EWHC 3947</p> <p>Date: 16/12/13</p> <p>Judge: Hickinbottom</p> <p>Development: Relocation of rugby club.</p> <p><u>Consideration of sustainable development</u></p> <ul style="list-style-type: none"> • Reference to presumption in paragraph 14 and the three dimensions (61) • Likens concept of sustainable development to role of development plan, seeking to “reconcile policies reflecting numerous conflicting interests, including the need for more housing, the need for more sports and recreational facilities, and the need to protect certain environmental and other assets” (121) • Refers to a presumption in favour of granting permission where there is insufficient land for housing (125)
10	<p>Name: North Norfolk District Council v Secretary of State for Communities and Local Government & Anor [2014] EWHC 279</p> <p>Date: 14/2/14</p> <p>Judge: Justice Purchas</p> <p>Development: Wind Turbine</p> <p><u>Consideration of Sustainable Development</u></p> <p>policy should be construed as providing for support and consideration in the context of sustainable development and climate change, taking account of the wide environmental, social and economic benefits of renewable energy gain and their contribution to overcoming energy supply problems as a general policy to be applied when renewable energy proposals are put forward (40)</p>

11	<p>Name: Barrow Upon Soar Parish Council v Secretary of State for Communities & Local Government & Ors [2014] EWHC 274</p> <p>Date: 19/2/14</p> <p>Judge: Collins</p> <p>Development: outline residential planning permission</p> <p>Consideration of Sustainable Development</p> <ul style="list-style-type: none"> • Paragraph 14 of the NPPF applied (5) • in this context it required “consideration of the policies contained in Paragraphs 18 to 219 taken as a whole.” (6) • particular reliance was placed on paragraph 173 (9) • “Even if the meaning of deliverable in the footnote to Paragraph 47 can be generally imported into Paragraph 173, there is no requirement that in order to be regarded as sustainable the development must be completed within 5 years.” (10) • “Since the NPPF was in the circumstances a highly material consideration, the presumption in favour of sustainable development clearly pointed in favour of the grant of permission. On the inspector’s findings, this was sustainable development. That conclusion was, as I have said, a proper one” (22)
12	<p>Name: Trafford Borough Council v (Secretary of State for Communities And Local Government & Anor [2014] EWHC 424</p> <p>Date: 24/2/14</p> <p>Judge: Stewart</p> <p>Development: 20 mega-watt biomass fuelled renewable energy plant</p> <p>Consideration of Sustainable Development</p> <ul style="list-style-type: none"> • Appendix III headed “Whether the Proposal Would Be Sustainable Development?” and considered evidence on the supply of waste wood and the assertions of sustainability. • Noted that “the supply situation is unlikely to be as clear cut” (621) but also that it could not be concluded that capacity exceeded supply (624, 627). The new evidence was material but not definitive (626). Greater weight would be given to the policy support for the position (627, 630) • On this basis “the proposal constitutes a sustainable form of development.” (631)
13	<p>Name: Langton Homes Limited v Secretary of State for Communities And Local Government & Anor [2014] EWHC 487</p> <p>Date: 27/2/2014</p> <p>Judge: Foskett</p> <p>Development: demolition of public house and construction of 7 dwellings</p> <p>Consideration of Sustainable Development</p> <p>The interrelationship of policies depended on the local planning context. The inspector’s approach was “articulated intelligibly...cannot further be criticised as an exercise in planning judgment.” (61)</p>

14	<p>Name: Plant, R (On the Application Of) v Pembrokeshire County Council & Anor [2014] EWHC 1040</p> <p>Date: 4/3/14</p> <p>Judge: Hickinbottom</p> <p>Development: 2 wind turbines</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Considered assertion that any policy that contravened an environmental aspiration could not be sustainable (31) • recognised competing environmental credentials of renewable power sources and impact on landscape (31) and that SP1 was ‘concerned with “sustainable development”’ (32) • development could not become unsustainable because of isolated negative impacts; instead “whether a development is sustainable requires an assessment of whether <i>overall</i> the development achieves a positive economic, social and environmental impact; i.e. whether, on the basis of all the material factors, the proposed development is appropriate and acceptable in planning terms” (32)
15	<p>Name: Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor [2014] EWHC 754</p> <p>Date: 19/3/14</p> <p>Judge: Lindblom</p> <p>Development: 91 houses</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • ruled on the meaning of the words ‘absent’, ‘silent’ and ‘out of date’ in paragraph 14 (44, 45) and stated that this was a matter of ‘objective interpretation’ (52). • it was for the decision maker to decide how the policy should be applied (46, 57) • plan was not absent or silent so the presumption did not apply (58, 61). • Inspector’s report was “an exercise of planning judgment shaped by the relevant provisions of the development plan”(61) and was not defective (63) • “I do not think he had to spell out that in this very obvious sense the development would be unsustainable.” (179)
16	<p>Name: Brown v Carlisle City Council [2014] EWHC 707</p> <p>Date: 21/3/14</p> <p>Judge: Collins</p> <p>Development: freight distribution centre</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • considered assertion that failure to comply with a planning policy meant that development was not to be regarded as sustainable.”(55) • The NPPF did not prevent the grant of a planning permission with “planning advantages” even where the policy context was unfavourable. Development could be regarded as sustainable where “the advantages in planning terms outweigh the disadvantages” • “the word sustainable in the NPPF is not defined; the reader has to work through some 200 paragraphs which indicate what particular matters can be taken into account”. • It was for the decision maker to balance the merits and “nothing in the NPPF detracts from, or varies that.” (56)

