Neutral Citation Number: [2026] EWHC 51 (Admin)

Case No: AC-2024-LON-004212
AC-2024-LON-004245

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2026

Before :

MRS JUSTICE LIEVEN

- -

Between :

GLADMAN DEVELOPMENTS LIMITED

Claimant

and

SECRETARY OF STATE FOR HOUSING, COMMUNITIES and LOCAL GOVERNMENT

First Defendant

and

LANCASTER CITY COUNCIL

Second Defendant

- -
- -

Ms Melissa Murphy KC (instructed by **Addleshaw Goddard**) for the **Claimant**
Mr Jack Smyth (instructed by **Government Legal Department**) for the **First Defendant**
Mr Killian Garvey (instructed by **Governance (Legal) Lancaster City**) for the **Second Defendant**

Hearing dates: **22 July 2025**

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Approved Judgment

This judgment was handed down remotely at 12:00pm on 15 January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONORABLE MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is a challenge under s.288 Town and Country Planning Act 1990 ("TCPA") to the decision of a Planning Inspector, Helen Hockenhull ("the Inspector"), appointed by the Secretary of State for Housing Communities and Local Government ("SoS"). The decision is dated 21 November 2024 ("the Decision"). Gladman Developments Ltd ("the Claimant") was the applicant for planning permission and the appellant at the Inquiry. The First Defendant is the SoS, and the Second Defendant is Lancaster City Council, the Local Planning Authority ("LPA").

2. The Claimant was represented by Melissa Murphy KC, the SoS was represented by Jack Smyth and the LPA was represented by Killian Garvey.

3. There were two conjoined appeals before the Inspector:

   (a) Appeal A (APP/A2335/W/24/3345416): relating to development comprising "the demolition of Low Hill House and the erection of up to 644 dwellings (Use Class C3), a local centre (Use Class E) of no more than 280sq m internal floorspace, a community hall (Use Class F2) of no more than 150sq m internal floorspace, public open spaces including equipped children's play areas, land re-grading, recreational routes, landscaping and sustainable urban drainage systems and creation of vehicular access from Bailrigg Lane and Hala Hill to the North" on land at Bailrigg Lane, Lancaster, Lancashire.

   (b) Appeal B (APP/A2335/W/24/3345417): relating to the construction of an access link road between Bailrigg Lane and the Health Innovation Campus.

4. There are two Grounds of Challenge:

   Ground 1: the Inspector erred in the Decision Letter ("DL") at paragraphs 99-100 when she treated national policy on flood risk contained in the National Planning Policy Framework ("NPPF") as establishing a requirement that planning permission must be refused in every case where a sequential test is required but not undertaken.

   Ground 2: the Inspector erred in DL99 in failing to take an obviously material consideration into account, specifically, the decision in appeal reference APP/P4225/W/24/3346477, which followed the approach to conflict with national flood risk policy advocated by the proposed Claimant and rejected by the Inspector (as a material consideration in the decision); notably, the Inspector described that approach as "unprecedented".

<u>The Factual Background</u>

5. The site is within an area identified as a "broad location for growth" in the statutory development plan. Policy SG1 of the local plan enabled development to come forward in that area subject to various development management criteria.

6. The Council refused planning permission for Appeal A for four reasons, relating to the provision of highways infrastructure, urban design, shadow flicker and flood risk. Of these, two were withdrawn prior to the appeal Inquiry, leaving urban design and flood risk outstanding.

7. An Inquiry was held on 15th to 18th October and 22nd October 2024.

The Inspector's Decision Letter

8. The Inspector identified the main issues for the appeal, as recorded in the Decision Letter ("DL") at DL9-11, in short: urban design, "whether the site is sequentially preferable in terms of flood risk", heritage effects and impact on nearby European protected sites.

