Matter 3 – The Housing Strategy : the need for housing and the housing requirement		
Action	**Date on which Action Completed**	**Examination Doc Reference No.**
NHDC to provide 'HMA in Bedfordshire and Surrounding Areas updating evidence on migration June 2016' to be added to the Examination Library as ED25	15.11.2017 Enclosed as Appendix M3-1	ED25
NHDC to provide information to Inspector as to whether the above report was put into evidence at either or both of the Luton and Stevenage Examinations	15.11.2017 NHDC confirmed to the hearing sessions that the report was not put in evidence at either Examination	n/a
NHDC to check Inspector's Report into Further Alterations to the London Plan and provide reference as to what was said regarding acceptability of using longer term migration trends	Included in ED137 - Matter 1 : Appendix M1-3	ED137
NHDC to: • **liaise with Luton Borough Council to reconsider wording in Plan regarding early review**	31.05.2018 MM375	
• **produce further Statement of Common Ground setting out agreement/disagreement on this issue and any proposed changes of text to Plan**	31.05.2018 Note enclosed as Appendix M3-2	ED139
NHDC to provide Inspector with references for *Oadby and Wigston v SSCLG* and *St Modwen Developments Ltd v SSCLG*	18.12.2017 Enclosed as Appendix M3-3	ED58a and ED58b ED57a and ED57b
NHDC to: • **provide clarification as to what is meant by self-build development in Policy SP8(f)(iii) either in policy text itself or supporting text** • **consider greater promotion of self-build in explanatory text (main modification)**	31.05.2018 MM035 MM044	
NHDC to consider basis for 1% figure for self-build on strategic sites	6/02/2018 Also included in ED144 - Matter 8 : Appendix M8-1	ED83
NHDC to insert 'net' into housing requirement figures in Policy SP8	31.05.2018 MM035 and MM036	

Appendix M3 – 1

ED25: HMAs in Bedfordshire and the surrounding areas: Updating the evidence on Migration

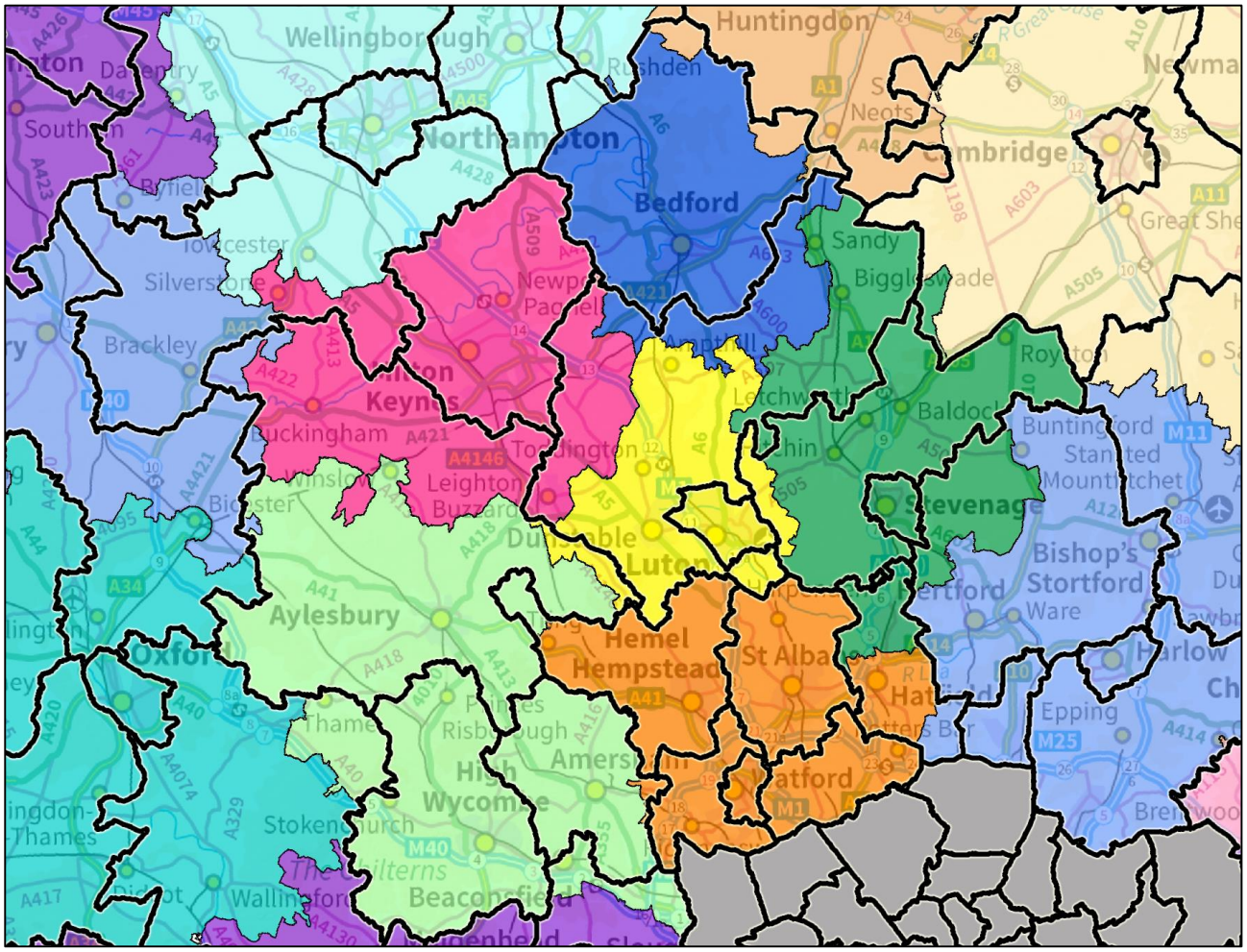
HMAs in Bedfordshire and the surrounding areas: Updating the evidence on Migration

Reviewing migration data from the 2001 and 2011 Census

1. Opinion Research Services (ORS) was commissioned in 2015 by a partnership of seven councils (Central Bedfordshire Council, Bedford Borough Council, Luton Borough Council, Milton Keynes Council, North Hertfordshire District Council, Stevenage Borough Council and Aylesbury Vale District Council) to identify Housing Market Areas (HMAs) for the partnership and surrounding areas. The report was published in December 2015 as *"Housing Market Areas in Bedfordshire and surrounding areas"* (referred to in this report as the "2015 Study").

2. The 2015 Study used the latest commuting flows, house prices and Broad Rental Market Area (BRMA) data currently available, including commuting data from the 2011 Census. Nevertheless, detailed migration flows from the 2011 Census has not been published as public data, so migration data from the 2001 Census was used instead. Based on the available evidence, the study concluded that the areas shown in Figure 1 provide the most appropriate and up-to-date housing market geographies.

Figure 1: Functional housing market areas in Bedfordshire and the surrounding area (Source: Housing Market Areas in Bedfordshire and surrounding areas, December 2015)



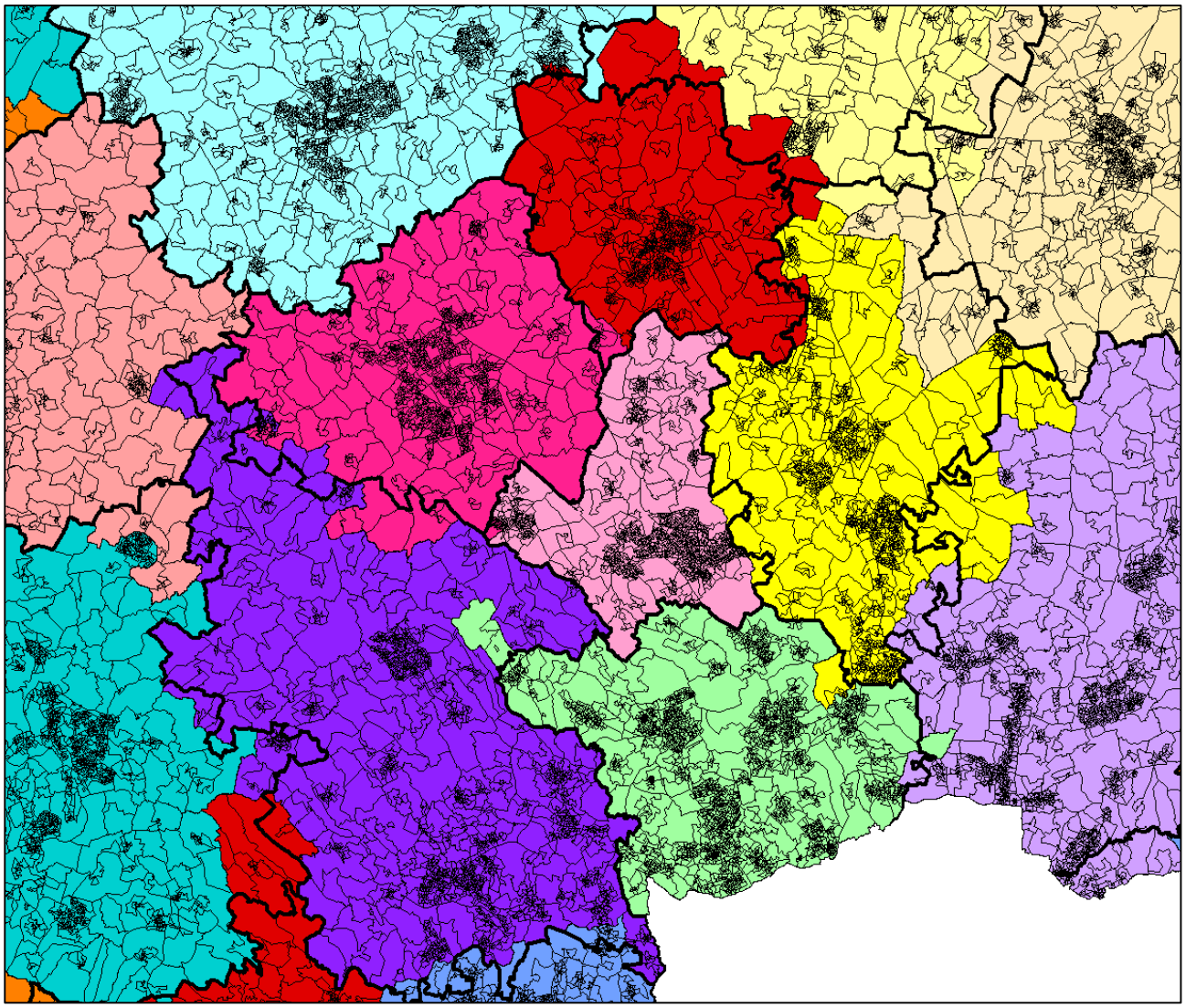
3. Since the 2015 Study was completed, ORS has been granted access to the safeguarded migration flow data from the 2011 Census through the ONS Virtual Microdata Laboratory (VML). Therefore, to ensure that the evidence that informed the analysis of Housing Market Areas (HMAs) in Bedfordshire and the surrounding area remains as up-to-date and robust as possible, ORS has analysed the migration flow data from the 2011 Census alongside the 2001 Census data which informed our original analysis.

4. This paper reviews the outcomes of this additional analysis in the context of our conclusions about the functional HMAs set out in the 2015 Study and the associated recommendations for "best fit" joint working arrangements.

Identifying Migration Zones

5. Using migration flow data from the 2001 Census, the 2015 Study showed that the strongest relationships in terms of migration mirrored the strongest commuting relationships (based on commuting flow data from the 2011 Census). On this basis, migration zones were identified using the strongest relationships in terms of migration flows for each MSOA. Through replicating this analysis using migration flow data from the 2011 Census, we have updated the migration zones using the strongest relationships from the new data.

