

Status:  Positive or Neutral Judicial Treatment

East Staffordshire BC v Secretary of State for Communities and Local Government

Also known as:

Barwood Strategic Land II LLP v East Staffordshire BC

Court of Appeal (Civil Division)

30 June 2017

Case Analysis

Where Reported	[2017] EWCA Civ 893; [2018] P.T.S.R. 88 ; [2018] 1 P. & C.R. 4 ; [2017] J.P.L. 1378 ; Official Transcript ;
Case Digest	<p>Subject: Planning</p> <p>Keywords: Discretion; Housing supply; National Planning Policy Framework; Planning permission; Presumptions; Residential development; Sustainable development</p> <p>Summary: The court considered the meaning and scope of the presumption in favour of sustainable development in the National Planning Policy Framework, and how it related to the presumption in favour of the development plan in the Planning and Compulsory Purchase Act 2004 s.38(6). It also resolved the inconsistency between the decisions in Wychavon DC v Secretary of State for Communities and Local Government [2016] EWHC 592 (Admin), [2016] P.T.S.R. 675 and Cheshire East BC v Secretary of State for Communities and Local Government [2016] EWHC 571 (Admin), [2016] P.T.S.R. 1052, finding that the reasoning in the latter was to be preferred.</p> <p>Abstract: A developer appealed against the quashing of outline planning permission for a residential development.</p> <p>Planning permission had initially been refused because a local plan restricted development. A planning inspector allowed the developer's appeal on the basis that the National Planning Policy Framework (NPPF) para.14 created a presumption in favour of granting permission for "sustainable development". The inspector, relying on Wychavon DC v Secretary of State for Communities and Local Government [2016] EWHC 592 (Admin), [2016] P.T.S.R. 675, found that although the developer's proposal conflicted with the local plan, that conflict was outweighed by its sustainability so that planning permission should be granted. The judge below held that the inspector had erred because, although planning decision-makers had discretion, outside that given by para.14 of the NPPF, to approve developments which conflicted with local plans, that would be the exception rather than the norm. He quashed the grant of planning permission.</p> <p>Held: Appeal dismissed.</p> <p>Had the inspector made a material error of law in granting planning permission? - Yes. For the reasons given by the judge</p>

below, he had misdirected himself as to para.14 of the NPPF. He had concluded that that presumption competed with the statutory presumption in favour of the development plan in the [Planning and Compulsory Purchase Act 2004 s.38\(6\)](#). He had been under a misconception that a proposal which did not gain the para.14 presumption could nevertheless acquire it elsewhere in the NPPF (see paras 37, 40-48 of judgment).

Would the court exercise its discretion against granting relief? -

No, for two reasons. First, the proposal conflicted with three policies in the local plan and was therefore contrary to the statutory presumption in s.38(6) of the 2004 Act. Second, the inspector's error was one of substance. It could not be said, for the purposes of the [Senior Courts Act 1981 s.31\(2A\)](#), that his conclusion would inevitably have been the same had that mistake not been made (paras 51-52).

The court made the following points as part of its finding that there had been a material error of law:

Weight attributable to planning policy - Planning policies were suitable for judicial interpretation, but they were not statutory or contractual provisions and should not be construed as such. The *application* of such policies involved an exercise of planning judgement, which the court would not generally interfere with. A decision-maker's failure to properly apply relevant policy would constitute a failure to have proper regard to a material consideration, [Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government \[2014\] EWHC 754 \(Admin\), \[2017\] P.T.S.R. 1283](#) approved and [Secretary of State for Communities and Local Government v Hopkins Homes Ltd \[2017\] UKSC 37, \[2017\] 1 W.L.R. 1865](#) followed (paras 8-9, 13).

Section s.38(6) duty - This was a duty to ensure that planning determinations accorded with the development plan. It involved weighing all other material considerations in the balance. The duty was not displaced or modified by the NPPF, which was merely guidance for decision-makers, [Edinburgh City Council v Secretary of State for Scotland \[1997\] 1 W.L.R. 1447](#) and [BDW Trading Ltd \(t/a David Wilson Homes \(Central, Mercia and West Midlands\)\) v Secretary of State for Communities and Local Government \[2016\] EWCA Civ 493, \[2017\] P.T.S.R. 1337](#) applied (paras 11-14).

Operation of the NPPF presumption - Five basic points in *Hopkins Homes* showed how the NPPF presumption was engaged and how it operated in cases where a planning authority had failed to demonstrate a five-year supply of deliverable housing sites. Those points also provided the context in which the court had to consider the opposite scenario (paras 22-23).