9. The main issues (other than flood risk) were resolved as follows:

    (a) Urban design. DL39-40. The Inspector found that the proposal would provide an innovative, high quality urban design and sense of place, compliant with policy. Further, that the Council would have control at reserved matters stage and could negotiate revisions if need be.

    (b) Heritage. DL70, 97. The Inspector accepted that the scheme would cause less than substantial harm to the significance of Bailrigg Farmhouse, and concluded that the harm was outweighed by the benefits of the proposal.

    (c) Protected sites. DL76. The Inspector was satisfied that the scheme was acceptable in this regard, subject to the imposition of a package of conditions.

10. Other concerns had been raised in objections to the appeal proposal. Those matters were considered by the Inspector at DL77-85. She concluded that they did not indicate that planning permission should be refused.

11. Therefore the single outstanding issue was flood risk. The Inspector's conclusions on that issue were determinative of the appeal. Her consideration of flood risk is at DL41-62:

    a. At DL41 she correctly sets out the policy in the NPPF, and refers to para 168 NPPF;

    b. At DL42 she records that most of the site lies within Flood Zone 1 (low risk) but a "very small area" on the western boundary lies within Flood Zones 2 and 3 (medium to high risk);

c. At DL43-44 she accepts the appellant's assessment that there is an area of medium to high flood risk on the western boundary associated by Burrow Beck;

d. At DL43-56 she considers the issue of whether a Sequential Test of flood risk is required following the guidance in the PPG and at DL56 concludes that one is required:

e. At DL57 she accepts that in terms of flood risk the development has the potential for betterment, saying:

"I acknowledge that the proposed surface water drainage strategy has the potential to result in betterment. It is proposed to regulate surface water run off flows through the use of attenuation basins and tanks so that run off will be attenuated on site up to and including the 1 in 100 year plus 50% climate change event. This would have post development benefits as it would reduce peak flows which contribute to existing flooding downstream and ensure the development does not increase the risk of flooding elsewhere. Furthermore, the proposed re alignment of Ou Beck from the rear gardens of properties on Knowle Hill Crescent and Barnacre Close would assist to alleviate the current risk of flooding. These improvements form a positive aspect of the scheme providing wider sustainability benefits. Whilst they do not alter my finding that a Sequential Test is required, I take account of them in the planning balance."

f. At DL58 she noted that neither the Environment Agency nor the Lead Local Flood Authority had objected to the development. Although she says, correctly, that that is not relevant as to whether a Sequential Test is required;

g. As DL59-60 she references the fact that there had been a Strategic Flood Risk Assessment ("SFRA") supporting the Local Plan. My understanding is that this would in essence have been a Sequential Test, but the Inspector says that that was superseded by the 2021 SFRA.

h. At DL62 she concludes that because she has found that a Sequential Test is required there is a breach of policy DM33 of the Local Plan and of the NPPF and Planning Practice Guidance ("PPG").

12. At DL87-100 the Inspector addresses the "Planning Balance":

a. At DL87 she finds that Appeal A is in a sustainable and suitable location and does not prejudice the delivery of housing at the LPA's main housing site;

b. At DL88 she finds the LPA has a housing land supply of only 2.4 years, with a shortfall of 761 dwellings. The proposed development would deliver up to 451 new market homes;

c. At DL89 she records that the LPA has delivered 287 affordable homes over 7 years, with a shortfall of 2300 homes. Appeal A would deliver up to 193 homes;

d. At DL90 she says that she gives substantial weight to these housing contributions;

e. At DL91-95 she records a series of other benefits from the proposal; open space and green infrastructure; a community hall; £76.5m of construction spend supporting jobs; enhancement to biodiversity and the betterment on flood risk; and improvements to sustainable travel;

f. At DL97 she says that the less than substantial heritage harm is outweighed by the benefits set out above;

g. The most critical paragraphs are at DL98-100:

"98. In light of the lack of a 5-year housing land supply, the tilted balance in paragraph 11d) of the Framework is engaged. However, as I have found that a Sequential Test is required and none has been submitted, in line with Footnote 7, this provides a clear reason for refusing the development proposed. The failure to provide a Sequential Test is also in conflict with Policy DM33 of the LP2, Policy SP8 of LP1 and section 14 of the Framework.