Figure 2: Comparing migration zones based on 2001 and 2011 data (Source: 2001 Census and 2011 Census, ONS. Note: Coloured areas show 2001-based migration zones; heavy black lines show 2011-based migration zones)



6. It is evident that the 2011-based migration zones largely mirror the 2001-based zones, although there are some differences at the edges:

- **Bedford:** the 2011-based zone includes slightly fewer areas in Hertfordshire, Huntingdonshire and Northamptonshire, but does include some additional areas in Central Bedfordshire that were in the Milton Keynes 2001-based zone;
- **Central Buckinghamshire:** the 2011-based zone no longer includes Thame (which is now in the Oxford migration zone) and some areas on the outskirts of Buckingham are in the Milton Keynes zone now. Nevertheless, the 2011-based zone includes some additional areas between Aylesbury and Milton Keynes and also extends slightly further south, now including additional areas near Gerard's Cross and to the south of Marlow;
- **Luton:** there is very little difference between the 2001-based and 2011-based migration zones, although there are some minor changes on the borders with both Stevenage and Milton Keynes;
- **Milton Keynes:** once again, there is little difference between the 2001-based and 2011-based zones; though, as noted above, some areas to the north have transferred to the Bedford zone and Milton Keynes has gained some areas near Buckingham and lost some areas north of Aylesbury; and
- **Stevenage:** this is the migration zone that has possibly had most change from 2001 to 2011, gaining areas to the north whilst losing other areas to the east. Nevertheless, most of the changes relate to largely rural areas and there do not appear to be any significant settlements that have either been gained or lost.

7. Figure 3 and Figure 4 set out the updated key statistics for each of the identified migration zones based on the two migration containment ratios set out in the PAS OAN technical advice note (second edition, paragraph 5.15), with long-distance moves continuing to compare thresholds of 20 miles and 50 miles:

> *"Supply side (origin); moves within the area divided by all moves whose origin is in the area, excluding long-distance moves*
>
> *Demand side (destination): moves within the area divided by all moves whose destination is in the area, excluding long-distance moves."*

Figure 3: Supply side (origin) statistics for Migration Zones (Source: 2011 Census, ONS)

			Migration Zone				
			Bedford	Central Bucks	Luton	Milton Keynes	Stevenage
Moved within area			10,900	25,841	24,264	20,840	20,613
Moved to elsewhere	Moves of up to 20 miles		2,267	4,188	4,321	3,045	3,756
	Moves of 20 to 50 miles		1,483	6,587	3,158	3,228	3,991
	Moves of 50 miles or more		2,398	8,383	4,558	4,342	5,438
Total supply side moves			17,048	44,999	36,301	31,455	33,798
Moves within area as…	% of all moves	2011 data	63.9%	57.4%	66.8%	66.3%	61.0%
		2001 data	*63.4%*	*54.7%*	*63.4%*	*62.4%*	*59.4%*
	% of moves up to 50 miles	2011 data	**74.4%**	**70.6%**	**76.4%**	**76.9%**	**72.7%**
		2001 data	*75.6%*	*70.2%*	*74.8%*	*74.8%*	*71.8%*
	% of moves up to 20 miles	2011 data	**82.8%**	**86.1%**	**84.9%**	**87.3%**	**84.6%**
		2001 data	*83.3%*	*82.8%*	*84.6%*	*84.1%*	*82.2%*

Figure 4: Demand side (destination) statistics for Migration Zones (Source: 2011 Census, ONS)

			Migration Zone				
			Bedford	Central Bucks	Luton	Milton Keynes	Stevenage
Moved within area			10,900	25,841	24,264	20,840	20,613
Moved from elsewhere	Moves of up to 20 miles		2,754	5,696	3,728	3,617	4,947
	Moves of 20 to 50 miles		1,721	7,045	3,734	3,752	4,764
	Moves of 50 miles or more		2,074	5,644	3,199	3,876	3,495
Total demand side moves			17,449	44,226	34,925	32,085	33,819
Moves within area as…	% of all moves	2011 data	62.5%	58.4%	69.5%	65.0%	61.0%
		2001 data	*53.8%*	*49.0%*	*57.8%*	*52.9%*	*52.0%*
	% of moves up to 50 miles	2011 data	**70.9%**	67.0%	**76.5%**	**73.9%**	68.0%
		2001 data	*70.0%*	*67.8%*	*73.7%*	*71.4%*	*66.0%*
	% of moves up to 20 miles	2011 data	**79.8%**	**81.9%**	**86.7%**	**85.2%**	**80.6%**
		2001 data	*79.0%*	*80.2%*	*85.4%*	*84.2%*	*76.7%*

8. It is evident that the statistics for the 2011-based migration zones are similar to the 2001-based zones in terms of the proportion of moves within the area. However, the proportion of moves of up to 50 miles and up to 20 miles is slightly higher based on the 2011-based zones that it was when the 2001-based zones were analysed. There are only two exceptions:

   - **Bedford:** the proportion of supply side moves has reduced; from 75.6% to 74.4% based on the 50 mile threshold, and from 83.3% to 82.8% based on the 20 mile threshold; and
   - **Central Buckinghamshire:** the proportion of supply side moves has reduced from 67.8% to 67.0% based on the 50 mile threshold, however the proportion has increased from 80.2% to 81.9% based on the 20 mile threshold.

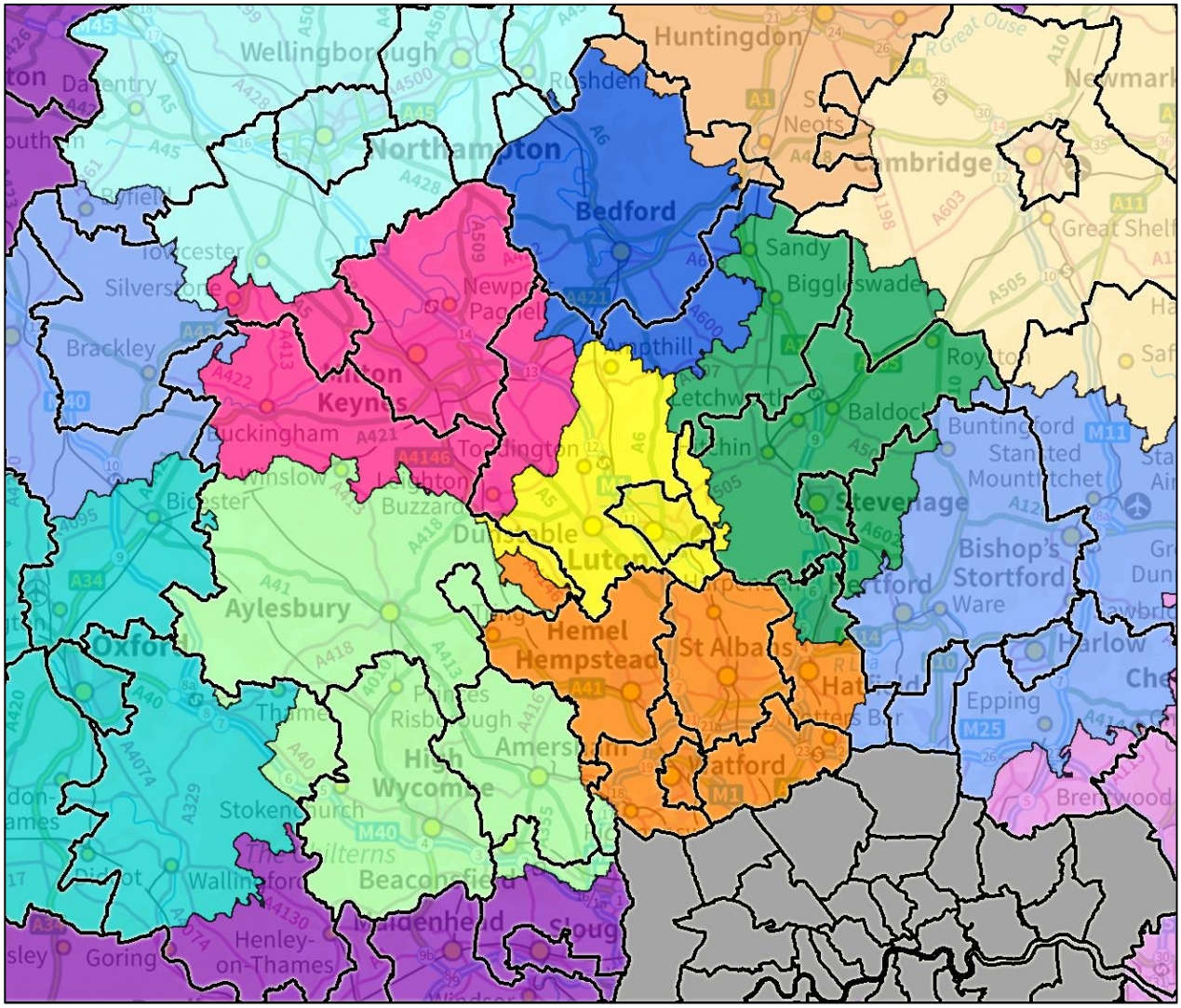
9. Based on the original statistics, the 2015 Study concluded that a *"relatively high proportion of household moves"* are contained within the migration zones identified at that time. As most of the 2011-based migration zones have a higher proportion of moves within the area, this conclusion remains appropriate for the updated zones – so these functional areas all meet the requirements of PPG in this regard.

Updating the Functional Housing Market Areas

10. The 2015 Study took account of the evidence based on commuting zones, migration zones and house prices to establish the most appropriate functional housing market areas, based on majority agreement between the three geographies. Areas which fell within the same commuting zone, migration zone and BRMA were evidently allocated to that functional housing market area. Where there was disagreement between the three geographies, the functional housing market area was allocated based on the two geographies that did agree (and determined by the commuting zone in the few areas where all three geographies differed).

11. As the 2011-based migration zones differ slightly from the 2001-based zones that were previously identified, we have repeated this process to identify the most appropriate functional housing market areas. Figure 5 illustrates the outcome of this analysis. When compared to the original functional housing market areas (Figure 1), it is evident that there are very few changes.

Figure 5: Functional Housing Market Areas (updated using 2011-based migration zones) with Local Authority Boundaries



12. Figure 6 details the distribution of the resident population for the five updated functional housing market areas by local authority. Cells have been highlighted in dark green where two thirds or more of the population for a local authority area are resident in a functional housing market area. Cells have been highlighted in light green where at least a third of the population for a local authority are resident in a functional HMA.

Figure 6: Functional Housing Market Areas Resident Population by Local Authority Area updated (Source: 2011 Census, ONS. Note: Population rounded to nearest 100. Figures may not sum due to rounding)

Local Authority Area	Functional Housing Market Area											
	Bedford		Central Bucks		Luton		Milton Keynes		Stevenage		Elsewhere	
	N	%	N	%	N	%	N	%	N	%	N	%
Partner LAs												
Aylesbury Vale	-	-	137,900	80.8%	2,800	1.6%	28,000	16.4%	-	-	2,000	1.2%
Bedford	151,800	98.2%	-	-	-	-	-	-	-	-	2,700	1.8%
Central Beds	15,400	6.1%	-	-	112,900	44.8%	50,200	19.9%	73,600	29.2%	-	-
Luton	-	-	-	-	201,500	100.0%	-	-	-	-	-	-
Milton Keynes	-	-	-	-	-	-	246,700	100.0%	-	-	-	-
North Herts	-	-	-	-	1,400	1.1%	-	-	124,300	98.8%	100	0.1%
Stevenage	-	-	-	-	-	-	-	-	83,400	100.0%	-	-
Surrounding LAs												
Chiltern	-	-	91,600	99.7%	-	-	-	-	-	-	200	0.3%
Dacorum	-	-	1,400	1.0%	-	-	-	-	-	-	141,500	99.0%
East Herts	-	-	-	-	-	-	-	-	8,500	6.3%	127,300	93.7%
East Northants	200	0.3%	-	-	-	-	-	-	-	-	68,100	99.7%
South Bucks	-	-	25,600	38.9%	-	-	-	-	-	-	40,200	61.1%
South Cambs	-	-	-	-	-	-	-	-	6,900	4.7%	139,900	95.3%
South Northants	-	-	-	-	-	-	12,400	14.72%	-	-	72,100	85.3%
South Oxon	-	-	8,500	6.5%	-	-	-	-	-	-	123,000	93.5%
Three Rivers	-	-	6,200	7.3%	-	-	-	-	-	-	80,100	92.8%
Welwyn Hatfield	-	-	-	-	-	-	-	-	56,800	53.2%	50,000	46.8%
Wycombe	-	-	169,000	100.0%	-	-	-	-	-	-	-	-
TOTAL	**167,400**	**-**	**440,200**	**-**	**318,600**	**-**	**337,400**	**-**	**353,500**	**-**	**-**	**-**

13. There are no substantive differences in the distribution of population based on the original functional housing market areas (that used 2001-based migration zones) or the updated functional areas, defined using the 2011-based migration zones.

