IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Claim No. CO/1962/2020

B E T W E E N:

THE QUEEN
(on the application of GERALD GORNALL)

Claimant

-and-

PRESTON CITY COUNCIL

Defendant

-and-

(1) SENTANTII HOLDINGS LIMITED
(2) COMMUNITY GATEWAY ASSOCIATION LIMITED
(3) TIM FORREST
(4) JOHN HOLDEN
(5) WAINHOMES (NORTH WEST) LIMITED
(6) MICHAEL WELLS
(7) SEDDON HOMES LIMITED
(8) STORY HOMES LIMITED

Interested Parties

INDEX TO ENCLOSURES WITH DEFENDANT'S SUMMARY GROUNDS OF RESISTANCE

Date: 2 June 2020
Your reference: M-00891801
Our reference: LAS/WK/018057

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Shoosmiths LLP
2 Colmore Square
38 Colmore Circus
Queensway
Birmingham B4 6SH

By e-mail and Special Delivery

Dear Sirs,

Response to Pre-Action Protocol Letter
CLA-Joint Memorandum of Understanding
Claim for Judicial Review

We write in response to your letter of 21 May 2020 ("the PAP Letter") and further to our interim response by letter of 26 May 2020. We adopt the form of response at Annex B to the Pre-Action Protocol for Judicial Review.

1. THE PROPOSED CLAIMANT

1.1. The proposed Claimant is Mr Gerald Gornall whose address for reply is: FAO Tim Willis, Shoosmiths LLP, 2 Colmore Square, 38 Colmore Circus Queensway, Birmingham B4 6SH.

1.2. The Council notes that the PAP Letter does not explain the basis on which the proposed Claimant has standing to bring this claim. In particular, the PAP Letter does not set out any basis on which the approval of MOU2 (as defined below) has materially prejudiced the proposed Claimant. Insofar as the proposed Claimant is concerned with undertaking residential development within the Council's area, it is not clear on what basis there is any prejudice arising from MOU2. The Council reserves the right to rely on s. 31 of the Senior Courts Act 1981 in this context and/or to submit that the proposed Claimant has an alternative remedy to judicial review.

2. FROM

2.1. Preston City Council ("the Council") of Town Hall, Lancaster Road, Preston PR1 2RL.

3. REFERENCE DETAILS

3.1. Wendy Kearns has conduct of this matter. All correspondence should be marked for the attention of Wendy Kearns and bear the reference LAS/WK/018057.

4. THE DETAILS OF THE MATTER BEING CHALLENGED

4.1. The Council considers the decision under challenge to be the decision by the Leader of the Council on 17 April 2020 to approve the Memorandum of Understanding and Statement of Co-operation between the Central Lancashire authorities ("the Decision", "MOU2").

4.2. The Council does not agree with the characterisation of the Decision in the PAP Letter at [3], in particular the suggestion that MOU2 was "*adopt[ed] … as policy*".

5. RESPONSE TO THE PROPOSED CLAIM

Summary

5.1. The Council does not accept that it has acted unlawfully as alleged in the PAP Letter. The Claimant's judicial review claim, now issued (but to which this letter does not respond), will be resisted in its entirety.

Preliminary observations on the PAP Letter

5.2. The Council notes that the Pre-Action Protocol for Judicial Review ("the Protocol") states at [16] (emphasis added): "*The letter [before claim] should contain … a clear summary of the facts and the legal basis for the claim*." Further, the example letter before claim at Annex A to the Protocol states at [7] (emphasis added): "*Set out a brief summary of the facts and relevant legal principles, the date and details of the decision, or act or omission being challenged, and why it is contended to be wrong*."

5.3. The PAP Letter fails, however, to identify or set out the relevant legal principles or to identify the statutory provisions within that framework on which the proposed claim purports to be based. Additionally, the PAP Letter contains a number of unparticularised general allegations. Given this, there has been a clear failure to comply with the Protocol.

5.4. Where the proposed Claimant has instructed specialist planning solicitors, Leading and Junior Counsel, it is not for the Council to make good such deficiencies.

Factual background – local planning policy, MOU1 and MOU2

5.5. In July 2012, the Council, together with the other local planning authorities in Central Lancashire (namely South Ribble Borough Council ("SRBC") and Chorley Council ("CC"), together "the Central Lancashire authorities" or "the CLAs"), adopted the Central Lancashire Adopted Core Strategy ("CLACS").

5.6. The essential background to the CLACS is described at [1.1] – [1.5] of that document. The Council notes in particular that the policies contained in the CLACS "*will be taken together in determining applications and priorities for Central Lancashire*" (see [1.4]) and that it was considered "*appropriate and efficient to consider similar issues facing Central Lancashire in a collaborative way and so better plan for the future of the area*" (see [1.5]).

5.7. Chapter 8 of the CLACS, titled "*Homes For All*", considers the provision of housing in Central Lancashire. Policy 4 within Chapter 8 deals with housing delivery and materially provides:

> *"Provide for and manage the delivery of new housing by:*
> *(a) Setting and applying minimum requirements as follows:*
> - *Preston 507 dwellings pa*
> - *South Ribble 417 dwellings pa*
> - *Chorley 417 dwellings pa*
>
> *with prior under-provision of 702 dwellings also being made up over the remainder of the plan period equating to a total of 22,158 dwellings over the 2010 – 2026 period."*

5.8. On 19 September 2017, the Council's Cabinet decided to enter into a '*Joint Memorandum of Understanding and Statement of Co-operation relating to the Provision of Housing Land*' ("MOU1") with CC and SRBC.

5.9. MOU1 states at [6.1]:

> *"Chorley Borough Council, Preston City Council and South Ribble Borough Council agree:*
> *a) To continue until the adoption of a replacement local plan to apply the housing requirements set out in the Joint Central Lancashire Core Strategy Policy 4…*
> *b) That there is no requirement for each local planning authority to meet its identified individual Objectively Assessed Need for housing where higher in view of this agreement and the longstanding and continuing joint working between the Councils.*
> *c) To continue the existing monitoring arrangements for the Central Lancashire Core Strategy and individual local plans to confirm that the MOU is delivering as intended."*

5.10. MOU1 states at [7.1]:

> *"This document will be reviewed no less than every three years and will be reviewed when new evidence that renders this MOU out of date emerges."*

5.11. In 2018 the LCAs commenced a review of the CLACS and each of the authority's individual local plan with a view to delivering a single Central Lancashire Local Plan ("CLLP"). This process is ongoing.

5.12. On 17 April 2020 the Leader of the Council took the Decision. MOU2 states at [8.1]:

> *"Preston City Council, South Ribble Borough Council and Chorley Council hereby agree:*
>
> *(a) to adopt the use of the standard method formula to calculate the minimum number of homes needed in Central Lancashire (1,026 pa as at April 2019), in accordance with national policy, in replacement of the out-of-date housing requirements set out in Policy 4 of the Central Lancashire Core Strategy.*
>
> *(b) to apply the recommended distribution of homes as follows:*
>
> *Preston: 40%*
> *South Ribble: 32.5%*
> *Chorley: 27.5%*
> *Total: 100%*
>
> *(c) to review the recommended distribution of homes set out in (b) no less than every three years or upon the adoption of a new Central Lancashire Local Plan, which ever is sooner, unless new evidence that renders this document out of date emerges.*
>
> *(d) to produce a Statement of Common Ground annually to update the actual minimum housing requirements across Central Lancashire, in accordance with the agreed distribution set out in (b) until adoption of a new Central Lancashire Local Plan. At April 2019, these requirements are as follows:*
>
> *Preston: 410 dwellings per annum*
> *South Ribble: 334 dwellings per annum*
> *Chorley: 282 dwellings per annum*
> *Total: 1,026 dwellings per annum*
>
> *(e) to co-operate in the performance and monitoring of the MOU generally and to monitor housing completions and each Council's respective five-year housing land supply position against the requirements set out in (d) (or subsequent Statements of Common Ground) with immediate effect."*

5.13. On 13 May 2020 the Council, SRBC and CC entered into a Statement of Common Ground, concluding as follows:

> *'2.5 Applying the agreed MOU distribution to this aggregate figure means that, at April 2020, the minimum requirement for each Central Lancashire authority is:*
>
> *Preston: 404 dwellings pa*
> *South Ribble: 328 dwellings pa*
> *Chorley: 278 dwellings pa*
> *Total: 1,010 dwellings pa*
>
> *2.6 In accordance with part (e) to the Agreement contained within the MOU, each Central Lancashire authority will monitor housing completions and each Council's respective five-year housing land supply position against the*

requirements set out in paragraph 2.5 of this Statement of Common Ground with immediate effect.

3. Review

3.1 In accordance with part (c) to the Agreement contained within the MOU, the recommended distribution of homes set out in part (b) to the Agreement contained within the MOU will be reviewed no less than every three years, or upon the adoption of a new Central Lancashire Local Plan, which is sooner, unless new evidence that renders the MOU out of date emerges.

3.2 In addition, in accordance with part (d) to the Agreement contained within the MOU, a Statement of Common Ground will be produced annually to update the minimum housing requirements across Central Lancashire. This is the first such Statement of Common Ground, the next Statement of Common Ground will be produced no later than May 2021'

SRBC appeal decision

5.14. On 13 December 2019, an Inspector appointed by the Secretary of State dismissed an appeal by Wainhomes (North West) Ltd against the decision of SRBC to refuse outline planning permission "*for up to 100 dwellings with access and associated works*" at land to the south of Chain House Lane, Whitestake, Preston (reference APP/F2360/W/19/3234070) ("the DL").

5.15. The following matters are noted, having regard to your reference to the DL:

(a) The DL has not been quashed by the High Court. The DL is currently subject to a claim pursuant to s. 288 of the Town and Country Planning Act 1990, with the substantive hearing fixed for 17 June 2020. Further, whilst the Secretary of State has indicated his consent to the quashing of the DL on one narrow ground (see below), SRBC are contesting the claim.

(b) The DL was issued after the publication of the consultation version of MOU2 (but during the second consultation period).

(c) MOU2 does not refer to the DL.

(d) The only reference to the DL in the report of the Council's Director of Development which was considered by the Leader of the Council prior to making the Decision is at [3.15] – [3.18].

National policy and guidance

5.16. At the time of the adoption of the CLACS and the entry into MOU1, national planning policy was contained in the National Planning Policy Framework ("NPPF") published in 2012. The NPPF was subsequently revised in July 2018 and, most recently, in February 2019.

5.17. The Council will refer, in resisting the proposed claim, to various passages within NPPF and Planning Practice Guidance ("PPG"); but it is sufficient for these purposes to refer only to the provisions set out below.

5.18. NPPF para. 73 materially provides:

> *"Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old [fn 37]."* (emphasis added)

5.19. NPPF footnote 37 provides:

> *"Unless these strategic policies have been reviewed and found not to require updating. Where local housing need is used as the basis for assessing whether a five year supply of specific deliverable sites exists, it should be calculated using the standard method set out in national planning guidance."* (emphasis added)

5.20. The policy in NPPF para. 73 represents an updated version of the policy in para. 47 of the NPPF (2012). Notably, para. 73 read with footnote 37 introduces a new provision for the calculation of housing requirement by the application of the standard method where the local planning authority's strategic policies are more than five years old.

5.21. The standard methodology is set out in the PPG which was updated in February 2019 alongside the NPPF. It is not necessary to recite the mechanics of the calculation, but it is relevant to note the following accompanying guidance in the PPG:

> *"**What is the standard method for assessing local housing need?***
> *The National Planning Policy Framework expects strategic policy-making authorities to follow the standard method in this guidance for assessing local housing need.*
> *The standard method uses a formula to identify the minimum number of homes expected to be planned for, in a way which addresses projected household growth and historic under-supply.*
> *The standard method set out below identifies a minimum annual housing need figure. It does not produce a housing requirement figure …*
>
> ***How should local housing need be calculated where plans cover more than one area?***
> *Local housing need assessments may cover more than one area, in particular where strategic policies are being produced jointly, or where spatial development strategies are prepared by elected Mayors, or combined with strategic policy-making powers.*
> *In such cases the housing need for the defined area should at least be the sum of the local housing need for each local planning authority within the area. It will be for the relevant strategic policy-making authority to distribute the total housing requirement which is then arrived at across the plan area …"*[1]

Observations arising from the factual background

5.22. Having regard to foregoing, the following matters are noted:

[1] Paragraphs: 002 and 013; reference IDs 2a-002-20190222 and 2a-013-20190222; revision date (both paragraphs) 20 02 2019.

(a) MOU2 replaces the previously agreed position in MOU1. MOU1 was not adopted as a development plan document or subject to strategic environmental assessment and was not challenged on either basis (or at all).

(b) MOU2 does not amend or replace Policy 4 of the CLACS. Policy 4 is being reviewed separately as part of the ongoing review of the CLACS.

(c) MOU2 represents that application of the standard method to authorities within Central Lancashire '*against their local housing need*' in accordance with NPPF para. 73 and having regard to PPG for the purpose of assessing five year housing land supply.

Ground 1 – "failure to comply with development plan document process"

5.23. The PAP Letter asserts that "*PCC has circumvented national planning policy*". No reference to a particular provision of the NPPF or any other document containing national planning policy is provided in support of this assertion. As such, it is impossible to provide a detailed response. Nevertheless for the avoidance of doubt, the Council's position is that MOU2 does not fail to comply with national planning policy.

5.24. As to the assertion that MOU2 "*should have emerged and been the subject of a formal Development Plan Document … process*", the PAP Letter does not disclose any basis on which the proposed Claimant contends that MOU2 falls within any of the relevant statutory provisions (in particular the Planning and Compulsory Purchase Act 2004 and the Town and Country Planning (Local Planning) (England) Regulations 2012). As such, the PAP Letter does not disclose any basis for considering that MOU2 is a DPD.

5.25. For the avoidance of doubt, the Council's position is that MOU2 is not a DPD as it does not fall within any of the relevant statutory provisions.

5.26. Further, for the reasons above, the Council does not accept that it has "*adopted a policy which ought to be in a development plan policy without doing so*" as alleged in the PAP Letter.

Ground 2 – "failure to comply with SEA requirements"

5.27. As with Ground 1, the PAP Letter fails to set out the relevant legal framework or to identify the specific legislative provisions or legal principles on which Ground 2 is based.

5.28. Insofar as it is asserted that MOU2 should have been subject of strategic environmental assessment ("SEA") by virtue of the fact that it is alleged to be a DPD, Ground 2 must fail because MOU2 is not a DPD for the reasons above.

5.29. The PAP Letter fails to engage with any of the statutory provisions relevant to this issue (in particular Directive 2001/42/EC and the Environmental Assessment of Plans and Programmes Regulations 2004) and as such sets out no properly formulated argument for the Council to respond to in this response. As a necessary consequence, the PAP Letter fails to disclose any basis for considering that these matters are satisfied in respect of MOU2.

5.30. For the avoidance of doubt, it is the Council's position that no SEA was required for MOU2.

Ground 3(a) – "incorrect approach to five year housing land supply calculation"

5.31. The PAP Letter alleges that *"PCC has misinterpreted National policy and Guidance and again fallen into legal error"* but fails to refer to any specific provisions of either the NPPF, PPG or any other national policy or guidance document. As such, the Council is unable to respond to Ground 3 in any detail.

5.32. Notwithstanding the matters above, the Council's position is that MOU2 is in accordance with both the NPPF and the PPG, and that there has been no misinterpretation of either the NPPF or PPG.

Ground 3(b) – "the South Ribble Council appeal case"

5.33. In respect of your reference to "*the South Ribble Council appeal case*", the Council assumes that this is a reference to the DL, as defined above.

5.34. You assert that the Council has "*had regard to an appeal methodology … which is wrong in law*". You further state: "*[the DL] is subject to an appeal by the developer to which the primary decision maker (SoS for MHCLG), has conceded. It is apprehended that the challenge is likely to succeed, but in any event, regard was wrongly had to the approach on this issue within the appeal which too falls into legal error. Upon the Secretary of State's concession that his decision was unlawful the proposed Defendant should have resiled from reliance upon its content*".

5.35. The following difficulties arise in respect of your allegations,:

(a) A judicial review claim in respect of the Decision is not a proper context within which to challenge the lawful status of the DL; rather the lawfulness of the DL is properly considered in the pending statutory review. As such, the PAP Letter appears to be launching an impermissible collateral challenge.

(b) The PAP Letter does not explain why the "*appeal methodology … is wrong in law*". Reference to "*methodology*" is particularly opaque and it is not clear what aspect of the DL is being referred to by the PAP Letter. Similarly, the PAP Letter asserts that "*in any event, regard was wrongly had to the approach on this issue within the appeal which too falls into legal error*", but again there is no explanation or reference to a particular part of the DL. Put simply, it has not been demonstrated that the DL is "*wrong in law*", and this allegation is at best premature.

(c) The PAP Letter fails to explain in what way it is said that the DL was relied upon by the Council unlawfully. Even if the DL is subsequently quashed, the PAP Letter fails to grapple with: (i) the fact that it was not quashed at the time of the Decision; (ii) the absence of any reference to the DL in MOU2; (iii) the manner in which the DL was referred to in the report to the Leader; or (iv) the fact that a quashed decision may nevertheless be a material consideration (see ***R. (Davison) v Elmbridge Borough Council*** [2019] EWHC 1409 (Admin); [2020] 1 P. & C.R. 1 *per* Thornton J at [56] in particular).

5.36. Accordingly, the PAP Letter discloses no basis for considering that the Decision was unlawful as alleged.

Ground 4 – "failure to comply with PCC's constitution"

5.37. The PAP Letter alleges that the Decision "*was ultra vires as it was both a reserved decision and a key decision under PCC's Constitution*". The inference is that the PAP Letter considers that the Decision was unlawful because it was required to be taken by the full Council, rather than by the Leader of the Council because (i) it was reserved decision and/or (ii) it was a key decision.

5.38. As to the first basis for this allegation, the Decision was not a reserved decision in accordance with the Council's constitution.

5.39. As to the second basis for this allegation, it is incorrect that a key decision must be taken by the full Council. It appears that this argument is based on a mis-reading of the Council's constitution.

5.40. It follows that on neither basis was the Decision unlawful.

6. DETAILS OF ANY OTHER INTERESTED PARTIES

6.1. You state that "*[t]his claim does not challenge the decisions of CC and SRBC who are accordingly not considered to be interested parties*". This reasoning appears to be defective because if any of Grounds 1 – 3 are made out, there would be unlawfulness on the part of both CC and SRBC who, *qua* local planning authority for their

respective areas, have adopted MOU2. Further and in any event, given that MOU2 is the product of joint working between the Council, CC and SRBC, it is the case that CC and SRBC are interested on that basis. Accordingly, the Council considers that CC and SRBC should be added to any claim as interested parties and also that appropriate pre-action correspondence should be undertaken with CC and SRBC.

6.2. We do not supply the details of CC and SRBC as it is clear from the PAP Letter that you are in possession of the same (the fact that the PAP Letter was copied to CC and SRBC appears to be tacit recognition that CC and SRBC are interested parties).

7. ADR PROPOSALS

7.1. You have not made any ADR proposals which require a response.

7.2. The Council does not consider that this is a matter which is amenable to ADR.

7.3. Nevertheless, for the reasons above, it is apparent that the proposed Claimant has failed to comply with the Protocol. Accordingly, the Council considers that further steps should be taken to comply with the Protocol prior to commencing any claim.

8. RESPONSE TO REQUESTS FOR INFORMATION AND DOCUMENTS

8.1. The Protocol states at [13]: "*Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues.*" Your request for information does not comply with this: it is neither proportionate nor limited to what is properly necessary. In short, it is a "fishing expedition".

