Information about the decision being appealed (UKSC Form 1 PTA, p. 7)

Narrative of the facts (all emphasis supplied unless otherwise indicated)

1. "Neighbourhood planning gives communities direct power to develop a shared vision for their neighbourhood and shape the development and growth of their local area. They are able to choose where they want new homes, shops and offices to be built", National Planning Policy Framework para. 29. In accordance with this advice, Thurston Parish Council prepared the Thurston Neighbourhood Development Plan. The policies and proposals within it were subject to statutory examination and a referendum as to their acceptability and the Plan was formally "made" on 19 October 2019.

The Thurston Five

2. The village of Thurston has been the subject of a great deal of development pressure in recent years, with planning permission granted in 2017 on five sites ("the Thurston Five") outside the then settlement boundary for a total of 818 new dwellings. The total existing number of dwellings in the village at present is only a little over 1300.

The Thurston Neighbourhood Plan

3. The now statutory Thurston Neighbourhood Development Plan responds to this history of substantial development pressure by providing that "new development in Thurston Parish shall be focused within the [now revised] settlement boundary of Thurston Village as defined on the Policies Maps", see Policy 1: Spatial Strategy set out below.

4. The Parish Council's fundamental contention, which was accepted by the Judge at first instance, is that the Neighbourhood Plan accordingly stipulated that (except in specified circumstances which do not apply here) no development should be permitted outside the settlement boundary and that any development outside that boundary would be contrary to Policy 1 in the Plan, thus engaging the presumption in favour of the development plan in section 38(6) of the Planning and Compulsory Purchase Act 2004.

5. The Court of Appeal nevertheless decided that the decision under challenge involved the "application" of Policy 1 and not its "interpretation" (see below).

6. Policy 1, entitled "Spatial Strategy", provides that "new development in Thurston Parish shall be focused within the settlement boundary…". This clear direction to locate development within that boundary is confirmed by the supporting text to the policy (with some omissions for brevity):

> 4.1 The Babergh and Mid Suffolk emerging Joint Local Plan is required to provide for significant levels of housing growth in order to address the identified needs of the two districts over the Plan period to 2036. Whilst the spatial distribution of this growth will be determined through the development of the Joint Local Plan, Thurston's status as a proposed 'core village' means that it will play a key role in addressing that need.
> 4.2 The granting of planning permission for a series of large sites in late 2017 has meant that there are over 1,000 dwellings in the planning pipeline for Thurston, i.e. with planning permission but not yet built or occupied. It is for the Joint Local Plan to ultimately address the objectively assessed housing need of the two districts over the period to 2036 and also to determine Thurston's contribution to that. Given (i) the levels of growth in the planning pipeline; (ii) the fundamental concerns of the Suffolk County Council Highways Team about highway capacity; and (iii) the need to deliver major new education infrastructure in the form of a larger primary school on a new site, it is not expected that significant additional growth will need to be planned for in Thurston to support the emerging Joint Local Plan. In light of this, the spatial strategy seeks to be more restrictive as to the types of development which can be brought forward outside the settlement boundary, in line with Mid Suffolk Core Strategy Policies CS1 and CS2. In order to reflect a positive approach however, it is considered appropriate to provide some flexibility to address particularly significant needs identified in Thurston. Specifically, this relates to the needs of the ageing population… proposals would have to demonstrate that there are no other suitable sites within the settlement boundary that are available or deliverable.
> 4.3 Indeed, the value of the agricultural land in the parish means that its protection is important; once lost, the ability to produce crops is gone forever…
> 4.4 What is important is that all growth is supported by the infrastructure that is most needed in Thurston and will provide the greatest benefit to the wider community.
> 4.5 Therefore, the general approach in the Thurston Neighbourhood Plan is that growth will be focused on the sites with planning permission (which are located within the amended settlement boundary) and on small scale infill sites within the settlement boundary.
> 4.6 The Neighbourhood Plan (pages 75-76) identifies the sites in the planning pipeline which are expected to deliver housing along with a range of specific infrastructure and community facilities. More generally, these sites and other developments are expected to provide high quality schemes which generally enhance the public realm and improve accessibility for pedestrians and cyclists".

7. Consistently with the above, Policy 1 further provides as follows:

> "B. Development proposals within the settlement boundary… will be supported subject to compliance with the other policies in the Neighbourhood Plan.
> …

D. Development proposals to meet specialist housing and care needs on sites that are outside the settlement boundary will be permitted where it can be demonstrated that no available and deliverable site exists within the settlement boundary".

