Neutral Citation Number: [2025] EWCA Civ 32

Case No: CA-2024-000466

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mr Justice Holgate
[2024] EWHC 279 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/1/2025

Before:
SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE NEWEY
and
LADY JUSTICE ANDREWS

- -

Between:

MEAD REALISATIONS LIMITED	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Respondents**
(2) NORTH SOMERSET COUNCIL	

- -
- -

Lord Banner KC and Isabella Buono (instructed by **Clarke Willmott LLP**) for the **Appellant**

Hugh Flanagan (instructed by **the Treasury Solicitor**) for the **First Respondent**

North Somerset Council did not appear and were not represented

Hearing date: 26 November 2024

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Approved Judgment

This judgment was handed down remotely at 4:20pm on 30 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals:

Introduction

1. Did an inspector, when determining an appeal against a local planning authority's refusal of planning permission for housing development, err in law by misunderstanding or misapplying policy and guidance on the "sequential test" for development proposed in areas at risk of flooding? That is the main question in this case. It concerns the relationship between national planning policy in the National Planning Policy Framework ("NPPF") and the corresponding guidance in the Planning Practice Guidance ("PPG"), both issued by the Government, and also their relationship with the relevant policy in the development plan.

2. With permission granted by Lewison L.J., the appellant, Mead Realisations Ltd., appeals against the order of Holgate J. – as he then was – dated 12 February 2024, by which he dismissed its claim for planning statutory review, under section 288 of the Town and Country Planning Act 1990, of the decision of the inspector appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government, dismissing its appeal against the refusal by the second respondent, North Somerset Council, of planning permission for a development of up to 75 dwellings at Lynchmead Farm, Ebdon Road, Wick St Lawrence, near Weston-Super-Mare.

3. The site lies to the north-west of Weston-Super-Mare, in a "High Probability (3a)" floodplain. The application for planning permission was made in June 2020, and refused by the council in July 2022 for three reasons, which included the contention that the proposal was contrary to government policy for the "sequential test" in paragraph 162 of the NPPF and to the related policy in the development plan. Mead Realisations appealed against that decision, under section 78 of the 1990 Act. The inspector held an inquiry into the appeal in May 2023. At the inquiry the council relied on the guidance relating to the policy in paragraph 162 of the NPPF that had been published in the PPG in August 2022. The inspector's decision letter is dated 20 June 2023. Mead Realisations' claim was filed on 28 July 2023. Permission to proceed was granted by Lang J. on 12 September 2023. On 31 October 2023 Sir Duncan Ouseley directed that the claim be heard together with a claim made by Redrow Homes Ltd. in which similar issues arose. The two claims came before Holgate J. at a hearing in the Planning Court on 17 and 18 January 2024. He dismissed them both. Mead Realisations appealed to this court; Redrow Homes did not.

4. In my view the judge was right to conclude and decide as he did.

The issues in the appeal

5. There are two grounds of appeal. They both relate to the judge's conclusions on the first ground of the claim under section 288, and they present us with two main issues:
    (1) whether the judge wrongly held that the PPG can "amend" the NPPF (ground 1); and
    (2) whether the judge wrongly held that the inspector properly treated the PPG as "elucidating" the NPPF (ground 2).

Paragraph 162 of the NPPF

6. In the first version of the NPPF, published in March 2012, paragraph 101 contained a policy for a "sequential approach" to be taken in assessing proposals for development likely to give rise to, or increase, the risk of flooding:

> "101. The aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. The Strategic Flood Risk Assessment will provide a basis for applying this test. A sequential approach should be used in areas known to be at risk from any form of flooding."

7. In the July 2021 version of the NPPF, extant when the inspector made his decision on Mead Realisations' section 78 appeal, the "sequential test" for flood risk appeared in paragraph 162, which was in chapter 14, "Meeting the challenge of climate change, flooding and coastal change". That paragraph, in similar terms to paragraph 101 of the version published in March 2012, stated:

> "162. 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 a 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."

8. There was no definition of "reasonably available sites" either in chapter 14 of the NPPF or in its "Glossary".

9. The 2021 version of the NPPF has since been superseded. In the current version, which was published on 12 December 2024, the policy set out in paragraphs 174 and 175 is not materially different from that in paragraph 162 of the version published in July 2021. Once again, there is no definition of "reasonably available sites" either in the text or in the "Glossary".

Paragraph 7-028 of the PPG

10. When the NPPF was first published in March 2012, the Government also issued a document entitled "Technical Guidance to the National Planning Policy Framework". That document was withdrawn on 7 March 2014.

11. The PPG was first published by the Government on 6 March 2014. It included a section entitled "Planning and Flood Risk", superseding the technical guidance document. That

section was amended on 25 August 2022. The amendment included the insertion of paragraph 7-028, which has since remained in its original form.

12. Paragraph 7-028 contains guidance on the "sequential test". The guidance relates to the policy in paragraph 162 of the NPPF, including the concept of a "reasonably available" site. It states:

> "What is a "reasonably available" site?
>
> 'Reasonably available sites' are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'.
>
> The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications."

13. I should add that the Government's response, dated 12 December 2024, to the consultation undertaken for the July 2024 draft NPPF, on Question 80 – "Are any changes needed to policy for managing flood risk to improve its effectiveness?" – said this:

> "After considering the comments received in relation to reasonably available sites, we will shortly be updating planning practice guidance to clarify the definition of reasonably available sites that should be considered as part of the sequential test."

Policy CS3 of the North Somerset Core Strategy

14. The North Somerset Core Strategy, containing policy CS3, was originally adopted by the council in April 2012. Its adoption was the subject of a successful challenge in the High Court, which did not, however, attack policy CS3. In January 2017 it was replaced by the North Somerset Core Strategy (January 2017).