14. On this basis, the 2015 Study conclusions remain appropriate and we would continue to recommend to the commissioning partners that the most pragmatically appropriate "best fit" for housing market areas in Bedfordshire and the surrounding areas comprises:

- **Bedford HMA:** Bedford borough;
- **Central Buckinghamshire HMA:** Aylesbury Vale district, Chiltern district and Wycombe borough;
- **Luton HMA:** Luton borough and Central Bedfordshire;
- **Milton Keynes HMA:** Milton Keynes borough; and
- **Stevenage HMA:** Stevenage borough and North Hertfordshire district.

15. It is important to note that these "best fit" groupings do not change the actual geography of the functional housing market areas identified in Figure 5 – they simply provide a pragmatic arrangement for the purposes of establishing the evidence required and developing local policies, as suggested by the CLG advice note and reaffirmed by the PAS technical advice note.

16. The functional housing market areas continue to provide the most appropriate framework for spatial planning, so it will still be important for the local planning authorities to maintain dialogue with all of their neighbouring areas under the Duty to Cooperate.

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Appendix M3 – 2

ED139: Further liaison with Luton Borough Council and areas of (un)common ground

Note to Inspector

Further liaison with Luton Borough Council and areas of (un)common ground

1. The Inspector has requested that North Hertfordshire District Council (NHDC) provide further information to the Examination regarding liaison with Luton Borough Council in relation to the proposed housing allocation East of Luton (LP1, Policy SP19, p.71).

2. Following the hearing sessions for Matter 3 (the need for housing and the housing requirement) and Matter 8 (affordable housing, housing mix and supported, sheltered and older persons housing), the following actions have been specified:

    - NHDC to :

        - liaise with Luton Borough Council to reconsider wording in Plan regarding early review; and

        - produce further Statement of Common Ground setting out agreement/disagreement on this issue and any proposed changes of text to Plan (as shown in the Council's Table of Examination Actions, Examination Document ED53, p.3);

    - NHDC to liaise with Luton BC in respect of:

        - a main modification to Policy SP19 to make it clear that the 1,950 homes to be provided on site east of Luton to assist with meeting Luton's unmet need will include access to affordable housing

        - self-build plots on site east of Luton (ED54, pp.2-3)

<u>Updated position</u>

3. As requested by the Inspector, there has been an ongoing dialogue between the two authorities. Although there is broad agreement between the two authorities on some of the above matters, North Hertfordshire District Council and Luton Borough Council have not been able to agree the precise wording of the relevant proposed Modifications. Therefore, it has not been possible to produce a further Statement of Common Ground at the present time.

4. Table 1, on the following page, summarises the substance of the dialogue between the two authorities on this matter to date. The proposed draft Modifications that relate to these issues are therefore presented by NHDC on the understanding that Luton Borough Council will have the opportunity to make any necessary representations through any future Main Modifications consultation.

Table 1: NHDC summary of liaison with Luton Borough Council on Matter 3 and Matter 8 actions

Action	Proposed modification(s) by NHDC	Luton Borough Council response	NHDC response
Liaise with Luton Borough Council to reconsider wording in Plan regarding early review	The existing text of the Implementation, Monitoring & Review section of the Plan contains sufficient provisions regarding NHDC's commitment to complete a full review by the mid-2020s at the latest (LP1, p.224) and no further change is required. Notwithstanding this, an additional paragraph is proposed after paragraph 14.39 (LP1, p.224) to address concerns to read: ***We will also work with these*** [Luton HMA] ***and other relevant authorities to understand, and holistically plan for, any long-term strategic infrastructure requirements arising from future growth. This will include consideration of any infrastructure that may be required within North Hertfordshire to facilitate and mitigate the delivery of growth proposed in other authorities' plans or other long-term aspirations that may come to fruition over the plan period. Any proposals to expand London Luton Airport beyond the limits of its current planning permission would fall within the scope of this commitment.***	Request a new policy in the Implementation, Monitoring and Review committing NHDC to bring forward a full review of the Plan by 2020; Requested additional paragraph under paragraph 14.39 to read: ***NHDC will be a co-commissioning authority for the A505 Corridor Study along with Luton Borough Council, Central Bedfordshire and other neighbouring authorities as appropriate.*** Request to amend proposed additional paragraph (as shown left) to remove the following phrases: "other relevant authorities" [outside of the Luton HMA]; "and mitigate" [the delivery of growth proposed in other authorities plans…]	NHDC considers the requested review timetable is unreasonable. Although Luton has sought further assurances and / or a policy commitment on review, they have not at any stage in their Reg.19 representations or evidence to the hearing sessions sought to initiate a review on this timescale. The request for an immediate review implies uncertainty over the strategy and / or allocations in the Plan as currently submitted and would create an uncertain policy environment for the determination of planning applications, contrary to the intentions of a plan-led system. NHDC considers that the other amendments proposed are too Luton-specific. NHDC has eight adjoining local planning authorities and four adjoining highway authorities as well as operating within a two-tier environment with Hertfordshire County Council. The monitoring and review mechanisms need to appropriately reflect this wider context and the range of likely relationships and projects. Removal of reference to mitigation not supported.

Action	Proposed modification(s) by NHDC	Luton Borough Council response	NHDC response
Liaise with Luton in respect of a main modification to Policy SP19 to make it clear that the 1,950 homes to be provided on the site east of Luton to assist with meeting Luton's unmet need will include access to affordable housing	New criterion (f) to Policy SP19 (LP1, p.71) to read: ***(f) Appropriate mechanism(s) to ensure that the affordable housing derived from the 1,950 homes for Luton's unmet needs address affordable housing needs from Luton Borough.*** Additional supporting text at Paragraph 4.219 (LP1 p.72) to read: ***The contribution towards unmet needs from Luton will include the provision of both market and affordable homes. The District Council will work with Luton Borough Council to secure appropriate mechanisms for nomination rights in any legal agreement(s) relating to the site(s).***	Request that proposed supporting text is deleted and added to proposed criterion (f)	NHDC considers this amendment would make criterion (f) unwieldy. It is considered that the modification proposed by the Council is appropriate and the proposed supporting text provides the necessary additional information to aid its interpretation by decision-makers.
Liaise with Luton Borough Council in respect of self-build plots on site East of Luton	Delete requirement for self-build plots in criterion (f) of Policy SP19 (LP1, p.71) following analysis contained in Council's self-build note (ED83)	Agree that, given there was no specific requirement identified in Luton's Plan for self and custom build development and the proposed east of Luton site seeks to meet Luton's unmet housing needs, reference to a quantum of serviced plots for self build development at criterion '(f)'' is removed from Policy SP19.	None required

Appendix M3 – 3

ED57A: St Modwen Developments High Court Judgement

ED57B: St Modwen Developments Court of Appeal Judgement

ED58A: Oadby and Wigston High Court Judgement

ED58B: Oadby and Wigston Court of Appeal Judgement

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: [2017] EWCA Civ 1643

Case No: C1/2016/2001

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE OUSELEY
[2016] EWHC 968 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2017

Before:

Lord Justice Jackson
Lord Justice McCombe
and
Lord Justice Lindblom

- -

Between:

St Modwen Developments Ltd.	**Appellant**
- and -	
(1) Secretary of State for Communities and Local Government **(2) East Riding of Yorkshire Council** **(3) Save Our Ferriby Action Group**	**Respondents**

- -
- -

Mr Christopher Young and Mr James Corbet Burcher (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Mr Richard Honey (instructed by **the Government Legal Department**) for the **First Respondent**
Mr Paul Tucker Q.C. and Mr Freddie Humphreys (instructed by **East Riding of Yorkshire Council**) for the **Second Respondent**
Ms Emma Reid-Chalmers (**Pro bono** instructed by **direct access**) for the **Third Respondent**

Hearing date: 8 June 2017

- -

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

Lord Justice Lindblom:

Introduction

1. The complaint in this appeal is that the Government's planning policy for housing development in the National Planning Policy Framework ("the NPPF") – in particular, the policy for a five-year supply of housing land in paragraph 47 – was misunderstood and misapplied in a decision on a statutory appeal against the refusal of planning permission. The appeal is by no means the first of its kind. It raises no new point of law.

2. The appellant, St Modwen Developments Ltd., appeals against the order of Ouseley J., dated 28 April 2016, dismissing its application under section 288 of the Town and Country Planning Act 1990 challenging the decisions of the first respondent, the Secretary of State for Communities and Local Government – in a decision letter dated 25 June 2015 – to dismiss two appeals under section 78 of the 1990 Act against the refusal of planning permission by the second respondent, East Riding of Yorkshire Council, for a large development of new housing on land at Brickyard Lane, Melton Park, about 13 kilometres to the west of Hull. The third respondent, Save Our Ferriby Action Group, was an objector to the proposals.

3. The appeal site extends to about 38 hectares, in three parcels, the largest of which is about 35 hectares to the south of Monks Way, straddling Brickyard Lane. Access to it is gained from the A63 trunk road to its north. The village of Melton lies to the north of the A63, the village of North Ferriby to the south, the town of Elloughton-cum-Brough about two kilometres to the west. Much of the site had been allocated for employment development in the development plan – the Beverley Borough Local Plan (1996) and the Joint Structure Plan for Kingston upon Hull and the East Riding of Yorkshire (2005) – and also in the emerging East Riding Local Plan. The first of the two schemes before the Secretary of State, the scheme in "Appeal A", was for up to 510 dwellings; the second, in "Appeal B", for up to 390 dwellings, with 7.7 hectares of land for "employment" uses. The council's reasons for refusing planning permission, for both schemes, referred to the loss of employment land, conflict with the settlement hierarchy, and prejudice to the progress of the emerging local plan. Both appeals were recovered for determination by the Secretary of State. They were heard at an inquiry that lasted 20 sitting days in November 2013 and April, May and August 2014, and was eventually closed in September 2014. The inspector submitted her report to the Secretary of State on 2 March 2015, recommending that both appeals be dismissed. In his decision letter the Secretary of State agreed with that recommendation and accordingly dismissed both appeals.

4. The challenge before Ouseley J. was pursued on four grounds, all of which he rejected. The appeal before us is more confined. I granted permission to appeal on 11 November 2016. When I did so, I said the argument presented on behalf of St Modwen seemed "more elaborate than it need be". I accepted, however, there were matters fit for consideration by this court – in particular, the concept of "a supply of specific deliverable sites …" in paragraph 47 of the NPPF.

The issues in the appeal

5. There are seven grounds of appeal, corresponding broadly to the first of the four grounds pursued in the court below – described by Ouseley J. as "Ground 1: Housing land supply". At the hearing counsel agreed that those seven grounds present us with three main issues, which relate closely to each other, but in a logical sequence are these:

    (1) Did the Secretary of State misinterpret or misapply government policy for the supply of housing in paragraph 47 of the NPPF, and, in particular, the concepts of "supply" and "delivery", and were his relevant reasons clear and adequate (grounds 5 and 6)?