8.2. Nevertheless, having regard to the Protocol and the duty of candour, the following documents are enclosed:

(a) the report of the Council's Director of Development to the Leader of the Council in respect of MOU2; and

(b) the minutes of the Leader of the Council's decision on 17 April 2020.

9. ADDRESS FOR FURTHER CORRESPONDENCE AND SERVICE OF COURT DOCUMENTS

9.1. The Council's address for further correspondence and service of court documents is: FAO: Wendy Kearns (Legal Section), Preston City Council, Town Hall, Lancaster Road, Preston, PR1 2RL.

9.2. Please note, all correspondence and court documents sent to the Council should be clearly identified with the reference details noted above.

Yours faithfully,

Wendy Kearns
Solicitor (Licensing) - (Regulatory)

Case No: CO/3653/2015

Neutral Citation Number: [2016] EWHC 968 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Leeds Combined Court Centre
1 Oxford Road, Leeds, LS1 3BG

Date: 28/04/2016

Before :
Mr Justice Ouseley

- -

Between :

ST MODWEN DEVELOPMENTS LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) EAST RIDING OF YORKSHIRE COUNCIL**	**Defendants**
-and-	
(3) SAVE OUR FERRIBY ACTION GROUP	**Interested Party**

- -
- -

Christopher Young and James Corbet Burcher (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Richard Honey (instructed by the **Government Legal Department**) for the **First Defendant**
Paul Tucker QC and Freddie Humphreys (instructed by **the solicitor to ERYC)** for the **Second Defendant**
Emma Reid- Chalmers (instructed by direct access) for the **Interested Party**

Hearing dates: 28 & 29 January 2016

- -

Judgment

MR JUSTICE OUSELEY

1. St Modwen Developments Limited, the Claimant, challenges under s288 of the Town and Country Planning Act 1990, the decision of the Secretary of State for Communities and Local Government dismissing its appeal against the refusal of planning permission by East Riding Yorkshire Council, ERYC, for two alternative developments at Melton, about 8 miles west of Hull. He did so, accepting the Inspector's recommendation in her report after a Public Inquiry. St Modwen's preferred development, Appeal A, was for 510 houses, including 35% affordable housing, a care home and other associated facilities; but as an alternative, Appeal B, it sought planning permission for 390 houses and for 7.7 hectares of employment land, either (1) with 40% affordable housing or (2) with 25% affordable housing and a £6m contribution to a new bridge over the railway to improve access to a large area of employment land to the south of the appeal site.

2. The main issues at the Inquiry concerned the loss of the allocated employment land on the appeal site, and the need for housing. The issues before me concerned alleged errors of interpretation of the National Planning Policy Framework, NPPF, of March 2012, in relation to the Inspector's conclusion and the Secretary of State's acceptance that ERYC had a 5 year supply of housing land, and to a lesser extent their alleged error of law in their approach to the offer of £6m, which was found to be so disproportionately great, in relation to the harm which the development was said to do to employment land, that it was discounted.

The Decision Letter

3. The Secretary of State's Decision Letter accepted the recommendation and reasoning of the Inspector save in one respect and so any errors of hers affect the Decision Letter too. The overall conclusions of the Decision Letter, DL, in [18] and [19] were:

> "18. Although the provision of new homes, including affordable housing, would be an important social and economic benefit, the Secretary of State concludes that granting permission for either of the appeal schemes would be contrary to the Development Plan, so that it is necessary to consider whether there are material considerations sufficient to warrant a decision contrary to that.
>
> 19. With regard to Appeal A, the Secretary of State concludes that the benefits of the scheme are significantly and demonstrably outweighed by the adverse impacts including that on the Council's overall spatial strategy for housing, their economic objectives and the portfolio of employment land, and the urbanising impact on North Ferriby. In the case of Appeal B, the Secretary of State concludes that these disbenefits would be compounded by the reduced quantum of housing while the funding for a bridge across a railway line would not be a proportionate or reasonable response to any harm to the supply of employment land."

The Inspector's Report- IR

4. The Inspector correctly identified the issues as the relationship of the proposals to the statutory Development Plan, to the emerging local plan, and to national planning policies; the adequacy of the housing provision in ERYC; and the particular contribution made by the appeal site to the supply of employment land and to wider economic objectives. St Modwen was not proposing any form of development on the 7.7 has. of employment land in Appeal B. The loss of employment land had been a major reason for the refusal of planning permission. The core dispute about the loss of employment land concerned the characteristics of the appeal site rather than the quantity of employment land which would be lost. As a result, the Inspector concluded that the planning policy implications of Appeal A compared to Appeal B did not differ greatly, and the differences between the schemes, and the extent to which one might be more of a mixed use scheme than the other, were of limited relevance, [IR 13.4] .

5. There was no dispute but that the proposal conflicted with the adopted Development Plan, and indeed with the emerging local plan, because in each plan the appeal site was allocated for employment uses. One issue was whether it was still needed as employment land, but the Inspector concluded that it was, principally because of its location, suitability and contribution to the ERYC portfolio of employment land, rather than because of the need for the quantum of employment land itself in East Riding; it was also seen as well located to assist Hull's regeneration including its nascent renewable energy manufacturing industry. Hull is the only city in England to be wholly surrounded on its landward side by the area of another authority, ERYC, which wraps tightly around its urban area. St Modwen did not contend that there was no reasonable prospect of the site coming forward for employment use.

6. Instead, St Modwen contended that its proposals were sustainable development and so accorded with national policy in the NPPF, which reduced the weight to be given to the conflict with the Development Plan. The Inspector concluded that paragraph 49 of the NPPF expected housing proposals to be considered in the context of a presumption in favour of sustainable development. So even if there were a 5 year housing land supply, NPPF [49] would be engaged by reason of the fact that some relevant policies, including the fact that the proposals would be outside development limits, were out of date. The Inspector accepted at [13.10]:

> "As such, providing the proposals were accepted to be a form of sustainable development, the planning balance to be applied would be that permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits."

Housing Land Requirement and Supply

7. St Modwen's arguments before the Inspector as to how that balance should be struck relied mainly on what it said was a considerable shortage of housing land against the five year housing requirement. Both components of that argument were hotly contested. ERYC contended that the 5 year requirement should be assessed by reference to a Strategic Housing Market Area, SHMA, comprising ERY and Hull City, with a 5 year requirement for the ERYC part of it of 10053 dwellings, but if the

five year requirement were assessed by reference solely to the ERYC area, ignoring the SHMA and the relationship to Hull City, there was a 5 year requirement of nearly 14000 dwellings. St Modwen contended that the relevant figure was not that for the ERYC part of the SHMA, but for the area of ERYC taken on its own without consideration of the SHMA, and that that figure was 15312.

8. Against the housing requirement figures, ERYC contended that it had a 5 year supply of just under 15000 houses at 14971 whereas St Modwen set against any relevant requirement figure including its own of 15312, a housing land supply figure of 4734.

9. The Inspector's overall conclusions on housing land requirement and supply are set out in IR [13.63-13.65], and were accepted by the Secretary of State:

> "13.63. With regard to the five year housing requirement, I consider that the Council's figure of just over 10,000 for the housing market area is to be preferred, on the basis that it accords most closely with the relevant national policy and offers a reasonably robust, full, objective assessment of need. Use of an HMA-based figure should be understood as part of the first stage of formulating the requirement according to national policy rather than the second stage of applying a constraint on the basis of local policy making. The Secretary of State may conclude that the requirement should be based on the ERYC administrative area, in which case the Council's figure of just under 14,000 is to be preferred over the Appellant's figure of 15,300.
>
> 13.64. The Appellant's approach to the assessment of housing land supply is fundamentally flawed so that the Council's assessment of supply, at almost 15,000, is also to be preferred. Thus, whether the analysis is based on the HMA or the ERYC area, I consider that the Council has demonstrated the existence of a five year housing land supply. Even if the Appellant's five year housing requirement of 15,300 is taken, the shortfall of 300 would be modest in the context of the overall requirement, making it debatable whether any adverse effect on housing delivery due to supply constraints would be identifiable in practice.
>
> 13.65. Since it has not been shown that there is any pressing need for additional sites to come forward to sustain the local supply of housing, I consider that the appeal proposals would not deliver additional benefits by virtue of their contribution to that supply. The contribution of the proposals to the supply of affordable housing is a different matter. Here, significant need has been demonstrated and it seems likely that such need will persist. For that reason, substantial weight should attach to the proposals, in proportion to the extra contribution they would make to the supply of affordable housing."

It is the Inspector's approach to those differences which led to the challenge.

Ground 1: Housing land supply

10. Mr Young for St Modwen took aim first at the conclusions on housing land supply. If St Modwen's arguments had been accepted, the Inspector would have found that, on any of the requirement figures, there was a very large shortfall in housing land supply. He broke this part of his challenge into five issues, contending that, in relation to each, the Inspector and Secretary of State had misinterpreted NPPF [47], had ignored relevant considerations, and provided legally inadequate reasons en route to irrational conclusions.

11. These five issues are inter-related. (a) On the proper interpretation of "available now" in NPPF [47] footnote 11, sites contributing to the five year supply of housing land had to have planning permission, or at least a resolution to grant planning permission. (b) No evidence had been presented by the ERYC, on whom the burden lay, to show that the contributing sites were viable, as required by NPPF [47], and so the Inspector had no basis for including most of the sites in her assessment of housing land supply. (c) The Inspector misinterpreted "supply of specific deliverable sites", drawing a distinction between the assessment of supply and the assessment of "delivery", focusing on the former and ignoring the "deliverability" of the sites, treating supply and deliverability as the same. (d) The Inspector ignored the material fact, in judging the credibility of the housing land supply figures which she accepted, that ERYC's track record on housing delivery had averaged 635 dwellings a year, whereas it now proposed 3000 a year for 5 years. (e) She had made the same error in relation to ERYC's own projected housing trajectory as presented by it to the Local Plan examination, proceeding roughly in parallel: the trajectory showed significantly fewer than 3000 dwellings a year being delivered. (The public sessions of the hearing into the draft local plan were held after the appeal Inquiry and before the decision was issued, with a further hearing after the decision).

12. These contentions need to be examined in the context of the various issues on housing land supply which divided the parties at the Inquiry, because not all were of real importance.

Issue (a): the meaning of "available now".

13. The principal issue was the inclusion by ERYC in the housing land supply figures of sites allocated in the emerging Local Plan; St Modwen's approach limited that supply to sites with planning permission or a resolution to grant permission. It said that this approach was required by NPPF [47] and the words "available now" in footnote 11. This accounted for almost all of the difference of over 10000 dwellings between the parties [IR13.41-2]. The table at [13.41] shows that to be a slightly crude way of expressing the differences, but the other differences cancel each other out numerically, and need not feature separately in the case. The Inspector accepted ERYC's approach, and rejected St Modwen's.

14. NPPF [47] provides:

> "To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their local plan meets the full objectively assessed needs for… housing "in the housing market area so far as is consistent with the policies set out in this Framework…";

- local planning authorities were required to identify and update annually a "supply of specific deliverable sites sufficient to provide 5 years' worth of housing against their housing requirements…"

15. Footnote 11 to "deliverable" states:

> "11. To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

16. The Inspector's conclusions on this issue were as follows.

> "The approach to allocations in the emerging local plan
>
> 13.43. Footnote 11 of NPPF paragraph 47 states that deliverable sites should be available, in a suitable location, achievable and have a realistic prospect of being developed. Further advice is set out at PPG 3.19-23, which suggests various other factors to consider such as impact on surroundings, ownership and viability, all of which are site-specific. Both the Appellant and the Council draw attention to the Wainhomes judgement. From this, it appears there are two key points to note with regard to the interpretation of NPPF paragraph 47: firstly, that whether or not a site is deliverable is fact sensitive; and secondly, that inclusion of a site in an emerging local plan is some evidence of deliverability, since it should normally be assumed that an LPA will make a responsible attempt to comply with national planning policy. Nonetheless, there are other relevant factors including the plan's evidence base, the stage the draft plan has reached and the nature of any objections.
>
> 13.44. Pointing to the strong emphasis in NPPF on delivery, the Appellant has taken the position that supply will largely consist of sites with planning permission, putting forward a figure of just over 4,700 as the realistic supply. However if the exercise is to be fact-sensitive as indicated in the Wainhomes judgement, it follows that sites should not be discounted simply

on the basis of a general characteristic such as their planning status. Moreover, there is a fundamental lack of credibility in a figure for a period looking five years ahead which fails to acknowledge the likelihood that the Council will grant at least some planning permissions during that period. In this respect, it should be noted that the Appellant's own supply figure has had to be revised upwards by a substantial margin in the relatively short period between the submission of proofs in April 2014 and the holding of the inquiry only a few weeks later, in order to reflect this very fact. The Appellant's approach to deliverability does not achieve the intended aim of providing certainty over the projected five year period.

13.45. On the question of the status of sites without planning permission, the Appellant draws attention to various appeal decisions…In contrast, for the two appeals currently under consideration, the Council's case is based on all the sites identified in a submission draft allocations document rather than a small number of strategic sites. The relevant local plan is in the process of being examined and provides a much clearer picture as to technical or viability issues and the nature of any objections. The circumstances are not comparable and a different approach is warranted here, due to the different characteristics of the evidence base and the availability of public responses to the emerging plan. In addition, it seems to me there is a fundamental flaw in an approach to the assessment of housing land supply which fails to entertain the possibility that a Local Planning Authority with an identified need of at least 1400 dwellings a year and an emerging local plan which provides for 23,800 dwellings may grant at least some planning permissions for residential development over a five year period.

13.46. On its own, the absence of a planning permission is not sufficient reason for a site to be categorised as undeliverable. On that basis, I consider that very little weight can be attached to the Appellant's figures for supply from the existing and emerging local plans.

13.47. The second point arising from the Wainhomes case is that, in a plan-led system, regard needs to be had to the evidence base of the emerging plan, albeit this depends on context. In this instance, the emerging ERYC local plan makes detailed provision for development over the plan period. Whilst the Appellant protests that the detailed evidence base for those allocations was not put to the inquiry, it seems to me that the proper arena to test such detail is indeed the Local Plan examination. For the purposes of this inquiry, it is sufficient to establish the extent to which reliance may be placed on the emerging local plan."

17. Mr Young submitted that the correct, indeed only reasonable, interpretation of that phrase was that the sites had to have planning permission.

18. *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 held that the interpretation of planning policy was a matter for the Courts and not for the reasonable interpretation of the decision-maker, returning planning policy to the status of all other policies when it came to their interpretation. But beyond saying that it required an objective interpretation and in context, it said very little about what tools, materials or approach should be used in the interpretation exercise by the Court.

19. I do not accept Mr Young's contention. If the Inspector's interpretation of the NPPF is wrong it means that her reasonable planning judgment is contrary to what the proper interpretation of the NPPF requires. It is a strong indicator that an interpretation of a phrase within the NPPF is wrong if it yields an outcome which lacks a sound planning basis. It is not her interpretation which lacks a sound planning basis; it is St Modwen's.

20. In the paragraphs cited above, the Inspector explains why sites should not be discounted from the housing land supply simply because they lack planning permission. Then, in considering sites which do not have permission but which are allocated in the emerging local plan, she explains why those sites are suitable for inclusion in the supply figures. This is a reasonable planning judgment; indeed, it is the obviously sensible planning judgment. Mr Young's contention would be a rigid inhibition to the appraisal of "deliverability", that is the appraisal of the sites realistically likely to be delivered over the next five years. I can see no planning rationale for depriving the planning authority and Inspector of the opportunity to reach a judgment on the general criteria for deliverability on sites in an emerging local plan. Planning permission clearly goes to the issue of deliverability because a site with permission is suitable for housing development, and a barrier to delivery has been removed. But it cannot sensibly be argued that planning permission is required now for a site to be realistically deliverable over the next five years.

21. Mr Young based his argument on the interpretation of "available now", but that phrase is obviously more apt to deal with ownership constraints, the starting constraints to development, than it is to deal with the grant of planning permission, in view of the other express components of deliverability. However this was no accidental focus on the wrong words to convey his point. "Availability now" cannot be demonstrated by showing that development on a site is "achievable with a realistic prospect that housing will be delivered on the site within five years…" But that last phrase covers an important aspect of "deliverability". The planning judgment as to "deliverability" can clearly be made in respect of sites which do not have planning permission now, but can reasonably be expected to receive it so as to enable housing to be built on them within the next five years. These would include allocations in an emerging local plan, once assessed for the purpose of inclusion in the housing land supply, or indeed in an adopted plan. Mr Young had to exclude them; so he had to base his argument, to give it any bite, on the inappropriate phrase "available now", because of the effect of the word "now". "Now" means "now", and I accept that "available now" looks to the present availability of the land in question. There is nothing to suggest that the Inspector did not understand that. But for the reasons she gave, his argument that that phrase covers the grant of planning permission and

requires planning permission to have been granted "now", lacks a sound planning basis, and that is the first reason why it is wrong.

22. "Deliverability" is more fully dealt with in later paragraphs of the IR, to which I come under issues (b) and (c) of ground 1, where there is a separate challenge to the consideration given to viability and deliverability in relation to the inclusion in the supply figures of emerging sites in the local plan. In reality, though, issues (a), (b) and (c) are closely related: the justification for the inclusion in the supply figures of housing land allocations in an emerging local plan, helps to understand the Inspector's conclusion as to why the supply figures cannot sensibly be limited to sites with planning permission or a resolution to grant permission.

23. Second, the language of the footnote at issue is also decisively against Mr Young's argument. I have already pointed out that "available now" are words inapt to convey a need for planning permission as a criterion for "deliverability". However, if the Secretary of State had intended to require that only sites with planning permission were to be included within the five year supply figures, something of a radical change to what had hitherto been done, the obvious way to have done that would have been to use express words to that effect, rather than by using such oblique language as "available now", and in a footnote to "deliverable". The need for planning permission, in order for a site to be included in the supply figures would have been an obvious criterion to specify by itself. I find it impossible to accept that such a critical, and simply expressed, factor was left to be spelt out from "available now".

24. Mr Young had no real counter to that point beyond saying that it was implicit as a result of the second sentence of the footnote that planning permission was required. It would not otherwise be necessary to specify when a site with planning permission should be discounted from the supply now available. This sentence implies that a site with planning permission is deliverable unless excluded for the reasons in the second sentence. But that is a far, far cry from saying that a site without planning permission is not to be regarded as available now for the purposes of a five year supply. The inference which Mr Young needs to draw simply cannot be drawn.

25. Mr Young's argument contains a related fatal internal contradiction, since he enlarged the notion of "available now" beyond the need for planning permission to have been granted now so as to include sites with a resolution to grant permission. He did so for the understandable reasons that this could be close to a permission, and permission would usually follow within a reasonable period thereafter - although there is known to be many a slip twixt cup and lip here - and it would also reduce the unappealing rigidity of his argument. He can however even less extract that extended criterion from "available now". In reality, this is to allow a judgment on the prospect of the site receiving permission within the period to play a part in the planning judgment of whether it should be included in the supply figures. And once he has accepted that in principle, the limits to that principle are not to be set for the convenience of a particular forensic argument.

26. Mr Young is also making the words "available now" cover both the absence of ownership constraints, and possibly the removal of any need for the owner to find alternative land for, for example, any statutory function carried out on the land in question, as well as the grant of permission. This is working the phrase too hard.