17	<p>Name: Earl Shilton Action Group, R (on the application of) v Hinckley and Bosworth Borough Council & Ors [2014] EWHC 1764</p> <p>Date: 7/4/14</p> <p>Judge: Hickinbottom</p> <p>Development: caravan site</p> <p><u>Consideration of Sustainable Development</u></p> <p>"Sustainable development" is not specifically defined in the NPPF, but is usually defined terms of development which meets the needs of the present without the compromising ability of future generations to meet their own needs. It is said in paragraph 6 of the NPPF that the policies set out in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development means in practice for the planning system. "Sustainability" therefore inherently requires a balance to be made of the factors that favour the proposed development and those that favour refusing it, in accordance with the relevant and national local policies." (14)</p>
18	<p>Name: Secretary of State for Communities and Local Government v Hopkins Developments Ltd [2014] EWCA Civ 470</p> <p>Date: 15/4/14</p> <p>Judges: Lord Justice Jackson, Beatson, Clarke</p> <p>Development: outline planning permission for 58 dwellings</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Jackson ruled that the question of sustainability was a live issue (68) and there was no procedural unfairness in it being a reason for refusal (69) • Beatson agreed and referred to "the issue of the sustainability of the development in the sense that term is used in the Framework - "the NPPF regards sustainable development as "a golden thread running through both plan-making and decision-taking" and states (paragraph 14) that "a presumption in favour of sustainable development lies at its heart" '(88) • sustainability was acknowledged as 'problematic' (90)
19	<p>Name: Lark Energy Ltd v Secretary of State for Communities And Local Government & Anor [2014] EWHC 2006</p> <p>Date: 20/6/14</p> <p>Judge: Lindblom</p> <p>Development: Solar farm</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • considered assertion that the Secretary of State did not take enough account of policies on renewable development (3) • The plan was not absent, silent or out of date so the Secretary of State did not have to refer to the presumption (62).
20	<p>Name: FCC Environment v (1) Secretary of State for Communities And Local Government (2) East Riding of Yorkshire Council [2014] EWHC 2035</p> <p>Date: 23/6/14</p> <p>Judge: Stewart Development: Wind Turbine</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • considered how proposal failed to represent sustainable development (35), how moderate harm to landscape could make development unsustainable (36) • overall conclusion that the turbines were unsustainable was 'justifiable' in this context (39)

21	<p>Name: Wynn-Williams, R (on the application of) v Secretary of State for Communities and Local Government [2014] EWHC 3374</p> <p>Date: 03/7/14</p> <p>Judge: Elvin</p> <p>Development: change of use to a tennis court</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Considered assertion that inspector applied Development Plan in preference to the presumption in favour of sustainable development • the effect of Paragraph 14 was simply to “set out consequences under “decision-making” which depend on the application of judgment by the decision-maker” (30). • The age of a policy did not make it inconsistent with the Framework (34) • Paragraph 14 of the Framework had the same ‘starting point’ as “section 38(6), namely whether the development proposals accord with the Development Plan” (30) • presumption could not be applied until that exercise had been gone through (36) • “paragraph 6 makes quite clear that what sustainable development means in terms of the NPPF is that which is set out in the substance of paragraphs 18 to 219.” (37) • “providing the decision maker has properly understood the issues, has not misunderstood the meaning of policy and has taken account of all material considerations, then there is no prescription the court should apply to the process undertaken by the decision-maker” (39)
22	<p>Name: Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government & Ors [2014]</p> <p>Date: 18/7/14</p> <p>Judge: Patterson</p> <p>Development: Replacement runway</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • “the policies must be construed in context and, in relation to the NPPF, that is a consideration of the document as a whole. Construed as a whole it is clear that the NPPF is seeking to simplify the previous plethora of planning policy; to make the planning system more accessible and encourage sustainable patterns of growth.” (46). • what mattered was determining decisions “in a NPPF policy context” (60)
23	<p>Name: Secretary of State for Communities and Local Government & Ors v Redhill Aerodrome Ltd [2014] EWCA Civ 1386</p> <p>Date: 24/10/14</p> <p>Judges: Lord Justice Sullivan, Lord Justice Tomlinson, Lord Justice Lewison</p> <p>Development: Replacement runway</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • “The Framework now places a presumption in favour of sustainable development at the heart of national planning policy” • There was a presumption in favour of grant “where relevant policies in the development plan are out of date” • This did not apply where Framework policies indicated that development should be restricted...“far from there being any indication that placing the presumption in favour of sustainable development at the heart of the Framework is intended to effect a change in Green Belt policy, there is a clear statement to the contrary.” (34)
24	<p>Name: Cheshire East Council v Secretary of State for Communities and Local Government & Ors [2014] EWHC 3536</p>