    (2) Did the Secretary of State misdirect himself, or fail to provide clear and adequate reasons, in his conclusions on the council's housing trajectory (grounds 1 to 4)?

    (3) Did the Secretary of State err in law in his conclusions on the council's record of housing delivery (ground 7)?

The principles on which the court will act in a section 288 challenge

6. In my judgment at first instance in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

    "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).

    (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).

    (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an

application for planning permission is free, "provided that it does not lapse into *Wednesbury* irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasized the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same

vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63).

Paragraphs 47 and 49 of the NPPF

8. Paragraph 47 of the NPPF states:

> "47. 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 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;
> - 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."

The word "deliverable" in that paragraph is explained in a footnote – footnote 11 – which states:

> "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."

Footnote 12 explains the word "developable":

> "To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged."

9. The policy in paragraph 47 of the NPPF has on several occasions been considered by the courts (see, for example, *Suffolk Coastal District Council*, in particular in the judgment of Lord Gill at paragraphs 76 to 79; *City and District Council of St Albans v Hunston Properties Ltd.* [2013] EWCA Civ 1610, in particular the judgment of Sir David Keene at paragraphs 23 and 30; and *Solihull Metropolitan Borough Council v Gallagher* [2014] EWCA Civ 1610, in particular the judgment of Laws L.J. at paragraph 16).

10. Paragraph 49 of the NPPF is concerned with development control decision-making. It states:

> "49. 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."

The consequences for a local planning authority of its failing or succeeding in this fundamental requirement of national planning policy need no further explanation by the court (see *Suffolk Coastal District Council*, in particular the judgment of Lord Carnwath at paragraph 59, and the judgment of Lord Gill at paragraphs 80 to 85; and *Barwood v East Staffordshire Borough Council*, in particular my judgment at paragraph 22).

11. The Planning Practice Guidance ("the PPG"), first published by the Government in March 2014, in the section dealing with "Housing and economic land availability assessment", paragraph 3-029-20140306, under the heading "How is deliverability (1-5 years) and developability (6-15 years) determined in relation to housing supply?", says that "[assessing] the suitability, availability and achievability (including the economic viability of a site) will provide the information as to whether a site can be considered deliverable, developable or not currently developable for housing". Paragraph 3-031-20140306, under the heading "What constitutes a 'deliverable site' in the context of housing policy?", states:

> "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 deliverable 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 judgements on deliverability are clearly

> and transparently set out. If there are no significant constraints … 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.
>
> … ."

Paragraph 3-033-20150327, under the heading "Updating evidence on the supply of specific deliverable sites sufficient to provide five years worth of housing against housing requirements", was published on 27 March 2015, and was thus extant at the time of the Secretary of State's decision in this case. It states:

> "…
>
> [The NPPF] requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing. As part of this, local planning authorities should consider both the delivery of sites against the forecast trajectory and also the deliverability of all the sites in the five year supply.
>
> Local planning authorities should ensure that they carry out their annual assessment in a robust and timely fashion, based on up-to-date and sound evidence, taking into account the anticipated trajectory of housing delivery, and consideration of associated risks, and an assessment of the local delivery record. Such assessment, including the evidence used, should be realistic and made publicly available in an accessible format. …
>
> … ."

The previous version of that paragraph of the PPG, published on 6 March 2014, stated:

> "…
>
> [The NPPF] requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing. As part of this, the local planning authority should consider both the delivery of sites against the forecast trajectory and also the deliverability of all the sites in the five year supply. By taking a thorough approach on an annual basis, local planning authorities will be in a strong position to demonstrate a robust five year supply of sites.
>
> … ."

The inspector's report and the Secretary of State's decision letter

12. The inspector's report runs to 171 pages. It contains a comprehensive consideration of St Modwen's section 78 appeals on their planning merits, recording the parties' cases on the principal issues to which those appeals gave rise, and reaching conclusions on each.

13. The five "main planning issues", identified by the inspector in paragraph 13.5 of her report, included these:

> "13.5. …
>
> (i) the relationship of the proposals to the current and emerging development plan and to national planning policy;
>
> (ii) the adequacy of the provision for housing in the East Riding of Yorkshire, including for affordable housing, and the contribution which either proposal could make to that supply;
>
> (iii) the particular contribution made by the appeal site to the supply of employment land and to wider economic development objectives, including the potential of the Humber to become established as a centre for renewable energy;
>
> … ."

14. On the first of those three issues – "the development plan and national planning policy" – the inspector said, in paragraph 13.7, that there was "no dispute that the proposals conflict with the adopted development plan and the emerging local plan". But she was prepared to give them the benefit of "the presumption in favour of sustainable development" in the NPPF – observing in paragraph 13.10 that that presumption "could … be engaged by virtue of the fact that some of the relevant policies are out of date".

15. On the second issue – the "provision of housing in the East Riding of Yorkshire" – the inspector's conclusions, in paragraphs 13.63 to 13.65, were these:

> "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."

16. Behind those conclusions lay a much more detailed assessment, some of which I shall need to mention in dealing with the issues before us.

17. As for the third issue – "employment land supply and wider economic development objectives" – the inspector said, in paragraph 13.87, that "[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", and that "[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".

18. The inspector set out her "Overall Conclusions" in section 14 of her report. She confirmed that in her view both of the appeal schemes were in conflict with the relevant provisions of the development plan, concluding, in paragraph 14.2, that "[the] proposals run counter to local planning policies in three respects: the use of employment land for housing; the strategy of maintaining a portfolio of employment land; and the location and distribution of residential development", and that they were "contrary to the existing and the emerging development plan". She went on to say, in paragraph 14.4, that it was "necessary … to consider the proposals within the terms of the presumption in favour of sustainable development". Under the heading "The benefits of the proposals", in paragraph 14.5, she referred to the two contentions on which St Modwen had relied in asserting an urgent need for housing development: first, "that a significant shortfall exists in the availability of land for housing"; and second "that there is an acute need for affordable housing". She rejected the first of those two contentions (in paragraph 14.6), but accepted the second (in paragraph 14.7). As to the first, she said this, in paragraph 14.6:

> "14.6. The first … has not been demonstrated. The Council's assessment of the position as to the housing requirement and the housing land supply has been shown to be reasonably robust when tested at this inquiry. This would be the case whether the housing requirement was taken as that for the housing market area or the ERYC administrative area. In either case, a five year supply of sites exists. Since the identified supply already satisfies the test of boosting significantly the supply of deliverable sites, the proposals would not deliver any additional benefit in this respect."

On the likely "adverse impacts" of the proposed development, she concluded, in paragraph 14.10, that "[the] proposals would have a significant, detrimental effect on the portfolio of employment land", and "would also undermine wider economic development objectives …", and, in paragraph 14.16, that "a grant of planning permission for either proposal would strike at the heart of key strategic decisions in the emerging ERYC Local

Plan, thus undermining the plan-making process", and therefore that "the harm by way of prematurity should carry considerable weight". As to "[whether] the proposal would represent a sustainable form of development", she concluded, in paragraph 14.17, that it would not.

19. Finally, in striking "[the] overall planning balance", the inspector concluded in paragraph 14.20 that "[the] proposals are contrary to the development plan", that "[when] considered in the context of the presumption in favour of sustainable development contained in NPPF, these adverse effects would significantly and demonstrably outweigh the benefits of each proposal", and that "[the] material considerations are not sufficient to warrant a decision contrary to the development plan". Explaining her "Recommendation" in the light of those conclusions, she said in paragraph 14.21 that "[at] the heart of [the] inquiry was the question of whether the best use for the appeal site at this time would be to continue to hold it in reserve for employment development or to bring it forward now for housing", and that "[on] the evidence provided", she considered that "the planning case for housing has not been made so that neither appeal should succeed". In paragraph 14.22 she recommended that both appeals be dismissed.

20. In his decision letter the Secretary of State adopted the inspector's formulation of the "main issues" in the appeals, and agreed with her principal conclusions upon them. As to "[the] development plan and national planning policy", he noted in paragraph 10 that there was "no dispute that the proposals conflict with the adopted development plan and the emerging local plan" and he agreed with the inspector "with regard to the weight that this conflict should be given". He also agreed with the inspector's conclusion in paragraph 13.10 that, "in accordance with paragraph 49 of the Framework, so long as the appeal proposals can be accepted as a sustainable form of 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". On "[the] provision for housing in the East Riding of Yorkshire", he concluded in paragraph 11:

> "11. The Secretary of State has carefully considered the Inspector's reasoning on housing provision at IR13.11-13.62 and, for the reasons given at IR13.63-13.65, he agrees with her conclusions that the Council's figures of a requirement for just over 10,000 dwellings for the housing market and just under 14,000 for the Council's administrative area are to be preferred over those put forward on behalf of your client, as is the Council's assessment of overall supply, at almost 15,000. Overall, therefore, the Secretary of State agrees with the Inspector that, whether the analysis is based on the Housing Market Area or the Council's area, it has not been shown that there is any pressing need for additional sites to come forward to sustain the local supply of housing. However, he also agrees with the Inspector's conclusion that substantial weight should attach to the proposals in proportion to the contribution they would make to the supply of affordable housing."

And on "[the] employment land supply and wider economic objectives", he said in paragraph 12 that he agreed with the inspector's conclusion in paragraph 13.87 of her report that, "as the appeal site comprises a substantial proportion of the highly accessible Melton site, it represents a logical choice in relation to the spatial strategy of the emerging local plan with regard to employment land which would be much diminished if

the appeal site were to be developed for housing – thereby having a significant detrimental effect on the portfolio of employment land". He therefore also agreed with the inspector that, "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, potentially causing harm to economic development objectives". In his "Overall Conclusions", he said in paragraph 18 that "[although] the provision of new homes, including affordable housing, would be an important social and economic benefit, … 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". In paragraph 19 he concluded that "[with] regard to Appeal A, … 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", and "[in] the case of Appeal B, … these disbenefits would be compounded by the reduced quantum of housing while the 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". In paragraph 20 he said he agreed with the inspector's recommendations, and therefore dismissed both appeals.

Ouseley J.'s judgment

21. In a typically careful judgment, Ouseley J. considered the "Housing land supply" issue in St Modwen's challenge under five headings, two of which – "Issue (c): the approach to "deliverable" sites" and "Issues (d) and (e): housing record and trajectory" – largely embrace the issues now raised in this appeal.

22. Before getting to those two issues, the judge had come to these conclusions in paragraph 46 of his judgment:

> "46. … [The inspector] 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 [11]. 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. … ."

There is no criticism of those conclusions in this appeal.

23. On "Issue (c): the approach to "deliverable" sites", Ouseley J. said in paragraphs 49 to 52 of his judgment:

> "49. Mr [Christopher] 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. …
>
> 50. [Mr Young] 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 [Paul] Tucker [Q.C.] 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."

24. On "Issues (d) and (e): housing record and trajectory", in paragraphs 53 to 59, the judge said:

"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 EYRC, 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.

…

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."

Issue (1) – Did the Secretary of State misinterpret or misapply government policy for the supply of housing in paragraph 47 of the NPPF?

25. It is necessary at this stage to look more closely at the inspector's conclusions on the supply of housing land. In the section of her report where she dealt with "Planning Policy", she referred in paragraph 4.11 to the policies in paragraphs 47 and 49 of the NPPF, and summarized them, reminding herself of the requirement in paragraph 47 that local planning authorities "should identify a supply of specific, deliverable sites sufficient to provide five years worth of housing against their housing requirements". She came back to that requirement in paragraph 13.11, where she introduced her conclusions on "Issue 2: provision for housing in the East Riding of Yorkshire". As she said in that paragraph, "[where] the existence or otherwise of a shortage of land for housing is relevant to an appeal, it is necessary to have regard to NPPF paragraph 47", which she then paraphrased, and that "[as] part of this process, the LPA must identify sufficient sites to provide five years worth of housing against their housing requirements".