27. Third, such authority as there is supports my conclusion. The Inspector was referred, as was I, to the decision of Stuart-Smith J in *Wainhomes (South West) Holdings Ltd v SSCLG* [2013] EWHC 597. This decision is also relevant to the debate over deliverability since the issue was whether sites in emerging plans, and without permission, should be regarded as "deliverable". As Mr Young acknowledged, this is a decision against him. At [34], Stuart-Smith J commented on factors relevant to the interpretation of "deliverable" in footnote 11. Although it was common ground before him that planning permission was not a prerequisite to a site being "deliverable", he explained why he agreed with that common ground.

28. Stuart-Smith J said:

> "34. The issue for the inspector was whether the strategic sites were "deliverable" as defined by Footnote 11 so that they fell within the meaning of [47] and should have been included in the assessment of housing land supply. Footnote 11 is not entirely straightforward, but the following points are relevant to its interpretation:
>
> - It is common ground that planning permission is not a necessary prerequisite to a site being "deliverable". This must be so because of the second sentence of Footnote 11 and because it would be quite unrealistic and unworkable to suggest that all of the housing land supply for the following five year period will have achieved planning permission at the start of the period;
>
> - The parties are agreed that a site which is, for example, occupied by a factory which has not been derequisitioned, or which is contaminated so that housing could not be placed upon it, is not "available now" within the meaning of the first sentence of Footnote 11. However, what is meant by "available now" is not explained in Footnote 11 or elsewhere. It is to be read in the context that there are other requirements, which should be assumed to be distinct from the requirement of being "available now", though there may be a degree of overlap in their application. This suggests that being available now is not a function of (a) being a suitable location for development now or (b) being achievable with a realistic prospect that housing will be delivered on the site within five years and that development of the site is viable. Given the presence of those additional requirements, I would accept Ms Busch's submission for the Secretary of State: "available now" connotes that, if the site had planning permission now, there would be no other legal or physical impediment integral to the site that would prevent immediate development;… "

29. In [35] he said that the inclusion of a site in an emerging plan was some evidence that the site was deliverable since it should normally be assumed that it was included pursuant to a responsible planning authority's attempt to meet NPPF [47], but he made the important point that the weight to be attached to all those factors was a matter of planning judgment for the Inspector.

30. Mr Young submitted that this was not binding on me, which is correct, and that limited weight could be attached to a position agreed before the Inspector and before the judge, and therefore not argued. That might be a sound submission in many cases, but not so here since the issue was plainly considered, and reasons were given by Stuart-Smith J for accepting that agreed position at the outset of a considered analysis of "deliverability". I note that his comment on planning permissions focused on what was "deliverable" and not on what was "available now", though being "available now" is an ingredient of being "deliverable". But if planning permission now is not required for a site to be "deliverable" over five years, it cannot be a requirement of "available now".

31. Mr Young criticised the reasoning of Stuart-Smith J, to persuade me not to follow it: the fact that it might be difficult for planning authorities to have a five year supply of housing land with planning permission at the start of and through the rolling five year periods was no reason why it should not be required of them. And some, he informed me, did achieve that. Maybe they do, but if so, the fact that only some, and no more do so, (no further details provided), supports rather than undermines the judge's concern as to the realism of requiring all sites in the five year supply to have planning permission, and hence to support his judgment as to what in context the phrase at issue meant.

32. Finally, the Inspector was also referred to the Secretary of State's Planning Practice Guidance, PPG, of March 2014, a "web-based resource" published - and changeable without notice - "to bring together planning practice and guidance for England in an accessible and usable way". The Guidance was intended to assist practitioners; interpretation of legislation was for the courts but this guidance "is an indication of the Secretary of State's views".

33. This is guidance not policy and is not put forward by the Secretary of State as having the same status or weight as the NPPF itself. It does not purport to contradict the NPPF, though it is possible that its language may do so. At this stage, two paragraphs merit citation here. Chapter 3 [31] asks and answers:

> "**What constitutes a 'deliverable site' in the context of housing policy?**
>
> Deliverable sites for housing could include those that are allocated for housing in the Development Plan and sites with planning permission (outline or full that have not been implemented) unless there is clear evidence that schemes will not be implemented within five years.
>
> However, planning permission or allocation in a Development Plan is not a prerequisite for a site being delivered in terms of the five-year supply. Local planning authorities will need to

> provide robust, up to date evidence to support the deliverability of sites, ensuring that their judgments on deliverability are clearly and transparently set out. If there are no significant constraints (e.g. infrastructure) to overcome such as infrastructure, sites not allocated within a development plan or without planning permission can be considered capable of being delivered within a five-year timeframe.
>
> The size of sites will also be an important factor in identifying whether a housing site is deliverable within the first 5 years. Plan makers will need to consider the time it will take to commence development on site and build out rates to ensure a robust five-year housing supply."

34. Chapter 2 [20] asks and answers:

> **"What factors should be considered when assessing availability?**
>
> A site is considered available for development, when, on the best information available (confirmed by the call for sites and information from land owners and legal searches where appropriate), there is confidence that there are no legal or ownership problems, such as unresolved multiple ownerships, ransom strips tenancies or operational requirements of landowners. This will often mean that the land is controlled by a developer or landowner who has expressed an intention to develop, or the landowner has expressed an intention to sell. Because persons do not need to have an interest in the land to make planning applications, the existence of a planning permission does not necessarily mean that the site is available. Where potential problems have been identified, then an assessment will need to be made as to how and when they can realistically be overcome. Consideration should also be given to the delivery record of the developers or landowners putting forward sites, and whether the planning background of a site shows a history of unimplemented permissions."

35. The PPG clearly supports the view which I have formed as to whether planning permission is a prerequisite for a site to be "available now" or "deliverable."

36. There was some debate as to its relevance to the interpretation of NPPF [47], since its interpretation was an issue for the Court and not for the reasonable view, let alone for the say-so, of the policy maker; and the PPG post-dated the NPPF. I regard it as relevant as an aid to interpretation by the Court of the NPPF. The NPPF is not to be construed like a statute or contract. It is not a multilateral agreement such as a contract or treaty. A bespoke approach is required for the interpretation by the Court of statements made by the policy-maker, for the benefit of those who are affected, as to how he intends in general to use his discretionary powers. The policy-maker of the NPPF cannot say that he meant one thing when he used words which mean something else. But when the policy-maker produces a subordinate document to expand upon

what he has previously said, which does not and is not expressly intended to contradict it, that document may assist the Court in understanding what was intended in the first place and why, thus assisting it in its task of interpretation. This is not substituting his views for the interpretation of the Court.

37. For those reasons, I reject Mr Young's first contention in ground 1 as showing any error of law on the part of the Inspector or Secretary of State.

Issue (b): the evidence that the emerging plan sites were viable

38. This argument focused on the requirement in NPPF [47] footnote 11 that the sites included in the five year supply of housing land be viable. This was presented to the Inspector as an argument that the burden lay upon Councils to demonstrate viability, that *Wainhomes* said as much, and that it was not for the developer to refute viability. Here, contended Mr Young, ERYC had not presented evidence on viability, and so the Inspector had no evidence that the sites were viable, save to the extent that sites had planning permission, and she should have discounted them from the supply of housing land on that ground. Sites not allocated in the adopted development plan, and without planning permission, require "robust, up to date, clear and transparent evidence to support the deliverability of sites", provided by the local planning authority; PPG Chapter 3 [31] above. This, he submitted, also required the local planning authority to provide evidence of the site's viability, one of the factors referred to in footnote 11 to [47].

39. I turn to the evidence and arguments before the Inspector. The evidence before her on the emerging sites was outlined by her in earlier parts of her report. The shortcoming now asserted in that evidence concerns only viability as an aspect of deliverability. Mr Hunt for EYRC gave evidence to the Inspector which explained the process which sites in the Proposed Submissions Allocations Document, PSAD, had been through in order to be included in the 2013 Strategic Housing Land Availability Assessment, SHLAA, for ERY, including the numerous rounds of consultation, the ERYC's judgement that it had strong evidence to support deliverability, though not produced in any detail to the Inquiry, and its commitment to affording allocations significant weight in deciding planning applications in respect of them. There were a large number of relatively small sites in the supply side. An appendix provided an updated assessment of their deliverability. They were specific allocations, tested against the Council's Site Assessment Methodology, to identify constraints to delivery, using 33 specific questions, through three or four stages of full public consultation, and subject to a fact check with the promoters of the allocations to confirm the absence of ownership constraints, availability and deliverability. The general assessment of the objections received was that they did not raise issues of suitability. The planning status of the PSAD sites was noted. There was an updated January 2014 PSAD. The Inspector also had the 2013 SHLAA. The case for ERYC on this is set out in IR 7.101-7, notably 7.105-107.

40. Although Mr Young made submissions to the Inspector about the shortcomings in the evidence provided by the ERYC, as providing no technical or viability evidence and very little to demonstrate deliverability, St Modwen's witness had prepared his own assessment of many of the sites at issue, but declined to rely on it to show that those emerging allocations were not properly included in the supply calculations. This was because, as he interpreted [47] NPPF, it permitted only the inclusion of sites with

planning permission or a resolution to grant permission. There was therefore no counter evidence from St Modwen to that provided by ERYC, St Modwen resting its case on the very different issue of whether planning permission was a criterion for acceptance into the five year housing land supply. In fact, it was Mr Tucker QC for ERYC who prayed the St Modwen's assessment in aid in his submissions to the Inspector, IR 7.106.

41. St Modwen's case on housing land supply is summarised in [IR 9. 142-155]. I summarise this because it is important to understand how limited was the viability point among the many points taken before the inspector on housing land supply. The ERYC housing land supply figures were described in those submissions as "utterly implausible" on the basis of the past much lower delivery of housing, and its future trajectory, which was also lower than 3000 dwellings a year; it had been inconsistent in the sites it put forward; what mattered were the permitted sites or those with a resolution to grant. Others should only be included if there were "very clear evidence supporting the delivery of the site in the next 5 years." *Wainhomes* put the burden of providing that evidence on the Council. The only evidence was one of the Council's witness' Appendices, which had very little detail, and although there might be no objection to many of the sites, there was very little else to demonstrate delivery in the next five years. "Technical and viability evidence is not provided." The Council knew that it had to provide such evidence, yet there was virtually no such evidence for the emerging plan allocations, for example there was no evidence of the delivery record of owners or developers as the PPG suggested. The summary against each site was not robust. Delivery rates and lead in times were not realistic; and the past was the only real way to judge delivery.

42. The Inspector said that detailed evidence did not have to be put to the appeal Inquiry since that was a matter for the Local Plan examination; [IR 13.47], above. From [13.48] onwards, the Inspector assessed the ERYC contention that 11000 sites from the emerging local plan should be regarded as "deliverable over the next five years." She considered in turn the PSAD of January 2014, prepared for the local plan, the SHLAA and the updated appendices to the ERYC witness' evidence on this topic.

43. The Inspector continued:

> "13.49. Sites in the PSAD have been subjected to a four-stage assessment which includes deliverability. An example of this can be seen in the discussion of potential sites at Melton at Chapter 3 of Mr Hunt's PoE. However, although this methodology may support inclusion of a site within the emerging local plan, it does not demonstrate the likelihood of its delivery in the next five years, as indicated by the Council's own acceptance that some sites should be discounted.
>
> 13.50. Turning to the SHLAA, two key assumptions underpin its reliance on emerging local plan allocations in the five year housing land supply figures: that, since few sites require infrastructure to be provided prior to commencement of development, most of the allocations in the emerging local plan can be regarded as being free from significant constraints; and

> that the Council is committed to affording weight to the emerging local plan when determining planning applications.
>
> 13.51. Infrastructure constraints are identified in the emerging local plan (see eg PSSD policy A1). Although the responses to the PSAD have resulted in comments on many of the allocations, the general tenor of these does not indicate a failure to identify constraints. In addition, the Appellant's scrutiny of these allocations during the course of the inquiry indicated a need for relatively little change in the Council's assessment of sites which should be discounted (from 373 in ERYC 16 to 419 in ERYC 38a). As such, I consider that the first key assumption has been shown to be reasonable.
>
> 13.52. As to the second, a comparison between the information provided in April 2014 and the update to the inquiry three months later provides a useful illustration of the extent to which the Council is standing by its commitment to afford weight to the emerging local plan. The table below shows that the number of sites with planning permission or expected to obtain such permission has risen significantly (by almost 1100 in three months) and the trend for those under consideration is also upward. On that basis, I consider that the second key assumption in the SHLAA is also reasonable.
>
> 13.53. Clearly, given the number of sites involved, it may well turn out that not all allocations currently identified as deliverable will in fact be delivered. However I consider that, overall, the Appellant has not shown that this part of the evidence base is lacking in robustness. As a result, the Council's figure of 11,156 dwellings on sites identified in the emerging local plan should carry substantial weight."

44. Mr Honey, for the Secretary of State, accepted that NPPF [49] does say that relevant policies for the supply of housing should not be considered up to date *"if the local planning authority cannot demonstrate"* (my emphasis) a five-year supply of deliverable housing sites. PPG 3, as above, elaborated what topics should be covered and with what calibre of evidence; but it was not confined to the one issue of viability. That is the policy which the Inspector was bound to apply, and did.

45. There is no case law supporting Mr Young's submissions. *Wainhomes* says no such thing as he submitted to the Inspector and initially to me. Considerations of specific burdens of proof on specific aspects are wholly inappropriate for evaluative planning decisions of this nature.

46. There was no error of law by the Inspector. She addressed the issue of whether ERYC had demonstrated that the sites in its five year housing land supply figures were deliverable within the requirements of [47] NPPF and footnote. Her approach reflects the requirements of [49] NPPF and of the PPG. She had evidence on deliverability sufficient to enable her to reach a reasonable planning judgment; she summarises that evidence from ERYC, and to an extent also from St Modwen.

47. The conclusions of her report deal with the main issues raised by St Modwen. Viability as a separate point scarcely rated a mention beside the other criticisms raised. She distilled the two principal issues as being the basis upon which reliance was placed on emerging local plan sites, particularly because of the possibility of significant constraints, and the weight which ERYC would give to sites in the emerging local plan, when deciding whether to grant planning permission on them. No viability assessment for each site was required to be produced to the Inspector. The main viability issue would have been whether or not there were significant infrastructure constraints. Although the evidence was in a short form for each site, the basis upon which that had been arrived at was spelt out in some detail, and covered all the relevant aspects of deliverability, of which viability was one component. It might have been possible to test samples of sites to measure how the Council had appraised viability, in view of the large number of sites, but it was not necessary in law to do so. She was not required to determine for herself, by her own inquiries and financial exercises, that the sites were viable.

48. There is nothing in this second issue.

Issue (c): the approach to "deliverable" sites

49. Mr Young contended that the Inspector had misinterpreted what "deliverable" meant in NPPF [47].This was more an issue about the language she had used in two paragraphs, IR [13.53 and 13.56], rather than whether any substantive conclusions showed a misinterpretation of the concept. I have dealt with the concept and the substantive conclusions, in dealing with the previous issues. Mr Young's criticisms were directed at the first sentence of [13.53] and at the last sentence of [13.56], the first set out above, but repeated here for convenience and the latter features again in connection with the next ground:

> "13.53. Clearly, given the number of sites involved, it may well turn out that not all allocations currently identified as deliverable will in fact be delivered…."
>
> "13.56… However, the assessment of supply is distinct from that for delivery."

50. He submitted that the inspector had erred in drawing a distinction between the supply of housing and the delivery of housing on it. Delivery was at the heart of the NPPF. The Inspector had focused on "supply" and not on "deliverable supply". She needed to find that specific sites were deliverable. The argument itself veered somewhat uncertainly between the concepts of "delivery", and "deliverability".

51. In my judgment, the Inspector made no error of interpretation of the NPPF at all. The NPPF and the assessment of housing land supply are concerned with "deliverability", which is an assessment of the likelihood that housing will be delivered in the five year period on that site. The assessment of housing land supply does not require certainty that the housing sites will actually be developed within that period. The planning process cannot deal in such certainties. The problem of uncertainty is managed by assessing "deliverability" over a five year period, re-assessed as the five year period

rolls forward. The Inspector was simply recognising that there is that difference, and her focus had to be on deliverability, which was not disproved by showing that there were uncertainties. All this was very much a matter of degree for her.

52. There are many reasons why the difference may exist: the assumed production rates off large sites may be too high for the market, though that does not seem to have been an issue here; the building industry's infrastructure, skilled labour, finance, and materials, may not be geared up to the assumed rate; and the market may not wish to build or buy houses at the assumed rate of delivery; mortgage funds may not be available for those who would wish to buy. As Mr Tucker pointed out, the local planning authority can only do so much, that is to maintain a five year supply of deliverable housing land. The market, comprising house builders, finance and purchasers, has to do the rest. I reject this aspect of ground 1; the Inspector made no error of law.

Issues (d) and (e): housing record and trajectory

53. These can be taken together: (d) relates to the way in which the Inspector approached ERYC's past delivery of housing, and (e) relates to the trajectory it placed before the Inspector, and prepared for the Local Plan examination. They are also bound up with the other contention, featuring passim in Mr Young's argument, that the decision of the Inspector was not merely overly generous to ERYC, but was irrational.

54. The essence of (d) was that the supply figures, of 15000, over 5 years or 3000 a year was far beyond what ERYC had achieved in the past, which was of the order of 650 a year, and of (e) was that it was far ahead of what EYRC was putting forward as its expected production over the five years. ERYC's April 2014 Housing Implementation Strategy for submission to the Local Plan examination, in evidence before the Inspector, showed fewer than 1000 dwellings built in 2013-14, and 1500 or fewer in each succeeding year until that figure of 1500 was just exceeded in 2017-18, making a total for the five relevant years of no more than 7000 dwellings.

55. Mr Young described ERYC as in effect saying that there was a realistic prospect that 3000 houses a year would be produced, but that it did not regard that as the likely outcome, the outcome that more probably than not would occur. No legally adequate reasons had been given as to how its five year housing supply figures could be reconciled with its past and probable future delivery.

56. The relevant paragraphs from the Inspector's Report have been set out above. St Modwen had put forward the past record and anticipated trajectory as reasons why ERYC's housing land supply figure was simply not credible. The Inspector commented on this in IR [13.56] under the heading *"The credibility of the supply figure"*:

> "13.56. Whilst the Council's supply figure has fluctuated over the period of the inquiry, a fair reading of Mr Hunt's first proof shows that the discussion of a 12 year supply took place in the context of the weight which could be attached to sites in the emerging local plan (StM16). In a situation where a Local Plan is under preparation, it is not surprising that data will be subject to revision. As such, the fluctuations of themselves should not

> be seen as indicative of a lack of reliability. It is also suggested that the 15,000 figure should be seen as absurd in comparison with the housing trajectory. However, the assessment of supply is distinct from that for delivery."

57. NPPF [47], 4th bullet point, states that local planning authorities should illustrate "the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy…describing how they will maintain delivery of a five-year supply of housing land to meet their housing target."

58. Mr Young's point was not that market factors, such as a spread of locations, and locations where people actually wanted to live, or the delivery rate of large sites had been unlawfully ignored in the assessment of the sites warranting ERYC's supply figures. Both aspects of this ground went to an argument deployed before the Inspector to the effect that the housing land supply figures put forward by ERYC were not credible, and the Inspector well understood the way the point was being deployed, as her account of St Modwen's case and Mr Young's closing submissions to her showed. His was a simple point, but not a principal important issue, on the credibility of EYRC's judgment; he made it to the Inspector, which she rejected, as she was entitled to do in her planning judgment. This point is cousin to issue (c). It is necessary to be cautious lest a point on a s288 challenge takes a very different shape and emphasis from that which it had before the inspector.

