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PLANNING LAW UPDATE KILLIAN GARVEY

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Tilted Balance

Paragraph 11 of the NPPF:

For **decision-taking** this means:

- c) approving development proposals that accord with an up-to-date development plan without delay;
or
- d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date⁷, granting permission unless:
 - i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed⁶; 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.

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Tilted Balance

Accords with an up to date development plan?

Corbett v Cornwall Council [2020] EWCA Civ 508

44. How was the committee to resolve the tension between policy support for the proposal and policy conflict when deciding whether it was in accordance with the development plan as a whole? The answer is not that, as a matter of “necessary inference”, Policy 14 on its own, or together with Policy 23, dictated the outcome. **Under section 38(6) the members’ task was not to decide whether, on an individual assessment of the proposal’s compliance with the relevant policies, it could be said to accord with each and every one of them. They had to establish whether the proposal was in accordance with the development plan as a whole.** Once the relevant policies were correctly understood, which in my view they were, this was classically a matter of planning judgment for the council as planning decision-maker.

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Tilted Balance



Paul Newman New Homes Ltd v Secretary of State for Housing, Communities And Local Government [2021] EWCA Civ 15 dealt with the ‘triggers’ to get into the tilted balance.

1. Relying on the language of paragraph 14 of the 2012 version of the NPPF was not useful



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Tilted Balance

- For **decision-taking** this means:
 - approving development proposals that accord with the development plan without delay; and
 - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
 - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
 - specific policies in this Framework indicate development should be restricted.⁹

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- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed⁶; or
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Tilted Balance

2. An argument about what constitutes a ‘relevant’ policy does not require it to be determinative:

39. I respectfully agree with the Judge that **the concept of "relevance" means that the policy or policies must have a real role to play in the determination of the application, but there is no requirement that it or they should be enough in themselves to enable the decision maker to grant or refuse that application. "Relevant" does not mean, and cannot mean, "determinative"**. The first trigger cannot be activated if there is a relevant policy in the local plan, as there was here. Mr Lockhart-Mummery's suggested interpretation would involve doing violence to the language of paragraph 11d) by reading it as if it said: "where the local plan does not contain a body of policies sufficient for determining the application in principle."

40. I also agree with the Judge that in a case that involves a housing application, **there is no reason to restrict the concept of "relevance" to policies that are specifically targeted at the type of development under consideration** (such as affordable housing, or a block of flats) or the location of the proposed development (such as policies about building in the countryside). **A general development control policy may be capable of having a real role to play in the outcome of an application**

Tilted Balance

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Tilted Balance

3. Trigger two for the tilted balance

Either the absence of a 5 year housing land supply where it is a housing scheme

Or

The most important policies are out of date. Decide what is in the basket (which could be one policy or several) and thereafter decide whether the basket as a whole is out of date (i.e. inconsistent with the NPPF)



Tilted Balance

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Tilted Balance

Paragraph 11(d)(i)

Is there a restrictive policy (see footnote 6):

⁶The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.

Tilted Balance

Paragraph 11(d)(i)

Monkhill v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 74. Is paragraph 172 of the NPPF a restrictive policy?

Para 172:

Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. *The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads⁵⁴. The scale and extent of development ***within these designated areas*** should be limited. Planning permission should be refused for major development⁵⁵ other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:*

- a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;*
- b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and*
- c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.*

Tilted Balance

Paragraph 11(d)(i)

Monkhill v Secretary of State for Housing, Communities and Local Government
[2021] EWCA Civ 74. Is paragraph 172 of the NPPF a restrictive policy?

The application of the policy involved a balancing exercise in which any harmful effects of the proposed development on the AONB were given due weight, having regard to what the policy said, and any benefits of the proposal were set against them, leading to a conclusion on whether there was "a clear reason for refusing the development proposed". If there were no benefits to set against the harm to the AONB, or if there were benefits but they were insufficient to outweigh the harm, the decision-maker could properly conclude that the application of the policy provided a clear reason for refusing the development proposed

Tilted Balance

Paragraph 11(d)(i)

So paragraph 172 can be a restrictive policy for sites outside of the AONB, but affecting its setting.

One has to question whether the policy in the NPPF is restrictive to determine paragraph 11(d)(i)

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 - i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed⁶; 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.**

Tilted Balance



Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 104:

When applying the tilted balance, do you have regard for the development plan?



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Tilted Balance

Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 104:

59. Thus **the policies of the development plan will often inform the balancing exercise required under paragraph 11d)ii.** Holgate J. came to this conclusion (in paragraph 102 of his judgment), and in my view he was right. In many cases it will facilitate the assessment of "adverse impacts" and "benefits" to consider not only the relevant policies of the NPPF but also the corresponding policies of the development plan. Sometimes the proposal's compliance with a policy of the NPPF will best be gauged by considering whether it complies with a relevant policy of the plan. Some "adverse impacts" or "benefits" may only be capable of proper evaluation if policies of the plan are considered. And there will be cases in which the weight given to the proposal's conflict with a policy of the NPPF will be the greater if it is also embodied in a policy of the development plan, or less if it is not. Mr Honey gave the example of a "valued [landscape]" given general protection under the policy in paragraph 170a) of the NPPF, but also specifically protected for its local importance by an adopted local plan.

60. **It is clear, therefore, that a complete assessment under paragraph 11d)ii, in which "adverse impacts" and "benefits" are fully weighed and considered, may well be better achieved if relevant policies of the development plan are taken into account.** This is not a substitute for discharging the decision-maker's duties under [section 70\(2\)](#) of the 1990 Act and [section 38\(6\)](#) of the 2004 Act. It is integral to that process.

Tilted Balance



Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 104

Is there a mandatory approach to applying section 38(6) of the Planning and Compulsory Purchase Act 2004?



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Tilted Balance



Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 104

62. Mr Kimblin also argued that the performance of the duty under [section 38\(6\)](#) and the application of the "presumption in favour of sustainable development" must be undertaken as separate and sequential stages of decision-making, in which the "tilted balance" under paragraph 11d)ii of the NPPF is carried out as a self-contained exercise.

63. Holgate J. rejected this argument (in paragraphs 107 and 108 of his judgment). I also reject it. No support for it is to be found in statute or in authority. Indeed, it seems contrary to authority.



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