	<p>Date: 28/10/14</p> <p>Judge: Lewis</p> <p>Development: 94 Houses</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> considered whether the inspector erred in excluding housing development from assessment of whether the proposed development represented sustainable development (28) The inspector was aware of the difference between housing development and economic development. Sustainable development “has three aspects which need to be considered, economic, social and environmental” and the inspector rightly considered the contribution of housing “to the economic dimension of sustainability” (41)
25	<p>Name Morris, R (on the application of) v Wealden District Council [2014] EWHC 4081 (Admin)</p> <p>Date: 4/11/14</p> <p>Judge: Collins</p> <p>Development floodlights on a tennis court</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> Sustainable development is defined as that which provides for the needs of the future, including improvement as to quality of life in a way that minimises damage to local as well as local environment... it stems from, I think, a UN indication relating to climate change and a strategy which should be adopted in all countries. (12) according to the NPPF, what is sustainable development is to be gleaned from reading 200 paragraphs in the NPPF itself. However, as I have already indicated, I do not find that submission acceptable (26).
26	<p>Name: Crane v Secretary of State for Communities and Local Government & Anor [2015] EWHC 425 (Admin)</p> <p>Date: 23/2/15</p> <p>Judge: Lindblom</p> <p>Development: 111 dwellings, a sports hall, a neighbourhood centre, sports pitches,</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> Secretary of State was entitled to decide that the presumption was outweighed because of its adverse impacts (65) Paragraph 14 did not prescribe the weight to be given to out of date policies (71) “the decision-maker is required, when applying the presumption in favour of “sustainable development”, to consider every relevant policy in the NPPF.”(73) I the decision “ was not a conclusion beyond the range of reasonable planning judgment allowed to a decision-maker when undertaking the balancing exercise required by government policy in paragraph 14 of the NPPF.” (78) it was reasonably open to the Secretary of State to conclude that the “adverse impacts” of the appeal proposal, and especially its conflict with the Broughton Astley Neighbourhood Plan, would “significantly and demonstrably outweigh the benefits in terms of increasing housing supply”. This was, in my view, a wholly unimpeachable planning judgment (79)
27	<p>Name: Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor [2015] EWHC 410</p> <p>Date: 25/2/15</p>

	<p>Judge: Lang</p> <p>Development: outline planning permission for up to 146 dwellings</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • “the presumption in paragraph 14 of the NPPF only applies in favour of "sustainable" development. (17). • “In deciding whether or not a development is "sustainable", an Inspector has to consider both the description of sustainable development in paragraphs 6 to 10 of the NPPF, and the guidance on the way in which sustainable development may be achieved, set out in paragraphs 11 to 149 of the NPPF” (19) • logical for the Inspector in this appeal to decide what weight he should attach to the development plan, and to determine the issue of housing supply, before he considered the issue of sustainability(20) • the question whether or not the development is sustainable is a planning judgment for the Inspector to make on the evidence (24)
28	<p>Name: Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government & Ors [2015] EWHC 827</p> <p>Date: 26/3/15</p> <p>Judge: Lindblom</p> <p>Development: development of housing on land at the former Lympne Airfield in Kent</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • considered assertion that when presumption was engaged "the decision-maker must consider not only whether the plan's policies for the supply of housing are out of date, but also, specifically, which policies are out of date (62) • In the absence of a five year housing supply the presumption was engaged (67) and properly applied (68, 69, 71). • Inspector was entitled to make the judgments she did (72, 73) and there was nothing wrong with the way the policy presumption was applied “ (74) • Conclusion reached by deciding that the "substantial benefits" of the proposal were "significantly and demonstrably outweighed by the adverse impacts, when assessed against the policies in [the NPPF] as a whole" – “unmistakably in the language of paragraph 14 of the NPPF.” (74)
29	<p>Name: BDW Trading Ltd (t/as David Wilson Homes (Central, Mercia and West Midlands)) v The Secretary of State for Communities and Local Government & Anor [2015] EWHC 886 (Admin)</p> <p>Date: 1/4/15</p> <p>Judge: Hickinbottom</p> <p>Development: 114 dwellings</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • “rather than there being a presumption for development because there was no up to date plan, where the presumption lay depended upon whether the development was or was not in accordance with the new Stafford Plan” • There was therefore no substance to the second ground of the challenge –that the presumption was misapplied.
30	<p>Name: Wenman v The Secretary of State for Communities and Local Government & Anor [2015] EWHC 925</p> <p>Date: 21/4/15</p> <p>Judge: Lang</p>

	<p>Development: use of land for stationing a caravan</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • in order for the paragraph 14 assessment to be made properly, the decision maker had to carry out which housing policies were considered out of date, which were given weight and why (70) • “the Inspector was entitled to make a free-standing assessment of the sustainability of the proposed development, in the exercise of his planning judgment, at an appropriate stage in his reasoning process” (79)
31	<p>Name: Woodcock Holdings Ltd v Secretary of State for Communities And Local Government & Anor [2015] EWHC 1173 (Admin)</p> <p>Date: 1/5/15</p> <p>Judge: Holgate</p> <p>Development: outline planning permission for 120 dwellings, community facility/office space, care home and retail units</p> <p><u>Consideration of Sustainable Development</u></p> <ul style="list-style-type: none"> • Presumption described as “simply a broad statement of general application” (103) • “it does no violence to the language of paragraph 14 to treat the presumption in favour of sustainable development as weighing against housing supply policies” (104)