26. The inspector set out "the respective positions of the parties by the end of the inquiry" in a table in paragraph 13.14 of her report. As she said in a footnote (footnote 146), both the council and St Modwen had followed the policy in paragraph 47 of the NPPF "where there has been a persistent record of under delivery" and had therefore "adopted a common approach of including the 20% buffer as part of the calculation of the housing land requirement". The council's position was that the five-year requirement, for its own area, was 13,957, and for the housing market area, 10,053; St Modwen's, that it was 15,312. The parties' "final positions" on "Housing land supply" were set out in a table in paragraph 13.41: the council's position being that there was a "[total] five year supply" figure of 14,971; St Modwen's, that the figure was 4,734. The "principal area of disagreement", as the inspector said in paragraph 13.42, "related to allocations in the emerging local plan", though "[to] a lesser extent, there was also disagreement as to allocations in the existing Local Plan and to larger sites with planning permission".

27. She went on, in paragraphs 13.43 to 13.55, to deal with those issues. In paragraphs 13.43 to 13.50, under the heading "The approach to allocations in the emerging local plan", she said:

> "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. … Both the Appellant and the Council draw attention to the Wainhomes judgement [the judgment of Stuart-Smith J. in *Wainhomes (South West) Holdings Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin)]. 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 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, particularly High Peak and Ottery St Mary. … 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. [7.107; 9.147-8]

13.47. The second point raised 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.

13.48. The emerging local plan makes provision for 23,800 additional dwellings over the plan period. The Council contends that some 11,000 should be considered deliverable over the next five years. The Council's evidence to this inquiry on this point comprises the PSAD dated January 2014, the

SHLAA, which sets out the position at November 2013 and the evidence of Mr Hunt [the council's Planning Policy Manager], particularly appendices L and M (as updated by ERYC 14 and ERYC 25).

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."

28. On the "Supply from the emerging local plan" she noted, in paragraph 13.52, 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". And in paragraph 13.53 she said this:

"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. [7.104-107; 9.147-151]" (my emphasis).

In paragraph 7.107, one of the paragraphs in her summary of the council's case on housing land supply, she had said that "the big issue between the parties is the extent to which the draft allocations are included within the figures".

29. As for "Sites in the existing Local Plan", the inspector found in paragraph 13.54 that the council's "assessment that 612 dwellings could be delivered on these sites is reasonable". And under the heading "Lead-in times" she accepted, in paragraph 13.55, that the council's "figure of 1886 dwellings to be delivered on larger sites … appears to be reasonable".

30. In paragraph 13.56 the inspector turned to "The credibility of the supply figure", and said:

"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. [7.101-103; 9.142-144]" (my emphasis).

31. Before us, Mr Young repeated the argument on the inspector's alleged misinterpretation and misapplication of national policy in paragraph 47 of the NPPF rejected by Ouseley J.. The argument was largely based on what the inspector said in the two sentences I have emphasized in paragraphs 13.53 and 13.56 of her report. Mr Young submitted that the judge was wrong to uphold the inspector's distinction – which the Secretary of State plainly accepted – between "supply" and "delivery", by interpreting the concept of "a supply of specific deliverable sites sufficient to provide five years worth of housing …" (in the second bullet point of paragraph 47 of the NPPF) as not involving, inevitably, an assessment of "what would probably be "delivered"" (paragraph 59 of Ouseley J.'s judgment). Ouseley J.'s judgment, said Mr Young, is inconsistent. Although he had recognized (in paragraph 51) that the policy in paragraph 47 of the NPPF is concerned with "an assessment of the likelihood that housing will be delivered in the five year period" on the site in question, he had gone on (in paragraph 59) to conclude, in effect, that there is no need for an assessment of "what would probably be "delivered"". This distinction between deliverability and the probability of delivery was false, and betrayed a misinterpretation of policy in paragraph 47. Properly understood, submitted Mr Young, the policy requires an assessment of what would probably be delivered. It had not been St Modwen's case at the inquiry, nor was it now, that there had to be certainty of delivery. And, Mr Young confirmed, it was no longer their position that, to be included in the assessment, a site had to have planning permission for housing development.

32. I cannot accept those submissions. In my view it would have been most surprising if the Secretary of State had gone astray in his understanding and application of these fundamental components of national planning policy for the supply of housing, contained as they are in the Government's primary policy document for the planning system in England, which had been published some three years before he came to make his decisions in this case. Nor is it likely that an experienced inspector would err in that way (see the judgment of Lord Carnwath in *Suffolk Coastal District Council*, at paragraph 25). I think the court should approach arguments like this with great hesitation. Here I am in no doubt that the argument is bad; that neither the inspector nor the Secretary of State misinterpreted or misapplied the relevant concepts and requirements in NPPF policy, or failed to express their conclusions with completeness and clarity; and that the judge was therefore right, essentially for the reasons he gave.

33. It is important to keep in mind – as Ouseley J. said in the second sentence of paragraph 49 of his judgment – that Mr Young's argument here is really directed at the language used by the inspector in paragraphs 13.53 and 13.56 of her report. It does not attack her substantive conclusions on the deliverability of housing sites. Nor does it cast doubt on her conclusions, fully adopted by the Secretary of State, on the adequacy of the relevant housing supply when measured against the five-year housing requirement – specifically, 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" (paragraph 13.63 of the inspector's report); that if the Secretary of State were to conclude that the housing

requirement should be based not on the housing market area, but on the council's administrative area, "… the Council's figure of just under 14,000 is to be preferred over the Appellant's figure of 15,300" (ibid.); that St Modwen'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" (paragraph 13.64); that, whether the analysis was based on the housing market area or on the council's administrative area, "the Council has demonstrated the existence of a five year housing land supply" (ibid.); that "[even] if [St Modwen's] five year housing requirement of 15,300 is taken, the shortfall of 300 would be modest in the context of the overall requirement …" (ibid.); and that it had "not been shown that there [was] any pressing need for additional sites to come forward to sustain the local supply of housing …" (paragraph 13.65).

34. Those conclusions were as firm an endorsement of the council's case on housing land supply, and as firm a rejection of St Modwen's, as one could imagine. All of them, together with the assessment on which they were based, were expressly supported by the Secretary of State in paragraph 11 of his decision letter. They are not in themselves said to be unlawful. Nor could they be. They are, all of them, perfectly secure as matters of planning judgment, and not in any way vulnerable in proceedings such as these. I therefore agree with the judge's conclusions in paragraph 46 of his judgment, which were crucial, and – as I have said – are not the subject of any criticism before us.

35. That is the context in which this issue in the appeal has to be considered. It lends an air of inconsequence, even unreality, to the argument put forward. But in any case, as was submitted both by Mr Richard Honey for the Secretary of State and by Mr Tucker for the council, the argument itself is mistaken. Its fatal defect lies in its misreading of the policy in paragraph 47 of the NPPF. It misses the essential distinction between the concept of deliverability, in the sense in which it is used in the policy, and the concept of an "expected rate of delivery". These two concepts are not synonymous, or incompatible. Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessarily will be. For various financial and commercial reasons, the landowner or housebuilder may choose to hold the site back. Local planning authorities do not control the housing market. NPPF policy recognizes that.

36. Where the policies in paragraphs 47 and 49 of the NPPF are concerned with the composition of the five-year supply of housing land, they are consistently worded to refer to a supply of housing sites that can be regarded as "deliverable", not sites that are regarded as certain to be delivered. Thus, in the second bullet point of paragraph 47 the local planning authority's task is to "identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements …" (my emphasis) – with the appropriate buffer (whether 5% or 20%), whereas in the third bullet point, the requirement for subsequent years ("years 6-10 and, where possible, … years 11-15") is for the identification of specific sites that are "developable", or "broad locations for growth". And in the policy in paragraph 49 the implicit requirement is the same, namely that the authority must be able to "demonstrate a five-year supply of deliverable housing sites" (my emphasis). By contrast, the policy for the "housing trajectory" in the fourth bullet point of paragraph 47 is not expressed in terms either of "deliverable" or of "developable" sites as such, but in terms of illustrating "the expected rate of housing delivery" (my emphasis).

37. That those who drafted the policies in paragraph 47 and 49 of the NPPF intended to refer to "deliverable sites" and "deliverable housing sites" where they did, with a meaning distinct both from that of the expression "developable sites" and also from the idea of an "expected rate of housing delivery", is confirmed by their having taken the trouble to define the word "deliverable" so precisely in footnote 11, and the word "developable" in footnote 12. Had the Government's intention been to frame the policy for the five-year supply of housing land in terms of a test more demanding than deliverability, this would have been done.

38. The first part of the definition in footnote 11 – amplified in paragraphs 3-029, 3-031 and 3-033 of the PPG – contains four elements: first, that the sites in question should be "available now"; second, that they should "offer a suitable location for development now"; third, that they should be "achievable with a realistic prospect that housing will be delivered on the site within five years"; and fourth, that "development of the site is viable" (my emphasis). Each of these considerations goes to a site's capability of being delivered within five years: not to the certainty, or – as Mr Young submitted – the probability, that it actually will be. The second part of the definition refers to "[sites] with planning permission". This clearly implies that, to be considered deliverable and included within the five-year supply, a site does not necessarily have to have planning permission already granted for housing development on it. The use of the words "realistic prospect" in the footnote 11 definition mirrors the use of the same words in the second bullet point in paragraph 47 in connection with the requirement for a 20% buffer to be added where there has been "a record of persistent under delivery of housing". Sites may be included in the five-year supply if the likelihood of housing being delivered on them within the five-year period is no greater than a "realistic prospect" – the third element of the definition in footnote 11 (my emphasis). This does not mean that for a site properly to be regarded as "deliverable" it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years. As Lord Gill said in paragraph 78 of his judgment in *Suffolk Coastal District Council*, when referring to the policies in paragraph 47 of the NPPF, the insistence on the provision of "deliverable" sites sufficient to provide five years' worth of housing reflects the futility of local planning authorities relying on sites with "no realistic prospect of being developed within the five-year period".

39. One must keep in mind here the different considerations that apply to development control decision-making on the one hand and plan-making and monitoring on the other. The production of the "housing trajectory" referred to in the fourth bullet point of paragraph 47 is an exercise required in the course of the preparation of a local plan, and will assist the local planning authority in monitoring the delivery of housing against the plan strategy; it is described as "a housing trajectory for the plan period" (my emphasis). Likewise, the "housing implementation strategy" referred to in the same bullet point, whose purpose is to describe how the local planning authority "will maintain delivery of a five-year supply of housing land to meet their housing target" is a strategy that will inform the preparation of a plan. The policy in paragraph 49 is a development control policy. It guides the decision-maker in the handling of local plan policies when determining an application for planning permission, warning of the potential consequences under paragraph 14 of the NPPF if relevant policies of the development plan are out-of-date. And it does so against the requirement that the local planning authority must be able to "demonstrate a five-year supply of deliverable housing sites",

not against the requirement that the authority must "illustrate the expected rate of housing delivery through a housing trajectory for the plan period".

40. We are concerned with the alleged unlawfulness of a development control decision. In the light of a proper understanding of the policies in paragraphs 47 and 49 of the NPPF, in particular those pertaining directly to development control decision-making, was the judge's approach to that allegation misguided? In my view it plainly was not.

