Neutral Citation Number: [2026] EWHC 1651 (Admin)

Case No: AC-2025-LON-002601

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2026

Before:

THE HONOURABLE MRS JUSTICE LIEVEN

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Between:

R **(on the application of Faversham Town Council)**	**Claimant**
- and –	
[1] Secretary of State for Housing, Communities and Local Government **[2] Swale Borough Council** **[3] Gladman Developments Limited**	**Defendants**

- -

Estelle Dehon OBE KC and Simon Bell (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Ned Westaway and Michael Rhimes (instructed by the **Government Legal Department**) for the **1st Defendant**
The **2nd Defendant** has not participated in the proceedings
Guy Williams KC (instructed by **Addleshaw Goddard**) for the **3rd Defendant**

Hearing dates: 03 June 2026

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Approved Judgment

This judgment was handed down remotely at 11.30am on Monday 20th July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE LIEVEN

Judgment Approved by the court for handing down.

The Honourable Mrs Justice Lieven :

1. This is a challenge to the decision of the First Defendant (the SoS) through a planning inspector, O S Woodwards (the Inspector) dated 27 June 2025. The decision was to grant planning permission for up to 250 dwellings at a site on the edge of Faversham, Kent (the site). The Claimant is the local Town Council, which opposed the development. The Second Defendant is the local planning authority (LPA). The Third Defendant (the Developer) is the applicant for planning permission.

2. The Claimant was represented by Ms Dehon KC and Mr Bell. The 1st Defendant was represented by Mr Westaway and Mr Rhimes. The 2nd Defendant did not participate in these proceedings. The 3rd Defendant was represented by Mr Williams KC.

Grounds

3. The issues in the case all concern the Inspector's approach to flood risk on the site. Grounds 1-3 relate to the interpretation of the flood risk policies in the National Planning Policy Framework (NPPF) (February 2025 revision). The Grounds are:

    a. Ground One – the Inspector erred in law by "in effect" applying the Exception Test in NPPF [177] contrary to the terms of the NPPF;

    b. Ground Two – the Inspector was *Wednesbury* irrational in taking into account the mitigation measures in determining that the development could be made safe from flooding;

    c. Ground Three – the Inspector erred in his approach to a "strong reason" in [11(d)(i)] of the NPPF;

    d. Ground Four – the Inspector failed to apply the principles of consistency in decision making in relation to a number of previous decision letters.

Background

4. The site lies to the north of Faversham on agricultural land. Most of the site lies in Flood Zone 1, but some parts lie in Flood Zones 2 and 3. It was not in dispute that without mitigation measures some parts of the site were at risk of flooding under the appropriate climate change scenarios. The Flood Risk statement of common ground stated that with existing ground levels some areas of the site (including around 20 houses and the main access road) would be at risk of tidal flooding in the 1 in 200 year higher central undefended tidal flood level scenario. There were also some risks concerning surface water flooding.

5. However, although this is not recorded clearly in a Statement of Common Ground, by the end of the inquiry it appears to have been common ground that with the mitigation measures proposed, including land raising, the development would comply with the relevant standards for the requisite scenarios.

6. In those circumstances neither the Environment Agency (EA) nor the Local Lead Flood Authority (Kent County Council) objected to the proposal.

7. In relation to flooding the principal issue between the LPA and the Developer was the correct approach to the Sequential Test (ST) set out in the NPPF. I set out the relevant paragraphs of the NPPF below. The Developer had not undertaken a ST. It argued, both in evidence and through Mr Williams' submissions at the inquiry, that no ST was required. In the alternative he argued that if there was a requirement for a ST, then the other material considerations outweighed that policy failure.

8. The LPA and the Claimant strongly disagreed and argued that the lack of ST should lead to the refusal of planning permission.

The Decision Letter

9. At DL10 the Inspector identified that one of the three main issues was:

"whether or not the proposal represents an acceptable form of development having regard to its flood zone location and the provisions of local and national planning policy;"

10. At DL12 he recorded that on present day scenarios the site was not at risk of flooding. However, in the 1 in 200 scenario, there would be flooding to some parts of the site and the access road (DL13-14).

11. At DL15 onwards he referred to the relevant paragraphs of the NPPF and the ST.

    a. At DL16-17 he set out the reasons for the ST, being in order to establish whether there are reasonably available alternative sites;

    b. At DL18 he found that the land raising proposed should not be used as a way of avoiding the ST;

    c. At DL19 he found that the access road should itself be subject to the ST.