99. The appellant has submitted that if I determine that a Sequential Test is required and Footnote 7 engaged, this forms a material consideration and one factor in the planning balance. It is further argued that no harm results from this policy failure, since there is no risk of flooding to the development due to the design, layout and mitigation measures proposed and a betterment would be provided should the development proceed. The parties could not point me to an appeal decision where Footnote 7 had been engaged and yet permission had been granted. Such an approach would be unprecedented and would undermine national flood risk policy.

100. In the case of Appeal A, the overriding consideration is the failure to undertake a Sequential Test. Appeal A conflicts with the development plan and the material considerations do not indicate that the appeal should be decided other than in accordance with it. As I am dismissing Appeal A, I also dismiss Appeal B."

The Policy Framework

13. Central to this case is the NPPF and, in particular, paragraphs which at the time of the decision were numbered 11 and 168.

14. Paragraph 11 sets out the very well known policy on the "tilted balance":

"11. Plans and decisions should apply a presumption in favour of sustainable development.

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

a) all plans should promote a sustainable pattern of development that seeks to: meet the development needs of their area; align growth and infrastructure; improve the environment; mitigate climate change (including by making effective use of land in urban areas) and adapt to its effects;

b) strategic policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area (footnote 7); or

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

*For **decision-taking** this means:*

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

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

Footnote 7: The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 187) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 72); and areas at risk of flooding or coastal change."

15. Paragraphs 165 to 175 deal with flood risk.

> *"165. Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere."*

16. Paragraph 168 states:

> *"The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."*

17. The NPPF then goes on to set out how if the Sequential Test is not met the Exception Test should be applied.

18. Paragraph 170 states:

> *"The application of the exception test should be informed by a strategic or site-specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. To pass the exception test it should be demonstrated that:*
>
> *a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and*
>
> *b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall."*

19. The PPG deals in more detail with the relevant tests. At para 004 7-004-20220825 it states:

> *"Where an assessment shows that flood risk is a consideration for a plan or development proposal, the process is set out below:*
>
> *Avoid*
>
> - *In plan-making, a sequential approach should be employed. This involves applying the 'Sequential Test' and, if needed, the 'Exception Test'.*
> - *In decision-making, where necessary, planning authorities apply the Sequential Test and, if needed, the Exception Test, to ensure that flood risk is minimised and appropriately addressed.*
> - *Where the sequential and the exception tests have been applied as necessary and not met, development should not be allowed."*

20. At para 023 in respect of the sequential approach it states:

> *"Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied. Application of the sequential approach in the plan-making and decision-making process will help to ensure that development is steered to the lowest risk areas, where it is compatible with sustainable development objectives to do so, and developers do not waste resources promoting proposals which would fail to satisfy the test. Other forms of flooding need to be treated consistently with river and tidal flooding in mapping probability and assessing vulnerability, so that the sequential approach can be applied across all areas of flood risk."*

The Law

21. The legal framework and overall approach is not in dispute, although how the law applies to the facts is disputed.

22. The starting point is s.70(2) TCPA which states that in making a relevant decision, the decision maker must take into account the development plan and any other material consideration.

23. By s.38(6) Planning and Compulsory Purchase Act 2004 ("PCPA") the determination must be made in accordance with the development plan unless material considerations indicate otherwise.

24. Lindblom J (as he then was) set out the relevant principles in a challenge such as this in *Bloor Homes v Secretary of State for Communities and Local Government* [2014] EWHC 754 at [19]:

> *"19. The relevant law is not controversial. It comprises seven familiar principles:*
>
> *(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26 , at p.28).*
>
> *(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational*

decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953 , at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759 , at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for [2001] EWHC Admin 74 , at paragraph 6).