41. When the two sentences on which Mr Young concentrated in paragraphs 13.53 and 13.56 of the inspector's report are read fairly in their full context, they do not, in my view, reveal any misunderstanding of NPPF policy. The inspector was clearly alive to the distinction between deliverability and actual delivery, and had well in mind that deliverability entailed a "realistic prospect" of the site being delivered. She was entitled to conclude, as a matter of planning judgment, that "given the number of sites involved, it may well turn out that not all allocations currently identified as deliverable will in fact be delivered" (paragraph 13.53), and, again as a matter of planning judgment, that the council's housing supply figure of 15,000 dwellings was not undermined by its housing trajectory, given that "the assessment of supply is distinct from that for delivery" (paragraph 13.56). Indeed, those conclusions were as much statements of common sense as they were of planning judgment. In coming to them, the inspector did not dilute the test of deliverability provided for in paragraph 47 of the NPPF. It is plain – for example, in paragraphs 13.11 and 13.43 of her report – that she had a sound understanding of the policy in paragraph 47, and that this lay behind her conclusions in paragraphs 13.43 to 13.56, and, in particular, the distinction she drew in paragraphs 13.53 and 13.56 between deliverability and the actuality of delivery. And the reasons she gave for those conclusions, and more generally in her treatment of the housing land supply issue, were adequate and clear.

42. Ouseley J. was, in my view, undoubtedly right to conclude that the inspector and the Secretary of State did not misinterpret or misapply the NPPF policies in play, and that the relevant questions on "deliverability" and "delivery" were tackled lawfully. His grasp of the distinction between those two concepts is obvious both in paragraph 51 and in paragraph 59 of his judgment. There is no inconsistency of the kind complained of by Mr Young, either in those two paragraphs or elsewhere in the judgment. The judge did not suggest that in assessing deliverability a local planning authority should leave entirely to one side any difficulties beyond their control. But as he said in paragraph 51, "the assessment of housing land supply" is concerned with "deliverability", and "does not require certainty that the housing sites will actually be developed within [the five-year] period", and that, as the inspector recognized, "deliverability … was not disproved by showing that there were uncertainties".

43. The judge was not drawn beyond the court's proper role in reviewing a planning decision. What he said in paragraph 59 of his judgment was correct – that the evaluation of housing land supply involved the exercise of "planning judgment", having regard to the allocation of sites for housing development in the emerging local plan; that the "… difference between what was "deliverable" and what would probably be "delivered" … lies at the heart of the difference between the housing supply figures and the housing trajectory"; that this difference "did not reflect, on the Inspector's conclusions, a contradiction between her assessment of what was "deliverable" and what [the council] thought was "deliverable" …"; that where "deliverability" was concerned, the inspector

had "accepted that [the council] 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"; that where "delivery" was concerned, she recognized that "market factors", which were not in the council's control, would play their part; and that "the solution to a problem of delivery is not an increase in the supply of sites which are capable of delivery".

44. In my view therefore, the appeal cannot succeed on grounds 5 and 6.

Did the Secretary of State misdirect himself on the council's housing trajectory?

45. Mr Young submitted that the inspector, and in turn the Secretary of State, failed to take into account the council's housing trajectory in Figure 1 of its "East Riding Proposed Submission Local Plan – Housing Implementation Strategy (2012-2029)" of April 2014 as compelling evidence of its inability to demonstrate the requisite five-year supply of deliverable housing sites. That evidence had generated an important issue in the appeals, which the inspector should have addressed, in clear and adequate reasons. The judge was wrong to describe it as "not a principal important issue". It was undeniably an important issue in a case such as this. The housing trajectory, said Mr Young, is "the beating heart" of the policies in paragraph 47 of the NPPF. Here, he submitted, it was "the most critical piece of evidence" on housing land supply. Yet the inspector seems to have ignored it, failing to see its true significance and avoiding the "dichotomy of figures" presented to her by the council. The only possibly relevant reasons are in the final sentence of paragraph 13.56 of her report, where she said that "the assessment of supply is distinct from that of delivery". That paragraph seemed to be dealing with a different matter – the fluctuations in the council's housing supply figures, rather than with the housing trajectory itself. Even so, submitted Mr Young, its final sentence revealed a misunderstanding of NPPF policy for the preparation of a housing trajectory; it did not provide the "intelligible and … adequate" reasons required on a "principal important controversial [issue]" – as Lord Brown put it in *South Bucks District Council v Porter* (at p.1964D); and the absence of proper reasons indicates a failure to have regard to a material consideration.

46. I am unable to accept that argument. It is, in part, a reprise of the submissions I have already rejected on the previous issue. I am not going to repeat what I have already said, except that in my view the inspector's and Secretary of State's interpretation and application of government policy in paragraphs 47 and 49 of the NPPF, including the policy on the preparation of a "housing trajectory" in the fourth bullet point of paragraph 47, were legally impeccable. But there are four short conclusions to add.

47. First, it is wrong to describe the council's housing trajectory as having been, in itself, a "principal important controversial [issue]". Evidence was given about it at the inquiry, certainly, and submissions were made in closing. But it was only one feature of the case put before the inspector on housing land supply. She had regard to it as a material consideration, which bore on the question of whether the council's figures for housing land supply were credible. Ouseley J.'s conclusions to this effect in paragraph 58 of his judgment are correct. In these proceedings before the court the importance of the housing trajectory has been elevated to a significance it simply did not have in evidence and submissions at the inquiry. This was not conceded, but it seems quite plain. And I agree

with the judge's comment that one must "be cautious lest a point on a [section] 288 challenge takes a very different shape and emphasis from that which it had before the inspector". That is what has happened here.

48. Secondly, the inspector understood what St Modwen were saying about the housing trajectory, which was that it served to demonstrate a lack of credibility in the council's case on housing land supply. Mr Justin Gartland of Nathaniel Lichfield & Partners, who gave planning evidence on behalf of St Modwen at the inquiry, had described the use of the housing trajectory as a "reality check" (as he confirms in paragraph 95 of his witness statement of 14 August 2015). The inspector knew what was being suggested. The relevant submission made by Mr Young at the end of the inquiry appeared in a single paragraph – paragraph 295 – of a lengthy closing speech, 377 paragraphs in all. It came shortly after another submission on "credibility", in paragraph 291(vi) – that "the Council's supply figure has fluctuated to such an alarming degree that it … lacks any credibility". It acknowledged the role of the housing trajectory in the council's plan-making process. It was, as Mr Young said, contained in the council's "Housing Implementation Strategy (ERYC 32) published as part of the LP evidence base" – which confirms, in paragraph 2.10, that "[the] housing trajectory in figure 1 … shows how the Council plans to manage the delivery of housing over the plan period".

49. In paragraph 9.144 of her report, when summarizing St Modwen's case on housing land supply, the inspector recorded what Mr Young had submitted:

> "9.144. Another major problem with the credibility of the Council's own housing supply figures is the trajectory in the Housing Implementation Strategy, which shows delivery in 2013-2014 at less than 1,000 units (and closer to 800), followed by less than 1,400 for the following two years. The figure is 1,500 for 2016-17 and marginally higher than that in 2017-2018. That is a supply of about 6,500 to 7,000 in the next 5 years on the basis of its own evidence to the Local Plan examination."

This was a true reflection of the way in which the point had been put to her, in support of the argument that the council's position on housing land supply lacked credibility and should not be accepted, and with emphasis on the supply figure of a maximum of 7,000. In fact, it was almost an exact quotation of the submission made by Mr Young in paragraph 295 of his closing speech.

50. The inspector went on to record St Modwen's main argument on housing land supply, which included these points: that St Modwen had "examined the Council's delivery on the basis of just sites with planning permission and no discounting and projecting forward past delivery" (paragraph 9.146 of her report); that "[the] supply of housing should be assessed on what is available now and that will largely be sites with planning permission" (paragraph 9.147); that "… it is inappropriate to include sites without planning permission or even a resolution to grant unless there is very clear evidence supporting the delivery of that site in the next 5 years" (paragraph 9.148); that "[St Modwen] has elected not to accept any of the sites without planning permission or a resolution to grant" (paragraph 9.149); that "[St Modwen] believes that the Council's supply of housing land is around 5,000 dwellings", that this was "woefully inadequate", and that it was "clear that the Council has nothing like a five year supply of housing land" (paragraph 9.154). That was the gist of St Modwen's case on housing land supply,

which the inspector – and the Secretary of State – rejected. No complaint is or could be made about the inspector's recording of it, nor can it be said that she failed to understand it or failed to address it.

51. Thirdly, it is not open to St Modwen now to go behind the inspector's conclusions on the credibility and reliability of the parties' respective cases on housing land supply, which she reached in the light of all the relevant evidence, including the council's housing trajectory. Such conclusions are well within the exclusive province of planning judgment (see, for example, my judgment in *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040, at paragraph 33, and the first instance judgments of Stuart-Smith J. in *Wainhomes*, at paragraphs 35 and 54, and Dove J. in *Eastleigh Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin), at paragraphs 13 and 15). For the court to venture there would be to trespass beyond its jurisdiction in the review of planning decisions (see paragraphs 6 and 7 above).

52. Fourthly, it is pointless to rehearse the evidence and submissions presented to the inspector on the council's housing trajectory in an attempt to persuade the court that her conclusions on housing land supply, shared by the Secretary of State, are somehow legally flawed. They are not legally flawed. On a fair reading, they are all well within the range of lawful planning judgment. As Ouseley J. accepted, the discussion of the parties' evidence and submissions, in paragraphs 13.41 to 13.56 of the inspector's report, and her conclusions in paragraphs 13.63 to 13.65, are unassailable. Her conclusions are comprehensive and cogent, and are expressed in clear and adequate reasons. And they are not undone by a failure to take into account, as a material consideration, the council's housing trajectory, or by irrationality in the weight given to it.

53. As to the approach to sites allocated in the emerging local plan – a matter at the heart of the parties' dispute on the existence or not of a five-year supply of housing land – the inspector's conclusions in paragraphs 13.43 to 13.53 of her report, including her conclusion in paragraph 13.53 that "it may well turn out that not all allocations currently identified as deliverable will in fact be delivered", are faithful to the relevant policy in paragraph 47 of the NPPF, and, in law, unimpeachable. Her focus on the crucial question of deliverability, and her application of NPPF policy on that question, cannot be faulted.

54. Having set out those conclusions, the inspector went on in paragraph 13.56 to consider the credibility of the housing supply figures presented on either side. She referred at the end of that paragraph to her summary of St Modwen's case in paragraphs 9.142 to 9.144. As her conclusions show, she did not accept that the council's housing trajectory disproved its case on supply. This was a planning judgment she could properly make on the evidence and submissions before her. In making it, she demonstrably had regard to the housing trajectory as a material consideration; she referred to it directly. And she gave it the weight she judged to be right in view of its status and role.

55. Her relevant reasons, read as a piece, are an ample explanation of her conclusions. Individual sentences in them should not be separated from their full context. In terms that were crystal-clear, she disposed of the argument that the council's housing supply figure lacked credibility – or "reliability". She distinctly preferred the council's case to St Modwen's, finding herself able to conclude, in paragraph 13.64, that the council had "demonstrated the existence of a five year housing land supply".

56. That, in the end, was how she resolved the question of credibility, which required her to decide, on all the evidence and submissions she had heard on housing land supply, which side's case she was able to believe. The relevant planning judgment, which the Secretary of State accepted, fell very clearly in favour of the case put forward by the council. It cannot be disturbed in a legal challenge.

57. I conclude, therefore, that Ouseley J.'s conclusions on this part of St Modwen's challenge are valid, and that these four grounds of St Modwen's appeal – grounds 1 to 4 – must also fail.

Did the Secretary of State err in his conclusions on the council's record of housing delivery?

58. Mr Young's argument on this issue – the issue in ground 7 – began with the submission that Ouseley J. should not have thought that the inspector's failure to confront the council's "past shortcomings in the supply of land" could be overcome by the application of the 20% buffer. The inspector had not explained how in her view the council's claimed five-year supply of 15,000 dwellings could be squared with its "local delivery record" of 1,000 dwellings a year, and even less than that in the five years preceding the inquiry. Here again there was a failure to have regard to a material consideration. The council's "local delivery record" was, said Mr Young, "absolutely central" in St Modwen's case on housing land supply. But the inspector did not grapple with it. Before us, however, Mr Young concentrated on a different theme, not pursued before Ouseley J. – that neither the inspector nor the Secretary of State had dealt with the now current guidance in the PPG under the heading "Updating evidence on the supply of specific deliverable site sufficient to provide five years worth of housing against housing requirements". This revised passage in the PPG had been published after the inquiry, and after the inspector submitted her report to the Secretary of State, but before he issued his decision. In the circumstances, Mr Young submitted, the Secretary of State ought to have dealt with it.