12. At DL20 he said:

"Paragraph 177 [NPPF] *is extremely clear that an exception test can only be carried out after a sequential test has been undertaken. It starts with "Having applied the sequential test". Paragraph 172a is equally clear, stating "applying the sequential test and then, if necessary, the exception test". There is therefore no need to consider this further in terms of the obvious sequence of events. Whether or not it might be possible to compartmentalise the site is a moot point because the development is proposed as a whole and is no severable. Equally, whether or not the proposed access road would, by itself, trigger the need for a sequential test is also a moot point, because being triggered by the proposed residential development is sufficient by itself. Therefore, a sequential test is required. A sequential test has not been undertaken by the appellant. This is a clear conflict with the Framework."*

13. He then found there was a further requirement to do a ST because of the surface water flooding.

14. From DL22 onwards he dealt with harm from flooding:

"22. The area at risk of flooding in the design flood event is part of the main access road and future developable areas equivalent to circa 20 homes. The main vehicular access is obviously an important element of the site. However, it is relevant that less than 10% of the proposed homes would be in areas at risk of future flooding. In addition, it has been demonstrated that the entire appeal site could be made safe from flooding by the land changing measures, and by raising the access road, amongst other flood resistance and resilience measures at the detailed design stage, such as small flood barriers, raised services etc. It has also been confirmed that the land changing measures have already been accounted for in the visual envelope as used as the baseline for the assessment of landscape character, as considered below. This could be controlled by condition(s)."

23. The reasons for the land changing measures are a material consideration as to the weight to be applied to not undertaking the sequential test. In this regard, there is need to remediate parts of the site, which is a former quarry. However, it is not currently known to what extent this is required or what effect this would have on the land levels after the works. It has therefore not been fully

substantiated by the appellant that this is the only reason for the land changing, and it would certainly be convenient if the remediation just so happened to result in the minimum level needed to avoid flood risk. Nevertheless, remediation would form part of the reason for the land works. With regard to raising the access road for access to Ham Road, it has been demonstrated that this is required to provide suitable and safe access to the road.

24. The extent of pluvial flooding risk is relatively limited. It is from ponding on the site in existing depressions and similar factors. The depth of the flooding would be relatively shallow. There is no risk related to interrupting an off-site surface water flow path, or effects on other off-site properties. It is a fairly typical existing situation on an agricultural field. As part of the design detail for the proposal at reserved matters stages, the precise land levels, drainage solutions, and landscaping would all need to be considered. Given the limited nature of the existing and future surface water flood risk, designing out the flood risk could be comfortably accommodated as part of this natural detailed design process."

15. DL25-26 are important;

"25. Overall, therefore, there is no real world harm from either the failure to undertake a sequential test for tidal flooding or the failure to properly undertake a sequential approach. This is because it has been satisfactorily demonstrated that mitigation measures can make the proposed development safe for its lifetime from tidal flooding. There are also reasons other than flooding that result, although likely only in part, in the land levels changing mitigation measures. There would also be no real world surface water flood risk to the finished and occupied development proposal.

26. Despite the lack of real world harm, due to the failure to undertake a sequential test or to fully apply the sequential approach for the proposed residential development and access road in areas at risk of flooding in the future, the proposal therefore represents an unacceptable form of development having regard to its flood zone location and the provisions of local and national planning policy. The conflicts with the Framework are set out above. With regard to the Development Plan, the proposal would conflict with Policy DM21(2) of the LP because inappropriate development is proposed in an area at risk of flooding before mitigation measures are taken into account, and Policy ST7(11) which cross-refers to Policy DM21. It would, though, comply with Policy FAV8 of FNP, which requires there be no significant adverse impact on risk of flooding and the including of SUDS, but does not directly relate to the requirements of the Framework."

16. He then considered the other main issues and returned to the planning balance at DL81 onwards, dealing first with the positives:

    a. At DL81 he placed substantial weight on the provision of market housing. The LPA had a 3.98 year housing land supply, and the proposal was for 250 homes;

    b. At DL83 he placed substantial weight on the provision of affordable housing;

    c. At DL84 he placed significant weight on the economic benefits of the proposal.

17. On the negative side of the balance at DL90 he said:

"90. The appellant has failed to undertake a sequential assessment or to fully apply the sequential approach, both in relation to tidal and surface water flooding. However, as also set out above, there would be no real world harm as a result of the proposal, because the proposed mitigation works would mean that no areas of the proposed development in its final form would be at risk of flooding in the design flood event, or from surface water. Overall, though, and consistent with previous appeal decisions, I nevertheless place significant weight on this factor, which remains in conflict

with the Framework and local policy and represents a departure from the over-arching spatial planning requirement to direct inappropriate development away from areas at risk of flooding."