15. Policy CS3, under the heading "Environmental impacts and flood risk assessments", states:

> "…
> Development in zones 2 and 3 of the Environment Agency Flood Map will only be permitted where it is demonstrated that it complies with the sequential test set out in the National Planning Policy Framework and associated technical guidance and, where applicable, the Exception Test, unless it is:

- development of a category for which National Planning Policy Framework and associated technical guidance makes specific alternative provision; or

- development of the same or a similar character and scale as that for which the site is allocated, subject to demonstrating that it will be safe from flooding, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

For the purposes of the Sequential Test:

…

2. A site is considered to be 'reasonably available' if all of the following criteria are met:

- The site is within the agreed area of search.
- The site can accommodate the requirements of the proposed development.
- The site is either:
    a) owned by the applicant;
    b) for sale at a fair market value; or
    c) is publicly-owned land that has been formally declared to be surplus and available for purchase by private treaty.

Sites are excluded where they have a valid planning permission for development of a similar character and scale and which is likely to be implemented."

16. We were told that the reference to "associated technical guidance" is to the document issued by the Government in March 2012 and withdrawn on 7 March 2014.

The inspector's decision letter

17. In his decision letter, under the sub-heading "*Development plan policy*", the inspector addressed Mead Realisations' argument that none of the 39 alternative sites put forward by the council were "reasonably available" because they all failed one or more of the criteria in the second part of policy CS3 (paragraphs 14 to 22 of the decision letter). This, he said, was an argument that the council's witnesses' evidence "does not seek to challenge … to any great extent, relying instead on the assessment of reasonably available sites as defined in national flood risk policy and guidance rather than the second section of Policy CS3, which it considers to be out of date" (paragraph 14). He concluded (in paragraph 22):

> "22. Taking these factors together, I conclude that there is insufficient evidence to demonstrate that any of the alternative sites proposed as reasonable alternatives by the Council meet all of the bulleted criteria set out in the second section of Policy CS3."

18. However, under the sub-heading "*National flood risk policy*", he said (in paragraphs 23 to 27):

> "23. Moving on to consideration of the proposal against national planning policy, the second section of Policy CS3 is now inconsistent with the Framework. Although the wording of national planning policy on flood risk in the Framework is largely the same as it was when Policy CS3 was adopted, the interpretation of it has been clarified by more recent guidance contained in the PPG.
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> 24. In the PPG, reasonably available sites are defined as those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> 25. The PPG says that these could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. There is nothing in the PPG that requires smaller sites to be adjacent to one another, as suggested by the appellant. A series of separate small residential sites would still provide suitable alternative land for equivalent development at a lower risk of flooding.
>
> 26. The PPG also says that such lower-risk sites do not need to be owned by the applicant to be considered reasonably available. Reasonably available sites can include ones that have been identified by the planning authority in site allocations or land availability assessments. There are no exclusions in the PPG relating to sites with planning permission or that publicly owned land must be formally declared to be surplus.
>
> 27. Paragraph 219 of the Framework states that due weight should be given to development plan policies, according to their degree of consistency with the Framework. In this case, because of the inconsistency between the documents as to what is meant by reasonably available, I give lesser weight to the second section of Policy CS3 than I do to the newer and more up to date Framework as interpreted by the PPG."

19. He acknowledged (in paragraph 35) that "the guidance provided in the PPG [was] a material consideration which [he had] taken into account in [his] decision". And he went on to say (in paragraphs 36 to 41):

> "36. Drawing these matters together, I consider that for the purposes of applying the sequential test in this appeal, a reasonably available alternative site is one whose location lies within the district of North Somerset, can accommodate residential development, and would be available for development at the point in time envisaged for the proposal as interpreted above. The alternative sites could include a series of smaller sites so long as collectively they are capable of accommodating the proposed development. There is no need for such smaller sites to be contiguous. Sites do not need to be owned by the applicant, nor are they excluded because of an extant planning permission or resolution to grant. So long as a site is available to be developed there is no need for further evidence

that they are for sale or, in the case of publicly owned land, declared to be surplus and available for purchase by private treaty.

37. Applying those criteria to the alternative sites put forward by the Council, I find that many fall within the meaning of reasonably available in the Framework, as set out in the PPG.

38. Even if a more restrictive definition of the type of development were to be used, taken to mean residential development of a suburban nature, and the availability of sites for development was taken to be now, in the sense that they either have extant planning permission (or a resolution to grant) for residential development in the current development plan with delivery expected at least in part by 2025, then there are still many alternative sites that would meet the Framework definition of reasonably available.

39. Other than in specific instances, individual sites were not discussed in detail at the inquiry as both main parties accepted that the question of whether a site was deemed to be reasonably available depended largely on my conclusions on the differences in interpretation of the wording of the PPG, and the respective weight given between Policy CS3 on the one hand, and the Framework as informed by the PPG on the other.

40. I conclude that the proposed development fails the sequential test as set out in the Framework because there are reasonably available sites for residential development appropriate to the proposed development on land with a lower risk of flooding than the appeal site.

41. The first part of Policy CS3 requires that development will only be permitted where it is demonstrated that it complies with the sequential test set out in the Framework. As I have concluded that the Framework's sequential test would not be complied with, it follows that the proposed development is in conflict with the first part of Policy CS3. Other than for the definition of the area of search being North Somerset-wide, I consider the remainder of the second part of Policy CS3 to be out-of-date because it is inconsistent with the Framework. I therefore conclude that the proposed development conflicts with Policy CS3 overall. As Policy CS3 was agreed as being the most important policy in determining this appeal, I conclude that the proposal also conflicts with the development plan when taken as a whole."