59. The process for allocating sites in the emerging plan and the sites, albeit in brief, were considered by the Inspector and judged to be deliverable. She took account of these issues in reaching that judgment, but she concluded that they did not persuade her that the supply sites were not deliverable. That was a planning judgment for her. The past shortcomings in the supply of land were addressed in the manner required by the NPPF through the 20 percent buffer, though of course that can only address a shortfall caused by failings in the supply of deliverable housing land. The future difference between what was "deliverable" and what would probably be "delivered", discussed above, lies at the heart of the difference between the housing supply figures and the housing trajectory. This difference did not reflect, on the Inspector's conclusions, a contradiction between her assessment of what was "deliverable" and what ERYC thought was "deliverable", nor did it mean that ERYC was saying one thing to one Inspector and something completely different to another. She accepted that ERYC was intending to give great weight to the fact of allocation in the plan when it came to reach its decisions on planning applications for housing on such sites. So far as "deliverability" was concerned, which it was her task to consider, that was the second principal point. Thereafter it would be market factors which would lead to delivery. If sites are deliverable, and the problem in delivery is not within the control of the planning authority, for example the cost of housing or the availability of finance, the solution to a problem of delivery is not an increase in the supply of sites which are capable of delivery. The issue raised was not ignored; it was dealt with briefly but sufficiently.

60. Ground 1 is dismissed.

Ground 2: Housing land requirement

61. EYRC put forward two alternative bases upon which the basic five year housing land requirement should be calculated. St Modwen put forward another. There was agreement that a 20% buffer, in the form of an addition to the 5 year requirement, had to be allowed for in recognition of persistent past under provision, and that the past years' shortfalls should be made up within the 5 year period 2013 to 2018 as part of the housing requirement for that period.

62. The Inspector accepted both ERYC's figures for the housing requirement. There is no challenge to her recommendation that St Modwen's figures should be rejected. This challenge concerns her preference, agreed by the Secretary of State, for one of the two bases upon which ERYC had calculated the ERYC housing requirement figure. The first, which produced a requirement figure of 13957 over the relevant five years, to be set against the supply of 15000, was based on the assessment of the requirement for the ERYC area taken in isolation from Hull City. The second, which produced a requirement for 10053 houses, was based on the requirement figure for ERYC based on a Strategic Housing Market Assessment, SHMA, the combined areas of ERYC and Hull City. This was the Inspector's preferred basis.

63. Mr Young contended that this basis was unlawful as it involved a misinterpretation of NPPF [47] as interpreted by the Court of Appeal in *R (Hunston Properties Ltd) v SSCLG and St Albans City and District Council* [2013] EWCA Civ 1610, and applied in *Solihull MBC v Gallagher Estates Ltd* [2014] EWCA Civ 1610, [10]. The essential point of *Hunston*, put shortly, is that the assessment of the "full, objectively assessed needs for market and affordable housing in the housing market area", as required by the NPPF [47], should be an objective assessment and not one constrained by the application of policies such as Green Belt, which restrain the areas where development can take place. Mr Young contended before the Inspector that that requirement was not respected in taking as the need figure for ERYC, the apportioned figure for it derived from the SHMA. He contended before me that the Inspector, and Secretary of State, misinterpreted the NPPF in accepting her view that was the right approach here.

64. Before I turn to examine the merits of that contention, I accept the submissions of Mr Honey and of Mr Tucker that it does not matter if Mr Young is right and the Inspector in error, because the choice of method for assessing the housing requirement could afford no ground for quashing the decision. She, and the Secretary of State, reached the same view as to the adequacy of the housing supply whichever basis for the housing requirement was adopted. Mr Young did not suggest otherwise. That is the first reason for rejecting this ground.

65. Nonetheless, I consider that the full argument which I heard merits comment.

66. This is what the Inspector said about the approach to be taken:

> 13.16 As the Appellant points out, the question of full, objectively assessed need has been the subject of several planning appeals as well as Court judgements. From these, the key point which arises in relation to this appeal is that, since there is no up to date Local Plan, it is necessary to identify the

full, objectively assessed need, unconstrained by policy considerations, in order to arrive at the housing requirement. The fundamental point of disagreement between the Council and Appellant was whether, in this context, the starting point for establishing the housing requirement should be the LPA administrative area or the housing market area (HMA). The Appellant favours a figure based on the local authority's administrative area. The Council commends the use of the figure for the housing market area.

13.17 The Appellant's case on this point could be summarised as being that the HMA-based figure amounts to a policy constraint since it is a matter to be tested as part of the examination of the Local Plan. The use of the LPA area has been common practice in other planning appeals and was also the approach used in Hunston and Gallagher. As such, it is argued, the figure for this appeal should be that for the LPA administrative area.

13.18 On the other hand, the Council's case is that those legal judgements were directed towards principles such as the source of the figure for objectively assessed need and the importance for such a figure to be tested robustly. Thus, the courts have not yet dealt with the particular principle of whether the proper application of NPPF paragraph 47 in the development management context might reasonably be understood to envisage use of a figure based on the housing market area.

13.19 In this respect, Mr Young's advice is that the Courts have been alive to the wording of this paragraph and to the reference to the housing market area. There is no explicit ratio that supply must be decided by reference to the LPA area but this has been the basis for the preceding judgments. This reflects the fact that the LPA area is also the basis on which the housing supply has to be calculated. In further support, he refers to an (undefended) appeal decision where it was conceded that there had been an error of law whereby supply had not been assessed on the basis of the LPA area.

13.20 The interpretation of policy is a legal matter. However, when a decision-maker comes to apply a policy, it should be read objectively and in context. In relation to plan-making, the Government requires LPAs to have a proper understanding of housing needs in their area at paragraph 47, the policy framework is set out for the delivery of housing to meet that need in full.

13.21 It seems to me that the use of the term 'housing market area' in paragraph 47 should be understood in relation to the later advice at paragraph 159 as to the evidence base for plan-making. Paragraph 159 states that it is the SHMA which should

provide evidence of that need, recognising that the SHMA may cross administrative boundaries. Moreover, the importance of the housing market area as a unit for analysis is illustrated by the guidance in PPG as to how it should be defined and to its use in relation to assessments of need. In order to conform to national guidance and to produce a development plan which meets the test of soundness, the LPA must address the situation within the housing market area.

13.22 In addition, it is inherent in the activity of spatial planning that it must have some regard to local context, it cannot be undertaken in a vacuum. In this case, the key factors would include the functional relationship between the administrative areas of the two Councils and the longer term direction of strategic planning for the area. The East Riding of Yorkshire is a predominantly rural authority, wrapping around the City of Hull, whose own boundaries are quite tightly drawn around the urban area. The extent of the interrelationship has long been recognised for planning purposes, such as through the existence of the JSP. It is clearly expected to continue, as indicated by the defined FEA and HMA as well as the joint working arrangements in place for the preparation of the respective Local Plans for the two Authorities. Thus, notwithstanding the absence of an up to date development plan, it would run counter to the established approach to the strategic planning of the area, as endorsed by the respective Councils, to adopt an approach in relation to these appeals which looked only at the ERYC area and disregarded any consideration of the implications for the City of Hull.

13.23 In my view, therefore, a figure based on the HMA should not be understood as having been subject to policy constraint in the same way, for example, as a figure which has been affected by other planning policies such as the existence of designated green belt, as was the case with Hunston. As regards the Richborough Estates case, it is relevant to note that it took place in 2011, prior to publication of NPPF. Under the then *PPS3 Housing*, the focus was on the LPA area rather than the housing market area (a point also noted in CD C3 paragraph 21). This indicates a material shift has taken place in the underlying policy approach since that time, with NPPF placing increased emphasis on planning's role of assisting and supporting the market provision of housing. Mr Young's further point, that supply is calculated on the basis of the LPA area, I consider to be a pragmatic reflection of the fact that a Council's plan-making powers do not extend beyond its administrative area.

13.24 Whilst acknowledging Mr Young's views, I consider that an assessment of need based on the HMA should be understood

> as an integral requirement arising from national planning policy for housing, rather than the outcome of a second stage of policy-making at the local level.
>
> 13.25 However, although I accept Mr Tucker's point as to the proper application of NPPF paragraph 47, especially in the context of the East Riding, I am also conscious that NPPF has been framed in the context of a plan-led system. At the time of the inquiry, the HMA–apportioned figure was untested in two respects, firstly as regards the influence of the York HMA on the ERYC area and secondly as to the appropriate distribution between ERYC and Hull. The Council's evidence to the inquiry on these points, although somewhat thin, nevertheless indicates that they have received due consideration as part of the overall planning strategy. The HMA-based figure for full, objectivity assessed need cannot be given full weight since it is not contained in a duly adopted Local Plan. Even so, I consider that it should be taken as the starting point for the assessment of the housing requirement for these appeals. However, until the Local Plan is in place, the figure for the whole of the ERYC area should serve as an important consideration."

67. Paragraph 159 of the NPPF requires local planning authorities to have a clear understanding of the housing needs in their area. They should:

> "Prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The Strategic Housing Market Assessment should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:
>
> -meets household and population projections, taking account of migration and demographic change;
>
> -addresses the need for all types of housing, including affordable housing and the needs of different groups in the community (such as, but not limited to, families with children, older people, people with disabilities, service families and people wishing to build their own homes); and
>
> - caters for housing demand and the scale of housing supply necessary to meet this demand;
>
> - Prepare a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period."

68. The PPG contains no explicit reference to the NPPF whether by way of contradicting or amending it. It states that housing "need refers to scale and mix of housing and tenures likely to be needed in the housing market area [HMA] over the plan period…". The assessment of housing needs includes the Strategic Housing Market Assessment requirement in the NPPF. The PPG does not state that the HMA or SHMA is the area of the local planning authority, neither more nor less. It states that a HMA "is a geographical area defined by household demand and preferences... reflecting the key functional linkages between places where people live and work." It recognises that HMAs may cut across local authority boundaries. One of the ways in which such areas can be identified is by reference to household migration patterns. Where this happens, the PPG requires co-operation between the authorities involved, as is now their statutory duty.

69. Such housing market areas may be, as in this case, two local authority areas, or, as in the case of Wiltshire, a county unitary authority, a number of separate areas within the one local authority's area.

70. The PPG describes how the full objective assessment of the housing requirement can be done. Among adjustments permitted to household projections are migration levels affected by changes in employment growth. In the context of employment, but affecting migration assumptions, the PPG says: "any cross-boundary migration assumptions, particularly where one area decides to assume a lower internal migration figure than the housing market area figures suggest, will need to be agreed with the other relevant local planning authority under the duty to co-operate. Failure to do so will mean that there would be an increase in unmet housing need."

71. "Plan makers should not apply constraints to the overall assessment of need, such as limitations imposed by the supply of land for new development, historic under performance, viability, infrastructure of environmental constraints. However, these constraints will need to be addressed when bringing evidence bases together to identify specific policies within development plans." The assessment methodology in the Guidance was strongly recommended and departures should be explained by reference to particular local circumstances.

72. Hull City Council and ERYC had enjoyed a Joint Structure Plan, and had perforce worked together from 2005. Their Joint Planning Statement of April 2014, for submission to the ERYC local plan examination, agreed they had a strong track record of working together. One issue which that paper raised was the historic loss of population from Hull to the East Riding. It intended to provide "aspirational family housing in Hull to stem the flow of out migration from Hull into the East Riding. This was reflected in the proposed levels of housing growth. A significant increase in housing growth in the Hull Market Area would help support economic growth and help to meet housing needs. This had had regard to the need to support the regeneration of Hull, a long term objective of both Councils.

73. Chapter 10 IR [10.7-10.12] summarises the case put forward in opposition to the appeals by Hull City Council, because of its impact on the regeneration of Hull, including its housing market regeneration, with which the substantial release at Melton would compete, and where its housing market was fragile. The SHMA had noted the loss of population from Hull to the East Riding, and that the larger family

homes on offer there was an important driver of out migration from Hull. Melton was well within the Hull housing market area.

74. I am satisfied that Mr Young's arguments are wrong and if the appeal had turned on the difference between the two housing requirement figures, I would have dismissed it. I do not need to repeat what I said about the role of the PPG in interpreting the NPPF, but I emphasise the role of the more sensible planning judgment as a tool for the court in ascertaining the correct interpretation of the policy. Nor do I regard it as irrelevant that the author of the policy has endorsed a particular interpretation of it, as happened here. I agree with the Inspector that the NPPF does not require housing needs to be assessed always and only by reference to the area of the development control authority.

75. The first question is whether *Hunston* required the Inspector to reach a different decision. It did not. *Hunston* holds that, for whatever is the housing market area being considered, it is the full, objectively assessed, needs of that area which are to be considered. *Hunston* does not decide or even comment on the prior question of what housing market area should be examined, nor does it address the issue of how the needs should be apportioned between the various parts of the housing market area where it covers two local planning authorities' areas. *Solihull* makes the point that the phrase "as far as is consistent with the policy set out in this Framework" cannot be construed so as to bring in to the assessment of the full objectively assessed needs via the back door, what *Hunston* had excluded at the front door, namely policy constraints on which the local plan might impose on actually meeting those needs. But it does not deal with the area to be taken in the assessment of housing needs.

76. I was also referred to *Oadby and Wigston Borough Council v SSCLG* [2015] EWHC 1879 (Admin), in which Hickinbottom J at [35] held that, in the development control context though not in the local plan context, the housing needs fully and objectively to be assessed were those of the area of the local planning authority itself, and not those of the housing market area, since it would be an impossible task for the authority to assess the whole housing market area where it crossed administrative boundaries.

77. I understand the rationale for that approach but I cannot agree with it as a matter of interpretation of the NPPF [159]. It is clear from NPPF [159] supported by the PPG that the housing market area is not synonymous with the area of a single local planning authority, though they are often the same. The aim is to assess housing needs fully and objectively, and the needs are those of the market area and not those of the district council's area. The NPPF would read very differently if "housing market areas" was another phrase for planning authority areas, as it could so easily have said had that been intended. The text of NPPF is replete with references to the need for cross-boundary co-operation. I also note that *Oadby and Wigston* was referred to by Dove J in *Kings Lynn and West Norfolk Borough Council v SSCLG* [2015] EWHC 2462 (Admin), albeit not directly on this point, but he expressed the view [32 and 38] that NPPF [159] clearly required the objective assessment of needs to be carried out by reference to the housing market area.

78. The fear that the task of the authority would be too great is not sufficiently strong a factor to outweigh the clear words of the NPPF. This case illustrates how the co-operation works. There was no dispute before the Inspector but that the needs of the SHM Area had been fully and objectively assessed, though it could not be given full

weight, as the Inspector said, in advance of adoption of the local plan, and the local plan examination would enable it to be challenged. There was no issue but that the apportionment reflected the agreed views of both Councils. That apportioned figure was taken by ERYC to be its objectively assessed figure, and was accepted as such by the Inspector. Mr Young's submission was that the difference between the figures for ERYC as a stand alone Council and on the apportionment basis reflected the application of a restraint, contrary to *Hunston*. But, the fact that some apportionment is necessary in such a case provides no reason to disregard what I see as the clear words of the NPPF, that housing needs should be assessed by reference to the housing market area.

79. Second, once the relevant area for the assessment of housing needs, on the true interpretation of the NPPF, may cover more than the area of one district council, a basis for apportionment of need has to be found. That is where the co-operation and agreement of the local authorities comes in. It provides, on whatever basis it is done, for the full objectively assessed needs of each area. This process however does not cut across or undermine *Hunston* at all. The apportioned figure, thus ascertained, cannot be cut down, by reference to policy constraints such as Green Belt before the adoption of the local plan. But nor can it be said that that process means that housing needs are not being met, let alone that they are being wished on to an unwilling neighbouring authority, which will be entitled to ignore them. There was nothing here to suggest that the apportionment itself, though not fully tested in the local plan, was unlawful, unreasonably failing in its appreciation of the operation of the housing market area as between the two authorities.

80. Third, the Inspector explained why it makes planning sense to adopt the approach she did, fully aware of and applying faithfully as she saw it, the *Hunston* decision; [IR 13.22-25]. It seems to me that her approach makes considerably more planning sense than that proposed by Mr Young, which is rigidly legalistic, failing to reflect adequately the variety of planning circumstances which arise in the real world and for which the NPPF intends to cater. That too supports my view as to the correctness of her interpretation.

81. Finally, on a more technical note, Mr Young did not identify why the two ERYC figures differed so as to demonstrate whether a restraint, contrary to *Hunston* if it applied at all, had been applied to the needs of the ERYC area. The Inspector does not make it clear what the basis for the difference is either. But it does mean that he cannot contend for an error of law other than that the Inspector took the requirement as the apportionment from the housing market area rather than the area of ERYC assessed as a stand alone area, which I have concluded is no error at all. However, the arguments recorded by the Inspector, and explained before me, suggested strongly that the difference was not due to a failure to meet needs of ERYC, but was because Hull CC and ERYC had agreed that Hull CC should stem out-migration into ERY, in the interests of both, and so the past out-migration levels had not been carried forward into the future needs assessment of ERYC. If that is so, it would mean that no objectionable restraint policy had been applied anyway, no needs of ERYC were being left unmet. There is nothing in the parts of the PPG which deal with such issues which means that past migration patterns cannot be adjusted in the assessment of future need, responding to the provision of housing and other developments, without offending NPPF [49]. This is not applying a constraint to the meeting of need; it is

assessing what that need is. The Inspector was right to draw the distinction and to draw it where she did.

82. I dismiss Ground 2.

Ground 3: the £6m bridge contribution

83. Mr Young submitted that the Inspector had discounted the contribution for a new bridge over the railway line to a large area of employment land, offered by a unilateral planning obligation, and in effect failed to take into account what on the Claimant's case was an important factor in favour of allowing Appeal B(ii), and had done so unlawfully as she had misunderstood its relationship to the appeal.

84. The Inspector did not overlook it, but rejected it as worthy of any weight, [12.16], because it was not necessary to make the development acceptable, and because of its amount in relation to the harm done through the loss of employment land on the appeal site. In effect, this is a rationality challenge, passed through the language of the Regulation 122 of the Community Infrastructure Levy Regulations 2010 SI No. 948. This provides that a planning obligation may only constitute a reason for granting planning permission if it is necessary to make the development acceptable, directly related to it, and "fairly and reasonably related in scale and kind to the development".

85. In effect, St Modwen were putting forward the benefits of the bridge as improving access to what it saw as replacement employment land south of the railway line. The Inspector rejected the thinking behind this because this substitution of land flew in the face of the plan-led system, and because it ignored the particular role played by the Melton land as part of a portfolio of employment land; [13.80]. The Inspector then added:

> "13.82. In addition, the specific land identified by the Appellant is that to the south of the appeal site and across the railway line. The offer of funds to improve the accessibility of this land is made to overcome any harm associated with the use of 24ha of land within the appeal site for non-employment purposes (Appeal B(ii)). The area of land to benefit from improved access would be in the region of 142ha, some six times greater than that proposed for use for housing. Even allowing for the fact that some of this land is already in use, the scale and cost of this compensatory measure appears disproportionate to the potential harm it is intended to address. In addition, as Mr Garness' evidence makes clear, there are several other locations along the East-West multi-modal transport corridor which could be seen as candidates for a key employment site, not least of which would be the proposed extension to Melton West being promoted by Wykeland through the Local Plan process.
>
> 13.83. For these reasons, I consider that the offer of funding for a bridge across the railway line would not be a proportionate or reasonable response to any harm to the supply of employment land. However, for completeness, I set out my assessment of

> the case as made. To do so it is necessary to evaluate the substitute land in terms of its location and deliverability."