TABLE 12 Case Summaries: Meaning and Interpretation

	Case details	Comments on meaning and interpretation
1	RWE Npower Renewables Ltd, R (on the application of) v Ecotricity Ltd [2013] EWHC 751	it is now well established that planning policy statements, for example, in a development plan, have to be interpreted objectively in accordance with the language used read in its proper context. That task of interpretation (as distinct from any judgement involved in the application of any such policy) is a matter for the court itself: see Tesco Stores Ltd v Dundee City Council [2012] UKSC 13, [2012] PTSR 983 see eg per Lord Reed at [18]-[19].
2	Hunston Properties Ltd v Secretary of State for Communities and Local Government [2013] EWHC 2678	...proper construction of the NPPF requires the document to be read as a whole...it is necessary to take account of all the words used, that means that it is necessary to take account of the opening words of the paragraph – " <i>To boost significantly the supply of housing...</i> " the suggestion that the words "... in so far as is consistent with the policies set out in this Framework ..." requires or permits a decision maker to adopt an old RSS figure is unsustainable as a matter of language.
3	Fordent Holdings Ltd v Secretary of State for Communities and Local Government & Anor [2013] EWHC 2844	...The singular " <i>it</i> " does not lie easily with that word being intended to refer either to the plural " <i>new buildings</i> " in the opening sentence of Paragraph 89 or " <i>appropriate facilities</i> " in the opening line of the second bullet point... ... in my judgment in the context in which it is used, the word " <i>it</i> " in Paragraph 89 refers to and can only be referring to the " <i>facilities</i> " contemplated by the proposal being considered by the decision maker... the use of the singular as referring to something that is or might be plural does not justify departing from what otherwise is clear from the context.
4	William Davis Ltd & Anor v Secretary of State for Communities and Local Governments & Anor [2013] EWHC 3058	..I should apply the approach taken to the interpretation of development plans by the Supreme Court in <i>Tesco Stores Limited v Dundee City Council</i> [2012] UKSC 13.
5	Cotswold District Council v Secretary of State for Communities And Local Government & Anor [2013] EWHC 3719	It is now well established that the Secretary of State would be required to proceed upon a proper interpretation of the relevant planning policies and, for present purposes, the Framework. As the Supreme Court held at paragraph 18 in <i>Tesco Stores Ltd. v Dundee Council (Asda Stores Ltd. and another intervening)</i> [2012] UKSC 13 in relation to development plans: "... policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context". In the present case, there is a need to interpret paragraph 47 of the Framework correctly. That will involve determining, the correct approach to identifying a record of persistent under delivery of housing. That will involve, for example, consideration of the meaning of "persistent".

6	Corbett, R (On the Application Of) v Cornwall Council [2013] EWHC 3958	<p>In my judgment, information is "any other information" within the meaning of Regulations 2(1) and 19 of the EIA Regulations if it is substantive information provided by the applicant to ensure that the Council is provided with the information required for inclusion in an environmental statement as required by Schedule 4 to the EIA Regulations...</p> <p>Conversely, the phrase "any other information" in Regulations 2 and 19 does not include comments or responses made by the applicant in response to the concerns of, or points raised by, third parties or Council officers.</p> <p>... the phrase "any another information" must be read in context and in the light of the EIA Regulations as a whole....In context, therefore, "further information" and "any other information" is intended to be the information needed to ensure that the requirements for an environmental statement are met.</p> <p>.... The definition of any other information in regulation 2 is to be read accordingly and means any other substantive information provided by the applicant for planning permission to ensure that the information required for an environmental statement by Schedule 4 to the EIA Regulations is provided.</p> <p>...the Claimant's interpretation could lead to such odd or absurd consequences ... In my judgment, the regulations were not intended to produce such results.</p>
7	North Norfolk District Council v Secretary of State for Communities and Local Government & Anor [2014] EWHC 279	<p>The construction of the development plan policy is a matter of law for the court. In my judgment it is clear that the policy should be construed as providing for support and consideration in the context of sustainable development and climate change, taking account of the wide environmental, social and economic benefits of renewable energy gain and their contribution to overcoming energy supply problems as a general policy to be applied when renewable energy proposals are put forward.</p>
8	Trafford Borough Council v (Secretary of State for Communities and Local Government & Anor [2014] EWHC 424	<p>...A planning authority must proceed upon a proper understanding of the Development Plan...Policy statements should be interpreted objectively in accordance with the language read in its proper context and according to what is actually written...</p> <p>Policy statements should not be construed as if they were statutory or contractual provisions...Many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment....</p> <p>Matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State. ...</p> <p>interpretation of policy is a matter for the court, but the application of policy to a given set of facts is a matter for the decision maker, unless irrational or perverse.</p>

9	Langton Homes Limited v Secretary of State for Communities And Local Government & Anor [2014] EWHC 487	Mr Jones seeks to characterise that as a "thoroughly bad point" because the Inspector only identified the revocation of the EMRP as the matter that generated the need for further comments by the parties ...I do not consider that Mr Jones' argument on that issue is a good one – it is derived from too narrow a textual analysis of the relevant paragraph in the Inspector's decision letter.. I am, therefore, entirely satisfied that the Inspector was aware of the Scoping Consultation document and the arguments concerning its implications advanced by the Claimant which, in her view, she felt she had dealt with adequately in that sentence.
10	Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government & Anor [2014] EWHC 754	<p>...seven familiar principles:</p> <ul style="list-style-type: none"> • Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. ... <i>Seddon Properties v Secretary of State for the Environment</i> (1981) 42 P. & C.R. 26, at p.28). • reasons for an appeal decision must be intelligible and adequate, ... inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, <i>South Bucks District Council and another v Porter (No. 2)</i> [2004] 1 W.L.R. 1953, at p.1964B-G). • weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. • (Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. <i>Tesco Stores v Dundee City Council</i> [2012] P.T.S.R. 983, at paragraphs 17 to 22). • When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (<i>South Somerset District Council v The Secretary of State for the Environment</i> (1993) 66 P. & C.R. 80, at p.83E-H). • the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (<i>Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government</i> [2012] EWHC 1419). • Consistency in decision-making is important ...But it is not a principle of law that like cases must always be decided alike.
11	Earl Shilton Action Group, R (on the application of) v Hinckley and Bosworth Borough Council [2014] EWHC 1764	Here, in what I accept is a grammatically clumsy passage, the officer's report is simply saying that this strand of national policy should not be a reason for refusing the application...As I have indicated, an officer's report is not to be construed like a statute. There is a tenet of statutory construction that all words must have been intended to have conveyed something; but there no such tenet with regard to an officer's report. For the reasons that I have given, I consider that the words at the end of the quoted passage simply to have been there in error; and it would have been obvious to the Committee members that that was the case.