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

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

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

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. Fox Strategic Land and Property Ltd. v Secretary

> *of State for Communities and Local Government [2013] 1 P. & C.R. 6 , at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137 , at p.145).”*

25. In *Hopkins Homes* [2017] 1 W.L.R. 1865 Lord Carnwath said at [25] that the court should respect the expertise of planning inspectors and start from the presumption that they will have understood the planning policies in issue.

26. The present case concerns a situation where the policy, as set out in the NPPF para 168 and the PPG, appears to mandate refusal in cases where a Sequential Test is found to be required but has not been undertaken. The approach to such policies has been considered in a number of cases.

27. In *R (West Berkshire) v SSCLG* [2016] EWCA Civ 441 the Court of Appeal was considering a policy phrased in mandatory terms, see [25]. The Court dealt with how an Inspector should approach such a policy, at [30] saying:

> *“30. In our judgment, then, the policy stated in the WMS is not to be faulted on the ground that it does not use language which indicates that it is not to be applied in a blanket fashion, or that its place in the statutory scheme of things is as a material consideration for the purposes of s.38(6) of the 2004 Act and s.70(2) of the 1990 Act, and no more. It does not countermand or frustrate the effective operation of those provisions. The judge has, with respect, conflated what the policy says with how it may lawfully be deployed.”*

28. In *Asda Stores v Leeds City Council* [2021] EWCA Civ 32 the Court of Appeal was considering the effect of para 90 of the NPPF which stated that where a retail proposal failed the retail Sequential Test “it should be refused”. The key paragraphs are at [38] and [41]:

> *“38. Unlike others in the NPPF, the policy in paragraph 90 does not identify factors that may tell against the proposition that the application "should be refused". It is not qualified by a clause beginning with a word such as "if" or "unless" or "provided". But implicit in a policy of this kind, as in many that bear on decision-making, is the need for planning judgment to be exercised in its application. As a material consideration under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act , it must be given such weight as the decision-maker judges to be right when resolving whether the application is to be determined "in accordance with the development plan", as section 38(6) requires "unless material considerations indicate otherwise".*
>
> *...*
>
> *41. It is not necessary, in my view, to apply to the policy in paragraph 90 the label of "presumption". The meaning and effect of the policy are entirely clear without it. What paragraph 90 does is to establish, in national planning policy, a proposition that will indicate a refusal of planning permission if it is not overbalanced by other considerations. It*

does not matter, I think, whether one calls this a "presumption" or an "effective presumption" or an "expectation", or something else of that kind. The effect of the policy is the same. Whenever a decision-maker finds there is likely to be a "significant adverse impact" on the "vitality and viability" of the town centre, this will count as a negative factor with the force of government policy behind it. It will go against the proposal as a material consideration. Other policies in the NPPF may support the proposal. These too will be "material considerations" to which appropriate weight must be given. As Mr Warren submitted, the policy in paragraph 90 does not have some special status, enabling it to prevail over any other policy in the NPPF. Nor does it automatically trump any other material consideration or combination of material considerations bearing on the decision."

29. The approach to para 11 of the NPPF and footnote 6 in particular was considered by Holgate J (as he then was) in *Monkhill Ltd v SSHCLG* [2019] EWHC 1993. At [39] he set out a number of principles, of which sub paragraph 13 is the most important for present purposes:

"...

39(13). In other cases under limb (ii), the relevant "Footnote 6 policy" may not require all relevant considerations to be taken into account. For example, paragraph 196 of the NPPF requires the decision-maker to weigh only "the less than substantial harm" to a heritage asset against the "public benefits" of the proposal. Where the application of such a policy provides a clear reason for refusing planning permission, it is still necessary for the decision-maker to have regard to all other relevant considerations before determining the application or appeal (s. 70(2) of the 1990 Act and s. 38(6) of the 2004 Act). But that exercise must be carried out without applying the tilted balance in limb (ii), because the presumption in favour of granting permission has already been disapplied by the outcome of applying limb (i). That is the consequence of the decision-making structure laid down in paragraph 11(d) of the NPPF; ..."