86. She then concluded that the land south of the railway line was not of equivalent quality in location and that there was no known timetable for the provision of the bridge, to which a number of obstacles existed. Her conclusion on the loss of employment land were:

> "13.87. The appeal site comprises a substantial proportion of the Melton site, one of only four key employment sites in the East Riding and one of only two identified for general industrial uses. Melton is highly accessible and is available now, capable of responding to any interest arising either directly or, more likely, indirectly as a result of the Siemens investment. It represents a logical choice in relation to the spatial strategy of the emerging local plan. If the appeal site was developed for housing, whether along the lines of Appeal A or Appeal B, the status of Melton as a key employment site would be much diminished so that it would have a significant, detrimental effect on the portfolio of employment land. The likelihood of a lengthy delay in delivery of the suggested bridge over the railway line and the characteristics of the land itself mean that it would not immediately represent a comparable substitute for the land at Melton. Although there is potential for other land to come forward, this would have to be on an ad hoc basis rather than as part of a plan-led approach. As such, the proposed developments would be likely to cause substantial harm to wider economic development objectives, with some scope for more limited harm to the aim of assisting the Humber to become established as a centre for renewable energy."

87. She commented in her analysis of the planning balance, [14.10], that the proposals would have a "significant, detrimental effect on the portfolio of employment land", undermining wider economic objectives. Appeal B was not less harmful than appeal A in that respect because of the strategic role and nature of the Melton land:

> "14.10. … Where employment development is the predominant use, priority can be given to the needs of prospective developers for similar uses. Under the appeal proposals, the Melton industrial area would take on a mixed use character. In such circumstances, the needs of prospective industrial developers would become only one consideration amongst others, including the protection of residential amenity. In this respect therefore, I do not agree that the harm would be materially less in the case of Appeal B. In both instances, this harm should carry substantial weight."

88. I make those points in order that the issue of the value of the £6m contribution be put in context. Even if not seen as an offer disproportionate to the harm it sought to remedy, it would not have overcome the loss of the employment land on the appeal

site. Her judgment on that is a reasonable planning judgment, which contains no error of law at all.

89. Mr Young submitted that it was illogical for the Inspector to treat £6m as disproportionate in respect of the bridge contribution when the same sum, as a contribution towards 15 percent extra affordable housing in Appeal B, was not regarded as disproportionate. The fact that the area of land, access to which would be improved, was six times larger than the area of employment land lost was irrelevant. I do not agree. The Inspector was entitled to reach the conclusion she did. The question is not whether the sum is the same. The question is what it achieves; in the one instance it provides what is required by way of a contribution towards affordable housing. On the latter, viewed by itself, the area released is far greater than the area removed from the employment site, and is disproportionate to the harm "it is intended to address". It is rather more than a "like for like" relationship.

90. In any event, it is perfectly clear that she would have recommended refusal of Appeal B(ii) anyway because of the loss of part of the important employment site, and the reduction in the affordable housing benefit, which the bridge contribution did not overcome. The Inspector also makes the point, IR [14.10], about the impact of the housing development on the nature of the remaining employment land in the development of which a new issue of adjoining residential amenity would arise. So it was not a simply matter of the remaining site acreage. Either way she would have given no weight to the contribution; and the recommendation and decision would have been the same. See also the penultimate paragraph, IR [14.21]: should the site be held in reserve for employment development or brought forward now for housing? The planning case for housing had not been made out, so neither appeal should succeed. Besides the Secretary of State's position is quite clear on this issue; DL[19], as I shall come to.

91. Mr Honey submitted that there was also no challenge to the Inspector's conclusion, [12.16], on the requirement that, in addition to being reasonable and proportionate, the contribution to the bridge should be necessary. It was not necessary, and so would have been discounted anyway. I see his point, but it is more probable that that reference to "necessary" is just a reference forward in shorthand to the conclusion she reached on reasonableness and proportionality.

92. I dismiss Ground 3.

Ground 4: an irrational conclusion on Appeal B?

93. This ground is closely related to Ground 3, but it attacks what the Secretary of State said, which is couched in language which differs to some extent from that of the Inspector.

94. Mr Young focused on DL [19] above. This is in the section headed "Overall Conclusions". It was illogical to say that the harm done by the development would be compounded in Appeal B by the reduced housing. Whether forensically or genuinely, Mr Young submitted that this was "genuinely difficult" to understand. If housing was the problem, then the less housing and the more the employment land, the lesser the harm.

95. In my judgment, this is quite straightforward and the difficulty forensic. The housing proposal had some but insufficient benefits to outweigh a variety of disadvantages, as the first part of DL [19] stated. The disadvantages were not essentially related to the scale of the housing, including affordable housing, but the benefits are. The reduced scale of housing in Appeal B would reduce the benefits, notably through the reduction in affordable housing; and the impact of the loss of the employment land, to which the bridge contribution was not a reasonable response, would not be sensibly lessened; see also IR [14.10].

96. I reject this Ground too.

Conclusion

97. This application is dismissed. I have not specifically referred to the submissions of Ms Reid- Chalmers for the Interested Party. She adopted Mr Tucker's submissions.

Neutral Citation Number: [2016] EWCA Civ 1040

Case No: C1/2015/2447

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT IN BIRMINGHAM
MR JUSTICE HICKINBOTTOM
[2015] EWHC 1879 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2016

Before:

Lady Justice Black
Lord Justice Tomlinson
and
Lord Justice Lindblom

Between:

Oadby and Wigston Borough Council — **Appellant**

and

(1) Secretary of State for Communities and Local Government
(2) Bloor Homes Ltd. — **Respondents**

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Official Shorthand Writers to the Court)

Mr Timothy Leader (instructed by **Oadby and Wigston Borough Council**) for the **Appellant**
Mr Gwion Lewis (instructed by **the Government Legal Department**) for the **First Respondent**
Mr Reuben Taylor Q.C. (instructed by **Squire Patton Boggs (UK) LLP**) for the **Second Respondent**

Hearing date: 28 July 2016

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. In this appeal we must decide whether an inspector erred in law in his understanding and application of government policy for housing development in the National Planning Policy Framework ("NPPF") when determining an appeal against a local planning authority's refusal of planning permission for a proposed development of housing on an unallocated site. The appeal raises no novel or controversial issues of law.

2. The appellant, Oadby and Wigston Borough Council, appeals against the order of Hickinbottom J., dated 3 July 2015, dismissing its application under section 288 of the Town and Country Planning Act 1990 against the decision of the inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, to allow an appeal of the second respondent, Bloor Homes Ltd., against the council's refusal of an application for outline planning permission for a development of up to 150 dwellings on land at Cottage Farm, Glen Road, Oadby in Leicestershire. The inspector held an inquiry into Bloor Homes Ltd.'s appeal over six days in November 2014 and January 2015. His decision letter is dated 10 February 2015. Hickinbottom J. rejected the council's challenge to the decision on all grounds. Permission to appeal against the judge's order was granted by Lewison L.J. on 5 October 2015.

The issue in the appeal

3. The central issue in the appeal is whether the judge erred in holding that the inspector had neither misinterpreted nor unlawfully applied government policy in the relevant passages of the NPPF, in particular paragraphs 47, 49, 157, 158 and 159.

Policy in the NPPF

4. Paragraph 17 of the NPPF, which identifies 12 "[core] planning principles", says that planning should be "genuinely plan-led …" and that "[every] effort should be made objectively to identify and then meet the housing … needs of an area …".

5. In the section of the NPPF headed "Delivering a wide choice of quality homes", paragraph 47 states:

> "To boost significantly the supply of housing, local planning authorities should:
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> ● use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
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> ● identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an

additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;

- identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;

- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and

- set out their own approach to housing density to reflect local circumstances."

Paragraph 49 states:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

6. In a later section of the NPPF, in the part relating to "Plan-making", the general policies for "Local Plans" state, in paragraph 157, that local plans should "… be based on co-operation with neighbouring authorities, public, voluntary and private sector organisations". Under the heading "Using a proportionate evidence base", paragraph 158 enjoins local planning authorities to ensure that their local plans are "based on adequate, up-to-date and relevant evidence about the economic, social and environmental characteristics and prospects of the area", and that "their assessment of and strategies for housing, employment and other uses are integrated, and that they take full account of relevant market and economic signals". Paragraph 159 relates specifically to "Housing". It states:

> "Local planning authorities should have a clear understanding of housing needs in their area. They should:
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> - prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The Strategic Housing Market Assessment should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:
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> – meets household and population projections, taking account of migration and demographic change;
> – addresses the need for all types of housing, including affordable housing and the needs of different groups in the community …; and
> – caters for housing demand and the scale of housing supply necessary to meet this demand;

- prepare a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period."

7. Those policies in the NPPF are amplified in the Planning Practice Guidance ("PPG"), first published in March 2014. In its guidance on "Housing and economic development needs assessments" the PPG confirms that "[the] assessment of housing … development needs includes the Strategic Housing Market Assessment requirement as set out in the [NPPF]" (paragraph 2a-001-20140306). It refers to the "primary objective" of identifying need (paragraph 2a-002-20140306). It emphasizes that "[the] assessment of development needs is an objective assessment of need based on facts and unbiased evidence", and that plan-makers "should not apply constraints to the overall assessment of need …" (paragraph 2a-004-20140306). It says that "[there] is no one methodological approach … that will provide a definitive assessment of development need", but adds that the use of the "standard methodology" set out in the guidance is "strongly recommended" (paragraph 2a-005-20140306). It advises that local planning authorities "should assess their development needs working with the other local authorities in the relevant housing market area … in line with the duty to cooperate" (paragraph 2a-007-20140306). "Needs should be assessed in relation to the relevant functional area, [i.e.] housing market area …" (paragraph 2a-008-20140306). A "housing market area is a geographical area defined by household demand and preferences for all types of housing, reflecting key functional linkages between places where people live and work". The "extent of the housing market areas identified will vary, and many will in practice cut across various local planning authority administrative boundaries" (paragraph 2a-010-20140306). It is recognized that "[establishing] future need for housing is not an exact science" and that "[no] single approach will provide a definitive answer" (paragraph 2a-014-20140306). It is also acknowledged that "[the] household projection-based estimate of housing need may require adjustment to reflect factors affecting local demography and household formation rates which are not captured in past trends" (paragraph 2a-015-20140306). Under the heading "How should employment trends be taken into account?" paragraph 2a-018-20140306 states:

> "Plan makers should make an assessment of the likely change in job numbers based on past trends and/or economic forecasts as appropriate and also having regard to the growth of the working age population in the housing market area. Any cross-boundary migration assumptions, particularly where one area decides to assume a lower internal migration figure than the housing market area figures suggest, will need to be agreed with the other relevant local planning [authorities] under the duty to cooperate. Failure to do so will mean that there will be an increase in unmet housing need.
>
> …"

In the guidance on "Housing and economic land availability assessment", under the heading "What is the starting point for the five-year housing supply", paragraph 3-030-20140306 states:

> "Where evidence in Local Plans has become outdated and policies in emerging plans are not yet capable of carrying sufficient weight, information provided in the latest full assessment of housing needs should be considered. But the weight given to these assessments should take account of the fact they have not been tested or moderated against relevant constraints. Where there is no robust recent assessment of full

housing needs, the household projections published by the Department for Communities and Local Government should be used as the starting point, but the weight given to these should take account of the fact that they have not been tested …".

8. Some of the main concepts here were considered by Hickinbottom J. in *Gallagher Estates Ltd. v Solihull Metropolitan Borough Council* [2014] EWHC 1283 (Admin) (at paragraph 37):

> "(i) Household projections: These are demographic, trend-based projections indicating the likely number and type of future households if the underlying trends and demographic assumptions are realised. …
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> (ii) Full Objective Assessment of Need for Housing: This is the objectively assessed need for housing in an area, leaving aside policy considerations. It is therefore closely linked to the relevant household projection; but it is not necessarily the same. An objective assessment of housing need may result in a different figure from that based on purely demographics …
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> (iii) Housing Requirement: This is the figure which reflects, not only the assessed need for housing, but also any policy considerations that might require that figure to be manipulated to determine the actual housing target for an area. For example, built development in an area might be constrained by the extent of land which is the subject of policy protection, such as Green Belt or Areas of Outstanding Natural Beauty. Or it might be decided, as a matter of policy, to encourage or discourage particular migration reflected in demographic trends. Once these policy considerations have been applied to the figure for full objectively assessed need for housing in an area, the result is a "policy on" figure for housing requirement. Subject to it being determined by a proper process, the housing requirement figure will be the target against which housing supply will normally be measured."

9. The housing supply policies in the NPPF brought about a "radical change" in national planning policy, as Laws L.J. observed, with the agreement of Patten and Floyd L.JJ., in *Solihull Metropolitan Borough Council v Gallagher Estates Ltd.* [2014] EWCA Civ 1610 (at paragraph 16 of his judgment). The "two-step approach" in paragraph 47 of the NPPF, he said, "means that housing need is clearly and cleanly ascertained".

10. In the sphere of decision-making on individual applications and appeals, the implications of the policy for plan-making in paragraph 47 were explained by Sir David Keene (with the agreement of Maurice Kay and Ryder L.JJ.) in *Hunston Properties Ltd. v St Albans City and District Council* [2013] EWCA Civ 1610 (at paragraphs 21 to 27). The issue for the court in that case was the approach to be taken to a proposal for housing development on an unallocated site – there a site in the Green Belt – when the housing requirement for the relevant area has not yet been established by the adoption of a local plan produced in accordance with the policies in the NPPF (paragraph 21 of Sir David Keene's judgment). Sir David said this (in paragraphs 26 and 27):

> "26. … I accept [counsel's] submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an

> exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal. … [It] seems to me to have been mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.
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> 27. It follows from this that I agree with the judge below that the inspector erred by adopting such a constrained figure for housing need. It led her to find that there was no shortfall in housing land supply in the district. She should have concluded, using the correct policy approach, that there was such a shortfall. The supply fell below the objectively assessed five year requirement."

The evidence and submissions on housing need at the inquiry

11. Hickinbottom J. set out, in paragraphs 22 to 31 of his judgment, an ample account of the evidence and submissions presented to the inspector on housing need and supply, which I gratefully adopt without repeating in full.

12. The council relied on the Strategic Housing Market Assessment, dated June 2014, which had been prepared for several administrative areas in the housing market area, including Oadby and Wigston. It contended that its housing requirement was for between 80 and 100 dwellings a year – comparable with the requirement of 90 dwellings per annum in Policy CS1 of the core strategy. It maintained, through the evidence of its witness on housing need and supply, Mr Gardner, that the upper end of the range of 80 to 100 dwellings per annum was "based on seeking to enhance affordable housing delivery and growth in the workforce" (paragraph 3.41 of Mr Gardner's proof of evidence) and that this range "clearly" reflected a "policy off assessment" (paragraph 3.43).

13. The Strategic Housing Market Assessment had identified a "demographic-led" requirement for 79 dwellings per annum for the administrative area of Oadby and Wigston for the period 2011-2031, but indicated that when economic growth and the need for affordable housing were taken into account the requirement would rise to 173 dwellings per annum and 163 dwellings per annum respectively (Table 84 of the Strategic Housing Market Assessment). As for affordable housing, the Strategic Housing Market Assessment said that "the private rented sector makes a potentially significant contribution to meeting affordable housing needs" (paragraph 9.12). It acknowledged, however, that "[the] extent to which the Councils wish to see the private rented sector being used to make up for shortages of affordable housing is plainly a local policy decision which is outside the scope of this study" (also paragraph 9.12). It accepted that a "proportionate adjustment" to the figures for housing provision was appropriate, given that "some households in housing need are able to live within the Private Rented Sector …" (paragraph 9.21). It said that an "additional uplift … from the baseline demographic need" had been made for each of the local authorities. In Oadby and Wigston this had been done "[to] support the provision of additional affordable housing and to ease acute levels of need" (paragraph 9.25). The uplift had been made using "reasonable assumptions" which, it was considered, would achieve the aim "to improve affordability and/or delivery [of] affordable housing" (paragraph 9.26).

14. The evidence and submissions for Bloor Homes Ltd. attacked the Strategic Housing Market Assessment as an inadequate basis for assessing the need for housing, which had not been

formally tested through the process of an examination. Bloor Homes Ltd.'s witness on housing need and supply, Mr Longley, presented four scenarios. Two of those scenarios, which indicated a need for, respectively, 147 and 161 dwellings per annum, were, as Mr Longley conceded in cross-examination, based on flawed migration figures. In his closing submissions Bloor Homes Ltd.'s counsel, Mr Reuben Taylor Q.C., argued that, in view of the employment-related housing requirement and the identified need for affordable housing, the full, objectively assessed needs for housing must be "far higher" than the figure of 100 dwellings per annum indicated in the Strategic Housing Market Assessment (paragraph 71); that Leicester City Council had not committed to providing housing "to house the employees to meet Oadby and Wigston's housing needs" (paragraph 85); that reliance on the private rented sector to address the need for affordable housing represented a "policy-on" position (paragraph 113), and there was "no evidence of an agreement between the HMA authorities that [Oadby and Wigston's] affordable housing needs will be accommodated elsewhere" (paragraph 117); and that the "only reasonable conclusion" was that the appropriate figure to adopt as the housing requirement was "substantially in excess of 150 [dwellings per annum]" (paragraph 120).

The inspector's decision letter

15. In paragraph 4 of his decision letter, the inspector identified two "main issues" in Bloor Homes Ltd.'s appeal. The council's challenge concerns only the first: "[whether] there is a 5 year housing land supply in the local authority area and how this may impinge upon the applicability of current development plan policies with particular regard to the distribution of new housing development".

16. It is necessary to set out the relevant parts of the inspector's decision letter, to show how he approached that issue and the analysis that led him to conclude as he did.

17. The inspector noted that the Oadby & Wigston Core Strategy (September 2010) had been "adopted relatively recently" and it was therefore necessary, under paragraph 215 of the NPPF, to consider whether its policies were consistent with the NPPF (paragraph 9 of the decision letter). He observed that the housing figures underpinning Policy CS1 of the core strategy were derived from the revoked East Midlands Regional Plan, which was based on 2004 population projections that were now "considerably out of date" and superseded by the 2012 Sub-National Population Projections ("the 2012 SNPP") (paragraph 11). Although the Leicester and Leicestershire Member Advisory Group had "recently been set up to consider strategic planning matters across the county, including the role of the [Leicester Principal Urban Area]", this was, he said, "a group without decision making powers: there is no formal planning mechanism to co-ordinate implementation, monitoring and review of the PUA housing requirement across all the local planning authorities which have a stake in the PUA" (paragraph 12).

18. Having acknowledged, in the light of the Court of Appeal's decision in *Hunston Properties Ltd.*, that it was "necessary to consider the full, objective assessment of need", the inspector said that evidence had been "put forward to show that the assumptions underlying the [core strategy] are not compliant with NPPF in terms of them being based on reliable, up-to-date and tested information" (paragraph 13). In the light of the first instance decision in *Gallagher Estates Ltd.* ([2014] EWHC 1283 (Admin)), he acknowledged (in paragraph 14) that "a variation from the FOAN (ie the "requirement") should only emerge after an up to date local plan has been examined and where compliance with the duty to cooperate has

shown that local housing need can and should be met on sites outside the local planning authority area". In this case, he said, there was "no post-NPPF review of the [core strategy]", and "this must further undermine the degree to which the [core strategy] can be relied upon as the basis for decision making".