Wychavon [Cheshire East BC v Secretary of State for Communities and Local Government \[2016\] EWHC 571 \(Admin\), \[2016\] P.T.S.R. 1052](#) - The cases gave different views about the concept of sustainable development. For the reasons given in [Barker Mill Estates Trustees v Test Valley BC \[2016\] EWHC 3028 \(Admin\), \[2017\] P.T.S.R. 408](#), the analysis in *Cheshire East BC v Secretary of State for Communities and Local Government [2016] EWHC 571 (Admin), [2016] P.T.S.R. 1052* was to be preferred, *Wychavon* doubted, *Cheshire East* and *Barker Mill* approved. The most salient points in *Barker Mill* were that the NPPF presumption in favour of sustainable development, unlike the presumption in favour of the development plan in s.38(6), was not a statutory presumption. It

existed nowhere else in the NPPF except in para.14. When the s.38(6) duty was lawfully performed, a development which did not earn the sustainable development presumption, and which did not, therefore, have the benefit of the "tilted balance" in para.14, might still merit the grant of planning permission. A development not having the benefit of the para.14 "tilted balance" might still be found unacceptable. The presumption in favour of sustainable development was not irrebuttable; where there was a conflict between a proposal and a development plan, the decision-maker had to judge how much weight to give to that conflict. It was a matter of planning judgement not a matter of law (paras 31-35).

Guidance for courts - Courts needed to avoid excessive legalism and adopt a simple approach to cases like the instant one. Planning decision-making was not a mechanical or quasi-mathematical activity: it was a flexible process. In discharging their duties under the [Town and Country Planning Act 1990 s.70](#) and s.38(6) of the 2004 Act, decision-makers had a wide discretion (para.50).

Judge: Gross LJ; Underhill LJ; Lindblom LJ

Counsel: For the appellant: Satnam Choongh, James Corbet Burcher. For the first respondent: John Hunter. For the second respondent: Gwion Lewis.

Solicitor: For the appellant: Bird Wilford & Sale. For the first respondent: Sharpe Pritchard LLP. For the second respondent: Government Legal Department.

Appellate History & Status

Queen's Bench Division (Administrative Court); 22 November 2016

East Staffordshire BC v Secretary of State for Communities and Local Government

[\[2016\] EWHC 2973 \(Admin\)](#); [\[2017\] P.T.S.R. 386](#)

Affirmed

Court of Appeal (Civil Division); 30 June 2017

East Staffordshire BC v Secretary of State for Communities and Local Government

[\[2017\] EWCA Civ 893](#); [\[2018\] P.T.S.R. 88](#); [\[2018\] 1 P. & C.R. 4](#); [\[2017\] J.P.L. 1378](#)

Significant Cases Cited

Secretary of State for Communities and Local Government v Hopkins Homes Ltd

[\[2017\] UKSC 37](#); [\[2017\] 1 W.L.R. 1865](#); [\[2017\] 4 All E.R. 938](#); [\[2017\] P.T.S.R. 623](#); [\[2017\] J.P.L. 1084](#); SC; 10 May 2017

Barker Mill Estates Trustees v Test Valley BC

[\[2016\] EWHC 3028 \(Admin\)](#); [\[2017\] P.T.S.R. 408](#); [\[2017\] J.P.L. 417](#); QBD (Admin); 25 November 2016

BDW Trading Ltd (t/a David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State for Communities and Local Government

[\[2016\] EWCA Civ 493](#); [\[2017\] P.T.S.R. 1337](#); CA (Civ Div); 27 May

2016

Wychavon DC v Secretary of State for Communities and Local Government

[\[2016\] EWHC 592 \(Admin\)](#); [\[2016\] P.T.S.R. 675](#); QBD (Admin); 16 March 2016

Cheshire East BC v Secretary of State for Communities and Local Government

[\[2016\] EWHC 571 \(Admin\)](#); [\[2016\] P.T.S.R. 1052](#); [\[2016\] J.P.L. 909](#); QBD (Admin); 16 March 2016

Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government

[\[2014\] EWHC 754 \(Admin\)](#); [\[2017\] P.T.S.R. 1283](#); QBD (Admin); 19 March 2014