18. There were a number of other positives and negatives which I do not need to set out. At DL99-104 the inspector came to the final balance:

"99. The failure to perform a sequential test with regard to both tidal and pluvial flooding is a fundamental breach of planning policy, even if there are no real world effects as a result. The proposal also represents a departure from the adopted spatial strategy of the Council. The current housing land supply situation of the Council means that some departures from this strategy are inevitable, which lessens the weight to be applied to this conflict. Nevertheless, the importance of a plan-led system is a thread which runs through planning policy. This should be respected, and the departure is an important conflict to weigh in the planning balance. In addition, as set out above, I place moderate weight on the loss of BMV, and there are further harms with regard to character and appearance, existing ecology, construction traffic, heritage and the informal footpath. Taken together, and despite the package of benefits as set out above, these harms represent a conflict with the Development Plan when read as a whole.

100. Applications for planning permission must be determined in accordance with the Development Plan unless material considerations indicate otherwise, in accordance with s38(6) of the Planning and Compulsory Purchase Act 2004.The Framework is an important material consideration. As set out above, the Council cannot demonstrate a five-year supply of housing land. Therefore, as set out at Paragraph 11d and Footnote 8 of the Framework, the 'tilted balance' as set out at Paragraph 11dii is engaged unless the application of policies in this Framework that protect areas or assets of particular importance provide a strong reason for refusing the development proposed.

101. Footnote 7 confirms that areas at risk of flooding are counted as assets of particular importance. Although the proposal has failed to perform the required sequential tests, there would be no real world effects after mitigation is taken into account. A 'strong' reason for refusal based on flooding must, to my mind, go beyond mere technical conflicts, even if they are important. There must be substantive risks and harms that go beyond policy. I do not, therefore, view this as a strong reason for refusing the development proposed. For the avoidance of doubt, I also do not view the minor harms to heritage assets as representing a strong reason for refusal, or even a reason for refusal at all, as set out in my heritage balance section above. The 'tilted balance' is therefore engaged.

102. In this regard, the benefits of the proposal are many and weighty. It would provide a reasonably substantial housing development in a Borough with a lack of a five-year supply of housing land. There would also be benefits to the economy, BNG, public open space, off-site flooding, contaminated land and an electric car club.

103. With regard to Paragraph 14 of the Framework, the FNP became part of the Development Plan within the past five years. However, it contains policies and allocations that would only meet a housing requirement that does not accurately reflect up-to-date housing need, as set out above. The conflict with the FNP is also limited to Policy FAV7 with regard to BMV which is an inevitable loss when considered in the round, and FAV2 with regard to spatial strategy but only with regard to its overarching objectives rather than specifics parts of the policy. In this circumstance, therefore, the adverse impacts of the conflicts with FNP do not significantly and demonstrably outweigh the benefits.

104. Overall, and particularly because of the importance and weight to be applied to the proposed housing, the adverse impacts of the proposal would not significantly and demonstrably outweigh the benefits of the proposal. The appeal should therefore be allowed."

National Flooding Policy

19. The National Planning Policy Framework (NPPF) deals with flooding issues at [170]-[182]. The overarching policy is to direct inappropriate development away from areas of highest risk, see [170]. This is done, in part, by the adoption of a sequential test to both policies and development decisions.

20. In respect of development control decisions, the ST should be applied, see:

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

...

173. A sequential risk-based approach should also be taken to individual applications in areas known to be at risk now or in future from any form of flooding, by following the steps set out below.

174. Within this context the aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test.

175. The sequential test should be used in areas known to be at risk now or in the future from any form of flooding, except in situations where a site-specific flood risk assessment demonstrates that no built development within the site boundary, including access or escape routes, land raising or other potentially vulnerable elements, would be located on an area that would be at risk of flooding from any source, now and in the future (having regard to potential changes in flood risk)"

21. There is then what has been called the Exception Test at [177];

"177. Having applied the sequential test, if it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in Annex 3."

22. The Planning Policy Guidance is clear that a ST should be applied, see:

"What is the aim of the sequential approach?

The approach is designed to ensure that areas at little or no risk of flooding from any source are developed in preference to areas at higher risk. This means avoiding, so far as possible, development in current and future medium and high flood risk areas considering all sources of flooding including areas at risk of surface water flooding. Avoiding flood risk through the sequential test is the most effective way of addressing flood risk because it places the least reliance on measures like flood defences, flood warnings and property level resilience features. Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied. Application of the sequential approach in the plan-making and decision-making process will help to ensure that development is steered to the lowest risk areas, where it is compatible with sustainable development objectives to do so, and developers do not waste resources promoting proposals which would fail to satisfy the test. Other forms of flooding need to be treated consistently with river and tidal flooding in mapping probability and assessing vulnerability, so that the sequential approach can be applied across all areas of flood risk.