[emphasis added]

30. And [45]:

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

• It is, of course, necessary to apply s.38(6) in any event;

• If the proposal accords with the policies of an up-to-date development plan taken as a whole, then unless other considerations indicate otherwise, planning permission should be granted without delay (paragraph 11(c) of the NPPF);

> *• If the case does not fall within paragraph 11(c), the next step is to consider whether paragraph 11(d) applies. This requires examining whether there are no relevant development plan policies or whether the most important development plan policies for determining the application are out-of-date;*
>
> *• If paragraph 11(d) does apply, then the next question is whether one or more "Footnote 6" policies are relevant to the determination of the application or appeal (limb (i));*
>
> *• If there are no relevant "Footnote 6" policies so that limb (i) does not apply, the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and s.38(6));*
>
> *• If limb (i) does apply, the decision-taker must consider whether the application of the relevant "Footnote 6" policy (or policies) provides a clear reason to refuse permission for the development;*
>
> *• If it does, then permission should be refused (subject to applying s.38(6) as explained in paragraph 39 (11) to (12) above). Limb (ii) is irrelevant in this situation and must not be applied;*
>
> *• If it does not, then the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and s.38(6)).”*

Ground One

31. Ms Murphy submits that the Inspector erred in law in DL99 in her approach to the National Policy conflict, and in particular footnote 7. In the Claimant’s Closing Submissions to the Inquiry she had said:

> *“43. It is also self-evident that national policy is not statute, it operates as a material consideration. Flood policy within the local plan is one policy among many. There is no axiomatic refusal if there is conflict, that too is a question of judgment, balancing up the various factors.”*

32. Ms Murphy submits that in the first sentence of DL99 the Inspector was reflecting her closing submissions to the Inquiry. In the final sentence of DL99 the Inspector rejects that submission on the grounds that such an approach would undermine flood risk policy and be unprecedented. Ms Murphy says the first sentence of DL99 (i.e. her submission) was plainly correct on the basis of the statute and caselaw set out above. It necessarily follows that the last sentence (i.e. the Inspector’s conclusion) was wrong in law.

33. She submits that the structure of the DL reflects the main issues that were put before the Inspector, and the Inspector has simply recorded them in the DL. But that structure does not overcome the error which appears in DL98-100 where the Inspector appears to consider herself bound to refuse once she has found that there should have been, but was not, a Sequential Test. The Inspector treats that matter as “overriding” in DL100,

which is a clear error of law in the interpretation of the policy. It is clear from the caselaw set out above that a conflict with a mandatory policy in the NPPF and/or the Development Plan is not an "overriding factor", but merely a matter that goes into the s.70(2) TCPA planning balance.

34. The Defendants caution against taking an overly forensic approach to the DL, and refer to the caselaw that the Court should read the DL benevolently and with the presumption that the Inspector understands the policy, see *Hopkins Homes* at [25].

35. The Defendants both submit that Ms Murphy's analysis is wrong and overly forensic. In respect of DL99 they say that the Inspector in the last sentence was only referring to the previous sentence, and making the point that once she had found a *"clear reason"* within the meaning of footnote 7, then it would be unprecedented to grant permission. They say the proposition in the first sentence of DL99 was uncontentious. Mr Garvey refers to his own closing submissions to the Inquiry, where he had said:

> *"**(f) The benefits of the proposal and the planning balance***
>
> *49. The Council acknowledge that the proposal will attract numerous benefits. However, the Council's case is that given there is a clear reason for refusal in respect to flood risk, the tilted balance is not engaged and there is a clear reason to refuse permission. The parties are unaware of an instance where there has been a clear reason to refuse and yet permission has been granted. It would be a dangerous precedent that would undermine flood risk policy."*

36. The Defendants submit that if the DL is read as a whole then it is apparent that the Inspector was undertaking a planning balance between the various factors in favour of the development, and the breach of national and therefore Development Plan policy in not undertaking a Sequential Test. The Inspector was entitled to place significant weight on the departure from the NPPF and PPG, and therefore on the consequential breach of DM33.