8. Similarly, paras. 5.6-5.7 of the Neighbourhood Plan states as follows:

"5.6 The significant number of large developments granted planning permission in late 2017 are likely to come forward early in the Neighbourhood Plan period. It is considered that this scale of development is likely to adequately address the requirements of Thurston to support growth as a Key Service Centre/Core Village. It will be important that these developments are allowed to 'bed in' to the community. Any further development should be sustainable and be relatively limited in scale. Therefore it is not considered appropriate or necessary to identify any additional sites in the Neighbourhood Plan.

5.7 Rather, the Neighbourhood Plan's policies identify the issues that future development should address and provide criteria to ensure these are achieved. These policies shall also apply, where relevant, to the sites recently granted outline planning permission but without reserved matters approval. Over the lifetime of the Neighbourhood Plan, and providing infrastructure limitations can be overcome, housing growth could potentially be accommodated in a sensitive way within the parish. Such development would be tailored to address the housing needs of each sector of the population and would help meet the housing objectives identified in the BMSDC's Joint Local Plan".

9. See also para. 1.5 and 1.15 of the Neighbourhood Plan:

"1.5 The Neighbourhood Plan represents one part of the development plan for the neighbourhood area over the period 2018 to 2036, the other parts being the Mid Suffolk District Core Strategy Development Plan Document (2008), the Mid Suffolk District Core Strategy Focused Review (2012), the saved policies of the Mid Suffolk District Local Plan (1998) and the saved policies of the First Alteration to the Mid Suffolk Local Plan (2006).

…

1.15 Thurston Parish Council, as the Neighbourhood Plan authority, will be responsible for maintaining and periodically revisiting the Plan to ensure relevance and to monitor delivery. The ongoing development of the Joint Local Plan means that the Neighbourhood Plan is likely to be reviewed within five years of being 'made'".

10. From July-September 2019, the Defendant Council consulted on the Draft Babergh and Mid Suffolk Joint Local Plan - Preferred Options version, ie the "consultation" version of the draft plan for the purposes of reg. 18(1)(b) of the Town and Country Planning (Local Planning) (England) Regulations 2012 SI 2012/767 on which people may make "representations to the local planning authority about what [the] plan… ought to contain".

11. The draft "consultation" version of the draft plan proposed a strategy for the spatial distribution of housing along the transport corridors, which would include Thurston village, and an allocation for housing development on the Bloor Homes application site, as "site LA087", outside the Thurston settlement boundary. Both proposals are the subject of numerous objections by the Parish Council and others, as is the full quantum of development which Thurston can accommodate.

12. In relation to the location of the site, the Parish Council objected expressly on the grounds that it was in conflict with Policy 1 in the Neighbourhood Plan:

> "4. Thurston NDP POLICY 1: THURSTON SPATIAL STRATEGY states that all new development in Thurston parish shall be focused within the settlement boundary of Thurston village as defined within the Policies Maps on pages 76-77 of the Thurston Neighbourhood Plan.
> 5. The general approach in the Thurston NDP, fully supported by the Parish Council, has been that growth will be focused on the five significant sites which were granted planning permission as of 2017 (which are located within the settlement boundary as amended by the NDP) and on small-scale infill sites within the settlement boundary…
>
> 7. <u>The Parish Council challenges the premise that the former three sites should be considered as Allocations when they are located outside of the settlement boundary of the Thurston NDP, as approved at referendum</u>".

13. In July 2019, Bloor made an application to the Council for outline planning permission for the erection of up to 210 dwellings on the site together with open space and associated infrastructure, including junction improvements (and with means of access to be determined as part of the application).

14. The Parish Council objected to the application on the basis that the site lay "outside of the amended built-up area boundary and as such is contrary… Thurston Neighbourhood Development Plan Policy 1: Thurston Neighbourhood Strategy which states that all new development in Thurston parish shall be focused within the settlement boundary of Thurston village as defined within the Policies Maps… of the Neighbourhood Plan".

15. Similarly, as the Parish Council pointed out at first instance and in the Court of Appeal, when untrammelled by misleading advice by officers, the Council themselves reached the same straightforward conclusion that development outside the settlement boundary was contrary to Policy 1.

16. On 22 July 2020, the Council considered a planning application (ref. DC/20/00585) for a single dwelling outside the Thurston settlement boundary at the southern side of Norton Road, Great Green, Thurston. On that occasion, the planning committee resolved as follows:

> "RESOLVED: That the application be refused for the following reasons: Contrary to Neighbourhood Plan Policies 1, 1D, 6A, 6B, 9. Contrary to Policies H7, CS1, CS2, CS5, FC1 and FC1.1. Contrary to paragraph 78 of the NPPF".