Paragraph: 023 Reference ID: 7-023-20220825
Revision date: 25 08 2022"

23. The Environment Agency guidance on National Flood Risk (10 April 2025) makes the same point.

24. In this case the Inspector found that the LPA could not show that it had a 5-year land supply. In those circumstances [11] of the NPPF and the "tilted balance" arose:

"Given the Borough Council was unable to demonstrate a five-year housing land supply, the tilted balance in paragraph 11(d)(ii) of the 2024 NPPF was engaged. Paragraph 11 of the 2024 NPPF [CB/162] provides (as relevant):

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

(a)….

(b)…

For decision making this means:

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

(d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[FN8], granting permission unless:

(i) the application of policies in this Framework that protect areas or assets of particular importance[FN7] provides a strong reason for refusing the Proposed Development proposed; or

*(ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole, having particular regard to key policies for directing development to sustainable locations, making effective use of land, securing well-designed places and providing affordable homes, individually or in combination[FN9]." (*emphasis added*)*

Footnote 7 provides (as relevant):

"The policies referred to are those in this Framework (rather than those in development plans) relating to … areas at risk of flooding or coastal change."

25. This version of the NPPF had been introduced in December 2024. There were two relevant changes from the previous version:

a. In [174] the second line after "flooding" was all new, introducing exceptions to the requirement to undertake a ST;

b. In [11] the requirement for a "strong" reason for refusal replaced the earlier requirement for a "clear" reason.

The law

26. The principles that guide the Court in handling a challenge under section 288 are very well known and were summarised by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* (Practice Note) [2017] EWCA Civ 1643, [2018] PTSR 746 at [6] and include, as relevant to the present case:

    a. Planning decisions should be construed in a "reasonably flexible way".

    b. The reasons for an appeal decision must be "intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues", but need not refer to every material consideration (here Lindblom LJ paraphrased the judgment of Lord Brown in *South Buckinghamshire District Council v Porter* (No 2) [2004] 1 WLR 1953 at [36])

    c. Matters of the weight to be attributed to relevant material considerations are for the planning decision maker, subject to challenge only on conventional public law grounds.

    d. Planning policies should not be construed as though they were statutory or contractual provisions. The proper interpretation of policy is a matter of law for the Court, but its application is for the decision-maker. Statements of policy "are to be interpreted objectively by the court in accordance with the language used and in its proper context".

27. The NPPF is a statement of policy. It is a material consideration, but it is not law and is not binding. It should be interpreted using the usual principles and distinguishing between the interpretation of policy and application of policy, (*R (Asda Stores Ltd) v Leeds City Council* [2021] PTSR 1382 ([34]-[35]). Where (as in the retail policy considered in that case) a part of the NPPF advises that in a particular situation planning permission should be refused, this provides a proposition that will indicate a refusal of planning permission if it is not out-weighed by other considerations - see *Asda* at [41] and [42], per Sir Keith Lindblom SPT:

    "41. It is not necessary, in my view, to apply to the policy in paragraph 90 the label of "presumption". The meaning and effect of the policy are entirely clear without it. What paragraph 90 does is to establish, in national planning policy, a proposition that will indicate a refusal of planning permission if it is not overbalanced by other considerations. It does not matter, I think, whether one calls this a "presumption" or an "effective presumption" or an "expectation", or something else of that kind. The effect of the policy is the same. Whenever a decision-maker finds there is likely to be a "significant adverse impact" on the "vitality and viability" of the town centre, this will count as a negative factor with the force of government policy behind it. It will go against the proposal as a material consideration. Other policies in the NPPF may support the proposal. These too will be "material considerations" to which appropriate weight must be given. As Mr Warren submitted, the policy in paragraph 90 does not have some special status, enabling it to prevail over any other policy in the NPPF. Nor does it automatically trump any other material consideration or combination of material considerations bearing on the decision.

    42. The crucial point, therefore, is this. Even if the policy in paragraph 90 is rightly regarded as containing a "presumption", the "presumption" is one that can be overcome by countervailing factors, which are not specified or limited by the policy itself—but might include, for example, planning benefits such as the creation of jobs in an area where unemployment is high and an uplift to the local economy by the development proposed. Inevitably, this will be more difficult or less according to the nature and degree of the "significant adverse impact" the development is likely to have. The potential harm will vary from one proposal to another. Giving appropriate weight to it is a matter of planning judgment for the decision-maker. In some cases, the development may be judged likely to cause numerous shop closures and vacancies in the town centre, serious and lasting effects on trade to the detriment of the centre as a whole, and a long-term lack of investment. In others, the effects may still be "significant" but much less damaging, and the town centre may be

expected to recover in a relatively short time. A "significant adverse impact" is not a uniform concept."