37. The Defendants submit that if the Claimant was correct and the Inspector had thought the departure from policy in not undertaking a Sequential Test was determinative, then she would not have needed to set out the other factors in the planning balance at all. They both submit that if the Claimant is correct, then the Inspector would have committed such an egregious error that it is inconceivable that the Inspector would have made it.

Conclusion on Ground One

38. In my view the key to this Ground is indeed to read the DL as a whole, however, the outcome of doing so is to conclude that the Inspector did err in her interpretation of the policy. Ms Murphy focuses on the last sentence of DL99 and says that the Inspector is wrongly disagreeing with her submission in the first sentence of that paragraph. Mr Smyth and Mr Garvey both submit that the last sentence is only dealing with the penultimate sentence, i.e. where a "clear reason" in footnote 7 has been found, then it would be unprecedented and undermine flooding policy to grant permission.

39. The correct way to analyse the issue is to consider whether, reading the DL as a whole, the Inspector erred in law in her interpretation of the relevant policy, rather than focusing too much on one sentence.

40. It is correct that in the DL she has referred to the other material considerations which militate in favour of the grant of permission and that she has headed her concluding section "Planning Balance". However, considering the decision as a whole, it is apparent that she viewed the lack of a Sequential Assessment as fatal to the proposal, without carrying out any proper or meaningful balance with the other policies in the Development Plan and NPPF, and the other material considerations. She therefore did not approach the policy conflict in accordance with s.70(2) and the caselaw.

41. Taking into account all the matters set out in the DL, the decision is a somewhat surprising one. There was only one issue that remained outstanding, namely flood risk. All other reasons for refusal had been resolved.

42. In respect of flood risk the Inspector concluded that not merely was there no unacceptable actual flood risk on the site, but further that the proposal would lower the likelihood of flood risk off site, i.e. the betterment she referred to at DL57.

43. Therefore, in respect of substantive, as opposed to policy "harm" from the development, there was none.

44. Further, on the other side of the balance, there were significant benefits which had clear national (in the NPPF) and Development Plan support. The proposal would deliver a very significant amount of new housing, including affordable housing, in an area where there was only 2.4 years housing land supply and where the LPA had only delivered 287 affordable housing units over 7 years.

45. These factors all go to the planning merits, and the weight to be attached to them is a matter for the Inspector not the Court, see Lord Hoffman in *Tesco Stores* [2012] P&CR 9. However, by reading the DL as a whole, it becomes apparent quite how lacking the Inspector's ultimate balancing exercise was.

46. From DL87-97 the Inspector sets out a number of factors which militate in favour of the development. It is important to note that many of these, such as the provision of housing, would have strong policy support.

47. At DL98 the Inspector finds a *"clear reason"* for refusal *"in line with footnote 7"* by the failure to undertake a Sequential Test. She does not weigh that departure from policy against the matters she has set out in the earlier paragraphs of the Planning Balance section. She appears to assume that because there is this departure and that it is capable of being a *"clear reason"* within footnote 7, that is the end of the matter. There is no explanation as to why that departure outweighs the other material considerations, as would be required by s.70(2) TCPA and s.38(6) PCPA. There is no balancing of that departure from the Development Plan, with the other policies such as on the delivery of housing, which accord with the Development Plan. There is no explanation as to why it amounts to a "clear reason" on the facts of the particular case. As I read DL98 the Inspector's approach is that once she has found something which is capable of being a "clear reason" she then thinks that she does not need to balance the other factors. That is a clear error of law.