That is, Council Members concluded that the application was "contrary to the Thurston Neighbourhood Plan" because the site lay outside the Thurston settlement boundary.

17. The draft reg. 18 "consultation" version of the plan was superseded in November 2020 by the "pre-submission" version for the purposes of reg. 19 of the 2012 Regulations, on which people can make further representations by virtue of reg. 20, which has now been submitted to the Secretary of State for examination by an inspector who is (still) in the process of considering the draft plan's "soundness" in the light of representations made to it, in accordance with section 20 of the Planning and Compulsory Purchase Act 2004. (The reg. 19 version of the plan was in largely the same form as the reg. 18 version and the Parish Council and others made substantial objections to it as above).

18. Two years later, the examination currently stands adjourned while the Council prepare modifications to the draft plan to address concerns of the examining Inspectors.

19. Bloor's application was considered by the Council's Planning Referrals Committee on 29 January 2020 with a recommendation for approval, subject to conditions and satisfactory completion of a planning obligation under section 106 of the Town and Country Planning Act 1990. Following completion of the section 106 obligation, planning permission was granted on 23 December 2020.

20. A full rehearsal of the backgrounds facts of the Council's treatment of the Bloor planning application, both in the officer's report and in debate, which the Judge at first instance found to be legally flawed is set out in his judgment at paras. [3]-[45].

21. Both the Council and Bloor appealed against the Judge's judgment on the grounds set out below, all of them turning on the proper construction of Policy 1.

Statutory framework

22. By section 57 of the Town and Country Planning Act 1990, planning permission is required for the carrying out of any "development" of land. Section 56 of the 1990 Act defines "development" as meaning "the carrying out of building, engineering, mining or other operations… or the making a material change in the use of… land".

23. By section 70(2) of the 1990 Act, in dealing with an application for planning permission, a local planning authority must "have regard to the development plan, so far as material to the application… and any other material considerations".

24. Section 38(6) of the Planning and Compulsory Purchase Act 2004 further provides that "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

25. Section 38(3) of the 2004 Act provides that in England (outside Greater London) "the development plan is (a) the regional strategy for the region in which the area is situated (if there is a regional strategy for that region), (b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area, and (c) the neighbourhood development plans which have been made for that area".

26. On the interaction of policies, section 38(5) of the 2004 Act provides that "If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan".

Chronology of proceedings

29 January 2020	Resolution to grant planning permission
23 December 2020	Grant of planning permission
26 January 2021	Claim issued
23 February 2021	Permission to apply for judicial review granted (Lang J)

18 February 2022	Claim allowed
20 May 2022	Permission to appeal granted to both Appellants (Lewison LJ)
21 July 2022	Appeals expedited (Lewison LJ – not requested by any party)
18 October 2022	Appeals heard by CA (Lewison, Singh and Whipple LJJ)
21 October 2022	Judgment issued in draft
28 October 2022	Court of Appeal order allowing appeals

Relevant orders made in the Courts below

23 February 2021	Grant of permission to apply for judicial review (and costs capping order – Lang J)
18 February 2022	Claim allowed (Timothy Mould QC sitting as a Deputy High Court Judge)
20 May 2022	Grant of permission to appeal (Lewison LJ)
21 July 2022	Appeals expedited (Lewison LJ – not requested by any party)

Costs capping order in Court of Appeal

28 October 2022	Appeal allowed

Issues before the Court appealed from

27. The issues in the Court of Appeal, as defined by the Grounds of Appeal advanced by the Appellants (referred to respectively below as "the Council" and "Bloor") were the same, ie that the Judge at first instance erred in law:

    (1) in his construction of Policy 1 of the Thurston Neighbourhood Plan which provides that "new development in Thurston Parish shall be focused within the settlement boundary of Thurston Village as defined on the Policies Maps" (Issue 1); (and consequently)

    (2) in concluding that the "tilted balance" in para. 11 of the NPPF did not apply (Issue 2).

    The Council also criticised the judge's conclusion on the application of para. 14 of the NPPF (Issue 3).

Treatment of issues by the Court appealed from

Issue 1: whether the Judge erred in law in construing Policy 1 of the Neighbourhood Plan

28. Issue 1, whether the Judge erred in law in construing Policy 1 of the Neighbourhood Plan, was addressed in paras. 42 and following of the Court of Appeal's judgment (Singh LJ gave the lead judgment with which Lewison and Whipple LJ agreed). However, the Court of Appeal did not address this issue as the Judge had, in accordance with the opposing submissions on construction advanced before him. That is, all parties regarded the correct interpretation of Policy 1 as being at the heart of the case.