19. In his view, it was "not … appropriate for [him] to come to a definitive view as to what the likely housing need might currently be in Oadby & Wigston". But he saw "several areas of concern … which could be taken as indicating that the housing provision allowed for by Policy CS1 is insufficient" (paragraph 16). He referred to the argument that "to … consider Oadby & Wigston as a separate or independent planning unit would not reflect the circumstances of the HMA and how the interactions within the HMA bear upon the proportion or quantum of need within or close to the PUA, having regard to the operation of the local housing market over recent years" (paragraph 18). He recognized that the "[successful] operation of the HMA in the Leicester area depends upon close cooperation between the neighbouring planning authorities". There seemed to be "no formally constituted working arrangement between the authorities for strategic planning purposes in terms of some sort of standing joint committee …", though the Strategic Housing Market Assessment produced in May 2014 on behalf of Leicester City Council and the Leicestershire authorities had been accepted by the council as "indicative of the current assessment of need" (paragraph 19).

20. The inspector continued (in paragraphs 20 and 21):

> "20. The SHMA puts forward its conclusions as representing the "policy off" assessment. However, the SHMA has not been tested through a formal examination, and there are some points where questions are raised as to how accurate it is. In particular, the SHMA is based upon 2011 population projections whereas the methodology set out in PPG expects the latest population projections to be used as the basis for assessing need. As noted above, the 2012 SNPP figures are now available.
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> 21. The Leicester and Leicestershire Member Advisory Group has produced a Memorandum of Understanding (seemingly primarily to support the Charnwood Borough Local Plan), aligning the authorities with the conclusions of the SHMA, but this does not have the force of a formally constituted liaison or cooperation as outlined at paragraph 157 of NPPF, in that policies (and associated numerical limits etc), which may be covered by the Memorandum of Understanding have not yet been subject to post-NPPF scrutiny through a local plan examination. Of particular significance is how the SHMA has taken employment-led growth and affordable housing provision into account, and how that is reconciled across the HMA on a district-by-district basis."

21. In paragraphs 22 to 26 the inspector expressed serious misgivings about the approach adopted in the Strategic Housing Market Assessment:

> "22. There are indeed significant questions relating to the provision for affordable housing. Paragraph 9.25 of the SHMA particularly notes that there are "acute levels of need" for affordable housing in Oadby & Wigston. Table 39 in the SHMA identifies a backlog of 412 households in "unsuitable housing" which is translated into a 'Gross Need' figure for affordable housing of 251 in Table 40. To which can be added the 188 newly forming households in affordable housing

need shown in Table 41. Table 42 gives an annual requirement of 51 affordable dwellings up to 2036 to accommodate the need arising from existing households. This comes to 188+51 = 239 per annum for existing and newly forming households, to which has to be added at least a proportion of the backlog figure (251) to give an objective assessment of annual need for affordable housing.

23. However, taking account of the back-log of affordable housing provision, to support "full affordable housing delivery" Table 84 gives an annual need for just affordable housing of 163 2011-2031 and Table 85 gives a figure of 160 per annum for 2011-2036; both figures being more than double the figure which would be needed simply to fulfil the demographic-led (ie SNPP) projection. Nevertheless, Table 84 concludes with an OAN range for all housing for Oadby & Wigston of 80-100 per annum for 2011-2031 and Table 85 gives an annual range of 75-95 for 2011-2036. Both ranges are below the notional identified need for affordable housing of not less than 239 per annum noted above, let alone any need for open market housing.

24. The discrepancies between the apparent identified need and the OAN conclusions were explained at the inquiry to be attributable to cross-boundary provision and economic growth being accommodated by commuting for work purposes within the HMA. However, the mechanism for implementing and monitoring the success of this – particularly for affordable housing – is not clear; for example, no evidence was provided to show there is a mutual acceptance between neighbouring authorities of households on housing waiting lists.

25. Private rented housing is seen to be meeting a proportion of the affordable housing need in that it provides accommodation for households in receipt of housing benefit payments. Whereas there may have been historical reliance on the private rented sector to meet some of the demand for affordable housing, there have to be question over whether this truly meets the needs of such households in terms of security of tenure and quality of accommodation. Paragraph 50 of NPPF looks for either housing to be provided or a financial contribution of broadly equivalent value to have been put in place – ie it is the development industry and public sector together which should be providing affordable housing, not the private rented sector drawing on subsidies *via* social benefit payments.

26. I acknowledge that 100% of the affordable housing needs could not be met even within the SHMA's housing growth numbers discussed at [this] inquiry. However, as noted [at] paragraph 6.64 of the SHMA, what the acceptable proportion to be accommodated by the private rented sector would be is a "policy on" decision."

22. That analysis led to the following conclusions in paragraphs 27 to 31 of the inspector's decision letter:

"27. There is, therefore, a degree of uncertainty over what is the actual FOAN, including the provision for affordable housing. That could lead to a significant lacuna in meeting housing need; the consequences of which would include some form of shared housing, overcrowding and perhaps eventually homelessness. All

of which would be contrary to the expectations of NPPF which looks for a significant boost in the supply of high quality housing. I do, therefore, have sympathy with the view put forward at the inquiry by the appellant that the FOAN for Oadby & Wigston could be considerably more than the 90 per annum which is the basis for [core strategy] Policy CS1, and the maximum of 100 given in Table 84 of the SHMA.

28. The [council] argued that even if the [core strategy] is not seen to be compliant with the NPPF on account of it being based upon the revoked EMRP, the SHMA figures are broadly similar to the [core strategy], and therefore there is no practical difference with regard to the amount of development growth to be planned for. However, whilst I do not necessarily endorse any of the four scenarios put forward by the appellant as being definitive, from the evidence given at this inquiry, until the SHMA has been tested through a local plan examination the degree of uncertainty is so great that it would be unreasonable to accept that the figures given in the SHMA are in accordance with the expectations of NPPF and the methodology in PPG.

29. As stated above, I acknowledge that the SHMA states that it presents a "policy off" appraisal – but that is "policy off" for the HMA as a whole, not for the constituent local authorities with a stake within the HMA. I recognise that the historical performance of the housing market in the HMA cannot be ignored and the SHMA is accepted by the local planning authorities within the HMA as being a reasonable basis for the distribution of housing provision. This is supported by the Memorandum of Understanding, which has to be an indication of a degree of cooperation between the authorities with a stake in the HMA. However, that also implies that the housing need figure for Oadby & Wigston could be a constrained, "policy on", figure in terms of at least the distribution of growth across the HMA and between the various authorities.

30. Without any mechanism to formalise a reliance on cross-boundary provision, the conclusions set out in the SHMA, not least relating to affordable housing provision, have to be seen as an unsupported or untested "policy on" position – which would not correspond with the Hunston judgment. The initial distribution of development within the PUA was arrived at through the EMRP examination, which was held well before the NPPF was published and its expectations of how local plans should be prepared and scrutinised. That is, the overall figure for the HMA may be "policy off", but the distribution of the identified need between the various authorities would be – at least in part – a "policy on" position. That apportionment has not been tested at a NPPF compliant local plan examination.

31. Taking all of the above into account, I come to the view that these represent material considerations which could, subject to my findings on other matters, justify coming to a decision on the appeal scheme which would not accord with the development plan."

23. With those conclusions in place, the inspector turned to the question: "What is the housing need?". His conclusions on the annual figure are in paragraphs 33 and 34 of the decision letter:

> "33. Although I do not regard any of the scenarios put forward at the inquiry as being definitive of the housing need for Oadby & Wigston, as discussed above, the figure is likely to be in excess of the 90 dwellings per annum set out in Policy CS1. Whether the FOAN is as high as the 161 per annum postulated in one of the scenarios has to be open to question but, if using the Chelmer Model and based on only the household (demographic) projection figure – not allowing for economic growth adjustments – the figure could be in the order of 147 per annum.
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> 34. In any event, whatever the calculated figure might be, it is not consistent with the NPPF to regard that as a ceiling. The driving principle behind the NPPF policy is, as noted above, to significantly boost the supply of housing and, unless a particular scheme would not be compliant with other aspects of NPPF, it would not be necessary or even desirable to resist any theoretical 'oversupply' in the number of houses to be permitted. Having said that, for the purposes of this appeal I will adopt 147 per annum as the indicative figure for calculating whether the [council] is able to demonstrate a 5-year supply of housing land."

24. In the inspector's view, the figure of 147 dwellings a year, though it did not include "any specific allowance for the number of affordable homes needed" was appropriate, and "should give the opportunity to make inroads into that requirement" (paragraph 35 of the decision letter). A "cumulative shortfall of 93 dwellings" from earlier years in the plan period had to be added (paragraph 36). This was, said the inspector, "a persistent shortfall", justifying, in accordance with paragraph 47 of the NPPF, the addition of "a 20% buffer to the annual need figure to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land" (paragraph 37). Under the "Sedgefield" approach, it was appropriate to add the "backlog" to the first five years of the plan period (paragraph 38). Thus the evidence pointed to a five-year need for sites for a total of 975 dwellings – 195 dwellings a year: 147 dwellings a year for five years (735 dwellings) plus the 20% buffer (147 dwellings) plus the backlog from earlier years in the plan period (93 dwellings) (paragraph 39).

25. Under the heading "Housing land supply", in conclusions not contentious in these proceedings, the inspector found there was a total supply of sites in Oadby and Wigston for 705 dwellings (paragraphs 40 to 53 of the decision letter). This represented "3.6 years' housing land supply set against the estimated 5-year need (975)". There was therefore "a shortfall of 270 dwellings to bring it up to a full 5-year supply". The inspector acknowledged that his analysis of both the need and the supply figures had "not been subject to the detailed examination that might be applied at a local plan examination and they should not be taken as being precise", but added that in his view "until such time as the "policy on" distribution implied in the SHMA has been tested and endorsed through a local plan examination … they represent reasonable indications of the need/supply situation in Oadby & Wigston" (paragraph 55). Thus, on his first main issue he concluded that there was a "need to identify additional housing sites and particularly for affordable housing" (paragraph 56).

26. The inspector returned in his "Conclusion" to his principal conclusions on housing need and supply:

> "85. The appeal site is outside the defined limits of development for the PUA, as set in the Core Strategy. However, the Core Strategy pre-dates the publication of the

> NPPF and its policies are not compliant with the expectations of the NPPF, in particular with regard to the adequacy of housing land supply to meet identified local needs. Whereas there have been efforts to draw up a housing strategy which addresses the whole of the PUA the SHMA has not been tested through a local plan examination and there is uncertainty over the operation of any joint or mutually agreed policy to meet needs across local authority boundaries. That is, the quantum of the full, objectively assessed need as looked for by NPPF is not settled, and neither is it certain that the level of cooperation – and its implementation – implied by the Memorandum of Understanding and the SHMA satisfy the duty to cooperate set out at paragraph 157 of NPPF."

The proposed development would make "a significant contribution" to meeting the shortfall of 270 dwellings in the five-year housing need (paragraph 86). And it would be "sustainable development" (paragraph 87). The inspector therefore concluded that the appeal should be allowed, and conditional planning permission granted (paragraph 88).

The judgment of Hickinbottom J.

27. Hickinbottom J. identified the "conundrum" in the council's case: that, in the light of the Strategic Housing Market Assessment, it had adopted a "purportedly policy off housing requirement figure of 80-100 dpa – but the Strategic Housing Market Assessment itself assessed the housing need taking into account economic growth trends at 173 dpa, and the full affordable housing need alone at a net 160 dpa" (paragraph 34 of the judgment). He identified two particular difficulties in the council's position. The first was this (at paragraph 34(i)):

> "… For an authority to decide not to accommodate additional workers drawn to its area by increased employment opportunities is clearly a policy on decision which affects adjacent authorities who would be expected to house those additional commuting workers, unless there was evidence (accepted by the inspector or other planning decision-maker) that in fact the increase in employment in the borough would not increase the overall accommodation needs. In the absence of such evidence, or a development plan or any form of agreement between the authorities to the effect that adjacent authorities agree to increase their housing accommodation accordingly, the decision-maker is entitled to allow for provision to house those additional workers. To decide not to do so on the basis that they will be accommodated in adjacent authorities is a policy on decision."

And the second difficulty (at paragraph 34(ii)) was this:

> "Similarly, the justification provided for keeping the true affordable housing requirements out of the account is inadequate. First, insofar as the Council relied upon adjacent authorities to provide affordable accommodation, that is a policy on decision for the same reasons as set out above. Second, as the SHMA itself properly confirms, the benefit-subsidised private rented sector is not affordable housing, which has a particular definition (paragraph 6.79 …). Indeed, insofar as unmet need could be taken up by the private sector, that is described in the SHMA itself as "a matter for policy intervention and is outside the scope of this report" (paragraph 6.64). It remains policy intervention even if the private sector market would accommodate those who would otherwise require affordable housing, without any

> positive policy decision by the Council that they should do so: it becomes policy on as soon as the Council takes a course of not providing sufficient affordable housing to satisfy the FOAN for that type of housing and allowing the private sector market to take up the shortfall."

28. In view of the council's reliance on other authorities to provide housing "deriving from employment need and from those who require affordable housing", the judge said that he understood why the inspector had "described the SHMA as possibly policy off when the HMA was looked at as a whole". He rejected the submission made on behalf of the council by its counsel, Mr Timothy Leader, "that, although the FOAN for housing had to be understood at local authority level, it had to be assessed at HMA level; so that what was important was whether it was policy off at that level" (paragraph 35). In making that submission Mr Leader had relied on the judgment of Stewart J. in *Satnam Millenium Ltd. v Warrington Borough Council* [2015] EWHC 370 (Admin), and in particular his observation (at paragraph 25(iii)) that a local planning authority "has to have *the clear understanding* of their area housing needs, but in *assessing* their needs, is required to prepare a SHMA which may cross boundaries". But as Hickinbottom J. pointed out, Stewart J.'s comments "were made in the context of a challenge to a local plan under section 113 of the [Planning and Compulsory Purchase Act 2004]". He went on to say this:

> "… Housing requirements in such a plan are, of course, policy on. [Stewart J.] was not looking at housing requirements in a development control context – as I am. In that context, paragraph 49 of the NPPF refers to relevant policies for the supply of housing not being considered up-to-date "if *the local planning authority* cannot demonstrate a five-year supply of deliverable housing sites" (emphasis added). In a development control context, a local planning authority could not realistically demonstrate such a thing on a HMA-wide basis, which would require consideration of both housing needs and supply stocks across the whole HMA. Paragraph 49 is focused on the authority demonstrating a five-year housing land supply on the basis of its own needs and housing land stocks."

He therefore concluded (at paragraph 36) that "the Inspector was right – and, certainly, entitled – to conclude that the SHMA figures for housing requirements for Oadby & Wigston, as confirmed by the 2012-based SNPP and supported by Mr Gardner, were policy on and thus not the appropriate figures to take for the housing requirement for the relevant five year period".

29. All of those conclusions seemed to the judge "clear and certain" (paragraph 37). He questioned the inspector's adoption of a figure of 147 dwellings per annum as the "indicative figure" for housing need. But he concluded that the inspector was "entitled to approach the issue of five-year housing land supply on the basis that the FOAN – and thus the relevant housing requirement – was no less than 147 dpa" (paragraph 43).

Did the inspector err in his understanding and application of NPPF policy?

30. Before us, Mr Leader argued that the judge's conclusions were incorrect and cannot be reconciled with the decision of Stewart J. in *Satnam Millennium Ltd.*. Different levels of need could not apply in plan-making and in the making of development control decisions. Using the local planning authority's area rather than the housing market area as the "correct

unit of analysis" when assessing the "full, objectively assessed needs" for housing was wrong. The inspector had confused demographic trends across the housing market area – including the fact that many jobs in Oadby and Wigston had traditionally been taken by people living in other areas – which are essentially "policy off" considerations, with "policy on" intervention to adjust them. He was also wrong to regard the council's treatment of the need for affordable housing as "policy on". Under the policy in paragraph 47 of the NPPF, as amplified in the PPG, the "full, objectively assessed needs" must be assessed at the level of the housing market area, taking account of "cross-border issues" such as commuting patterns, and then specified for the local planning authority's area in the light of the authority's understanding of the implications of the Strategic Housing Market Assessment for its area. In this case the assessment of housing needs for the borough of Oadby and Wigston in the Strategic Housing Market Assessment was based not on the application of policy, but on "technical planning judgments" about the way in which the need for housing would in fact be met, assuming a certain level of population growth. The notion that the Strategic Housing Market Assessment was in material respects "policy on" was misconceived. Mr Leader sought to draw support for these submissions from the first instance decisions in *Kings Lynn and West Norfolk Borough Council v Secretary of State for Communities and Local Government* [2015] EWHC 2464 (Admin) and *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2016] EWHC 968 (Admin).

31. Mr Gwion Lewis for the Secretary of State and Mr Taylor for Bloor Homes Ltd. submitted that the inspector was right, and certainly entitled in law, to approach the issues of housing need and supply in the way he did, that government policy in the NPPF and guidance in the PPG did not constrain him to a different approach, and that the conclusions he reached on those issues, as a matter of planning judgment, were legally impeccable conclusions, and not at odds with any relevant authority.

32. I cannot accept Mr Leader's argument. In my view the judge was right to reject the complaints made about the inspector's approach and conclusions. I see no error of law in the inspector's decision. In my view his understanding and application of the relevant policies in the NPPF was entirely lawful, and his exercise of planning judgment on the matters he had to decide under those policies unassailable in proceedings such as these.

33. This case is one of several to have come before the Planning Court – and this court too – in which criticism has been levelled at the Secretary of State and his inspectors for their interpretation and application of government policy in the NPPF, notably its policies for housing development (see, for example, the first instance decisions in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), and in two of the cases to which we have been taken in this appeal – *Kings Lynn and West Norfolk Borough Council* and *St Modwen Developments Ltd.*). These challenges usually invoke the Supreme Court's decision in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, where it considered the approach the court should adopt to the interpretation of planning policy (see the judgment of Lord Reed, in particular at paragraphs 17 to 19). Some of these challenges have succeeded. But most have not. This should come as no surprise to those familiar with the basic principles governing claims for judicial review and statutory applications seeking orders to quash planning decisions. As this appeal shows very well, the NPPF contains many broadly expressed statements of national policy, which, when they fall to be applied in the making of a development control decision, will require of the decision-maker an exercise of planning judgment in the particular circumstances of the case in hand.

34. The policy in paragraph 47 of the NPPF relates principally to the business of plan-making. The policy in paragraph 49 relates principally to applications for planning permission; it deals with the way in which "[housing] applications" should be considered. But it must of course be read in the light of the policy requirement in paragraph 47 for local planning authorities to plan for a continuous and deliverable five-year supply of housing land. The policies in paragraphs 157, 158 and 159 all relate to plan-making. The requirement, in paragraph 159, to prepare a Strategic Housing Market Assessment as part of the "evidence base" for a local plan corresponds to the policy in the first bullet point in paragraph 47, which requires local planning authorities to "use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in [the NPPF] …" (see the judgment of Dove J. in *Kings Lynn and West Norfolk Borough Council*, at paragraph 35). The "housing market area" is not necessarily co-extensive with a single local planning authority's administrative area – as is plain from the first bullet point in paragraph 159, which envisages co-operation between authorities "where housing market areas cross administrative boundaries".

35. It is important to keep in mind the essential differences between the distinct activities of development plan-making on the one hand and development control decision-making on the other, and between the policies of the NPPF relating respectively to those two activities. We are concerned here with a development control decision. The inspector was not conducting an examination of a local plan. He was making a decision, on appeal, on an application for planning permission for housing development. How did the policies in those paragraphs of the NPPF bear on that exercise?

