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

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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**

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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

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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.
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> 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.
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> 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.
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> 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
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> 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:
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> - 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.