28. The point was reiterated by Holgate J (as he then was) in *Mead Realisations v SSLUHC* [2024] PTSR 1093 at [114] – [115]. There is a critical distinction between the interpretation of policy and the application of policy. The policy can be expressed in mandatory terms [114], see the Court of Appeal in *West Berkshire* [2016] PRSR 982. However, that does not involve treating the policy as binding, because it is the application of the policy "which must not involve a fettering of discretion", [115].

29. The correct approach to NPPF [11] and the tilted balance was set out in *Monkhill Ltd v SSHCLG* [2021] EWCA Civ 74 at [18]. At [34] the SPT explains:

"The application of the policy necessarily involves a balancing exercise in which any harmful effects of the proposed development on the AONB are given due weight, having regard to what the policy says, and any benefits of the proposal are set against them, leading to a conclusion, as a matter of planning judgment, on whether there is a "clear reason for refusing the development proposed". If there are no benefits to set against the harm to the AONB, or if there are benefits but they are insufficient to outweigh the harm, the decision-maker might properly conclude that the "application" of the policy does indeed provide "a clear reason for refusing the development proposed."

…

And:

"38 Under paragraph 11(d)(i), it is not enough that a footnote 6 policy, restrictive of development, is engaged. The policy in question must actually be applied (see R (Watermead Parish Council) v Aylesbury Vale District Council [2018] PTSR 43, at para 45, and East Staffordshire Borough Council, at para 22(2)), and its application must provide a "clear reason for [refusal]". Only then will the "tilted balance" under paragraph 11(d)(ii) be disapplied by the operation of paragraph 11(d)(i). If the policy in paragraph 11(d)(i) is to be operated effectively, it is therefore essential that policies referred to in footnote 6 are not artificially excluded in the absence of clear words with that effect."

30. There have been a number of cases concerning flooding risk and the ST.

31. It is entirely clear that the failure to carry out the ST, where it is required, is a material consideration in a planning balance, and will generally be a very weighty one. In *R (Watermead PC) v Aylesbury Vale DC* [2017] EWCA Civ 152 the officers report made a material clear error in its interpretation of the NPPF in respect of flooding and advised that a ST was not necessary, see [30]. Lindblom LJ held at [28]:

"28 If my understanding of the advice the officer gave on the sequential test is correct, I think that advice was not a true reflection of government policy for development in "areas at risk of flooding" in paragraphs 99—104 of the NPPF. The sequential test is distinct from, and is to be applied prior to, the exception test, which involves a different exercise (see paras 4—5above). The aim of the sequential test, as paragraph 101 explains, is to "steer new development to areas with the lowest probability of flooding". Where it applies, it involves an assessment of the availability of "sites appropriate for the proposed development in areas with a lower probability of flooding". It is required not only for "new development" proposed on sites which have not previously been developed but also for "new development" on land that is already developed: see paras 52, 67 and 68 of Lloyd Jones J's judgment in the Tonbridge and Malling Borough Council case [2006] 2 P & CR 29, quoted in para 19 above. And it is not said to be inapplicable to development that would reduce flood risk. The Government provided expressly for exemptions from it, in paragraph 104. There is a general exemption for developments "on sites allocated in development plans through the sequential test", and two specific exemptions for "minor development" and for "changes of use". None of those exemptions applied here. It follows that if as I think the officer's advice in the

fourth sentence of para 9.41 of his report was that under NPPF policy a sequential test was unnecessary in this case because the proposal was for "an already developed site", that advice was based on a misinterpretation of the policy. This was an error of law."

32. However, Lindblom LJ made entirely clear in the following paragraph that a decision maker was free to depart from national policy as long as he did so "consciously and for good reason". This reiterates the same point made by Lord Carnwath in *Hopkins Homes v SSHCLG* [2017] UKSC 17 at [21].

33. In *Gladman Developments v SSHCLG and Lancaster CC* [2026] EWHC the Inspector had found no substantive harm, but policy harm through the failure to carry out a ST. I said at [47]:

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

Grounds One and Two

34. These two grounds are so closely related that I will deal with them together. The Claimant argues that the Inspector "in effect" applied the Exception test in NPPF [178], even though no ST had been carried out. He did so by taking into account the flood risk mitigation measures including the land raising; by concluding that the development could be made safe through its lifetime; and that it would not cause flood risk elsewhere and in fact would cause betterment.

35. Ms Dehon submits that the effect of this approach was in practice to apply the Exception Test and completely undermine the requirement for the ST set out in the NPPF. It was also to undermine the policy to ensure that inappropriate development was located away from areas at risk of flooding, save where there was no alternative site.

36. She asks the rhetorical question – what would have the Inspector have done differently if he had applied the Exception Test? She says he would have done nothing differently, and would have considered the same factors. Therefore the only possible conclusion is that he did in reality apply the Exception Test.