20. When he came to the "Planning Balance" he acknowledged the benefits of the proposal, but concluded (in paragraphs 55, 56 and 59):

"55. Set against those benefits is the harm that would arise if the development were to flood. Evidence provided by the Council indicates that tidal flood waters could be deep. Such flooding would enter dwellings and surcharge drains. Standing water would be likely to be present for some time before water levels returned to normal. Such flooding would cause extensive damage both to buildings and their contents, requiring significant repair or replacement. There may also be adverse health and environmental impacts. The risk of this harm occurring weighs significantly against the proposal.

> 56. Irrespective of the degree of risk of flooding occurring or measures that could be taken to make the development resilient to flooding during its lifetime, the Framework is clear that development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. I have found that there are such sequentially preferable sites available. This weighs heavily against the proposal.
>
> …
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> 59. Although the benefits of providing housing, including affordable housing, in an area with an acknowledged shortfall of housing land would be significant, I conclude that the failure to meet the sequential test and the significant harm that would arise if the development were to flood outweigh those benefits and the other advantages outlined above."

21. In his "Conclusion", therefore, he said that "the proposal would conflict with the development plan when taken as a whole, and that it would also conflict with national planning policy on minimising flood risk to new development"; and that "[other] material considerations [did] not outweigh the harm so caused" (paragraph 61).

The conclusions of Holgate J. in the court below

22. On the relationship between the policy for the "sequential test" in the NPPF and the corresponding guidance in the PPG, Holgate J. said (in paragraph 62 of his judgment) that he did not think it was accurate to say the PPG was "only guidance, as if to suggest that it has a different *legal*, as opposed to *policy*, status from the NPPF", or that "fundamental legal principles on policy" did not apply to both. The ability of the Secretary of State to adopt either derived from "the same legal source of power as the central planning authority". The NPPF did "not have some special legal status" of its own.

23. The judge went on to say (in paragraph 67):

> "67. The policies in the NPPF vary in style. Some, like Green Belt policy, are relatively detailed and prescriptive (as policies). Other parts of the NPPF set a framework and the PPG provides more specific or detailed policy guidance on, for example, conditions in planning permissions, development affecting heritage assets and … the sequential test for flood risk cases."

and (in paragraphs 70 and 71):

> "70. As a matter of *policy*, PPG is intended to support the NPPF. Ordinarily, therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF. However, I see no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF. Mr Banner was unable to point to any legal principle by which the court could treat such a PPG as unlawful. [*R. (on the application of West Berkshire District Council) v Secretary of State for*

> *Communities and Local Government* [2016] 1 W.L.R. 3923)] is one example of the Secretary of State introducing a new national policy through WMS and PPG which amended, and was inconsistent with, the pre-existing national policy as set out in the NPPF. …
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> 71. Similarly, I am unimpressed by the claimants' argument that PPG cannot be adopted which is "restrictive" of policy in the NPPF. Where a policy in the NPPF is expressed in very broad or open terms, more detailed guidance in the underlying PPG may be rather more focused as to the approach to be taken. To describe that PPG as restrictive, and therefore inappropriate, is likely to be one-sided and unhelpful. Additions to, or changes in, policy may produce winners and losers. Parties affected by policy will have different points of view. …".

24. He described the policy in paragraph 162 of the NPPF as "a broad, open-textured policy". There was "no additional language indicating how the issue of "appropriateness" should be approached or assessed". And "[on] the face of it, the question of appropriateness is left open as a matter of judgment for the decision-maker" (paragraph 97). Paragraph 7-028 of the PPG did not conflict with that "open-textured" policy in the NPPF, but performed the "legitimate role of elucidating" it (paragraph 108). This interpretation did not involve treating either the NPPF policy or the PPG guidance as a "binding code", which would be "impermissible". They "can and should be read together harmoniously" (paragraph 112). Paragraph 7-028 of the PPG was "a proper aid to clarifying and understanding the meaning of the NPPF" (paragraph 113).

25. Upholding the inspector's approach as lawful, he said (in paragraphs 141 to 143):

> "141. I see no possible legal error in the Inspector's conclusion that the proposal conflicted with the first part of policy CS3 because it conflicted with the sequential test in the NPPF read together with the PPG. It was not suggested by Mead that policy CS3 should be interpreted as referring solely to the 2012 version of the NPPF and ignoring any alterations to that document. So if the NPPF had been amended by including the text contained in para. [7-028] of the PPG, Mead could have no legal complaint. I have explained that there is no legal principle which prevents national policy in the NPPF being altered by a WMS and/or PPG. In any event, para. [7-028] of the PPG is consistent with the open-textured language of para.162 of the NPPF properly understood. The former has merely clarified the latter. The Inspector correctly treated the PPG as having elucidated the NPPF.
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> 142. For essentially the same reasons, the Inspector did not commit any error of law when he concluded that the criteria in the second section of policy CS3 are out of date because they are inconsistent with the NPPF read together with the PPG (DL 23 to DL 27 and DL 41).
>
> 143. [Counsel] submits that the Inspector erred because in treating the PPG as interpreting the NPPF (or defining "reasonably available" sites) he was applying the PPG as a "binding code[".] I have already explained why that argument is unsustainable … ".

The first main issue – whether the judge wrongly held that the PPG can "amend" the NPPF

26. For Mead Realisations, Lord Banner K.C. argued that the judge was wrong to hold that the PPG could "amend" the NPPF. The PPG could amplify or elucidate policies in the NPPF – as did the "paradigm example" of its guidance supporting NPPF policy on heritage assets, in paragraph 18a-018 – but it could not rewrite those policies, such as by imposing additional mandatory requirements. The PPG was "subservient" to the NPPF. It could give guidance, or a "steer", on the application of NPPF policies, but not create additional requirements that must be met, or restrictions that must be complied with, if a proposal was to accord with those policies.