59. These arguments I also reject, for reasons similar to those I have given in discussing the previous two issues.

60. Here again one must take a fair-minded approach to the inspector's conclusions. The judge plainly did that in paragraphs 53 to 59 of his judgment. As he recognized, the evidence on the council's record of housing delivery, like the evidence on its housing trajectory, went to the credibility and reliability of its figures for housing land supply. And, as he found, that question was sufficiently and lawfully addressed by the inspector in paragraphs 13.41 to 13.56 and 13.63 to 13.65 of her report, and the reasons she gave were legally good. I agree with him.

61. As Mr Honey submitted, the council's housing trajectory looked forward in time, its housing record back. But the question of the deliverability of housing sites, the essential question for the inspector in considering the parties' cases on the five-year supply of housing land, required her to exercise her planning judgment. This had now to be done in the light of the emerging local plan, with its new policies for housing development and its new allocations of land for such development. In doing it, the inspector did not ignore the council's housing record. She had regard to it, though – correctly – not as a "principal

important controversial issue". Her summary of St Modwen's case – in particular in paragraphs 9.142 to 9.144 of her report, to which she referred in paragraph 13.56, included these points: that the council's claim to have a five-year housing supply of in excess of 15,000 dwellings was "utterly implausible on the available evidence" (paragraph 9.142), since this represented "a supply of over 3,000 houses a year" and "[the] Council's past track record shows it has never delivered houses in that quantity" (paragraph 9.142(i)); that "the available evidence from [Mr Hunt] is that completions up until April 2014 are still below the [regional strategy] requirement of 1,150 …" (paragraph 9.142(ii)); that against a requirement of 3,500 completions a year, "the Council has delivered an average of just 635 a year over the last 5 years" (paragraph 9.142(iii)); that for the years between 2004 and 2008 there had been "an annual delivery rate of 1,495 …" (paragraph 9.142(iv)); that the "annual delivery rate" for the period 2004 to 2013 was "1,017" (paragraph 9.142(v)); and that the council "accepts the record of persistent under delivery …" (paragraph 9.143). She had these points in mind when she reached her conclusions in paragraph 13.56, and in paragraph 13.64. Plainly, they did not dissuade her from the view that the council had, as she said in paragraph 13.64, "demonstrated the existence of a five year housing land supply". This was her ultimate planning judgment on the housing land supply issue. I see no reason for the court to interfere with it.

62. I do not accept that, in paragraph 59 of his judgment, Ouseley J. acquitted the inspector of error in dealing with the council's record of housing delivery merely on the basis of the 20% buffer required in cases where there has been "a record of persistent under delivery …". That notion is misconceived. To see why the judge found against St Modwen on this issue one must read the whole of his conclusions in paragraphs 53 to 59 of his judgment. His reference to the 20% buffer in paragraph 59 was entirely legitimate. What he said was that "[the] past shortcomings in the supply of land were addressed in the manner required by the NPPF through the 20 percent buffer …". He was right. As Mr Honey submitted, the 20% buffer is "a mechanism to address historic under delivery", its purpose being "to provide a realistic prospect of achieving the planned supply …". With this in mind, the judge was merely acknowledging, correctly, that the council had accepted the need for a 20% buffer to be applied in this case. This concession is referred to in paragraph 7.103 in the inspector's summary of the council's case on housing land supply – one of the paragraphs mentioned at the end of paragraph 13.56 – where she had recorded the council's "acceptance of a 20% buffer". It is also acknowledged in paragraph 13.14, where she set out the parties' respective positions on the housing land requirement, confirming in a footnote their "common approach of including the 20% buffer …". In my view therefore, Mr Young's submission here does not begin to prove any error of law.

63. Lastly, the argument that the Secretary of State failed to apply the revised guidance in the PPG affords no basis for quashing his decision. The revised guidance refers to a local planning authority's "local delivery record", but the thrust of it, at least for a development control decision, is not materially different from the previous guidance. And it cannot be said that the inspector's conclusions on the issue of housing land supply, or the Secretary of State's, could conceivably have been different if the new guidance had been explicitly taken into account. Those conclusions, as I have said, were lawfully reached in the light of the council's housing trajectory and "local delivery record". There is, in my view, nothing in this point at all.

Conclusion

64. For the reasons I have given I would dismiss this appeal.

Lord Justice McCombe

65. I agree.

Lord Justice Jackson

66. I also agree.

Neutral Citation Number: [2015] EWHC 1879 (Admin)

Case No: CO/1359/2015

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

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham

Date: Friday 3rd July 2015

Before :

MR JUSTICE HICKINBOTTOM

- -

Between :

OADBY AND WIGSTON BOROUGH COUNCIL

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) BLOOR HOMES LIMITED

Defendants

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Timothy Leader (instructed by **Mrs Anne Court, Monitoring Officer and Director of Legal Services, Oadby & Wigston Borough Council**) for the **Claimant**
Gwion Lewis (instructed by the **Government Legal Department**) for the **First Defendant**
Reuben Taylor QC (instructed by **Squire Patton Boggs**) for the **Second Defendant**

Hearing date: 26 June 2015

- -

Judgment
As Approved by the Court

Mr Justice Hickinbottom:

Introduction

1. Oadby & Wigston is a small borough of 56,000 people, to the south east of and adjacent to the city of Leicester. The three main towns of Oadby, Wigston and South Wigston fall within the Leicester Principal Urban Area ("PUA"); but the south part of the borough is largely open countryside.

2. The Claimant adopted the Oadby & Wigston Core Strategy Development Plan Document on 28 September 2010. Using housing figures from the revoked East Midlands Regional Plan, which were based on 2004 population projections, Policy CS1 makes provision for 1,800 new homes in the period 2006 to 2026 at an average rate of 90 dwellings per year ("dpa"). Although Policy CS1 recognises that some of these new dwellings will have to be built outside the PUA, most are directed to be within it; and Policy CS7 restricts development in the countryside unless (amongst other things) there is a justifiable need which outweighs the adverse effect on the rural environment.

3. This claim concerns the proposed construction of up to 150 dwellings and related development on land at Cottage Farm, Glen Road, Oadby, Leicestershire ("the Site"), which is outside the PUA. An application for planning permission by the Second Defendant ("the Developer") was refused by the Claimant planning authority ("the Council") on 27 February 2014; but, after a five-day inquiry, on 10 February 2015 an inspector appointed by the Secretary of State, Geoffrey Hill BA Hons, DipTP, MRTPI ("the Inspector"), allowed the Developer's appeal under section 78 of the Town and Country Planning Act 1990 ("the 1990 Act") and granted outline planning permission for the proposed development.

4. In this application under Section 288 of the 1990 Act, the Council seeks to quash that decision, on one broad ground, namely that the Inspector erred in his assessment of the full objectively assessed need for housing.

5. Before me, Timothy Leader appeared for the Council, Gwion Lewis for the Secretary of State and Reuben Taylor QC for the Developer. I thank each for his contribution. I should say that Mr Leader and Mr Taylor also appeared before the Inspector, for the Council and the Developer respectively.

The Legal Background

6. The relevant legal background is uncontroversial. In relation to planning determinations generally, whether the relevant decision-maker is a local planning authority or an Inspector on behalf of the Secretary of State on appeal, the following propositions, relevant to this claim, are well-established.

    i) Section 70(2) of the 1990 Act provides that, in dealing with an application for planning permission, a decision-maker must have regard to the provisions of "the development plan", as well as "any other material consideration". "The development plan" sets out the local planning policy for an area, and is defined by section 38 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to include adopted local plans.

ii) Section 38(6) of the 2004 Act provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Section 38(6) thus raises a presumption that planning decisions will be taken in accordance with the development plan, but that presumption is rebuttable by other material considerations.

iii) "Material considerations" in this context include statements of central government policy which are now largely set out in the National Planning Policy Framework ("NPPF"), effective from 27 March 2012, as supplemented by the Secretary of State's web-based Planning Practice Guidance ("the PPG"), which from 6 March 2014 replaced a plethora of earlier guidance documents and which is subject to regular updates.

iv) The true interpretation of policy, including the NPPF, is a matter of law for the court to determine (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13).

v) Whilst he must take into account all material considerations, the weight to be given to such considerations is exclusively a matter of planning judgment for the decision-maker, who is entitled to give a material consideration whatever weight, if any, he considers appropriate, subject only to his decision not being irrational in the sense of Wednesbury unreasonable (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780F-G).

vi) An inspector's decision letter cannot be subjected to the same exegesis that might be appropriate for a statute or a deed. It must be read as a whole, and in a practical, flexible and common sense way, in the knowledge that it is addressed to the parties who will be well aware of the issues and the arguments deployed at the inspector's inquiry, so that it is not necessary to rehearse every argument but only the principal important controversial issues. The reasons for an inspector's decision must be intelligible and adequate to enable an informed observer to understand why he decided the appeal as he did, including his conclusions on those issues. They must not give rise to any substantial doubt that he proceeded in accordance with the law, e.g. in his understanding the relevant policies (see Seddon Properties v Secretary of State for the Environment (1981) 42 P&CR 26 at page 28 per Forbes J; Bolton Metropolitan Borough Council v Secretary of State for the Environment [1995] 71 P&CR 309 at page 314; South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80 at pages 82H, 83F-G per Hoffmann LJ; and South Bucks District Council v Porter (No 2) [2004] UKHL 33 at [36] per Lord Brown). That standard of required reasons applies even where there are issues that turn on expert evidence: a planning decision-maker is not required to give detailed reasons for accepting or rejecting expert evidence, so long as it is apparent why the decision-maker has found as he has on the principal important controversial issues (a well-established proposition,

recently confirmed in Wind Prospect Developments Limited v Secretary of State for Communities and Local Government [2014] EWHC 4041 (Admin) at [36] per Lang J).

vii) Although an application under section 288 is by way of statutory application, it is determined on traditional judicial review grounds.

Housing Projections, Assessments and Requirements Etc

7. A local planning authority has two distinct, although associated, functions. First, since the Localism Act 2011 ("the 2011 Act"), and subject to national policy and a duty to cooperate with other relevant authorities imposed by section 33A of the 2004 (inserted by section 110 of the 2011 Act), a local planning authority is responsible for strategic development plans for its own area. Such plans are subject to independent examination by an inspector appointed by the Secretary of State, who determines whether the plan is "sound" and whether it complies with various procedural requirements. Once a development plan is adopted, then it sets the background against which the authority performs its second function, namely to determine applications for planning permission.

8. In respect of future housing, there are a number of different concepts and terms in play, which I considered recently in Gallagher Homes Limited and Lioncourt Homes Limited v Solihull Metropolitan District Council [2014] EWHC 1283 (Admin) at [37] as follows:

> "(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. They provide useful long-term trajectories, in terms of growth averages throughout the projection period. However, they are not reliable as household growth estimates for particular years: they are subject to the uncertainties inherent in demographic behaviour, and sensitive to factors (such as changing economic and social circumstances) that may affect that behaviour. Those limitations on household projections are made clear in the projections published by the Department of Communities and Local Government ('DCLG') from time-to-time (notably, in the section headed 'Accuracy').
>
> (ii) Full Objective Assessment of Need for Housing ['FOAN']: 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 is not necessarily the same. An objective assessment of housing need may result in a different figure from that based on purely demographics if, e.g., the assessor considers that the household projection fails properly to take into account the effects of a major downturn (or upturn) in the economy that will affect future housing needs in an area. Nevertheless, where there are no such factors, objective assessment of need may be – and

> sometimes is – taken as being the same as the relevant household projection.
>
> (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 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."