37. She further submits that the Inspector's approach was not within the range of reasonable decisions open to him and discloses a serious logical error, see *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [98]. The Inspector could not rationally find that the ST was required, and the Exception Test could only be applied after a ST, but then go on to effectively apply the Exception Test to find "no real world harm" in order to grant planning permission.

38. She submits that the effect of the Inspector's approach is to undermine the ST, and short circuit the careful policy process set out in the NPPF. If this approach is allowed then no developer will do the ST, thus wholly undermining the entire policy approach in this part of the NPPF.

39. Ground Two effectively covers the same ground. It focuses on the finding that mitigation measures could make the development safe from flooding in DL25. Ms Dehon submits that the Inspector's approach was *Wednesbury* irrational, because he had already found that the changing land levels

was irrelevant to whether the ST was required, see DL18. The effect of his approach to the lack of real world harm was to avoid the need for the ST, on the very basis of the mitigation measures he had said were irrelevant. She accepts that the Inspector was entitled to take into account the land raising, but says that the amount of weight he gave it was irrational.

40. The SoS and the Developer argue that there was no error by the Inspector. He understood and applied the policy in the NPPF entirely correctly. He did not apply the Exception Test. He was fully entitled to depart from the policy as long as his decision was rational and he explained his reasons, which he did.

Conclusion on Grounds One and Two

41. In my view neither of these Grounds have merit. The DL is clear as to the Inspector's approach and it discloses no error of law. The Inspector interprets the policy in the NPPF (and the PPG) entirely correctly in DL15-26. He finds that there is a requirement in the NPPF for the ST and that the failure to carry it out is a conflict (DL20) and he then gives that significant weight (DL90). He is equally clear that in those circumstances the Exception Test should not be carried out, DL20.

42. However, the Inspector then goes on to balance the serious conflict with the NPPF against the other material considerations, most importantly on the provision of market and affordable housing, see DL81-83.

43. The Inspector was entitled to depart from the NPPF, see *Asda Stores*. He was entitled to give the provision of new housing substantial weight, weight being a matter for the decision maker, see the classic exposition of Lord Hoffmann in *Tesco Stores*.

44. The Inspector plainly did not apply the Exception Test in NPPF [177]. Rather, he gave weight to a number of factors that would also have arisen under the Exception Test, including the fact that mitigation measures would make the site safe from flooding and there were reasons other than flooding that result in the land raising measures. The lack of real world harm was a material consideration. None of these were matters that the Inspector was not entitled to take into consideration.

45. The nub of Ms Dehon's complaint is that the factors relevant under the Exception Test were also relevant to the planning balance. However, that does not mean that "in effect" the Inspector applied the Exception Test, it merely means that the relevant material considerations were the same. As Mr Williams said it is entirely obvious that the ground raising proposed was a relevant consideration in the analysis of flood risk, and in the overall planning balance. There is a logical inconsistency, in my view, in Ms Dehon's submission because she accepts that the lack of harm was a material consideration, but then argues that the Inspector erred by actually taken it into account.

46. There was nothing irrational, or showing a "serious logical error", about the Inspector concluding that given the lack of real world harm, and the significant benefits of the development, the planning balance was in favour for the grant of permission.

47. The situation is analogous with the earlier *Gladman* case in that it is open to inspectors to depart from the NPPF, and specifically where no ST has been undertaken, to balance that policy breach against other material considerations, including the benefits of the development. That is the point of principle set out in *Asda Stores*. To put it succinctly, policy (even the NPPF) is not law and can be departed from so long as the decision maker given adequate reasons and acts rationally.

Ground Three

48. This Ground focuses on DL101. The Claimant argues that the Inspector misdirected himself by thinking that to find a "strong reason" for refusal in [11(d)] of the NPPF, and therefore applying the

tilted balance, he had to find "real world harm". The Claimant says that the harm arising from the failure to undertake the ST was sufficient to find a strong reason for refusal, and the Inspector erred in his interpretation of the policy.

49. The earlier version of the NPPF had merely said that there had to be a "clear" reason for refusal in [11(d)]. This word was changed in the December 2024 version of the NPPF to "strong" reason. All parties agree that this change was plainly for the purpose of raising the test for refusal of permission.

50. The other relevant change in the 2024 NPPF was in [175] where wording was added to remove the requirement for the ST, where no vulnerable parts of the development were within areas at risk of flooding. Ms Dehon submits that this change delineated the extent of where a ST was not required. She says that it was an error of law to read into "a strong reason for refusal" the need for substantive harm from the development, where that development did not benefit from the exemption in [175], and therefore a ST was still required under the NPPF.