29. Instead, having recorded at para. 42 that "the Parish Council succeeded before the Judge on the point of interpretation", Singh LJ said: "I am not convinced that that was the correct way of looking at the issue".

30. He went on to quote from the Judge's judgement in para. 43 as follows:

> "in my view the question which I have to address under Ground 1 is whether it was in accordance with Policy 1 of the Neighbourhood Plan to release the site for general housing development".

But Singh LJ then said: "In my respectful view that was not entirely accurate. This is because the question of whether proposed development is "in accordance" with a planning policy may raise both questions of interpretation of that policy and questions of its application… In my view this was a case which concerned the proper application of Policy 1 in the circumstances of the proposed development rather than its interpretation".

31. After quoting from the committee report, he said this at para. 53-54:

> "53. For my part I cannot see anything in the planning officer's Report which constitutes an interpretation of Policy 1 in the Neighbourhood Plan, let alone a misinterpretation of it… But, as has frequently been said by the courts, the writer of a report such as this is not sitting an examination paper. They are not required to address abstract questions in every case…".
>
> 54. In my judgement, what the submission for the Parish Council in substance amounts to is not that there was a misinterpretation of Policy 1 but that its application was clearly wrong in the circumstances of this proposed Development outside the settlement boundary. But that is to fall into the error of confusing the interpretation of a planning policy with its application. Mr Lewis had to submit that, if the District

> Council had understood the policy correctly, it could only have come to the conclusion that there was a conflict between that policy and this proposed development since it was outside the settlement boundary. But that is predicated on an interpretation that Policy 1 is absolute in its terms. It clearly is not even as a matter of textual analysis: the word "focused" does not mean that there can never be any development of a general kind outside a settlement boundary. Further, the Neighbourhood Plan itself recognised the existence of significant housing needs going beyond the Thurston Five by its reference in section 4 to the Draft Joint Local Plan and the 'core village' status of Thurston for future development".

32. He continued at para. 56: "…In my view… the Chief Planning Officer was correct to say that there was not a conflict but a tension. Certainly he was entitled to say that, in the reasonable application of Policy 1 to the facts of this case. As I have said, there was no error of interpretation of Policy 1. Nor, in my view, was there any error in its application such as to permit a court to interfere with the local planning authority's exercise of judgement".

33. It follows that Singh LJ (and Lewison and Whipple LJJ who agreed with him) took it on himself, at variance with the parameters of the debate recognised between the parties at first instance, to conclude that the exercise undertaken by the Council was one merely of "application" of policy not of interpretation.

34. He also concluded (in his para. 54 quoted above) that "the word "focused" does not mean that there can never be any development of a general kind outside a settlement boundary" when it is manifest from the terms of the policy as quoted above, when construed in its proper context, the "focused" does mean that there can never be general housing development outside the settlement boundary (but that, as provided for in criterion of Policy 1, special needs housing may be located outside the boundary).

35. The Parish Council accordingly submits that the Judge at first instance was quite right, in point of construction and therefore in point of law, to conclude (as he did in para. 73 of his judgment) that the settlement boundary of Thurston did represent a "barrier" to general housing development outside it and therefore that the Court of Appeal erred in law in holding otherwise.

36. As recorded in para. 55 of Singh LJ's judgment, the Chief Planning Officer did advise the Council that he did not regard the development outside the settlement boundary as being "in conflict" with Policy 1 of the Neighbourhood Plan and so the Council was misled by the Officer's misconstruction of the policy as the Judge held at para. 74 of his judgment.

37. Furthermore, the learned Judge's decision accorded with the approach in the highest authorities which hold that planning decision makers must proceed on a proper understanding of the development plan and that the question of the proper interpretation of a policy is a "logically prior" question to the exercise of planning judgement in applying the policy, see per Lord Reed in Tesco Stores Ltd v. Dundee City Council [2012] PTSR 983 at paras. 17-22:

> "17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, Gransden & Co Ltd v Secretary of State for the Environment (1985) 54 P & CR 86, 94, per Woolf J, affirmed (1986) 54 P & CR 361; Horsham District Council v Secretary of State for the Environment (1991) 63 P & CR 219, 225–226, per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan … considered by the House of Lords in the case of City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 1459, his Lordship observed:
>
> > 'In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.'
>
> 18. In the present case, the planning authority was required… to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as 'a proper interpretation' of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act [equivalent respectively to section

38(6) and section 70(2)] of much of their effect, and would drain the need for a "proper interpretation" of the pla n of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in R (Raissi) v Secretary of State for the Home Department [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780, per Lord Hoffmann. Nevertheless, 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.