48. It is not clear to me whether in the last sentence of DL99 she is saying Ms Murphy's argument at the first sentence is unprecedented and undermines national policy, or whether she is only referring to the previous sentence and the "clear reason". But it matters not, because she has failed to do any balancing or analysis of how she gets to the "clear reason". In DL100 she refers to the failure to undertake a Sequential Test as "overriding" but again it is unclear as to whether that is simply repeating DL99, or she thinks it is a factor of such significance as to outweigh the other considerations.

49. Ground One is not a reasons challenge. The error of law in the DL is that reading DL98-99 together it appears that the Inspector has taken an inflexible and mechanistic approach to the policy conflict, which is plainly not in accordance with the statutory provisions and the caselaw, inter alia in *Asda Stores* at [41].

50. There is no explanation in the DL as to why the Inspector thought that the failure to provide a Sequential Test was a "clear reason" for refusal, given all the other factors that she had set out above. It is such a surprising conclusion, that despite what Lord Carnwath said in *Hopkins Homes*, the Court can only assume that the Inspector misunderstood the policy framework and thought that the words in NPPF para 168 necessarily amounted to a clear reason for refusal within footnote 7, and therefore inexorably led to the refusal of permission.

51. For those reasons I consider that Ground One is made out and I will quash the decision.

Ground Two

52. Ms Murphy submits that the Inspector failed to take into account a material consideration, namely a materially similar Inspector's decision which interpreted the same policy issues in a completely different way. The Inspector had found that it would be "unprecedented" to grant permission where there was no Sequential Test, where she had found that there should be one. However, that was not unprecedented and the Inspector was under an obligation to check other Inspectors' decisions if she was going to make that assertion.

53. The decision is that of Inspector Benjamin Webb concerning a former DWP Distribution Centre at Heywood dated 7 November 2024 ("the Heywood Decision"). In that case the site was in Flood Zone 1, but part of the site was at risk of surface flooding. A Sequential Test had been carried out and it was concluded that there were reasonably available alternative sites. Therefore the Inspector found that there was a conflict with the relevant Development Plan policy because of the conflict with the NPPF, see para 45. At para 46 the Inspector found that the development would actually remove the flood risk. At para 47 he said:

> *"47. Taking the above considerations into account, I attach limited weight to the scheme's failure of the sequential test and resulting conflict with Policy G8, and greater weight to the scheme's compliance with Policy JP-S4 of the JDP, which amongst other things more generally seeks to locate and design development so as to minimise the impacts of current and future flood risk."*

54. Ms Murphy submits that this approach is wholly different from and inconsistent with the approach of the Inspector in the present case, who considered an almost identical conflict as being overriding, and being an unprecedented conflict.

55. Whether a different DL must be taken into account as a material consideration in a planning determination was considered in *Baroness Cumberlege v SSCLG* [2018] EWCA Civ 1305. The test to be applied in such cases was set out by Lindblom LJ at [36]:

> *"36. Like the judge, I would not accept that, as a matter of law, the Secretary of State ought to be aware of every previous decision taken in his name, whether by himself or a ministerial predecessor or by one of the inspectors to whom his decision-making function is largely delegated. In my view that concept is unrealistic and unworkable, given the number of decisions on planning appeals that have been made, year upon year, since the modern statutory code came into existence under the Town and Country Planning Act 1947 . There will, however, be circumstances in which, having regard to the interests of consistency in decision-making, the court is prepared to hold that the Secretary of State has acted unreasonably in not taking into account a previous decision of his own. Whether this is so in a particular case will always depend on the facts and circumstances (paragraphs 102 to 104 of the judgment). A possible example would be a case in which, within a short span of time, the Secretary of State has called in applications for his own determination, or recovered jurisdiction in appeals, in cases of a sufficiently similar kind, to which the same policies of the development plan apply."*

56. Mr Smyth and Mr Garvey submit that the Heywood Decision was not a material consideration because it was materially different from the present appeal. They point out that in the Heywood Decision there was a Sequential Test but it was failed. The Inspector gave that failure limited weight, which he was entitled to do. There was therefore no "clear reason" within footnote 7, and the analysis was wholly different from that of the current Inspector.