51. She submits that the Inspector failed to read the NPPF as a whole because he should have realised that the concern about any disproportionate application of the ST was addressed through the amendment to [175]. Therefore, it was irrational effectively to exempt the development from having to undertake the ST in circumstances which go beyond those in the widened scope of [175].

52. Ms Dehon says that this analysis is supported by the Government's Response to the consultation on the 2024 NPPF in respect of [175] and [11(d)(i)], which says:

"… [the] requirement for a sequential test is not triggered where it can be demonstrated, using a site-specific risk assessment, that no new development or access and egress route is proposed in an area of flood risk from any source. This assessment cannot rely on mitigation measures that would require active maintenance, as their effectiveness in mitigating flood risk cannot be guaranteed. This change will maintain standards of flood protection and make sure that local planning authorities continue to have appropriate information available to them when assessing applications, while making the application process more proportionate in these situations."

66. In respect of 11(d)(i) the Response explained that:

"A change has also been made to be clear that when assessing whether areas or assets of particular importance provide a reason for refusal, there should be a 'strong' basis for doing so when assessed against the policies in the National Planning Policy Framework (replacing the existing 'clear' reason). This reflects views that we heard about opportunities to strengthen the presumption's wording, in the context of the government's commitment to increasing the supply of homes, but still enables these key protections to be fully considered and enforced where it is appropriate to do so."

53. Mr Westaway submits that this Ground does not identify any error of interpretation in the DL. The Inspector interpreted the policy and went on to make a planning judgement on whether the breach of flooding policy gave a strong reason for refusal. He was entitled to take this course and there is nothing unreasonable in his conclusion.

54. The change in footnote 7 to [11] of the NPPF from clear reason to strong reason was for the obvious purpose of making it more difficult to disapply the tilted balance. This is a further indication that there was nothing unreasonable in the Inspector taking the view that in circumstances where there was a lack of "real world harm" there was no strong reason for refusal.

55. The fact that the harm was through a policy breach rather than any actual/real world/substantive harm was a material consideration that the Inspector was fully entitled to take it into account. If the DL is read as a whole it is apparent that the Inspector did not misinterpret the policy, but was merely applying it.

56. Mr Westaway further submits, that even if the Inspector did err in his interpretation of the policy by considering that a "strong reason" had to consist of substantive harm, the decision would inevitably have been the same. The Inspector had carried out a very clear balancing exercise, and found that the level of harm, which was so limited, did not outweigh the very clear benefits of the development. That conclusion would have remained the same.

57. Mr Williams submits that DL101 has to be read in the context of the LPA having argued that the lack of a ST was a "showstopper". The LPA's Closing Submissions at [30] said:

"30. The correct approach: Failure to perform a ST is a fundamental breach of national Policy and is, as Mr. Carpenter explained, a 'showstopper' in the circumstances set out immediately above.

31. That is entirely consistent with the plain wording of the PPG on this point, which provides that "the National Planning Policy Framework sets out strict tests to protect people and property from flooding which all local planning authorities are expected to follow. Where these tests are not met, new development should not be allowed," and Mr. Lane agreed that the ST was a 'strict' test to which this guidance was directed. As above, Mr. Lane accepted that the NPPF directs that developments in breach of a requirement for a ST be refused, and he agreed with me that the position in policy was "unequivocal.""

58. It was this argument that the Inspector was responding to in DL101. I note that the position being advanced here by the LPA was plainly contrary to the Court of Appeal decision in *Asda Stores*.

Conclusion

59. The question of whether the breach of flooding policy gave a strong reason for refusal was a classic planning judgement for the Inspector. "Strong reason" is an undefined term, which is not open to further judicial analysis or exegesis. The approach to interpretation of such undefined terms in the NPPF is set out in *Hopkins Homes* at [26]:

"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 judgement in the application of that policy; and not to elide the two."

60. The NPPF had been amended in [175] to exempt one aspect of development from the need to carry out the ST. However, the NPPF does not then attempt to prevent decision makers taking into account the nature of the harm in determining what is a "strong reason" for refusal. The tilted balance and footnote 7 apply to a range of policies, and that supports the analysis that the content of a strong reason is one of planning judgement.

61. If the Inspector had been trying to lay down a universal approach in DL101 that a strong reason must always involve real world harm, rather than a breach of policy, then that would be wrong. However, reading the DL as a whole and being fair to the Inspector, that is plainly not what he was doing. He was considering the facts of the case before him, and the policy conflict in question balanced against the lack of any actual flooding risk. He had very carefully balanced these factors through the decision letter, taking all these matters into account, and reached a perfectly reasonable conclusion.

Ground Four

62. Under this Ground the Claimant argues that the Inspector failed to apply the principles of consistency in decision-making, or alternatively failed to give adequate reasons for departing from previous inspectors' decisions on the ST. During the appeal the LPA had identified seven previous appeal decisions where the failure to undertake the ST had been identified as a strong reason for refusal when considering the application of the tilted balance.