Edinburgh City Council v Secretary of State for Scotland

[\[1997\] 1 W.L.R. 1447](#); [\[1998\] 1 All E.R. 174](#); [1998 S.C. \(H.L.\) 33](#); [1998 S.L.T. 120](#); [1997 S.C.L.R. 1112](#); [\[1997\] 3 P.L.R. 71](#); [Times, October 31, 1997](#); [\[1998\] J.P.L. 224](#); [\[1997\] E.G. 140 \(C.S.\)](#); [\(1997\) 94\(42\) L.S.G. 31](#); [\(1997\) 141 S.J.L.B. 228](#); [\[1997\] N.P.C. 146](#); [1997 G.W.D. 33-1693](#); HL; 16 October 1997

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Secretary of State for Communities and Local Government v Hopkins Homes Ltd

[\[2017\] UKSC 37](#); [\[2017\] 1 W.L.R. 1865](#); [\[2017\] 4 All E.R. 938](#); [\[2017\] P.T.S.R. 623](#); [\[2017\] J.P.L. 1084](#); SC; 10 May 2017

Goodman Logistics Developments (UK) Ltd v Secretary of State for Communities and Local Government

[\[2017\] EWHC 947 \(Admin\)](#); [\[2017\] J.P.L. 1115](#); QBD (Admin); 27 April 2017

R. (on the application of Watermead Parish Council) v Aylesbury Vale DC

[\[2017\] EWCA Civ 152](#); [\[2018\] P.T.S.R. 43](#); CA (Civ Div); 17 March 2017

Thorpe-Smith v Secretary of State for Communities and Local Government

[\[2017\] EWHC 356 \(Admin\)](#); QBD (Admin); 24 February 2017

Barker Mill Estates Trustees v Test Valley BC

[\[2016\] EWHC 3028 \(Admin\)](#); [\[2017\] P.T.S.R. 408](#); [\[2017\] J.P.L. 417](#); QBD (Admin); 25 November 2016

BDW Trading Ltd (t/a David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State for Communities and Local Government

[\[2016\] EWCA Civ 493](#); [\[2017\] P.T.S.R. 1337](#); CA (Civ Div); 27 May 2016

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[\[2016\] EWCA Civ 441](#); [\[2016\] 1 W.L.R. 3923](#); [\[2016\] P.T.S.R. 982](#); [\[2016\] 2 P. & C.R. 8](#); [Times, June 6, 2016](#); [\[2016\] J.P.L. 1034](#); CA (Civ Div); 11 May 2016

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[\[2016\] EWCA Civ 168](#); [\[2017\] 1 All E.R. 1011](#); [\[2016\] P.T.S.R. 1315](#); [\[2016\] 2 P. & C.R. 1](#); [\[2016\] J.P.L. 890](#); CA (Civ Div); 17 March 2016

Wychavon DC v Secretary of State for Communities and Local Government

[\[2016\] EWHC 592 \(Admin\)](#); [\[2016\] P.T.S.R. 675](#); QBD (Admin); 16 March 2016

Cheshire East BC v Secretary of State for Communities and Local Government

[\[2016\] EWHC 571 \(Admin\)](#); [\[2016\] P.T.S.R. 1052](#); [\[2016\] J.P.L. 909](#); QBD (Admin); 16 March 2016

Crane v Secretary of State for Communities and Local Government

[\[2015\] EWHC 425 \(Admin\)](#); QBD (Admin); 23 February 2015

R. (on the application of Hampton Bishop PC) v Herefordshire Council

[\[2014\] EWCA Civ 878](#); [\[2015\] 1 W.L.R. 2367](#); CA (Civ Div); 01 July 2014

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R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government

[\[2011\] EWHC 97 \(Admin\)](#); [\[2011\] 1 P. & C.R. 22](#); [\[2011\] J.P.L. 887](#); [\[2011\] A.C.D. 56](#); [\[2011\] 7 E.G. 96 \(C.S.\)](#); [\[2011\] N.P.C. 15](#); QBD (Admin); 07 February 2011

South Buckinghamshire DC v Porter (No.2)

[\[2004\] UKHL 33](#); [\[2004\] 1 W.L.R. 1953](#); [\[2004\] 4 All E.R. 775](#); [\[2005\] 1 P. & C.R. 6](#); [\[2004\] 4 P.L.R. 50](#); Times, July 2, 2004; Independent, July 6, 2004; [\[2004\] 28 E.G. 177 \(C.S.\)](#); [\(2004\) 101\(31\) L.S.G. 25](#); [\(2004\) 148 S.J.L.B. 825](#); [\[2004\] N.P.C. 108](#); HL; 01 July 2004