27. In making that submission Lord Banner relied on passages in four High Court judgments, which, he argued, show that PPG guidance does not have binding effect, even if it has a "flavour of obligation about it": the judgment of Dove J. in *Menston Action Group v City of Bradford* [2016] EWHC 127 (Admin); [2016] P.T.S.R. 466, where, in the context of flood risk, he referred to paragraph 7-050 of the PPG as being "obviously subservient to the policy [in paragraph 103 of the then extant version of the NPPF] for which it provides practice guidance" (paragraph 41); the judgment of Lieven J. in *Solo Retail Ltd. v Torridge District Council* [2019] EWHC 489 (Admin), in which, when considering the checklist for retail impact assessment set out in paragraph 2b-017 of the PPG, she rejected the suggestion that its content was "mandatory where there is a policy requirement for any form of impact test" (paragraph 34); the judgment of Lang J. in *R. (on the application of White Waltham Airfield Ltd.) v Royal Borough of Windsor and Maidenhead* [2021] EWHC 3408 (Admin), where, in the context of noise impact, she rejected an attempt to "elevate the PPG into a binding code which strictly prescribes the steps that a local planning authority must follow when undertaking its assessment" (paragraph 78); and the judgment of Lang J. in *Bramley Solar Farm Residents Group v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2842 (Admin), where, in the context of energy generation, she rejected the suggestion that the PPG imposed a duty to consider alternative sites (paragraph 171), and stressed that "[the] PPG is merely practice guidance which supports the policies in the [NPPF, and …] is not a binding code which prescribes the steps that must be taken when planning a solar farm" (paragraph 177). Lord Banner maintained that there was "no principled reason" to justify a different view being taken of the PPG's guidance on the sequential test for development proposed in areas of flood risk from that taken to its guidance on retail impact or noise assessment or energy generation.

28. Lord Banner submitted that the PPG could not "override" policy in the NPPF, nor create a "binding code" of that kind. He accepted that paragraph 7-028 of the PPG, properly understood, did not exceed the proper role of such guidance. But, he contended, the updated version of the PPG published in August 2022 could not redefine or constrain the broad concept of "reasonably available sites", which by then had been in NPPF policy for some ten years, by cutting down the range of possibilities under that policy or by providing an exhaustive list of considerations. The PPG could not support the implementation of national policy by changing its requirements. The stability of the policies in the NPPF would be undermined if their meaning and effect could be changed

by mere guidance that had only emerged in the PPG, without prior warning or consultation.

29. I cannot accept Lord Banner's criticism of the judge's approach. In my view Holgate J.'s conclusions on the status and role of the NPPF and of the PPG were correct. I also agree with his interpretation of the policy and guidance in question, and with his view on the synergy between them.

30. Lord Banner's argument on this ground rests on the proposition that, as a matter of law, the guidance for the sequential test in paragraph 7-028 of the PPG could not alter the policy in paragraph 162 of the NPPF by making it more onerous or restrictive than it was in its own terms. Like the judge, however, I think the premise here is wrong. As the inspector recognised, and as the judge concluded in paragraph 141 of his judgment, the policy and the guidance are entirely congruent with each other. The judge made the point well when he said that paragraph 7-028 of the PPG is "consistent with the open-textured language" of paragraph 162 of the NPPF, "properly understood". The guidance does not exceed the ambit of the policy. It does what guidance in the PPG can quite legitimately do, which includes explaining a particular policy in the NPPF and how it is meant to operate.

31. If that is so, there is no need for us to decide whether the proposition itself is incorrect, and whether there is any legal principle that prevents national policy in the NPPF being amended, or altered, by guidance in the PPG. But if the question of principle did arise for our decision, I would agree with Holgate J., again in paragraph 141, for the reasons he gave there and in preceding passages of his judgment, that no such rule exists in law.

32. There is no need to depart from orthodox principle in reaching those conclusions. It is well established that the interpretation of planning policy, whether at national or local level, is ultimately a matter for the court. It is equally well established that the court does not generally approach this task with the same linguistic precision as it does the interpretation of a contract or statute (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 938, at paragraphs 18 and 19). The court will also take care to distinguish between proceedings in which the interpretation of planning policy is truly in issue and those in which the real complaint is about the decision-maker's application of that policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] 1 W.L.R. 1865, at paragraph 26).

33. As the judge recognised (in paragraph 62 of his judgment), the legal status of the Government's planning policies in the NPPF and its guidance in the PPG is basically the same. No legal distinction exists between them. They are not legislation. Their status is equivalent in the sense that both of them are statements of national policy issued by the Secretary of State when exercising his general power to do so as the minister with overall responsibility for the operation of the planning system (see the judgment of Lord Carnwath in *Suffolk Coastal District Council*, at paragraph 19, where he referred to the NPPF as "national policy guidance"; the judgment of Lord Gill in the same case, at paragraph 74, where he referred to "[the] guidance given by the Framework"; and the speech of Lord Clyde in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295, in which he said, at paragraph 143, that "[the] formulation of policies is a perfectly

proper course for the provision of guidance in the exercise of an administrative discretion"). Both the NPPF and the PPG are national planning policy in this broad sense. So too, for example, is a written ministerial statement (see the judgment of Laws and Treacy L.JJ. in *West Berkshire District Council*, at paragraph 25).

34. More than a decade after they were first published, the NPPF and the PPG form a mature body of planning policy and guidance. They have somewhat different purposes. The NPPF is a comprehensive framework of national planning policy, in which the Government sets out its general policies for planning decision-making and plan preparation. The PPG is national guidance for planning practice, which can reinforce that framework. Policies in the NPPF will generally state the Government's objectives and purposes for various aspects of land use planning and planning decision-making, and the essential principles that apply. And – again generally – guidance published in the PPG explains how those policy objectives and purposes are to be achieved, and the principles put into practice, in the decision on an individual proposal or in the preparation of a plan.