…

21. A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed".

38. See also Canterbury City Council v. Secretary of State for Communities and Local Government [2019] EWCA Civ 669 per Lindblom LJ at [21]:

> "If the section 38(6) duty is to be performed properly, the decision-maker must identify and understand the relevant policies, and must establish whether or not the proposal accords with the plan, read as a whole. A failure to comprehend the relevant policies is liable to be fatal to the decision…"

39. Singh LJ next referred to (out of date) housing settlement policies in the Adopted Local Plan of 2006 pointed out that the Committee were advised that the proposed development did conflict with those policies and that the proposals "[did] not accord with the development plan as a whole", see para. 57:

> "57. It is clear from the conclusions in the Report, in particular at para. 4.1, that the Committee were advised that the proposed Development did conflict with the housing settlement policies in the Adopted Local Plan and for that reason "it does not accord with the development plan taken as a whole." However, the report continued, there were other material considerations which directed that planning permission should nevertheless be granted. This was clearly a reference to the exercise which the Committee had to perform under section 38(6) of the 2004 Act".

40. He therefore disposed of the Parish Council's submissions on this point as follows, in paras. 58-59:

> "58. At the hearing before this Court Mr Lewis submitted that this was not good enough. He submitted that it is not sufficient for the Committee to be advised merely that a proposed development does not accord with the Development Plan taken as a whole. He submitted that what is required is that the Report should identify precisely which policy or policies it does or does not accord with. He submits that the sting was taken out of the point that there was a conflict with the Development Plan taken as a whole because, elsewhere in the Report, the Committee had been advised that the relevant policies in the Development Plan (in particular CS2 and H7) were out of date.
>
> 59. In my judgement, this question cannot be considered in the abstract. As is often the case in planning, it has to be considered in the particular context where it arises. To take a hypothetical example, if the Report had said that there was a conflict with the Development Plan in relation to an entirely unrelated policy (perhaps to do with a matter such as employment) there might be some force in Mr Lewis's submission. But the fact of the matter is that, in the present case, the fundamental point of which the members of the Committee were reminded was their own policies as to where general housing should be located, in other words that the proposed development was in the "countryside" and therefore was contrary to the Development Plan policies on that issue. The reason why the local plan policies were out of date was not to do with that fundamental point but to do with the number of dwellings which would be needed in the Plan period going forward to 2036".

41. It is submitted that the Parish Council's submission on this point was entirely correct. The Officer's Report "should [have] identif[ied] precisely which policy or policies [the proposed development] does or does not accord with".

42. First, this is what the authorities above require in order for the exercise under section 38(6), which requires regard to be had to the development plan as a whole (ie including Policy 1 of the Neighbourhood Plan), to be carried out lawfully.

43. Secondly, this is what the case of Wavendon Properties Limited v. Secretary of State for Housing. Communities and Local Government [2019] PTSR 2077 (which is also relevant under Issue 2 below) requires the decision maker to do in considering whether the "tilted balance" in para. 11 of the NPPF applies, see per Dove J at para. 55:

> "…the first step was to identify which were the policies which were most important for determining the application. Having done so, it is then necessary for the decision-taker to examine each of those policies, applying the Framework and the approach in the Bloor Homes case [2017] PTSR 1283, to see whether they are out-of-date. Having done so, the next step required by paragraph 11(d) is an assessment of all the basket of policies most important to the decision in the round to reach a conclusion as to whether, taken overall, they could be concluded to be out-of-date or not for the purposes of the decision. If they were out-of-date then the presumption would be triggered".

44. Here, only the "out of date" policies were put into the Wavendon "basket". Policy 1 was left out of account because of the Council's misconstruction of it.

45. Thirdly, Singh LJ's conclusion at the end of para. 59 quoted above involves two misunderstandings of para. 11 of the NPPF. What Singh LJ says is that (1) the Committee were reminded that the proposed development was in the "countryside" and therefore contrary to the Development Plan policies and (2) the reason why the policies were out of date was not to do with the proposals being located in the countryside "but to do with the number of dwellings which would be needed in the Plan period going forward to 2036".

46. However, the "reminder" of the countryside location of the development under (1) was robbed of any force because the Council took the view, on the advice of the Chief Planning Officer, that the countryside protection policies could not be relied on precisely because they were "out of date" (whereas Policy 1 was wholly up to date but, because of the Officer's misconstruction of it, was not regarded as preventing the development outside the settlement boundary and therefore in "countryside").