36. The Court of Appeal has already considered this question, though in different circumstances, in *Hunston Properties Ltd.*. I see no reason to doubt the approach indicated there. The policy for plan-making in paragraph 47 of the NPPF explicitly requires that in the preparation of local plans the "full, objectively assessed needs for market and affordable housing in the housing market area" must be met, in so far as this can be done consistently with the policies of the NPPF as a whole (my emphasis). However, under the policy in paragraph 49, which relates specifically to development control decision-making, the effect of a local planning authority being unable to "demonstrate a five-year supply of deliverable housing sites" is that "[relevant] policies for the supply of housing" – which means relevant policies for the supply of housing in the development plan for that local planning authority's area – will not be considered up-to-date, with the potentially significant consequences for "decision-taking" under the policy in paragraph 14 of the NPPF (see paragraphs 42 to 48 of the judgment of the court in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2016] EWCA Civ 168). Paragraph 49 does not prescribe a particular method, applicable in every case and in all circumstances, for the comparison of the five-year housing requirement and housing supply in the making of a decision on a planning application or appeal. And one must not read into the policy in that paragraph an approach that prevents a realistic and robust comparison of housing need and supply for the purposes of making a development control decision.

37. The question here is whether in circumstances of the kind that arose in this case, where the relevant housing market area extended beyond the council's administrative area, it was permissible, in principle, for the inspector to identify the relevant housing requirements at the level he did, on the basis of the identifiable, objectively assessed needs for market and

affordable housing within that administrative area – having regard, of course, to all the material before him, including the Strategic Housing Market Assessment.

38. It is argued on behalf of the Secretary of State that the answer to that question is unequivocally and inevitably "Yes". I agree. It is also submitted that a decision-maker in a case such as this is not necessarily obliged to accept an apportionment – or distribution – of housing need "ascribed" in a Strategic Housing Market Assessment between different administrative areas in the housing market area. Again, I agree. A decision-maker in these circumstances may of course draw upon a Strategic Housing Market Assessment in seeking to fix the appropriate level of housing need against which to set the supply of deliverable housing sites. But he must not adopt a housing requirement below the full, unconstrained housing needs in the relevant area. He should not, for example, adopt a level of need for market or affordable housing that is, in truth, the product of a conscious redistribution of need from one local planning authority's area to another where this is effectively – in the inelegant jargon – an untested "policy on" decision, liable to be revisited and changed in a subsequent local plan process. Otherwise, he will likely fall into the kind of error that undid the inspector's decision in *Hunston Properties Ltd.* – where the inspector made the mistake of using "a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure" (paragraph 26 of Sir David Keene's judgment).

39. Here, as the inspector recognized (in paragraphs 12, 13 and 14 of his decision letter), the council's core strategy had not been prepared in accordance with the requirements of NPPF policy, and was not a reliable basis for decision-making. In these circumstances, as he also recognized, it was up to him, as decision-maker in the appeal, to evaluate for himself the full, unconstrained requirement for housing against which to test the council's ability to "demonstrate a five-year supply of deliverable housing sites" under the policy in paragraph 49 of the NPPF.

40. In my view the inspector did this in a legally impeccable way. I agree with Hickinbottom J.'s conclusion that he was entitled not to rely upon the distribution of housing need indicated in the Strategic Housing Market Assessment. He was not obliged to adopt without question a deliberate apportionment of housing needs between administrative areas that had not yet been the subject of any independent scrutiny in a local plan process, or any formal and final agreement between the authorities concerned. Nor did he have to accept the assertions made by the council about the means by which the need for affordable housing would be met. On these two points I would endorse the relevant conclusions of Hickinbottom J. in paragraphs 34 and 35 of his judgment.

41. There may be many good reasons for an inspector in a case such as this to hesitate before accepting an apportionment of housing needs between two or more local planning authorities' areas in a Strategic Housing Market Assessment. Considerations relevant to such a distribution of need may include, Mr Taylor submitted, the implications for transport infrastructure, the sustainability of a significant proportion of the population in one area commuting to and from work in another, the provision of affordable housing where it is needed, and various demographic, economic and social consequences of migration within the housing market area. Such considerations will influence planning policy, and will usually require formal co-operation between local planning authorities – as is now statutorily required under section 33A of the 2004 Act – as well as discussion in the statutory process of plan-making. The issues to which they give rise are inherently unsuitable for resolution at an inquiry into an appeal under section 78 of the 1990 Act.

42. Of course, as Mr Taylor conceded, there will be cases in which an appeal inspector finds he can safely rely on an apportionment of housing needs in a Strategic Housing Market Assessment. I would not want to define the circumstances in which an apportionment of need might be a secure basis for determining whether the local planning authority has succeeded in demonstrating a five-year supply of deliverable housing under the policy in paragraph 49. And I see no need for us to attempt that. It is enough to be satisfied – as I believe we can be – that in the particular circumstances of this case the inspector could reasonably conclude, for the reasons he gave, that the apportionment of need relied upon by the council was not a sure foundation upon which to assess the relevant housing needs, including the need for affordable housing, in the appeal before him.

43. Mr Taylor said the council had failed to provide the inspector with evidence – or at least convincing evidence – on some of the important questions arising from the apportionment of housing needs in the Strategic Housing Market Assessment. That seems to be so. But it is not the court's role to engage in the planning merits. They were for the inspector.

44. He was obviously conscious of the "interactions" between administrative areas in the housing market area, and understood their relevance to housing need and the operation of the local housing market in the PUA (paragraph 18 of the decision letter). But there was, as he put it, "no formally constituted working arrangement between the authorities for strategic planning purposes in terms of some sort of standing joint committee" (paragraph 19), with "the force of a formally constituted liaison or cooperation as outlined at paragraph 157 of NPPF" (paragraph 21). There were "significant questions relating to the provision for affordable housing" (paragraph 22). Notably, as he emphasized, the "OAN range for all housing for Oadby & Wigston" was "below the notional identified need for affordable housing … let alone any need for open market housing" (paragraph 23). And there was no identified "mechanism for implementing and monitoring the success" of the assumed "cross-boundary provision" and "economic growth being accommodated by commuting for work purposes within the HMA" (paragraph 24). He was unconvinced by the reliance placed on the private rented sector to absorb some of the need for affordable housing (paragraph 25). And he regarded the assumption as to the share of this need being met in that way – as the Strategic Housing Market Assessment itself acknowledged – as "a "policy on" decision" (paragraph 26).

45. All in all, notwithstanding the assumptions and conclusions in the Strategic Housing Market Assessment, the inspector was left with "a degree of uncertainty over what is the actual FOAN, including the provision for affordable housing". He recognized the prospect of "a significant lacuna in meeting housing need" – contrary to policy in the NPPF; and he saw the force of the argument put to him in evidence and submissions at the inquiry that "the FOAN for Oadby & Wigston could be considerably more than the 90 per annum which is the basis for [core strategy] Policy CS1, and the maximum of 100 given in Table 84 of the SHMA" (paragraph 27). In his view "until the SHMA has been tested through a local plan examination the degree of uncertainty is so great that it would be unreasonable to accept that the figures given in the SHMA are in accordance with the expectations of NPPF and the methodology in PPG" (paragraph 28). He was concerned that "the housing need figure for Oadby & Wigston could be a constrained, "policy on", figure in terms of at least the distribution of growth across the HMA and between the various authorities" (paragraph 29). In the absence of "any mechanism to formalise a reliance on cross-boundary provision" the conclusions of the Strategic Housing Market Assessment, "not least [those] relating to affordable housing provision", had to be seen as "an unsupported or untested "policy on"

position", which was not in line with the approach indicated by the Court of Appeal in *Hunston Properties Ltd.*. The "initial distribution of development within the PUA" had been undertaken before the advent of current government policy in the NPPF. Thus, he concluded, "the overall figure for the HMA [in the Strategic Housing Market Assessment] may be "policy off", but the distribution of the identified need between the various authorities would be – at least in part – a "policy on" position", and had "not been tested at a NPPF compliant local plan examination" (paragraph 30).

46. Those conclusions were clearly open to the inspector in the exercise of his planning judgment under the policies in the NPPF. I can see no legal flaw in them. They do not disclose any misinterpretation or misapplication of NPPF policy or of the guidance in the PPG.

47. Faced with making his own assessment of the appropriate level of housing need to inform the conclusion he had to draw under the policy in paragraph 49 of the NPPF, and doing the best he could in the light of the evidence and submissions he had heard, the inspector adopted an approximate and "indicative" figure of 147 dwellings per annum (paragraphs 33 and 34 of the decision letter), making no "specific allowance" for affordable housing (paragraph 35). Again, his conclusions embody the exercise of his own planning judgment, and I see no reason to interfere with them. He might simply have adopted a rounded and possibly conservative number to represent the global need for market and affordable housing in the council's area, such as the figure of 150 dwellings per annum, which in closing submissions for Bloor Homes Ltd. was said to be well below the actual level of need, or a higher figure closer to the 173 dwellings per annum referred to in the Strategic Housing Market Assessment. I accept that. But as Hickinbottom J. concluded, I do not think the court could conceivably regard the inspector's figure of 147 dwellings per annum as irrational, or otherwise unlawful.

48. Taken as a whole, therefore, the inspector's approach was in my view consistent with the decision of this court in *Hunston Properties Ltd.*, and lawful.

49. That conclusion is not shaken by the first instance decision in *Satnam Millennium Ltd.*. In that case the claimant contended that, in preparing its core strategy, the local planning authority had "failed to identify the OAN for housing, including affordable housing, whether in Warrington or the housing market area" (paragraph 12 of Stewart J.'s judgment). Stewart J. sought (in paragraph 25) to extract from the relevant statutory provisions and national policy and guidance the principles applying to this aspect of plan-making. He referred to paragraphs 47 and 159 of the NPPF:

> "…
>
> (ii) Paragraph 47 NPPF requires the Local Plan to meet the full OAN in the HMA. That much is clear.
>
> (iii) Paragraph 159 NPPF is helpful in clarifying this. It is to be noted that it deals particularly with housing. It begins by requiring LPAs to have a clear understanding of housing needs "in their area". It then proceeds to require LPAs to prepare a SHMA to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. In other words, the LPA has to have *the clear understanding* of

> their area housing needs, but in *assessing* these needs, is required to prepare an SHMA which may cross boundaries.
>
> …".

50. Stewart J. was not considering the policy in paragraph 49, or the way in which that policy is to be applied in circumstances such as those with which we are concerned here. His decision is not authority for the proposition that Mr Leader seeks to extract from it. It says nothing about the approach a decision-maker should take in a case where housing needs fall to be assessed in the absence of a local plan complying with policy for plan-making in the NPPF. It does not touch the reasoning in this court's decision in *Hunston Properties Ltd.*. And in my view it lends no force to the argument that the approach taken by the inspector in this case was bad in law.

51. When he granted permission to appeal in this case Lewison L.J. accepted it was arguable that the "full, objectively assessed needs" for housing ought to be the same in whichever context they were considered. If this were so, there was – he said – a "potential conflict" between Hickinbottom J.'s decision in this case and Stewart J.'s in *Satnam Millennium Ltd.*. Mr Lewis, on behalf of the Secretary of State, had the answer to this concern. As he submitted, there is no conflict between the two decisions; the issues and argument were quite different. There is, logically, no inconsistency between, on the one hand, the "full, objectively assessed needs" for housing in a housing market area wider than a single administrative area, when determined under the policies for plan-making in paragraphs 47 and 159 of the NPPF, and, on the other, the housing requirement for a local planning authority's own area within that housing market area, when determined for the purposes of the policy for development control in paragraph 49 in the manner indicated by this court in *Hunston Properties Ltd.*. They do not have to be the same. NPPF policy allows them to be different.

52. As I have said, Mr Leader relied too on the judgment of Ouseley J. in *St Modwen Developments Ltd.*. That case was distinctly different from this on its facts. The two local planning authorities concerned – Hull City Council and East Riding of Yorkshire Council – had in "[their] Joint Planning Statement of April 2014, for submission to the ERYC local plan examination, agreed they had a strong track record of working together" (paragraph 72 of the judgment). Ouseley J. agreed with the inspector "that the NPPF does not require housing needs to be assessed always and only by reference to the area of the development control authority" (paragraph 74) and observed that the Court of Appeal's decision in *Hunston Properties Ltd.* did not require him to reach a different conclusion (paragraph 75). He referred to paragraph 35 of Hickinbottom J.'s judgment in this case, in particular Hickinbottom J.'s comment to the effect – as he, Ouseley J., put it – that it would be an "impossible task" for a local planning authority making a development control decision "to assess the whole housing market area where it crossed administrative boundaries" (paragraph 76). He said he could not agree with this "as a matter of interpretation of [paragraph 159 of] the NPPF …" (paragraph 77). In the case before him there had been, he said, "no issue but that the apportionment [of need] reflected the agreed views of both Councils"; that "apportioned figure was taken by ERYC to be its objectively assessed figure, and was accepted as such by the Inspector" (paragraph 78).

53. In that case the inspector and Secretary of State were able to accept, as the appropriate basis for testing the sufficiency of the housing land supply, the agreed apportionment of housing needs between the two administrative areas in the housing market area – given the

authorities' long-standing and continuing co-operation in plan preparation. Ouseley J. saw nothing unlawful in that conclusion. He said (at paragraph 79):

> "… [Once] the relevant area for the assessment of housing needs, on the true interpretation of the NPPF, may cover more than the area of one district council, a basis for apportionment of need has to be found. That is where the co-operation and agreement of the local authorities comes in. It provides, on whatever basis it is done, for the full objectively assessed needs of each area. …"

and (at paragraph 81):

> "… Hull CC and ERYC had agreed that Hull CC should stem out-migration into ERY, in the interests of both, and so the past out-migration levels had not been carried forward into the future needs assessment of ERYC. If that is so, it would mean that no objectionable restraint policy had been applied anyway, no needs of ERYC were being left unmet. There is nothing in the parts of the PPG which deal with such issues which means that past migration patterns cannot be adjusted in the assessment of future need, responding to the provision of housing and other developments, without offending [paragraph 49 of the] NPPF. …".

54. In this case, however, for the detailed and cogent reasons he gave, the inspector was unable to accept the distribution of need in the Strategic Housing Market Assessment. Hickinbottom J. upheld the inspector's approach and conclusions as lawful, and in my view he was clearly right to do so. Taken as a whole, Ouseley J.'s reasoning in *St Modwen Developments Ltd.* does not cast any legal doubt on the inspector's decision here. His remarks on what Hickinbottom J. said in paragraph 35 of his judgment were not aimed at the judge's essential conclusions on the inspector's analysis – and in my view they do not upset those conclusions.

55. Mr Leader also sought to rely on the first instance decision in *Kings Lynn and West Norfolk Borough Council*. But I do not see anything in Dove J.'s judgment in that case to undermine Hickinbottom J.'s decision in this. Again, the facts and issues were different. The first issue for the court, as Dove J. described it (in paragraph 17 of his judgment), was whether the appeal inspector, in "accepting … adjustments to the FOAN for vacancies and second homes, … had unlawfully misapplied [paragraph 47 of the NPPF], in that this adjustment was contended to be a policy adjustment which was illegitimate when identifying the FOAN for the purpose of calculating the five-year housing land supply". Dove J. concluded that the inspector had not misapplied the policy. The inspector had been "entitled to form the view as a matter of judgment based on the empirical material that an allowance should be made …" (paragraph 36 of the judgment). In discussing that question Dove J. commented on paragraph 34(ii) of Hickinbottom J.'s judgment in this case. He disagreed with any suggestion "that in determining the FOAN, the total need for affordable housing must be met in full by its inclusion in the FOAN …" (paragraph 34). But he went on to say this (also in paragraph 34):

> "… As Hickinbottom [J.] found at [paragraph] 42 of that judgment, what the Inspector did in that case was to exercise his planning judgment, firstly, to conclude that the FOAN was higher than the council's figure and secondly, (again deploying planning judgment) to arrive pragmatically at a figure for the FOAN in order for it to be used to assess the five-year housing land supply. The council's figure was regarded by the Inspector in that case as being short because it failed to properly

> take account of factors which should have been included in the FOAN, including considering affordable housing need. Understood in this way, references to "policy on" and "policy off" become a red herring. The appropriate figure was for the Inspector's judgment to determine taking account of all the matters involved in finding the FOAN."

and (in paragraph 35):

> "… When a planning authority has undertaken or commissioned a SHMA, that will obviously be an important piece of evidence, but it is not in and of itself conclusive. It will be debated and tested at the local plan examination or (as in the present case) in appeals within the development control process."

As it seems to me, those observations of Dove J. sit perfectly well with Hickinbottom J.'s essential reasoning in this case.

56. In short, I do not think Mr Leader's argument gains strength from any of those first instance decisions – nor, indeed, from the decisions of this court in *Hunston Properties Ltd.* and *Gallagher Estates Ltd.*. And in my view, for the reasons I have given, it must be rejected.

Conclusion

57. I would therefore dismiss this appeal.

Lord Justice Tomlinson

58. I agree.

Lady Justice Black

59. I also agree.

Extract from previous Planning Practice Guidance

"Housing need assessment

…

How should local housing need be calculated where plans cover more than one area?

Local housing need assessments may cover more than one area, in particular where strategic policies are being produced jointly, or where spatial development strategies are prepared by elected Mayors, or combined authorities with plan-making powers.

In such cases the housing need for the defined area should at least be the sum of the local housing need for each local planning authority within the area. It will be for the relevant strategic policy-making authority to distribute the total housing requirement which is then arrived at across the plan area.

Where a spatial development strategy has been published, local planning authorities should use the local housing need figure in the spatial development strategy and should not seek to re-visit their local housing need figure when preparing new strategic or non-strategic policies.

Paragraph: 018 Reference ID: 2a-018-20180913

Revision date: 13 09 2018"

Neutral Citation Number: [2004] EWHC 257 (Admin)
IN THE HIGH COURT OF JUSTICE CO/4525/2003
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 4 February 2004

B e f o r e:

MR JUSTICE SULLIVAN

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THE QUEEN

on the application of

STEPHEN TAYLOR

- v -

MAIDSTONE BOROUGH COUNCIL

- - - - - - -

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- - - - - - -

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- - - - - - -

J U D G M E N T

(As Approved by the Court)

- - - - - - -

Wednesday 4 February 2004

MR JUSTICE SULLIVAN:

1. This is an application for judicial review of a decision by the defendant to refuse planning permission taken at a meeting of the defendant's Planning Committee on 11 June 2003. The application for planning permission related to land at Winterwood Farm, Chartway Street, East Sutton in Maidstone, where the claimant grows and packs soft fruit for retailers.

2. In 1994 planning permission was granted on appeal for a change of use of the farm to a mixed use for agriculture and for the importation and packing of produce not produced on the farm. The claimant's business has grown and on 8 July 2002 he applied for planning permission for a replacement packhouse. It was proposed to demolish existing storage units and to change the use of the existing packhouse back to agricultural use. The proposed replacement packhouse would be a very large building with a footprint of 2,842 square metres. The claimant contends that the net increase, having deducted the storage units and the existing packhouse, would be 1,538 square metres.

3. When the matter first came before the Committee on 13 March 2003, the Director of Development Services recommended refusal of the application for two policy reasons: conflict with structure plan policies relating to the protection of open countryside and the best and most versatile agricultural land. The report considered the impact of the proposed building on residential amenity, but did not recommend refusal of planning permission on that ground.

4. Initially, there was some confusion as to what the Committee actually decided on 13 March. As corrected, the resolution is as follows:

> "Contrary to the recommendations of the Director of Development Services, the Committee agreed that subject to the receipt of satisfactory amended plans, properly scaled and with the application site accurately delineated, and to no adverse comments being received as a result of the requisite departure publicity, the Director of Development Services be given delegated powers to permit subject to conditions/legal agreements to be determined by the Committee. In making this decision, Members felt that the proposed development was important to sustain local employment and would improve the appearance of the site."