35. I would endorse here the observation made by Mr David Elvin Q.C. in *Bent v Cambridgeshire County Council* [2017] EWHC (Admin) (at paragraph 37) that the PPG "comprises a mixture of policy and guidance produced in a less formal manner than the NPPF and subject to frequent on-line revision". Guidance of the kind one sees in the PPG performs a valuable role in explaining, clarifying or elucidating the policies in the NPPF to which it relates. The PPG is not, as Lord Banner put it, a "rival corpus of policy". Much of the guidance it contains is explicitly connected to NPPF policies. It complements those policies. Reflecting the "Conclusion" and "Recommendations" of the report submitted by Lord Taylor of Goss Moor to the Department for Communities and Local Government in December 2012, its function is to support the NPPF, to the benefit of applicants, authorities, those involved in some other way or interested in the planning process, and practitioners. Its mode of publication, as an online resource, makes it both accessible and adaptable to changing circumstances. It promotes greater predictability and consistency in various aspects of planning decision-making and plan preparation when the Government considers this to be necessary, with amendments or additions made to the guidance from time to time and redundant passages withdrawn. It is conducive to certainty in the planning process, without constraining unduly the exercise of planning judgment by local planning authorities, or, in appeals, the Secretary of State and inspectors.

36. This is not to say – and it would be unreal to suggest – that in areas of policy where the Government has provided no guidance in the PPG the conduct of planning decision-making and plan preparation is left as a free-for-all – unpredictable, inconsistent and arbitrary. It is merely to recognise that in these areas the Government has seen no need to use the PPG as a means of assisting the exercise of planning judgment by those to whom Parliament has given the task of making decisions and preparing development plans.

37. These are only generalities. I have not sought to describe, exactly and completely, the different attributes of NPPF policy and PPG guidance, but only to identify some of the features they have. I do not think it is necessary to attempt an exact definition of the role of the PPG. The formulation of national planning policy and guidance involves, for the Secretary of State, a wide discretion, which can be exercised flexibly as

circumstances require. As Holgate J. recognised in paragraph 67 of his judgment, the policies of the NPPF are not uniform in style. Where the NPPF policy is in relatively broad terms, as it is for flood risk, the need for elucidation or explanation in the PPG may be greater. Where the policy is more prescriptive, it may be less. But there are no hard and fast rules on what each must contain, or how each must be expressed.

38. Both the policies in the NPPF and the guidance in the PPG are capable of being material considerations in decision-making on planning applications and appeals. And the weight to be given to such policy or guidance in a planning decision is a matter for the decision-maker, subject to the court's intervention on public law grounds (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 2 All E.R. 636, at p.657e-j).

39. Relevant factors in assessing weight may include the respective terms of the policy and guidance and whether they sit easily together; the timing of their publication, including, for example, whether the policy emerged before the guidance or vice versa, and how recently each was issued; and the nature of the process by which they were produced, including, for example, the fact that the guidance in the PPG is generally not subject to any external consultation before being issued, whereas the policies in the NPPF are.

40. In *Solo Retail* (at paragraph 33) Lieven J. pointed out that the PPG is "not consulted upon, unlike the NPPF and Development Plan policies" and is "subject to no external scrutiny, again unlike the NPPF, let alone a Development Plan". She also noted that "[it] can, and sometimes does, change without any forewarning", that it "is not drafted for or by lawyers", that "there is no public system for checking for inconsistencies or tensions between paragraphs", and that "[it] is intended, as its name suggests to be guidance not policy …". However, to describe the PPG as being, in a legal sense, wholly "subservient" to the NPPF or subordinate to it in a hierarchy of national planning policy would not be right – and Lieven J. did not say that in *Solo Retail*. The exact relationship between a particular policy in the NPPF and corresponding or relevant guidance in the PPG will vary according to the content and terms of the policy and guidance in question.

41. Holgate J. understood the interdependence between NPPF policy and PPG guidance when he said (in paragraph 70 of his judgment) that "[as] a matter of *policy*, PPG is intended to support the NPPF", and "therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF". I agree. Given the function of guidance in the PPG to support policies in the NPPF, one would not expect the Government to publish policies and guidance that are inconsistent with each other. This would not only be counter-intuitive; it would cause needless confusion about the Government's objectives.

42. Policies in the NPPF and guidance in the PPG may, I think, be used as an aid to the interpretation of each other. In *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610; [2018] 2 P. & C.R. 9, a case concerning the policy in paragraph 55 of the 2012 version of the NPPF, I said (at paragraph 36) that "I doubt[ed] that it would be right to exclude the guidance in the PPG as a possible aid to understanding the policy or policies to which it corresponds in the NPPF". That comment was "obiter" because the court did not have to resort to the PPG to assist the interpretation of a policy whose meaning was "plain on its face and required[d] no illumination from the PPG or any other statement of national policy or

guidance". In this case too, both the NPPF policy in question and the related guidance in the PPG are clear in their own terms, and when read together they form a coherent whole.

43. Interpreting the policy and guidance with which we are concerned is not difficult. The starting point is the heading given to paragraph 7-028 of the PPG – "What is a "reasonably available" site?". This links precisely to the policy in paragraph 162 of the NPPF, and indicates that the intention of the guidance is to explain the policy as written, not to amend it.

44. In setting up the "sequential test", the first sentence of paragraph 162 of the NPPF expresses the aim of the Government's policy in very simple terms – "to steer new development to areas with the lowest risk of flooding from any source". The general thrust of the policy is to be seen in the second sentence, which describes the sequential approach – that "[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", but adds nothing to define or explain the meaning of "reasonably available sites". The third sentence confirms that the strategic flood risk assessment will provide the basis for applying the sequential test; and the fourth that the sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.