12	Cherkley Campaign Ltd, R (on the application of) v Mole Valley District Council & Anor [2014] EWCA Civ 567	<p>At paras 89-106 of his judgment the judge engaged in an elaborate examination of the meaning of "need" in paragraph 12.71 of the Local Plan, looking at dictionary definitions and at the general and specific context, and identifying both a geographical and a qualitative component. ...He concluded: "103. In my judgment, the word '<i>need</i>' in paragraph 12.71 means '<i>required</i>' in the interests of the public and the community as a whole, i.e. '<i>necessary</i>' in the public interest sense. '<i>Need</i>' does not simply mean '<i>demand</i>' or '<i>desire</i>' by private interests. Nor is mere proof of '<i>viability</i>' of such demand enough. The fact that Longshot could sell membership debentures to 400 millionaires in UK and abroad who might want to play golf at their own exclusive, 'world class', luxury golf club in Surrey does not equate to a '<i>need</i>' for such facilities in the proper public interest sense."</p> <p>It is common ground that in relation to the construction and application of planning policy statements the court should be guided by the principles summarised by Lord Reed in <i>Tesco Stores v Dundee City Council</i> [2012] UKSC 13, at paras 18-21.</p> <p>The text...is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy</p> <p>the exercise engaged in by the judge in the present case was one of interpretation, not application, ... It seems to me, however, that in holding that it required applicants to demonstrate that further golf facilities were "'<i>necessary</i>' in this part of Surrey in the interests of the public and the community as a whole" he adopted an unduly exacting and narrow interpretation of that statement.</p> <p>The word "need" has a protean or chameleon-like character, as Mr Findlay and Mr Katkowski respectively submitted, and is capable of encompassing necessity at one end of the spectrum and demand or desire at the other. The particular meaning to be attached to it in paragraph 12.71 depends on context. ... Overall I take the view that if any need requirement is to be read into the policy by reference to paragraph 12.71, "need" is to be understood in a broad sense</p> <p>In making his finding as to meaning the judge placed emphasis on the general context...his reasoning appears to have been that because planning control is exercised in the public interest, "need" must relate to the interests of the public and/or the community as a whole. I respectfully disagree with that reasoning.</p>
13	Lark Energy Ltd v Secretary of State for Communities And Local Government & Anor [2014] EWHC 2006	<p>Mr Newcombe pointed to the final sentence of paragraph 30, which begins with the words "Given this". Those two words, he submitted, can only sensibly be read as referring to the Secretary of State's comparison between the two schemes, rather than to the merits of the appeal scheme itself. I disagree. The words must be read sensibly in their context, "</p> <p>"Given this" could mean "Because of this" or "As a result of this"....There is, however, another way to read the expression "Given this". It could simply mean "In the light of this", or "Having regard to this", or "Taking this into account".</p>

14	<p>Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government & Ors [2014] EWHC 2476</p>	<p>In this case the starting point is what the relevant extant NPPF policies mean...the policies must be construed in context and, in relation to the NPPF, that is a consideration of the document as a whole.</p> <p>It is for the decision maker to determine whether the individual impact attains the threshold that warrants refusal as set out in the NPPF. That is a matter of planning judgement and will clearly vary on a case by case basis.</p> <p>Where an individual material consideration is harmful but the degree of harm has not reached the level prescribed in the NPPF as to warrant refusal, in my judgment, it would be wrong to include that consideration as "any other harm".</p> <p>the NPPF... has no words that permit of a residual cumulative approach in the Green Belt ...does contemplate findings of residual cumulative harm in certain circumstances.... Such phraseology does not appear in the Green Belt part of the NPPF.</p> <p>Once a development has been found to be inappropriate in the Green Belt it is by definition harmful. To that harm has to be added additional harm to the Green Belt. In the context of the NPPF that is what "any other harm" means.</p>
15	<p>Secretary of State for Communities and Local Government & Ors v Redhill Aerodrome Ltd [2014] EWCA Civ 1386</p>	<p>Do the words "any other harm" in the second sentence of paragraph 88 of the Framework mean "any other harm to the Green Belt" as submitted by the Respondent, and found by the Judge, or do they include any other harm that is relevant for planning purposes, such as harm to landscape character, adverse visual impact, noise disturbance or adverse traffic impact, as submitted by the Appellants?</p> <p>...If it had been the Government's intention to make such a significant change to Green Belt policy in the Framework one would have expected that there would have been a clear statement to that effect.</p> <p>It is true that the "policy matrix" (see paragraph 54 of the judgment) has changed ...I do not accept...that the other policies "wrapping around" the Green Belt policy in paragraphs 87 and 88 of the Framework are "very different" from previous national policy (see paragraph 24 of the judgment), or that, as the Judge put it, there has been "a considerable policy shift"...The Inspector's approach to "any other harm" was correct.</p>
16	<p>Ashburton Trading Ltd v Secretary of State for Communities And Local Government & Anor [2014] EWCA Civ 378</p>	<p>The starting point is the correct interpretation of CS9(E). That is a question of law for the court: see <i>Tesco Stores Limited v Dundee City Council</i> [2012] PTSR 983 at paras 17 to 21 per Lord Reed.</p> <p>In some cases, the words in a policy may "speak for themselves"... But in my view, this is not such a case. I do not consider that there is room for the exercise of planning judgment in determining the meaning of CS9(E).</p> <p>The meaning of "generally" in CS9(E) is a hard-edged question of construction for the court to determine... even if "generally" is surplusage, that is insufficient of itself to point to one interpretation rather than another.</p>