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[\[1997\] 1 W.L.R. 1447](#); [\[1998\] 1 All E.R. 174](#); [1998 S.C. \(H.L.\) 33](#); [1998 S.L.T. 120](#); [1997 S.C.L.R. 1112](#); [\[1997\] 3 P.L.R. 71](#); Times, October 31, 1997; [\[1998\] J.P.L. 224](#); [\[1997\] E.G. 140 \(C.S.\)](#); [\(1997\) 94\(42\) L.S.G. 31](#); [\(1997\) 141 S.J.L.B. 228](#); [\[1997\] N.P.C. 146](#); [1997 G.W.D. 33-1693](#); HL; 16 October 1997

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Key Cases Citing

Followed

Mansell v Tonbridge and Malling BC

[\[2017\] EWCA Civ 1314](#); [\[2018\] J.P.L. 176](#); CA (Civ Div); 08 September 2017

All Cases Citing

Mentioned by

Braintree DC v Secretary of State for Communities and Local Government

[\[2018\] EWCA Civ 610](#); CA (Civ Div); 28 March 2018

Mentioned by

Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC

[\[2018\] EWCA Civ 489](#); CA (Civ Div); 16 March 2018

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Jelson Ltd v Secretary of State for Communities and Local Government

[\[2018\] EWCA Civ 24](#); CA (Civ Div); 19 January 2018

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[\[2017\] EWHC 2562 \(Admin\)](#); QBD (Admin); 11 October 2017

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[\[2017\] EWCA Civ 1314](#); [\[2018\] J.P.L. 176](#); CA (Civ Div); 08

September 2017

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[\[2017\] EWCA Civ 1315](#); [\[2018\] J.P.L. 194](#); CA (Civ Div); 08 September 2017

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[Planning and Compulsory Purchase Act 2004 \(c.5\) s.38\(6\)](#)

[Senior Courts Act 1981 \(c.54\) s.31\(2A\)](#)

[Town and Country Planning Act 1990 \(c.8\) s.70](#)

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[Planning and Compulsory Purchase Act 2004 \(c.5\) s.38](#)

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[Senior Courts Act 1981 \(c.54\) s.31](#)

[Senior Courts Act 1981 \(c.54\) s.31\(2A\)](#)

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[Town and Country Planning Act 1990 \(c.8\) s.70\(2\)](#)

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Journal Articles

The element of planning discretion in the context of an up-to-date plan: the implications of the Barwood case

Development plans; Discretion; Interpretation; Material considerations; National Planning Policy Framework; Presumptions; Sustainable development.

[J.P.L. 2018, 2, 129-137](#)

A presumption too far

Development plans; Housing supply; Interpretation; National Planning Policy Framework; Planning permission; Presumptions; Residential development; Sustainable development.

[E.G. 2017, 1728, 61](#)

Further clarification of NPPF para.14

Development plans; Interpretation; National Planning Policy Framework; Planning permission; Presumptions.

[J.P.L. 2017, 10, 1071](#)

Barwood Strategic Land II LLP v East Staffordshire BC and Secretary of State for Communities and Local Government

Development plans; Interpretation; National Planning Policy Framework; Planning permission; Presumptions; Sustainable development.

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Legal update: the key issues emerging from the cases in the last year

Air quality; Green belt; Habitats; Heritage assets; Housing supply; National Planning Policy Framework; Neighbourhood development plans; Planning policy; Reasons; Sustainable development.

[J.P.L. 2017, 13 Supp \(Making Planning Great Again\), OP56-OP73](#)

When presumption in favour of sustainable development applies

Development plans; National Planning Policy Framework; Planning permission; Presumptions; Sustainable development.

[S.P.E.L. 2017, 183, 120-122](#)

Books

Cross on Local Government Law

Chapter: Chapter 22 - Planning and Urban Regeneration

Documents: [22-33A The principles](#)

Emmet & Farrand on Title

Chapter: Chapter 33 - Planning and Compulsory Acquisition

Documents: [33.038 Material considerations](#)

Encyclopedia of Planning Law and Practice

Chapter: Chapter 1 - General Statement

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Chapter: Part III ### Control Over Development

Documents: [P70.01 Determination of applications: general considerations](#)

Encyclopedia of Planning Law and Practice

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Documents: [P288.01 Proceedings for questioning the validity of other orders, decisions and directions](#)

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