45. The policy in paragraph 162 of the NPPF was aptly described by the judge as "broad" and "open-textured". Mr Hugh Flanagan, for the Secretary of State, also referred to it as being "high level". It does not set rigid parameters for the concept of "reasonably available sites". This is an elastic concept, not defined or limited by any other text in the NPPF, nor accompanied by any criteria. It leaves for decision-makers a range of evaluative judgment in ascertaining whether a particular site is or is not "reasonably available".

46. In the absence of a definition of "reasonably available sites" in the NPPF itself, there was obvious scope to clarify that concept in the PPG, and obvious advantage in doing so. Providing a definition in the glossary to the NPPF, or elsewhere in the text, was not the only way in which that could be done. The opportunity to do it was properly taken in the PPG.

47. On the correct interpretation of the policy in paragraph 162 of the NPPF and the guidance in paragraph 7-028 of the PPG, the latter did not amend the former. The PPG did not contradict or override the existing NPPF policy for the sequential test. It did not generate a new or different policy. It did not modify the existing policy by introducing into that policy additional requirements or restrictions. It provided practical guidance on the application of the policy as it stood. It articulated the Government's thinking on the concept of "reasonably available sites". It did so by identifying considerations that would be relevant in applying the pre-existing policy in the NPPF. None of this involved any amendment to the NPPF policy itself. No such amendment was required. The guidance fell within the four corners of the policy.

48. What the PPG guidance did was to clarify – or "elucidate" – the NPPF policy as written. And it did so in flexible language, not in prescriptive terms. It prompts the exercise of

evaluative judgment by the decision-maker. Its first paragraph invites the decision-maker to judge what is a "suitable location for the type of development", and whether or not there is "a reasonable prospect that the site is available to be developed at the point in time envisaged for the development". The second paragraph is notably open-ended. It begins by saying that these locations "could include" sites of various kinds: "a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development". It adds that "[such] lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'". These are not "mandatory" requirements. They are not a "binding code", or a "straitjacket". They are elucidation, or explanation. Seen in this way, as Mr Flanagan submitted, the guidance in paragraph 7-028 of the PPG is, in fact, "subservient" to the policy in paragraph 162 of the NPPF.

49. Even before the PPG guidance was published it would have been open to a local planning authority, or an inspector, to apply the NPPF policy in the way that the guidance was later to indicate. Equally, once the guidance had been issued it was permissible for decision-makers, when performing their duty under section 38(6) of the Planning and Compulsory Purchase Act 2004, to apply the policy in the light of that guidance in judging whether a decision to grant planning permission would be in accordance with development plan policy drafted to embrace the sequential test in the NPPF. And that is what happened here.

50. The fact that the PPG guidance was only published about ten years after the NPPF policy first appeared does not matter. The publication of practice guidance does not have to be contemporaneous, or near contemporaneous, with the publication of the policy it serves. Nor is the use of the PPG to provide practice guidance limited to explaining the intention of the Government at the time when the related policy in the NPPF was originally promulgated. No such limit on the function of the PPG as practice guidance appears anywhere in the PPG, or in the NPPF. It would artificially curtail the Government's freedom to explain, through such guidance, the intended operation of NPPF policy.

51. The final point here is this. When the decision in this case was made, national policy for the sequential test in paragraph 162 of the NPPF had been incorporated into the development plan in the first part of policy CS3. Also, however, the NPPF policy referred to there had subsequently been clarified by the guidance in paragraph 7-028 of the PPG, which was now in place. And the second part of policy CS3, in stating criteria for assessing whether a site is "reasonably available", not only went beyond what was said in the NPPF policy itself; it was also out of kilter with the clarification of that policy provided in the PPG.

52. In my view therefore, Holgate J. was right to hold that the guidance in paragraph 7-028 of the PPG did not amend the policy in paragraph 162 of the NPPF. As he said (in paragraph 112), the policy and guidance "can and should be read together harmoniously", and (in paragraph 141) "… para.[7-028] of the PPG is consistent with the open-textured language of para.162 of the NPPF properly understood", "[the] former has merely clarified the latter", and "[the] Inspector correctly treated the PPG as having elucidated the NPPF". This was a classic case of guidance in the PPG doing what it can and should do in supporting, by clarifying, the policy in the NPPF to which it relates.

53. But if the question of principle raised in ground 1 of the appeal were not merely hypothetical in the circumstances here and it were right to regard the guidance in paragraph 7-028 of the PPG as not merely having elucidated or explained the policy in paragraph 162 of the NPPF but as having actually amended it, I cannot see any legal obstacle to that. I would accept the judge's view (in paragraph 70 of his judgment) that there is "no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF", nor "any legal principle by which the court could treat such a PPG as unlawful". As the judge said, *West Berkshire District Council* provides an example of the Secretary of State introducing a new national policy through WMS and PPG that amended, and was inconsistent with, an extant national policy in the NPPF. I also agree with his conclusion (in paragraph 141) that "there is no legal principle which prevents national policy in the NPPF being altered by a [Written Ministerial Statement] and/or PPG". Putting the point at its lowest, for the Government to have used the guidance it gave in paragraph 7-028 of the PPG to modify or qualify its own policy in paragraph 162 of the NPPF in those terms would not have been contrary to any provision of statute, nor would it have it offended any principle of law.

54. None of the four judgments on which Lord Banner relied is at odds with the conclusions of Holgate J. on this part of the challenge, or with my own. They do not suggest a different outcome for ground 1 of the appeal. As Holgate J. said (in paragraph 87 of his judgment), it is necessary to read the passages relied on "in the context of what the issues were in those cases and what was really decided by the court".