17	Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor [2015] EWHC 410	<p>It is not suggested, nor could it be, that the Secretary of State neglected or misunderstood the imperative in paragraph 47 of the NPPF "to boost significantly the supply of housing"</p> <p>In this case the Secretary of State did what paragraph 14 of the NPPF required him to do. This does not, in my view, show any misunderstanding of policy in the NPPF, nor a misapplication of it. On the contrary, the Secretary of State carried out the balance between "any adverse impacts" and "benefits", as paragraph 14 of the NPPF requires. The reasons he gave for his conclusions are, again, both intelligible and adequate. They are not in themselves legally deficient. And they betray no error of law...one comes back to the most elementary principle of planning law...that the weight to be given to material considerations, including statements of government policy, is a matter for the decision-maker to judge,</p>
18	Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government & Ors [2015] EWHC 827	<p>The approach the court must take to the interpretation of planning policy was explained by Lord Reed in his judgment in <i>Tesco Stores Ltd. v Dundee City Council</i> [2012]</p> <p>In my view the meaning of the policy is absolutely clear. There are two distinct concepts in it: the "requirement" and the "target". The policy is entirely consistent in differentiating between those two concepts. The distinction is not hard to understand. It is the difference between a need and an aspiration. A "requirement" in this context is something which is needed, which must be provided. A "target" is more ambitious; it is a goal that is set, which may or may not be attained. The "requirement" is the requisite minimum, which must be met whether or not the "target" is achieved. This is a normal use of those words, which gives them a natural meaning.</p> <p>In my view, to enlarge the task of construing a policy by requiring a multitude of other documents to be explored in the pursuit of its meaning would be inimical to the interests of clarity, certainty and consistency in the "plan-led system"</p>
19	Woodcock Holdings Ltd v Secretary of State for Communities And Local Government & Anor [2015] EWHC 1173	<p>The NPPF should not be construed as if it were a statute or a contract, any more than a development plan, and regard should be had to both the context and object of the policy being interpreted (<i>Tesco Stores v Dundee City Council</i> [2012] PTSR 983 paragraphs 19, 21 and 25 - 27)...Thus, it may be relevant, and sometimes necessary, to adopt a purposive construction of the policy in question.</p> <p>"relevant policies for the supply of housing", is not limited to relevant policies in the statutory development plan...the second key phrase, "should not be considered up-to-date", operates as a deeming provision which treats the relevant policies as being out of date so as to engage "the presumption in favour of sustainable development".</p>
20	Suffolk Coastal	the meaning of the policy in paragraph 49 of the NPPF has already been considered several times at first instance, with various results. ...

	District Council v Hopkins Homes Ltd & Anor [2016] EWCA Civ 168	<p>...two or three distinctly different possible interpretations of the policy.... the "narrow" interpretation...the "wider" or "comprehensive" interpretation...the so-called "intermediate" or "compromise" interpretation.</p> <p>The approach the court will take when interpreting planning policy is well settled. As Lord Reed said in <i>Tesco v Dundee City Council</i> [2012] UKSC 13 ...</p> <p>policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context".</p> <p>... The adjectives "up-to-date" and "out-of-date" do not always have an exactly opposite meaning in ordinary English usage. But in the way they are used in the NPPF we think they do.</p> <p>The contentious words are "[relevant] policies for the supply of housing". In our view the meaning of those words, construed objectively in their proper context, is "relevant policies affecting the supply of housing".</p> <p>The meaning of the phrase "for the supply" is also, we think, quite clear. The word "for" is one of the more versatile prepositions in the English language. It has a large number of common meanings. These include, according to the Oxford Dictionary of English, 2nd edition (revised), "affecting, with regard to, or in respect of".</p> <p>A "supply" is simply a "stock or amount of something supplied or available for use"</p> <p>Interpreting the policy in this way does not strain the natural and ordinary meaning of the words its draftsman has used. It does no violence at all to the language. On the contrary, it is to construe the policy exactly as it is written.</p>
21	Horada & Ors v Secretary of State for Communities and Local Government & Ors [2016] EWCA Civ 169	<p>... the citizen affected by a decision is entitled to an explanation of the reasons in plain English which the citizen can understand.</p> <p>Experts must therefore guard against speaking in terms which can only be understood through the intermediary of a lawyer or other professional.</p>
22	Lee Valley Regional Park Authority, R (on the	<p>The interpretation of planning policy is ultimately the task of the court, not the decision-maker. ...(see the judgment of Lord Reed in <i>Tesco Stores Ltd. v Dundee City Council</i> [2012] UKSC 13,</p>