5. In accordance with the council's code of conduct adopted pursuant to the Local Government Act 2000 for dealing with planning matters, the claimant and objectors to the proposed development were allowed to address the Committee. To ensure that the Committee's proceedings are kept to a reasonable length, each speaker is limited to three minutes, may not ask supplementary questions or make a supplementary statement, and may not be cross-examined.

6. The matter came back to the Committee on 24 April. The Director reported that the claimant had provided satisfactory amended plans. The Director's report continued:

> "I have now advertised the application as a departure from the provisions of the Development Plan. The period for receipt of comment ends on 11 April 2003. Since the meeting held on 13 March 2003, I have received the

following representations:

> LETTERS OF OBJECTION HAVE BEEN RECEIVED FROM THE CHARTWAY RESIDENTS ASSOCIATION (MANY MEMBERS OF WHICH HAVE WRITTEN IN PREVIOUSLY TO OBJECT), TWO PEOPLE WHO HAVE OBJECTED PREVIOUSLY, AND ONE PERSON WHO HAS NOT PREVIOUSLY OBJECTED. All appear to be residents of the Borough. All points of objection have been received previously but the point is now emphasised that this application is a major departure from the Development Plan and to permit would be to set an undesirable precedent.
>
> ONE LETTER OF SUPPORT HAS BEEN SUBMITTED FROM A PERSON WHO HAD NOT PREVIOUSLY WRITTEN. That person appears to be a resident of the Borough. No new points are raised."

The report then dealt with the question of conditions. It said:

> ".... should Members wish to grant planning permission for the development, I consider the following conditions would be appropriate."

The Director then set out eleven suggested conditions, together with a legal agreement seeking details of and the implementation of a "green" travel plan. The report stated that the Director's recommendation remained unchanged. The claimant was allowed to speak for three minutes at this meeting. The members resolved:

> "That consideration of this application be deferred to enable the proposed conditions to be strengthened in order to protect the amenities of local residents. Conditions relating to the operating hours, delivery times, Sunday and Bank Holiday operations should be included. A detailed landscaping scheme should be submitted showing how the development will be absorbed, including land forming and bunding. Also, a condition should be explored requiring refrigerated lorries to run off the electricity power supply on site rather than off their diesel engines."

7. The application was due to be reconsidered on 5 June, but that proved not to be possible because of lack of time. When the application came back before the Committee on 11 June, the claimant had been told that he would not be allowed to speak. He was told by a council officer on the telephone that a decision in principle had been taken on 13 March and that only conditions would be considered on 11 June. Similar information was given to him by a councillor. In the event, no third parties were allowed to speak on 11 June. Only members of the Committee participated in the debate.

8. One of the members of the Committee was the ward member who spoke forcefully against the grant of planning permission. Members had before them a report by the Director dealing with the conditions that had been put forward. The report stated that the conditions had been reviewed, that there had been a meeting with the claimant to discuss the issues arising, and that the claimant had agreed that the conditions set out in the report would be acceptable to him in the operation of the business. The recommendation was that if members were minded to grant permission, the Director would recommend an agreement requiring a "green" travel plan referred to previously.

9. After quite an extensive debate, in which a number of the Committee members participated, the Committee decided by a majority of 10:3 that planning permission should be refused for

three reasons. The first two reasons were the policy objections that had been raised in the original Director's report. The third reason was:

> "The development would have a harmful effect on the residential amenity of the neighbouring properties which cannot be sufficiently overcome by conditions and therefore contrary to policy ENV2 of the Maidstone Borough-Wide Local Plan (2002)."

10. The claimant has now appealed to the First Secretary of State against that refusal of planning permission. Whilst a decision to refuse planning permission or to impose conditions is in principle susceptible to challenge by way of an application for judicial review, given the availability of the very comprehensive statutory right of appeal to the Secretary of State, it will only be in the most exceptional circumstances that judicial review will be a more appropriate remedy. R v Hillingdon London Borough Council, ex parte Royco Homes Ltd [1974] 1 QB 720 is an example of such a case. An unlawful condition had been imposed and the Divisional Court concluded that certiorari was the more appropriate way of challenging that particular condition. Having referred to the comprehensive system of appeals from decisions of local planning authorities under the (then) Town and Country Planning Act 1971, Lord Widgery CJ said at pages 728-729:

> "It seems to me that in a very large number of instances it will be found that the statutory system of appeals is more effective and more convenient than an application for certiorari and the principal reason why it may prove itself to be more convenient and more effective is that an appeal to the Secretary of State on all issues arising between the parties can be disposed of at one hearing. Whether the issue between them is a matter of law or fact or policy or opinion, or a combination of some or all of these, one hearing before the Secretary of State has jurisdiction to deal with them all, whereas of course an application for certiorari is limited to cases where the issue is a matter of law and then only when it is a matter of law appearing on the face of the order."

The court's power to grant a quashing order is no longer confined to those cases where the error of law appears on the face of the order.

11. In the context of local authority licensing, Latham J (as he then was) in R v Leeds City Council, ex parte Hendry (CO/266/92, unreported, 14.12.93) said at page 7:

"…. where there is an alternative remedy, and especially where Parliament has provided a statutory appeal procedure, it is only exceptionally that judicial review should be granted. However, the question which has to be asked in every case such as this is not simply whether or not there is an alternative statutory appeal procedure but whether in the context of that procedure the real issue to be determined can sensibly be determined by that means. If it can, then clearly the statutory procedure should prevail and should be the route adopted by any person aggrieved. If on the other hand the statutory appeal procedure is not apt to deal with the question that is raised in the given case, then there is nothing to prevent an Applicant from seeking relief by way of judicial review." (my emphasis)

12. If one pauses to ask what is the "real issue" in the present case, the answer is obvious. It is not, as contended by Mr Fookes on behalf of the claimant, whether there were any procedural irregularities in the decision-making process adopted by the Committee, but whether planning permission should be granted for the proposed replacement packhouse. Since planning permission has been refused, the claimant will have a full opportunity to explain before an Inspector appointed by the Secretary of State why permission should be

granted. Mr Fookes submits that the Inspector will not in practice address the procedural complaints advanced on behalf of the claimant. That may well be true, save insofar as defects in the decision-making process may have led the Committee into making an error in its assessment of the planning merits of the proposal.

13. It is important to establish the ambit of the claimant's procedural complaints. Mr Fookes' skeleton argument referred to advice which had been given to Committee members at the second Committee meeting on 2 April by the defendant's Head of Legal Services. She advised the Committee that:

> "Councillors have already agreed to grant permission. You cannot change that original decision now."

The skeleton argument proceeded upon the premise that the Head of Legal Services' advice was correct. It was submitted on behalf of the claimant that

> "without a resolution to revoke the delegation, the only matter for the Committee to consider was the suitability of the conditions requested. These had been provided to the satisfaction of the Director of Development."

14. With respect to the defendant's Head of Legal Services, her advice to the Committee was not correct. The true position was that the Committee was not merely entitled, but bound, to consider the merits of the application in principle after the meeting on 13 March 2003. If that is correct, it follows that the Committee was fully entitled to reconsider the matter and to refuse planning permission for the three reasons given on 11 June. The Committee was entitled to revisit the question whether planning permission should be granted in principle for the following reasons:

(1) As submitted by Mr Barraclough QC on behalf of the defendant, the fact that the Committee had delegated the power to grant planning permission to the Director in certain circumstances did not mean that it could not at any stage prior to the actual grant of planning permission recover the reins and decide the matter for itself: see paragraph 3.3.9 of Arden's Local Government Constitutional and Administrative Law 1999 and the authorities therein cited. Thus as a matter of principle, and whatever the precise terms of the delegation, the Committee retained co-extensive authority with the Director to grant or to refuse planning permission.

(2) Looking at the precise terms of the resolution on 13 March, it is plain that the Committee delegated power to the Director of Development Services to grant permission on three conditions: first, the receipt of satisfactory amended plans (which condition was satisfied); secondly, there should be "no adverse comments being received as a result of the requisite departure publicity". It is plain from the Director's report on 24 April that adverse comments had been received as a result of the departure publicity. It is irrelevant that those objecting had made points which had been raised previously. The Director was simply not entitled to grant permission without first referring the matter back to Committee.

(3) Thirdly, any permission was to be subject to conditions which were to be determined by the Committee. It follows that if the Committee failed for any reason to determine the conditions, or declined to agree conditions because upon reflection the Committee felt that such conditions would be inadequate, then the Director would have no power to permit to grant permission.

15. The Committee was not merely entitled to reconsider the principle of development, but

obliged to do so in view of the fact that this was a departure application. The procedures required the application to be advertised, and the council had to consider any representations made in response to that advertisement. Thus the Committee was required to consider whether planning permission should be granted in the light of the representations made. If it had approached the matter on 24 April or 11 June upon the basis that there had been a decision in principle to grant planning permission so that the issue could not be re-opened and that the Committee would only be prepared to consider the question of conditions, then the Committee would have unlawfully fettered its discretion in such a manner as to defeat the underlying purpose of the departure procedure. The whole purpose of advertising a departure from the development plan is to enable that proposed departure to be drawn to the public's attention so that parties who support or oppose the departure may make representations to the local planning authority for or against the proposal. It would have frustrated that process if the members of the Committee had regarded themselves as bound by a prior decision to grant planning permission.

16. Thus, whatever procedural errors may or may not have been made by the Committee, the claimant could not have complained if he had been told prior to 11 June that the "in principle" decision on 13 March did not prevent further consideration of the question whether or not planning permission should be granted, and that the discussion would not be limited to the issue of conditions. It is open to question whether in those circumstances he would have been strictly entitled to address the Committee for a further three minutes under the Code. The Code does not deal expressly with applications which have been deferred for further consideration.

17. Nevertheless, I accept that there was unfairness in the council's failure to warn the claimant that the matter would be reconsidered in principle and arguably in its failure to allow him to speak for three minutes at the meeting on 11 June. Mr Fookes submitted that there had been a breach of natural justice and a breach of the claimant's legitimate expectation under the Code. Those are two ways of saying the same thing. Undoubtedly it would have been much better if the claimant had been allowed to address the Committee on the third occasion upon the issue of principle.

18. But the question remains, accepting that there has been a breach of the Code, is judicial review an appropriate remedy for that procedural unfairness? Even if it is, should the court give relief as a matter of discretion, given not merely the availability of an appeal to the Secretary of State, but the fact that the claimant has availed himself of that opportunity? In my judgment these proceedings for judicial review are not appropriate. The procedures laid down in the Code are not an end in themselves. They are designed to ensure that so far as is possible the "correct" decision is made on the planning merits of the proposal under discussion. This is not a case where the claimant has been deprived of any opportunity to put his case before the Committee. He has been given the opportunity to address the Committee on two occasions. Upon the basis that he should have been given a third opportunity to address the Committee, whilst he has been deprived of that opportunity, he will have a much fuller opportunity to deploy all the evidence and arguments as to why planning permission should be granted before an independent Inspector.

19. Mr Fookes submits that the council's reasons for refusal will define the issue before the Inspector. In practical terms the Inquiry Procedure Rules will require the defendant to revisit the matter before the inquiry for the purposes of drafting the defendant's pre-inquiry statement under the Rules. The defendant will have to consider whether it wishes to pursue any or all of the grounds of refusal and, if so, to give particulars of those grounds. Thus the claimant will have ample opportunity to prepare his case in response to the council's up-to-

date reasons for refusal as particularised in its pre-inquiry statement. Mr Fookes submits that such an approach would render the Code of no value whatsoever. He says that it has been adopted pursuant to the 2000 Act and is there to be observed.

20. I do not suggest that a breach of the Code is to be regarded lightly, but it has to be remembered that some of those affected by the Code will have no statutory right of appeal. If planning permission is granted, those aggrieved by the grant of planning permission will simply be able to contest procedural defects. They will not be able to raise the planning merits of the decision. By contrast, if planning permission is refused, the merits of the decision can be thoroughly examined on appeal and if and insofar as any procedural defect has contributed to an erroneous view of the planning merits, that can be exposed at the inquiry. If it is concluded that the procedural error has not led to a defect in the defendant's appraisal of the planning merits of the proposal, then it is difficult to see why relief should be granted in any event. The mere fact that there has been a breach of the Code does not lead to the inevitable conclusion that judicial review is the appropriate remedy, particularly if there is another right of appeal which is capable of dealing with the underlying issue, the planning merits of the proposal.

21. Mr Fookes complained that the ward member had approached the issue without an open mind and had in effect pre-judged the question as to whether permission should be granted or not. He submitted that the ward member's approach to the matter was contrary to the advice set out in the Code. It should be noted that the ward member does not accept those criticisms. She contends that she was arguing forcefully against the proposal, but that her mind was not closed.

22. Even if it is assumed that the claimant is right about this issue, the question remains whether an application for judicial review is the appropriate remedy. The ward member was but one member of the Committee which voted 10:3 to refuse planning permission for the three reasons set out above. It would in my judgment be most undesirable if applications for judicial review based upon criticisms of the conduct of individual council members were permitted when there exists the possibility of a statutory appeal against any resulting refusal of planning permission. There is no basis for believing that the remaining twelve members of the Committee were unduly influenced by the ward member; but if it is assumed that they were and that they were led by the ward member into refusing planning permission upon spurious grounds, then again that is a matter which will be exposed during the inquiry and rectified by the Inspector.

23. Finally, it is submitted that the council's reasons for refusing permission are inadequate. The council is required to give reasons for refusal by the Town and Country Planning (General Development Procedure) Order 1995, article 22(1). Mr Fookes submitted that no proper or intelligible reasons were given as to why the conditions sought at the earlier meeting, which he says had been agreed by the Director of Planning and accepted by the claimant, were unacceptable at the meeting on 11 June. That is to require reasons for reasons. The council was obliged to set out why it considered that planning permission should be refused. Reason 3 states that the councillors' concerns about the effects of the proposal on the residential amenity of neighbouring properties could not be sufficiently overcome by conditions. The complaint that there is no explanation as to why the councillors reached that view stems in part from the false premise that the councillors were entitled only to consider conditions at the meeting of 11 June. For the reasons set out above, the councillors were entitled to reconsider the application in the round and to refuse permission on the two policy grounds that had originally been recommended by the officer.

24. So far as the third reason for refusal is concerned, as a reason for refusal of planning

permission it is adequate. Although Mr Fookes cited In re Poyser and Mills' Arbitration [1964] 2 QB 467, 478, in his skeleton argument, that decision was concerned with an arbitrator's reasons and has been applied to the adequacy of reasoning in Inspectors' decision letters. Inevitably the reasons given in a refusal notice are very much more brief. In any event, they are not the last word because in its pre-inquiry statement the council will have to explain why it considers that the harmful effects on residential amenity of the proposal cannot be sufficiently overcome by conditions. If the explanation in the statement and/or at the inquiry is inadequate so that time is wasted before the Inspector, then the Inspector can be asked to make an appropriate order in relation to costs. Thus there is no reason to believe that the inquiry process will not be able to tease out the basis for reason 3 of the refusal. Whether or not the reasons given for refusing planing permission are adequate is pre-eminently a matter of planning judgment for the Inspector to decide. This complaint does not raise an issue of law which is appropriate for judicial review.

25. For these reasons, therefore, this application for judicial review must be refused. While there is some force in the procedural complaint raised by the claimant, that he was not allowed to address the final Committee meeting and was not told that it would reconsider the matter in principle, the complaint does not exist in a vacuum. In essence the claimant complains that because of the faulty procedure, the defendant refused planning permission when it should have adhered to its first inclination which was to grant planning permission. The real issue is whether the defendant was right to change its mind on the planning merits. Since that question will be answered by the Inspector, it would not be right to grant judicial review of the process which led the defendant to its decision to refuse planning permission.

26. MR BARRACLOUGH: My Lord, I ask for my costs.

27. MR JUSTICE SULLIVAN: Has there been any summary assessment produced? I have not seen anything. Sometimes they get to the other side and not to me. Mr Fookes, you have not seen anything?

28. MR FOOKES: No, nothing.

29. MR JUSTICE SULLIVAN: So it has to go for detailed assessment, I would imagine.

30. MR BARRACLOUGH: Yes. I had not seen a statement, but I have had one put into my hand. But, my Lord the proper thing is for detailed assessment.

31. MR JUSTICE SULLIVAN: Do you want to say anything about that, Mr Fookes, the principle or the detail?

32. MR FOOKES: My Lord, may I make a very short response? I submit there should be not order for costs for two reasons. First, the point I made at the beginning of my skeleton, there were no detailed grounds for contesting filed or served in this case. The point about alternative remedy was not a point raised in the Acknowledgement of Service, which was extremely brief.

33. MR JUSTICE SULLIVAN: I did see that. Let me turn it up again.

34. MR FOOKES: It is at Divider 2.

35. MR JUSTICE SULLIVAN: Yes.

36. MR FOOKES: And it is possible that had the point been taken at that stage, permission

might not been granted. Had it been set out as the other side's case, then we might have reconsidered it appropriate to (inaudible). In fact the first time it is mentioned at all was in the skeleton argument about two days ago.

37. The second point is that in the Practice Direction on costs it does say at 13.6 that if there is failure by a party without reasonable excuse to comply with the foregoing paragraphs, it will be for the court to decide what order to make in regard to costs.

38. Putting the two together, I would say that there should be a nil order for costs.

39. MR JUSTICE SULLIVAN: You certainly can say that the council's evidence as to precisely what the legal position was, at least until the skeleton argument arrives, possibly slightly less than clear. Mr Barraclough?

40. MR BARRACLOUGH: My Lord, I have the White Book at 54.16.7.

41. MR JUSTICE SULLIVAN: Both of you have the advantage of me because there is not one on the bench at the moment.

42. MR BARRACLOUGH: May I hand mine up? It simply says the usual that costs should follow the event.

43. MR JUSTICE SULLIVAN: Yes.

44. MR BARRACLOUGH: My Lord, I do not pretend that the council made a positive decision not to oppose permission on the alternative remedy ground. I do not pretend that it occurred to them to do so. The chances are that is only when the whole of claimant's case is considered that one can realistically determine that this is one of those exceptional cases that justifies judicial review and it would not be unreasonable to argue the matter at this stage. It was only today, although I do not pretend that it was a logical thought process --

45. MR JUSTICE SULLIVAN: It may be fair to say, Mr Barraclough, that the point about co-terminus jurisdiction was I think raised by you during the course of argument --

46. MR BARRACLOUGH: Delegation.

47. MR JUSTICE SULLIVAN: Delegation.

48. MR BARRACLOUGH: I tell my Lord immediately that that came to me when my hand happened to alight on the book last night and I read that passage. My Lord, delegation was mentioned in my skeleton --

49. MR JUSTICE SULLIVAN: It was.

50. MR BARRACLOUGH: -- but in a slightly different way. I found, I have to say, Arden's book more descriptive of the point. But the delegation point, nevertheless, was argued in the skeleton. The main alternative remedy argument must have been the claimant's. It is a basic area of judicial review and it must have been appreciated on the claimant's side that that was disputed for that reason if for no other.

51. MR JUSTICE SULLIVAN: Yes, thank you very much. I do consider that this is a case where, if I may put it shortly, the council has not covered itself with glory. I except entirely Mr Barraclough from that comment. I feel that the questions of alternative remedy and the questions of the proper construction of the resolution, in particular the implication of the

departure procedures, could and should have been raised at an earlier stage. I am not persuaded that this is a case for no order as to costs because it does seem to me that, albeit at a rather belated stage, the council did raise the question of alternative remedy, even if the matter was not perhaps as fully explored as it might have been.

52. In all the circumstances, and doing the best I can, the order I make is that the claimant shall pay half the defendant's costs. Those costs are to go for detailed assessment unless otherwise agreed.