55. In *Menston* Dove J. had to consider a passage of guidance in the PPG relating to the effect of development on flood risk and the policy to which it related in the NPPF. He found (in paragraph 41 of his judgment) that the passage in question, in paragraph 7-050 of the PPG, which concerned opportunities to "reduce" the level of flood risk overall, was "obviously subservient" to the policy of the NPPF for which it provided practice guidance, which referred, in paragraph 103, to authorities "ensuring that flood risk is not increased elsewhere". There was, therefore, an evident tension between the policy in the NPPF and the guidance in the PPG. Dove J. said that "the text within the PPG could not override that reading of the primary document", and that the particular passage of guidance he was dealing with was "of generic or overarching application and does not provide an additional gloss on the Framework's separation of policy requirements for plan-making and decision-taking". This was ultimately a question of interpretation for the court. In that case, as Holgate J. said (in paragraph 92), "… the PPG did not purport to give guidance on development control …" and "[accordingly], this was an example of PPG which was not an aid to the interpretation of NPPF policy for dealing with planning applications". And in any event in this case there is no tension between the policy and guidance in question.

56. In *Solo Retail*, when considering the checklist for retail impact assessment in paragraph 2b-017 of the PPG, Lieven J. (in paragraph 33 of her judgment) urged "considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set out [in the PPG]". She emphasised that the PPG was "intended … to be guidance not policy [,] must therefore be considered by the Courts in that light", and would "rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in [*Tesco v Dundee*] applied to the Development [Plan] Policy there in

issue" (paragraph 33). The paragraph containing the checklist, she said, "cannot and should not be interpreted and applied in an overly legalistic way as if it was setting out mandatory requirements" (paragraph 34). The force of what Lieven J. was saying there was that the PPG was not imposing an additional, compulsory test. Her observations on the relevant passage in the PPG do not go against the conclusions to which Holgate J. came on the issues in this case. The issue in that case, as he said (in paragraph 88) and as Lieven J. herself had said (in paragraph 30 of her judgment), was "really an argument about the application of policy, not its interpretation"; and the PPG "did not set out mandatory requirements …".

57. In *White Waltham* Lang J. was considering the relationship between the policy in paragraph 182 of the NPPF, which sought noise assessments that took into account the effects of development on "[existing] businesses and facilities", and the guidance in paragraph 30-009 of the PPG, which sought consideration of both "existing and future activities". Rejecting the claimant's attempt to "elevate the PPG into a binding code which strictly prescribes the steps that a local planning authority must follow when undertaking its assessment, otherwise it will be found to have acted unlawfully", she described this as "a mistaken approach". The PPG, she said, was "merely practice guidance, which is intended to support the policies in the NPPF" (paragraph 78 of her judgment). Again, those conclusions do not disturb Holgate J.'s analysis in this case. And as he said (in paragraph 89), Lang J. rejected the challenge to the adequacy of the noise assessment that had been carried out, and "[in] those circumstances, the claimant's reliance under ground 2 upon PPG guidance added nothing of substance …".

58. In *Bramley Solar*, a case concerning a proposed solar farm, Lang J. rejected (at paragraphs 117 to 179 of her judgment) the suggestion that the guidance in paragraph 5-013 of the PPG, which stated that applicants "will need to consider" alternative sites, imposed a duty to do so in the absence of any such requirement in the NPPF. She repeated what she had said in *White Waltham*; the PPG was "not a binding code which prescribes the steps that must be taken … " (paragraph 177). The same may be said once again. The issue in that case was different from the one that arises here, but Lang J.'s essential conclusions do not clash with those of Holgate J..

59. If, however, there is any incompatibility between the reasoning in those four judgments and Holgate J.'s in this case, I should make it clear that I regard his as sound, and prefer it.

The second main issue – whether the judge wrongly held that the inspector properly treated the PPG as "elucidating" the NPPF

60. On ground 2 of the appeal Lord Banner submitted the judge was wrong to conclude (in paragraph 141 of his judgment) that the inspector had treated the guidance in paragraph 7-028 of the PPG as merely "elucidating" the policy in paragraph 162 of the NPPF. The inspector had not understood the position of the PPG in the "hierarchy" of policy and guidance. Having found in paragraph 22 of his decision letter that the proposal accorded with policy CS3 of the core strategy read together with paragraph 162 of the NPPF, he had gone on to find in paragraph 23 that this position had been changed by the amendments to the PPG made in August 2022, and that the second part of policy CS3 was "now inconsistent" with the NPPF. He had treated the PPG guidance, in excess of

its proper role, as "rigidly defining" the concept of "reasonably available sites", and setting out "binding criteria" or "requirements" that must be satisfied if a site was to be considered "reasonably available" under national planning policy in the NPPF. The PPG could not "in law" have that effect. The inspector had not used the PPG as an aid to the interpretation of NPPF policy; he had used it to rewrite the policy.

61. This argument is, in my view, ill-founded. The inspector did not find that the guidance in paragraph 7-028 of the PPG had amended, or altered, the policy in paragraph 162 of the NPPF. On the contrary, he concluded, in paragraph 23 of his decision letter, that the guidance had "clarified" the policy. And this, as I have said, is the correct understanding of the guidance.

62. I agree with Holgate J.'s reading of the inspector's decision letter. He was right to hold, in paragraph 141 of his judgment, that it was open to the inspector to find the proposed development in conflict with the first part of policy CS3 because it did not comply with the policy for the "sequential test" in paragraph 162 of the NPPF as now "clarified" – or "elucidated" – by the guidance given in paragraph 7-028 of the PPG. And as the judge held in paragraph 142, the inspector did not commit any error of law when he found that the criteria in the second part of policy CS3 were out of date because they were inconsistent with the NPPF read together with the PPG.