47. In relation to (2) Singh LJ is simply wrong to say that the reason why the policies (not including Policy 1) were out of date was "to do with the number of dwellings which would be needed in the Plan period going forward to 2036". What para 11 of the NPPF is concerned with is whether a local planning authority "demonstrate a five year supply of deliverable housing sites", not whether as currently assessed they can meet their projected (and as yet untested) housing needs in a draft local plan.

48. In fact at the time of their decision, the Council were no longer in deficit in terms of their available five year supply and the "number of dwellings… needed in the Plan period going forward to 2036" was simply a factor relied by the Council in saying that the Neighbourhood Plan was "in tension" (but not "in conflict") with the (again, untested) aspiration in the draft local plan. (In any event, any so-called "tension" with the "direction of travel" in the non-statutory still only slowly emerging, not yet thoroughly examined draft Joint Local Plan, was expressly to be addressed when the Neighbourhood Plan is reviewed, as set in para. 1.15 of the Neighbourhood Plan quoted above).

49. The Court is also invited to note that, according to what he said in the course of argument, permission to appeal was granted by Lewison LJ apparently on the basis that the Report did not contain "anything… which constitutes an interpretation of Policy 1" (as referred to in para. 53 of Singh LJ's judgment) although that is to overlook the transcript of the Committee meeting containing the Officer's advice that the proposed development was "not in conflict" with the Neighbourhood Plan. Lewison LJ also expedited the hearing of the appeal without any party requesting the Court of Appeal to do so. It is to be inferred that he thought a clear error had been made on the part of the Judge which needed to be remedied swiftly. It is submitted that any such assumption was unjustified by reference to authority and certainly not by the Court of Appeal's conclusion that the Report does not purport to construe Policy 1.

50. Again, the Parish Council submits that the construction of Policy 1 was a fundamental prerequisite to the making of a lawful decision on the planning application before the Council, and in any event, the Parish Council put the conflict with the policy at the forefront of their representations on the application which are quoted in the Committee Report (but their objection on this ground was ignored because the Council took the view that there was no conflict), as recorded in the Report:

> "This application on land to the south west of Beyton Road is outside of the amended built-up area boundary and as such is contrary to not only policies within the Mid Suffolk Local Plan but also the post examination Thurston Neighbourhood Development Plan POLICY 1: THURSTON SPATIAL STRATEGY which states that all new development in Thurston parish shall be focused within the settlement boundary of Thurston village as defined within the Policies Maps…".

51. The language used by the Court of Appeal in rejecting the Parish Council's submissions also corroborates the impression that the outcome was (erroneously) regarded as a foregone conclusion, when in fact the true position in law, it is submitted, is at set out above. Singh LJ's judgment is dismissive of the Parish Council's submissions (based after all on the judgment of the Judge), see at para. 53: "Mr Lewis was driven to submit…", para. 54: "Mr Lewis had to submit…" and para. 55: "The closest that Mr Lewis was able to come…"

52. Also, just before the hearing of the appeal, Singh LJ drew the parties' attention to the case of R (Wyatt) v. Fareham Borough Council [2022] EWCA Civ 983 decided by him, the Senior President of Tribunals and Males LJ and containing some familiar learning on the section 38(6) exercise "so that submissions can be made about it at the hearing if you wish to". However, none of the parties regarded it as relevant and so did not make any submissions on it. But to the extent that it informed Singh LJ's judgement that that exercise had been performed correctly in the instant case it was not in fact relevant because in that case "there [was] no issue of policy interpretation for the court to resolve", see para. 98. Also, counsel for the local planning authority who was successful in resisting the Wyatt claim at first instance and on appeal was the trial judge in this appeal. It follows that he can well have been expected to have applied any principles emerging from Wyatt if they were relevant in this case, although he did not – and, the Parish Council submits, as an expert Planning Court Judge, he decided this case on the correct legal basis, whereas the Court of Appeal did not.

53. The Parish Council submits that Singh LJ's assumption that Wyatt might be relevant, ie as an example of a straightforward application of section 38(6), is a further indication of the Court of Appeal's misapprehension of the correct approach to the determination of this case.

Issue 2: whether the Judge erred in law in concluding that the tilted balance did not apply

54. Issue 2 is whether the Judge erred in law in concluding that the tilted balance did not apply.

55. All the parties were agreed that the Judge's conclusion on the application of the tilted balance was bound up with his conclusion on the construction of Policy 1 and so his conclusions on Issue 2 stood or fell depending on the correctness of his conclusion on Issue 1.

56. Having concluded that the Judge was in error on Issue 1, the Court of Appeal therefore held that the Report's treatment of the question whether the tilted balance applied was "entirely accurate", see para. 66.