57. Mr Garvey also submitted that the Claimant should have drawn the Inspector's attention to the Heywood Decision and no explanation is given in the Claimant's evidence as to why they failed to do so.

58. I accept that the Heywood Decision was a material consideration, which if it had been referred to the Inspector would have needed to have been dealt with. Although it is not on precisely the same facts or policy issue, the Inspector there treated the failure to provide a Sequential Test as a matter to be considered but that could be departed from. As I have set out above, the Inspector in the present regarded the lack of a Sequential Test as an "overriding consideration".

59. However, the issue in this case is whether it was a mandatory consideration to which the failure to refer vitiates the decision because it was unreasonable not to refer to it, see *Cumberlege* at [36]. The test, as set out there, will always depend on the facts and circumstances.

60. Unlike in *Cumberlege* these were two Inspectors' decisions rather than decisions of the SoS. There are many thousands of Inspectors' decisions every year and it would be a considerable burden on the Inspectorate to have to check in every case whether there is another Inspector's report which covers the same policy issue and is inconsistent. This would not be a simple task because such inconsistency is often not a binary choice, but depends itself on a judgement being made as to the level of materiality.

61. In the present case, although both decisions covered the same or very similar policy issues, they did not relate to the same Local Planning Authority or to similar developments.

62. Ms Murphy submits that there was a duty on the Inspector to investigate whether there were other relevant decisions because she said it would be "unprecedented" to grant permission in the circumstances of the case. I agree that the language was somewhat unfortunate, and gave rise to the very obvious question as to whether it really was unprecedented, but I do not consider the use of the word places a duty on the Inspector to further investigate.

63. In order for another Inspector's decision to be a mandatory material consideration even where it was not drawn to the Inspector's attention, there would have to be some very striking element which simply could not be ignored. There is no factor here that puts the present case into that category.

64. I therefore dismiss Ground Two

POSTSCRIPT

65. After this judgment was handed down in draft for corrections, the Claimant drew the Court's attention to the decision of the Court of Appeal in *Keep Chiswell Green v SSHCLG* [2025] EWCA 958. The decision had been handed down by the Court of Appeal on 22 July 2025, the day after the hearing in the present case. The First Defendant highlighted the relevance of [82] of *Chiswell*, which states;

> *"As is clear from paragraph 120, the test for determining whether a consideration is so obviously material is the public law test of irrationality, that is, whether it would be irrational, and therefore unlawful, for the Secretary of State not to take it into account. It is not simply a question of whether a new consideration might realistically be capable of causing the public authority to reach a different conclusion, as suggested at paragraph 46 of the decision of Lane J. in R (Hayle Town Council) v Cornwall Council and others [2023] EWHC 389 (Admin), adopting an earlier formulation of the test by Sir Ross Cranston in R (Hardcastle) v Buckinghamshire Council [2022] EWHC 2905 (Admin), [2023] Env LR 462. Determining whether it was irrational not to take a particular matter into account will involve consideration of, amongst other things, the nature of the issue being decided, and the relevance and importance of the new material to that issue. The fact that a party to the appeal knew about the material consideration, but did not take steps to inform the decision-maker of it, is also likely to be a powerful indicator that the new material is not a material consideration . Put simply, it is not enough that the new matter might be capable of causing a decision-maker to reach a different conclusion. It must be a gamechanger."*

66. In these circumstances I invited the parties to submit written representations if so advised. Ms Murphy did so. She accepts that the approach I have adopted above, in particular at [60]-[63] accords with *Chiswell* and that all the relevant considerations that require to be taken into account have been. There is therefore no need to make any further reference to *Chiswell*.