63. I see nothing unlawful in the inspector's conclusions on the proposal's conflict with national and local policy. On a fair reading of his decision letter, it cannot be said that he misunderstood the relationship between the policy in paragraph 162 of the NPPF and the guidance on "reasonably available sites" in paragraph 7-028 of the PPG, or that he regarded the guidance as imposing on him as decision-maker a "binding code", "binding criteria" or "mandatory requirements", or as putting him in a "straitjacket". Nor did he misunderstand the relationship between the Government's policy and guidance and policy CS3 of the core strategy.

64. His assessment is straightforward, and unsurprising. In paragraph 23 of the decision letter he referred, rightly, to the inconsistency between the second part of policy CS3 and the policy for the sequential test in the NPPF, which had not itself changed, but whose "interpretation" had, as he said, been "clarified by more recent guidance contained in the PPG". In paragraphs 24, 25 and 26 he recorded the gist of the guidance accurately. His use of the word "defined" in paragraph 24, when taken in context, does not imply that he misconstrued or misapplied the guidance in paragraph 7-028 of the PPG. In paragraph 27, his reference to "inconsistency between the documents" simply reflected the fact that the PPG had now explained the concept of "reasonably available sites" in a way that was different from policy CS3. Quite properly in the light of the policy in paragraph 219 of the NPPF, he exercised his own planning judgment on the relative weight to be given respectively to the second part of policy CS3 and to the NPPF policy "as interpreted by the PPG". He clearly did not regard the up to date guidance as overriding the NPPF policy itself, but as assisting an understanding of it. And he concluded, crucially, that "lesser weight" was now due to the second part of policy CS3. No issue is taken, or could be, with that exercise of planning judgment. It was, in my view, lawful.

65. In paragraph 35, before carrying out the sequential test, the inspector acknowledged that the PPG guidance was a "material consideration" in his decision – which was

correct. His description of the sequential test, in paragraph 36, is uncontentious. He then, in paragraphs 37 to 40, applied the approach to which he had referred. It was right to say, as he did in paragraph 37, that the meaning of "reasonably available sites" had been "set out" in the PPG. This does not imply that he regarded the guidance as rigidly prescriptive. Nor does his use of the word "definition" in paragraph 38, again taken in context. He referred in paragraph 39 to "differences in interpretation of the PPG", and to the NPPF policy being "informed by the PPG". His use of these phrases, in context, was justified. He concluded in paragraph 40 that "the proposed development fails the sequential test as set out in the [NPPF]". No criticism is, or could be, made of the exercise of planning judgment in those paragraphs, or of the conclusion that flowed from it. In paragraph 41 the inspector focused on the "first part" of policy CS3, recognising that, as he had "concluded that the [NPPF]'s sequential test would not be complied with, it follows that the proposed development is in conflict with the first part of Policy CS3". That conclusion is unimpeachable. So too are the following conclusions in the same paragraph: that leaving aside the definition of the area of search being North-Somerset-wide, "the remainder of the second part of Policy CS3 [is] out-of-date because it is inconsistent with the [NPPF]", that "therefore … the proposed development conflicts with Policy CS3 overall", and that "[as] Policy CS3 was agreed as being the most important policy in determining this appeal, … the proposal also conflicts with the development plan when taken as a whole". And the ultimate weighing of the "Planning Balance" in paragraphs 50 to 59, again in the exercise of planning judgment, was also, in my view, impeccable.

66. Put simply, the inspector's critical conclusions, that the proposal failed the sequential test under current government policy in the NPPF, read – as it now had to be – in the light of the current guidance in the PPG, and that the proposal was not in accordance with the development plan, taken as a whole, are clearly expressed and properly reasoned. His exercise of planning judgment was lawful throughout. And his conclusions reflected a proper understanding and faultless application of the policy in paragraph 162 of the NPPF and the guidance in paragraph 7-028 of the PPG, and of policy CS3 of the core strategy. No public law error occurred.

67. To find, as the inspector did, that the criteria in the second part of policy CS3 did not reflect the policy in paragraph 162 of the NPPF read in the light of the guidance in paragraph 7-028 of the PPG was plainly correct. And in view of his conclusion that there was conflict here with national planning policy for the sequential test in the NPPF as elucidated by the PPG, his conclusion that there was conflict with the first part of policy CS3, which incorporated that policy of the NPPF, was both logical and lawful. That a decision to grant planning permission for the proposal would therefore not be a decision taken in accordance with the development plan was also a lawful conclusion.

68. I do not accept that the inspector's conclusions on the proposal's conflict with policy CS3 are undone by the fact that this policy was adopted when the original, 2012 version of the NPPF was current, that the sequential test for flood risk in paragraph 101 of that version was, in substance, no different from its successor in the 2021 version, and that the PPG guidance only emerged much later. As Mr Flanagan pointed out, although the core strategy, containing policy CS3, was adopted about four weeks after the publication of the NPPF in March 2012, the relevant national policy at the time of the local plan examination would have been Planning Policy Statement 25: Development and Flood Risk, published in March 2010. It is also a matter of fact that policy CS3 was

not in issue in the challenge brought to the adoption of the core strategy, and remained in its original form when the core strategy was re-adopted in October 2017. But that history does not displace the inspector's conclusion that since the meaning and effect of government policy in paragraph 162 of the then current version of the NPPF had now been explained by the Government itself, in paragraph 7-028 of the PPG, it was clear that the proposal before him was in conflict with the NPPF policy and thus with the first part of policy CS3. Nor does it nullify his conclusion that the criteria in the second part of policy CS3 were inconsistent with the NPPF and the PPG. These, as I have said, were conclusions he was entitled to reach. The prior sequence of events in the adoption of development plan policy and the publication of national policy and guidance does not make them unlawful.

Conclusion

69. For the reasons I have given, I would dismiss the appeal.

Lord Justice Newey:

70. I agree.

Lady Justice Andrews:

71. I also agree.