	<p>application of) v Epping Forest District Council & Anor (Rev 1) [2016] EWCA Civ 404</p>	<p>The first sentence of paragraph 88 of the NPPF must not be read in isolation from the policies that sit alongside it. "</p> <p>This understanding of the policy in the first sentence of paragraph 88 does not require one to read into it any additional words. It simply requires the policy to be construed objectively in its full context</p> <p>Implicit in the policy in paragraph 89 of the NPPF is a recognition that agriculture and forestry can only be carried on, and buildings for those activities will have to be constructed, in the countryside, including countryside in the Green Belt...This is not a matter of planning judgment. It is simply a matter of policy.</p> <p>If the Government had meant to abandon that distinction between "inappropriate" and appropriate development, one would have expected so significant a change in national policy for the Green Belt to have been announced. But I also think that the argument Mr Jones founded on his distinction between "definitional harm" and "actual harm" fails on its own logic.</p> <p>The true position surely is this. Development that is not, in principle, "inappropriate" in the Green Belt is, as Dove J. said in paragraph 62 of his judgment, development "appropriate to the Green Belt". On a sensible contextual reading of the policies in paragraphs 79 to 92 of the NPPF, development appropriate in – and to – the Green Belt is regarded by the Government as not inimical to the "fundamental aim" of Green Belt policy</p>
23	<p>West Berkshire District Council Reading Borough Council v Department for Communities And Local Government [2015] EWHC 2222</p>	<p>In Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 the Supreme Court held (paragraphs 19-20) that it is the function of the courts to interpret planning policy, but the exercise of judgment in the application of a policy is a matter for the decision-maker, the planning authority.</p>
24	<p>Turner v Secretary of State for Communities and Local Government &</p>	<p>The question of the true interpretation of the NPPF is a matter for the court. In my judgment, the approach the Inspector adopted was correct and the judge was right so to hold.</p>

	Anor [2016] EWCA Civ 466	<p>The word "openness" is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case.</p> <p>The question of visual impact is implicitly part of the concept of "openness of the Green Belt" as a matter of the natural meaning of the language used in para. 89 of the NPPF.</p>
25	Loader, R (on the application of) v Rother District Council & Ors [2015] EWHC 1877	<p>Within the glossary, 'open space' is defined as including "All open space of public value... the assessment is not to be limited just to areas of land which are for active recreational use. That is not what a true reading of the paragraph says nor, indeed, is it consistent with healthy communities as contained within section 8 of the NPPF.</p> <p>The claimant contends that the policy and guidance give a broad interpretation of open space. I agree. A proper reading of the policy documents makes that clear.</p>
26	Milwood Land (Stafford) Ltd v Secretary of State for Communities and Local Government & Anor [2015] EWHC 1836	<p>"intention" might refer to the subjective intention of the author of a policy...the Inspector spoke of the intention of the words used...he used the term to mean the objective, or overall broad approach, or thrust, of the words used as derived from the words themselves seen in the context of the PSB as a whole.</p> <p>Development plans are full of broad statements of policy which have to be read flexibly and in their proper context (see <i>Tesco v Dundee</i>, especially at [18]-[21] and [34]-[35]).</p>
27	Menston Action Group, R (on the application of) v City of Bradford Metropolitan District Council & Anor [2015] EWHC 2292	<p>As a matter of the ordinary and natural meaning of the words used within the condition I reject the claimant's submission.</p>
28	Old Hunstanton Parish Council v Secretary of State for Communities and Local Government & Ors [2015] EWHC 1958	<p>I agree with Counsel for the Claimant that this evidence, as presented, does not demonstrate housing <u>need</u>; these are merely expressions of interest, which on closer investigation may, or may not, amount to "need", and which may, or may not, qualify as "local".</p> <p>"I consider that the natural meaning of the term, in this context, is not necessarily limited to the needs of the settlement in which the development is situated. It could also extend to the needs of other small rural settlements and communities nearby, if in the judgment of the decision-maker, they are "local".</p>
29	Pertemps Investments Ltd v Secretary of State for	<p>The proper interpretation of planning policy, whether in the development plan or in the NPPF or in some other policy document published by the Government, is ultimately a matter of law for the court (see the judgment of Lord Reed in <i>Tesco v Dundee City Council</i>, at paragraphs 19 to 22).</p>

	Communities And Local Government & Anor [2015] EWHC 2308	<p>The application of planning policy is a matter for the decision-maker, within the constraints of the statutory scheme, and subject to review by the court.</p> <p>I turn to Policy P17. ... its meaning is not hard to discern when its provisions are considered in their proper context...Policy P17 is deliberately aligned with national policy in the NPPF. Policy P17 could not be consistent with the NPPF if it expanded the "closed lists" in paragraphs 89 and 90... Policy P17 does no such thing.</p> <p>The error the inspector made is apparent in the penultimate sentence of paragraph 6 of his letter. In that sentence he said he saw "some tension" between Policy P17 and the NPPF. There is, I believe, no such tension. ...By reading that distinction into the disputed provision the inspector gave it a false meaning: ... the inspector misconstrued Policy P17. That was an error of law</p>
30	Nicholson, R (on the application of) v Allerdale Borough Council & Ors [2015] EWHC 2510	<p>In <u>Tesco Stores Ltd v Dundee City Council</u> [2012] PTSR 983 the Supreme Court held that the correct interpretation of planning policy is a question of law to be determined by the Courts (paragraph 18). . The exercise of judgment by a planning authority when applying a policy is legally distinct from the construction of that policy.</p> <p>For a number of reasons I do not accept that the purpose of REM10, properly construed, is simply to determine whether land uses are acceptable on the site by reference to criteria (i) to (iv), such that if a proposal conflicts with one or more of those criteria it must be treated as being in breach of REM10.</p>
31	Thornhill Estates Ltd v Secretary of State for Communities and Local Government & Ors [2015] EWHC 3169	<p>I do not accept the criticism that by referring to paragraph 49 NPPF, or by using the word "now" the Inspector was limiting his consideration to five year housing land supply issues. The context of the sentences and the reference to the application of N34 through the Interim Policy and to paragraph 14 militates against that.</p>
32	Daventry District Council v Secretary of State for Communities And Local Government & Anor [2015] EWHC 3459	<p>In <i>Tesco Stores Limited v Dundee City Council</i> [2012] UKSC 13, Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed) said, at [17]: "It has long been established that a planning authority must proceed upon a proper understanding of the development plan..."</p>
33	Meyrick, R (On the Application Of) v Bournemouth Borough Council [2015] EWHC 4045	<p>the definition of 'deliberate neglect' adopted in the officer's report cannot be faulted...it can be taken to imply a conscious decision to fail to take proper care of a heritage asset.</p>