57. The Parish Council maintains, as it did successfully before the Judge, that the "tilted balance" in para. 11(d) of the NPPF (which applies "where… the policies which are most important for determining the application are out of date") was not engaged since "Spatial Strategy" Policy 1 was manifestly "one of the policies which are most important for determining the application" and could not on any view be regarded as "out of date", having only been "made" in October 2019.

58. However, that policy was not put into the Wavendon "basket" of "most important policies" and so the Council's consideration was fundamentally undermined. That is, the Council failed at the "first step" which was "to identify which were the policies which were most important…", see Wavendon at [55].

59. If the Council had construed Policy 1 correctly, the committee report could not have been written in the way that it was, since Policy 1 had been omitted in undertaking the Wavendon exercise, see the unnumbered para. as follows:

> "A number of policies within the [adopted Local] Plan have now been held to be 'out-of-date' as a result of recent planning appeal decisions on the basis of Inspectors declaring them to be inconsistent with the NPPF 2019. On this basis the tilted balance required by paragraph 11 of the (sic) is brought into play where those policies are, in the round, considered to be those most important for the determination of the application in this instance noting the key issues; principally, policies CS1, CS2, and H7".

60. See also para. 3.10.3 of the Report:

> "…Members are advised that the 'Tilted Balance' described in paragraph 11 of the NPPF (2019) is triggered by the fact that some of the Council's relevant adopted planning policies are 'out-of-date' and the fact that the Thurston Neighbourhood Plan (2019) fails to satisfy the requirement contained in paragraph 14b of the NPPF (2019). The latter meaning the Neighbourhood Plan cannot in itself be relied on to resist sustainable development outside of the defined settlement for reasons previously discussed…".

61. As pointed out above, Policy 1 of the Neighbourhood Plan was excluded from the Council's consideration at this stage as a result of their misconstruction of it.

62. As the Court of Appeal held in Paul Newman New Homes Ltd v. Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 15, in which Wavendon was approved, "the concept of "relevance" [in para. 11(d) of the NPPF] means that a policy, or policies, had to have a real role to play in the determination of the application", per Andrews LJ at 39.

63. The Parish Council submits that Policy 1 self-evidently "had a real role to play in the determination of the application" but was in effect ruled out of account as a result of the Council's misconstruction of it.

Issue 3 – whether the judge's conclusion on the application of NPPF para. 14 was correct

64. Issue 3 is whether the judge's conclusion on the application of para. 14 of the NPPF.

65. As the Judge made clear in para. 89 of his judgment, resolution of the issue on para. 14 of the NPPF was not necessary to his decision. It followed that any decision on the issue in the appeal would not affect the outcome of it.

66. The Court of Appeal again held that the Judge's decision on Issue 3 was entirely predicated on the conclusion which he had… reached on" the construction of Policy 1 and that since the Court of Appeal had decided that that conclusion was wrong, it followed that the appeal should be allowed on Issue 3 as well, see para. 69.

67. The Parish Council once again submits that the Judge's construction was right and that his conclusions on Issue 3 in para. 91 of his judgment were again correct.

Proposed grounds of appeal

Ground 1

68. The Court of Appeal erred in concluding that the Council's decision to grant planning permission involved the application and not the interpretation of Policy 1 of the Neighbourhood Plan.

69. The Court of Appeal further erred in its construction of that policy and in failing to in follow the approach in Tesco Stores Ltd v. Dundee City Council [2012] PTSR 983 that planning decision makers must proceed on a proper understanding of the development plan and that the question of the proper interpretation of a policy is a "logically prior" question to the exercise of planning judgement in applying the policy.

70. The Judge at first instance was quite right, in point of construction and therefore in point of law, to conclude (as he did in para. 73 of his judgment) that the settlement boundary of Thurston did represent a "barrier" to general housing development outside it and therefore that the Court of Appeal erred in law in holding otherwise.

Ground 2

71. The Court of Appeal erred in concluding that the Council were right to apply the "tilted balance" in para. 11 of the NPPF in deciding to grant planning permission.

72. The Parish Council maintains, as it did successfully before the Judge, that the "tilted balance" in para. 11(d) of the NPPF (which applies "where… the policies which are most important for determining the application are out of date") was not engaged since "Spatial Strategy" Policy 1 was manifestly "one of the policies which are most important for determining the application" and could not on any view be regarded as "out of date", having only been "made" in October 2019.

Ground 3

73. The Court of Appeal erred in its conclusion on the application of para. 14 of the NPPF.

74. The Parish Council once again submits that the Judge's construction was right and that his conclusions on Issue 3 in para. 91 of his judgment were again correct.