63. The Inspector referred to these decisions at DL90 when saying he placed significant weight on the failure to carry out a ST, and this was "consistent with previous appeal decisions". However, he made no reference to these decisions in his conclusions, and did not explain why he departed from them. Mr Bell points out that Gladman's planning witness had accepted in cross examination that these decisions had a bearing on whether the failure to undertake a ST resulted in a strong reason for refusal.

64. He submits that the decision here is plainly inconsistent with those earlier decisions and therefore it was incumbent on the Inspector to give reasons for departing from them. He relies upon *North Wiltshire District Council v Secretary of State for the Environment* [1993] 65 P&CR 137 where Mann LJ said:

"One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that: there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the Judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons or departure from the previous decision. To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case m a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

65. *DLA Delivery Ltd v Baroness Cumberledge* [2018] PTSR 2063 recognises the proposition, drawing on *North Wiltshire DC v SSE* (1993) 65 P&CR 137, that earlier appeal decisions may be material considerations, and obviously material considerations, in later determinations where the issue being determined is alike, Lindblom LJ at [34]:

"Secondly, the court should not attempt to prescribe or limit the circumstances in which a previous decision can be a material consideration. It may be material, for example, because it relates to the same site, or to the same or a similar form of development on another site to which the same policy of the development plan relates, or to the interpretation or application of a particular policy common to both cases: see para 92 of Holgate J's judgment in the St Albans City and District Council case [2015] EWHC 655."

66. The Planning Court has warned against leaning heavily on other appeal decisions to ascertain the meaning of national policy in *Bewley Homes Plc v SSLUHG* [2024] EWHC 1166 (Admin) at [65]:

"65. It appears that the issues raised by ground 1 have been the subject of controversy in a number of planning appeals and that this has led to advocates and experts referring to various appeal

decisions at public inquiries and hearings in support of rival positions. This is reminiscent of the "doctrinal controversy" concerning the "tilted balance" which afflicted so many planning appeals until the matter was settled by the Supreme Court in Hopkins [2017] PTSR 623, paras 23 and 81 . This ought not to occur if national policies, particularly those expressed in high level or broad terms, are read in a straightforward manner to mean what they say, and not subjected to forensic manipulation (see eg R (Asda Stores Ltd) v Leeds City Council [2021] PTSR 1382, para 35)."

67. Mr Rhimes submits that the Inspector was not departing from these decisions, he applied the approach that the failure to carry out a ST carried significant weight. Where he was differing from the earlier inspectors was whether that departure alone led to meeting the test in footnote 7.

68. None of the previous decisions were actually comparable. They were all on different sites with necessarily different planning judgements to be made. Save for the Lancaster decision all the developments were for much smaller developments where the benefits of the development would necessarily be much less. The Lancaster development was the one that was subsequently quashed in *Gladman v SSHCLG*. Most importantly there was now a new and higher policy test of "strong" reason for refusal.

Conclusion

69. There was no error of law in relation to the previous inspectors' decisions. The Inspector did take them into account, see DL90. However, they do not fall within the category of case where the Inspector had to give any further reasons for explaining why he did not refuse permission on the grounds of departure from the ST.

70. Firstly, the policy in the NPPF footnote 7 had changed, now encompassing the higher test of strong reason for refusal. That fact alone explains a different approach.

71. Secondly, these cases concerned different sites, where necessarily there would be different planning judgements to be formed.

72. Thirdly, the developments were themselves different, the current one being significantly larger than six of the seven previous decisions being relied upon. The seventh being the Lancaster case. The obvious consequence of this was that the planning benefits of delivering significantly more housing were much greater.

73. Therefore, in my view the requirement for consistency in decision making explained in *North Wiltshire* and *DLA Delivery* do not apply in this case.

74. In terms of the reasons challenge, if the decision letter is read fairly and as whole it is quite clear why the Inspector did not follow the earlier decisions. He considered that the departure from the ST did not, on the facts of this case, justify refusal. That emerges from his very carefully reasoned decision.

75. For these reasons I dismiss the application.

Postscript

76. After this judgment was circulated in draft the parties drew my attention to a decision of Jefford J in North Somerset DC v SSCHLG [2026] EWHC 1430 (Admin) which was handed down on 12th June, after the hearing on 3rd June in the present case.

77. The case concerns a similar situation to the present, where the Inspector decided to grant permission where the ST was failed but flood risk did not represent a strong reason for refusal. The analysis is entirely consistent with that set out above, although the factual position in respect of the ET was different. It is not necessary to make further comment on the judgment.