34	Edward Ware Homes Ltd v Secretary of State for Communities and Local Government & Anor [2016] EWHC 103	"Housing supply policies" in a development plan may include policies which deal with or direct the distribution of the housing to be provided during the plan period.
35	The London Borough of Bromley v Secretary of State for Communities and Local Government & Anor [2016] EWHC 595	In my judgment, it is unnecessary to gloss the paragraph 89 exceptions and they should be read naturally and in the context that it is part of the statutory planning code that permission for new buildings always carries with it permission for the use of the buildings.
36	JJ Gallagher Ltd & Ors v Cherwell District Council & Anor [2016] EWHC 290	<p>where a policy is neither obscure nor ambiguous it is not necessary or appropriate to resort to other documents outside the local plan to help with the interpretation of policy... The starting point to be taken when interpreting planning policy seems to me to be the wording of the policy itself,</p> <p>I reject the submission that the words used in Bicester 13, in themselves, and in their context, admit some built development within the CTA. The words used are perfectly clear; they do not permit any development within the CTA... the wording makes sense in context...the supporting paragraphs are entirely consistent</p>
37	Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor [2016] EWHC 571	<p>In my judgment, DL20 is clearly correct, neatly and appositely characterising the approach mandated by paragraph 14 of the NPPF.</p> <p>I entirely reject Mr Hunter's submission that the use of the verb "must" in DL40 betrays an erroneous approach.</p>
38	Williams, R (on the application of) v Powys County Council & Anor [2016] EWHC 480	<p>Turning now to the meaning of 'affect', ... primary legislation in the case both of the Norfolk Broads and other Areas of Outstanding Natural Beauty require the relevant authorities to have regard to the purpose of conserving and enhancing the natural beauty of the area in question....</p> <p>'beauty' is a concept based for present purposes on visual appreciation; 'site' is not.</p>

39	St Modwen Developments Ltd v Secretary of State for Communities and Local Government & Anor [2016] EWHC 968	<p><i>Tesco Stores Ltd v Dundee City Council</i> [2012] UKSC 13 held that the interpretation of planning policy was a matter for the Courts and not for the reasonable interpretation of the decision-maker, returning planning policy to the status of all other policies when it came to their interpretation. But beyond saying that it required an objective interpretation and in context, it said very little about what tools, materials or approach should be used in the interpretation exercise by the Court</p> <p>"Now" means "now", and I accept that "available now" looks to the present availability of the land in question.</p> <p>Mr Young is also making the words "available now" cover both the absence of ownership constraints, and possibly the removal of any need for the owner to find alternative land for, for example, any statutory function carried out on the land in question, as well as the grant of permission. This is working the phrase too hard.</p> <p>A bespoke approach is required for the interpretation by the Court of statements made by the policy-maker, for the benefit of those who are affected, as to how he intends in general to use his discretionary powers. The policy-maker of the NPPF cannot say that he meant one thing when he used words which mean something else. But when the policy-maker produces a subordinate document to expand upon what he has previously said, which does not and is not expressly intended to contradict it, that document may assist the Court in understanding what was intended in the first place and why, thus assisting it in its task of interpretation. This is not substituting his views for the interpretation of the Court.</p> <p>Mr Young contended that the Inspector had misinterpreted what "deliverable" meant in NPPF [47]...The Inspector had focused on "supply" and not on "deliverable supply"...In my judgment, the Inspector made no error of interpretation of the NPPF at all....</p>
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Glossary

The Brundtland Definition	The definition of Sustainable Development used by Gro Harlem Brundtland in her report to the UN General Assembly in 1987
The Consultation	The consultation version of the Framework issued in July 2011
DCLG	Department of Communities and Local Government
DECC	Department for Environment and Climate Change
The EIA Directive	The Environmental Impact Assessment Directive
The Framework	National Planning Policy Framework 2012
JPL	Journal of Planning and Environmental Law
The Legal Test	Section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Town and Country Planning Act 2004
NDP	Neighbourhood Development Plan
NPPG	National Planning Policy Guidance
NPS	National Policy Statement
The Proposal	The Framework proposal document dated XXX
The SEA Directive	The Strategic Environmental Effects Directive
The Secretary of State	Secretary of State for Communities and Local Government
The 1947 Act	Town and Country Planning Act 1947
The 1990 Act	Town and Country Planning Act 1990
The 2004 Act	Planning and Compulsory Purchase Act 2004