MEYRIC LEWIS

Reasons why permission to appeal should be granted

75. All the parties and the Judge, a "specialist Planning Court Judge" (see reference to Hopkins below) proceeded on the basis that the central issue in the case was the proper construction of Policy 1 of the Neighbourhood Plan. After hearing full argument, and construing Policy 1 in its appropriate context, the Judge agreed with the Parish Council's submission that, on its literal wording, any development outside the boundary was contrary to the policy and the Spatial Strategy in the Plan and therefore engaged the presumption in section 38(6) of the 2004 Act. His construction is reinforced by para. 4.5 of the supporting text to the policy: "the general approach in the Thurston Neighbourhood Plan is that growth will be focused on the sites with planning permission (which are located within the amended settlement boundary) and on small scale infill sites within the settlement boundary" (and see also para. 5.6 quoted above).

76. While construction of policy is a matter of law for the court, there is no legal basis on which the Judge's construction of Policy 1 can be faulted in the "contextual" background against which he construed it, see Tesco above.

77. On the other hand, the Court of Appeal took it on themselves to conclude, contrary to the mutually understood parameters for debate recognised by the parties and the trial judge, that the Council's decision actually involved the application of Policy 1 rather than any interpretation of it.

78. It is submitted accordingly that this appeal raises a point of law of general public importance, namely, what the principles to be applied are in determining whether a local planning authority's treatment of development plan involves its interpretation or (mere) application.

79. The Tesco case referred to above involves consideration by the Supreme Court of the principles to be applied in a case involving the interpretation of policy.

80. Hopkins Homes Ltd v. Secretary of State for Community and Local Government [2017] UKSC 37; [2017] 1 WLR 1865 is a case involving consideration by the Supreme Court of the questions arising on the application of policy. But the Supreme Court has never been called upon to identify the difference between the two concepts of interpretation and application.

81. In Hopkins, Lord Carnwath JSC emphasised the distinction between the interpretation of a planning policy and its application as follows, see at para. 26:

> "Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the Tesco case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

82. The instant case and cases such as Gladman Developments Ltd v. Canterbury City Council [2019] EWCA Civ 669 and Chichester DC v. Secretary of State [2019] EWCA Civ 1640; [2020] 1 P & CR 9 pull in different directions and so it would be desirable to have a ruling by the Supreme Court to reconcile the principles to be applied.

83. The issue is also the subject of academic consideration, see The Interpretation of Planning Policy: The Role of the Court Journal of Environmental Law (10 Sep 2022) by Alistair Mills, Dias College Assistant Professor in Law, Magdalene College, Cambridge who highlights the difficulties in the distinction drawn in case law between the interpretation and application of policy, positing that the distinction is too simplistic, as is a binary distinction between "broad" and "specific" planning policies.

84. These principles need settling both as being a point of law of general public importance and "at this time" in accordance with para. 3.3 of Supreme Court Practice Direction because the Spatial Strategy in the Parish Council's Neighbourhood Plan is effectively negated if development outside the settlement boundary, on sites in addition to the Bloor site, can be allowed on the basis that it is not regarded as being in conflict with Policy 1 in the Neighbourhood Plan.

85. It is also submitted that it would be an injustice if the Parish Council's ability to challenge the housing strategy and provision in the emerging draft Local Plan, including the Bloor site and the other sites outside the settlement boundary were rendered nugatory by the upholding of the grant of planning permission for the Bloor proposals on the basis of an error of law on the part of the Court of Appeal.

86. The Court is also invited to note that this issue is not one confined to Thurston Parish in as much as at least four other neighbourhood plans in Suffolk (namely Stradbrooke, Melton, Martlesham, and Fressingham) use the same formula as in the Thurston Neighbourhood Plan, ie "development shall be focused within the settlement boundary", so their spatial strategies will be vulnerable to being breached by any decision that development outside their settlement boundaries is not in conflict with their Neighbourhood Plans.

87. Furthermore, since no case involving a Neighbourhood Plan has ever reached the Supreme Court, this appeal represents an opportunity for the Supreme Court to consider the Neighbourhood Planning regime referred to in the NPPF quoted in para. 1 above.

88. Lastly, the Parish Council requests expedition of the consideration of its petition for permission to appeal and thereafter of the hearing of its appeal. The case was expedited

by Lewison LJ without reference to any of the parties and decided very quickly after that. It follows that, if the Bloor permission is allowed to stand, the Parish Council will have lost their chance to challenge the allocation of the site on the basis of its conflict with the Neighbourhood Plan in the examination of the draft local plan when it resumes next year.

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