The "proper process" there referred to is the rigorous process that is required before a development plan is adopted, to which I have referred.

9. This claim in part concerns "affordable housing", as opposed to "market housing". Affordable housing is defined at some length in Annex 2 to the PPG, the core definition being:

> "Social rented, affordable rented and intermediate housing, provided to eligible households whose needs are not met by the market."

The PPG emphasises that:

> "Homes that do not meet the above definition of affordable housing, such as 'low cost market' housing, may not be considered as affordable housing for planning purposes."

Relevant National Policies

10. The relevant national policies are set out in the NPPF.

11. Paragraph 14 provides, so far as relevant to this claim (all emphasis in the original):

> "At the heart of the [NPPF] is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> For **plan-making** this means that:
>
> - local planning authorities should positively seek opportunities to meet the development needs of their area;

- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:

  — any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  — specific policies in this Framework indicate development should be restricted…

For **decision-taking** this means [unless material considerations indicate otherwise]:

- approving development proposals that accord with the development plan without delay; and

- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless

  — any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  — specific policies in this Framework indicate development should be restricted…".

12. Part 6 of the NPPF deals with "Delivering a wide choice of high quality homes". The identification of sites for future housing provision is dealt with in paragraphs 47-49, which provide (so far as relevant) as follows:

> "47. 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 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;
>
> - 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;…

48. …

49. 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."

These policy provisions inform the relevant housing requirement to be used by a local planning authority for both its strategic plan-making function when (e.g.) preparing a local plan, and its function of decision-making in respect of a particular planning application.

13. In respect of local plan-making, paragraphs 47 and 49 of the NPPF require such a plan to meet the "policy on" housing requirement, i.e. the FOAN adjusted in accordance with other policies set out the NPPF, e.g. those designed to protect the Green Belt which might result in a particular authority being development-constrained and unable to deliver the FOAN for housing.

14. The policy in respect of plan-making is further developed in paragraphs 150 and following of the NPPF. Paragraphs 158-159 are particularly relevant to this claim:

> "158. Each local planning authority should ensure that the Local Plan is based on adequate, up-to-date and relevant evidence about the economic, social and environmental characteristics and prospects of the area. Local planning authorities should ensure 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.
>
> 159. Local planning authorities should have a clear understanding of 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."

15. In respect of decision-taking in individual applications, paragraphs 47 and 49 of the NPPF are particularly relevant in the absence of a demonstration of a particular level of supply of deliverable housing sites. If the authority cannot demonstrate a five-year plus buffer supply of housing land at the time of a decision for specific housing development, then that weighs in favour of a grant of permission. In particular, in those circumstances, (i) relevant housing policies are to be regarded as out-of-date, and hence of potentially restricted weight; and (ii) there is a presumption of granting permission unless the adverse impacts of granting permission "significantly and demonstrably" outweigh the benefits, or other NPPF policies indicate that development should be restricted in any event.

16. In support of the housing requirement provisions in the NPPF, the Secretary of State has published guidance in Part 2a of the PPG. Of particular relevance to this claim are paragraphs 2a-22 and 2a-29. The former, under the heading "How should affordable housing need be calculated?", states:

> "Plan makers working with relevant colleagues within their local authority (e.g. housing, health and social care departments) will need to estimate the number of households and projected households who lack their own housing or live in unsuitable housing and who cannot afford to meet their housing needs in the market.
>
> This calculation involves adding together the current unmet housing need and the projected future housing need and then subtracting this from the current supply of affordable housing stock."

Paragraphs 2a-29 states:

> "The total need for affordable housing should be converted into annual flows by calculating the total net need (subtract total available stock from total gross need) and converting total net need into an annual flow.

> The total affordable housing need should then be considered in the context of its likely delivery as a proportion of mixed market and affordable housing developments, given the probable percentage of affordable housing to be delivered by market housing led developments. An increase in the total housing figures included in the local plan should be considered where it could help deliver the required number of affordable homes."

17. In respect of housing provision, the NPPF thus effected a radical (generally, pro-housing development) change from the previous policy (Solihull Metropolitan Borough Council v Gallagher Estates Limited and Lioncourt Homes Limited [2014] EWCA Civ 1610 at [7]-[16]); and, if the local planning authority has not adopted a new local plan since the NPPF came into effect, its housing requirement should be calculated on the current FOAN, unqualified and unconstrained by other policies (City and District Council of St Albans v Hunston Properties Limited and the Secretary of State for Communities and Local Government [2013] EWCA Civ 1610 ("Hunston") at [21]-[27]).

The Issue before the Inspector

18. In paragraph 4 of his decision letter, the Inspector identified two main issues for his determination.

19. One concerned the effect of the proposed development on the character and appearance of the area and the wider landscape setting. The Inspector's conclusions in respect of that issue are not challenged in this application.

20. The Inspector described the second issue thus:

> "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."

The burden of demonstrating a five-year housing land supply fell on the Council.

21. In considering the issue, the Inspector had to consider and then compare:

i) The available housing land sites. The Inspector found that sites had been identified for 705 dwellings over the five-year period (paragraph 54). That finding is not challenged.

ii) The relevant housing requirement figure. Citing Hunston and Gallagher at first instance, the Inspector correctly noted that, as the Oadby & Wigston Core Strategy had been adopted prior to the NPPF coming into effect, and there had been no post-NPPF review, it was necessary to consider the policy-off FOAN (paragraphs 13-14). To the FOAN figure would have to be added (a) the appropriate buffer (in view of the Council's persistent past failures to meet housing requirement targets, 20%) and (b) backlog (93 over the five-year period), neither of which is in issue before me. What is in issue is the

Inspector's adoption of 147 dpa for the policy off FOAN for housing – indeed, that is the core issue in the application now before me.

22. In respect of the FOAN for housing, the Inspector was assisted by the evidence of two experts in planning demographics, namely Justin Gardner of Justin Gardner Consulting (instructed on behalf of the Council) and Guy Longley of Pegasus Group (instructed on behalf of the Developer). The Developer instructed a second expert, Mark Rose of HOW Planning LLP, specifically in relation to affordable housing need.

23. Mr Gardner explains (in paragraph 1.1 of his statement for the Inspector's inquiry) that he often works in association with planning consultants GL Hearn Limited. As such, Mr Gardner had worked on the Leicester and Leicestershire Strategic Housing Market Assessment ("the SHMA") for the Leicester and Leicestershire Local Planning Authorities including the Council, together comprising the Leicestershire Housing Market Area ("the Leicester HMA") in June 2014. I stress that the SHMA was in respect of the whole HMA; although it gave figures broken down into the requirements for each local planning authority involved.

24. The SHMA used the DCLG Household Projections, based upon the 2011 Sub-National Population Projections ("SNPP") and Interim Household Projections. It concluded that the Leicestershire HMA had a FOAN for housing for the period 2011-31 in the range of 3,775-4,215 dpa, of which the FOAN for the Oadby & Wigston was 80-100 dpa (paragraph 9.22 and table 84), compared with the Policy CS1 requirement of 90 dpa.

25. It said that these figures were policy off; and so, in translating the figures into housing targets in development plans, individual planning authorities would have to consider whether adjustments were necessary to adjust the level of housing in the light of (e.g.) evidence regarding the potential for local economic growth or to address unmet needs from adjoining authorities (Executive Summary, Conclusions regarding Overall Housing Need). The SHMA itself indicated that the housing need for Oadby & Wigston taking into account econometric forecasts (i.e. housing needs derived from employment projections) was 173 dpa (paragraph 5.55 and table 23); and the need for affordable housing was gross 249 dpa of which the estimated level of current stock was 89 dpa, leaving a net need of 160 dpa.

26. Indeed, the SHMA referred to "a particularly acute need" for affordable housing in Oadby & Wigston (paragraph 9.14). The authors of the SHMA themselves considered whether an upward adjustment in housing provision levels was appropriate "to support the provision of additional affordable housing and to ease acute levels of need" (paragraph 9.25), and had made such an adjustment. However, despite the net need 160 dpa described above, the adjustment was very modest, because:

    i) The mid-point demographic housing need per annum for Oadby & Wigston was 75 dpa. The net affordable housing need (160 dpa) as a percentage of the demographic need was therefore 213% (paragraph 6.61 and table 47). On the basis that, to ensure housing development was commercially viable, affordable housing could be no more than, say, 20% of the total housing, to meet the full affordable housing need would requiring increasing the annual total housing requirement to 800 dpa (paragraph 6.63 and table 48) – which was clearly unrealistic and unviable (paragraph 6.80).

ii) The private sector would in fact make up for shortages of affordable housing, by providing accommodation in the private market through the provision of housing benefit for those who would otherwise require affordable housing. The estimated number of such lettings was in excess of the total need derived through housing needs analysis; and there was no obvious shortfall in the supply of private rental sector dwellings and its ability to meet the needs of households that would otherwise require affordable housing: (paragraphs 6.68-6.69).

27. On the basis of the SHMA, the Council continued to work to a housing requirement figure of the mid-point 90 dpa, which was in line with Policy CS1.

28. In accordance with the duty to cooperate in section 33A of the 2004 Act and the requirement of paragraph 179 of the NPPF for "local planning authorities to work together to meet development requirements which cannot wholly be met within their own areas", on 23 September 2014, the Council approved a Memorandum of Understanding between all of the authorities that comprise the Leicestershire HMA. That set out the figures for housing need taken from the SHMA, which, in Oadby & Wigston's case were said to be 1,360-1,700. The memorandum confirmed that the Council – and each of the relevant authorities – "are able to accommodate the upper figure… within their own area" (paragraph 3.5; see also paragraph 5.2), such that there were no "cross-border" issues.

29. In his evidence to the Inspector, Mr Gardner (unsurprisingly, given that the SHMA was published as recently as June 2014) supported the analysis and conclusions from that document. He concluded as follows:

i) Of the 80-100 dpa range in the SHMA, the lower figure was based on demographic projections, and the 25% uplift that was added to give the higher end of the range – which was, amongst the Leicestershire HMA authorities, one of the higher uplifts – was "based on seeking to enhance affordable housing delivery and growth in the workforce" (paragraph 3.41).

ii) The 80-100 dpa range was "clearly" a policy off assessment (paragraph 3.43).

iii) The SHMA was based on 2011 data, and paragraph 2a-16 of the PPG encouraged the use of the most up-to-date projections. However, a detailed analysis of the 2012-based Sub-National Population Projections ("SNPP") using the same methodology as the SHMA, namely the mid-point between the 2011-based and the tracked 2008-based DCLG households projections' household formation rates, whilst suggesting a different housing trajectory over time, confirmed a FOAN of 80 dpa over the whole relevant period (paragraphs 4.16-4.18, and the separate annexed September 2014 FOAN analysis report on the basis of the 2012-based SNPP).

iv) It was therefore appropriate to continue to use the housing requirement figure of 90 dpa, as originally set in Policy CS1 and confirmed in the SHMA. The increase from the demographic projection of 80 dpa to 90 dpa might reduce the need for housing elsewhere (e.g. in Leicester City) and allow for higher household formation rate and for a greater proportion of younger households to enter the housing market (paragraphs 6.16-6.19).

v) The employment-driven need for housing would be met by commuters from (in particular) Leicester City, where unemployment is relatively high. The high "notional" level of affordable housing need would be reduced in practice by (a) affordable housing in adjacent authority areas, and (b) the contribution of the private rented sector, which provided housing subsidised by housing benefit payments, such accommodation being affordable in fact although not "affordable housing" by definition (see paragraph 9 above).

Mr Gardner therefore concluded that, on the basis of the SHMA and the 2012-based SNPP, the Policy CS1 figure for housing requirement of 90 dpa remained good.

30. The Developer's experts approached the issue somewhat differently.

i) Mr Longley noted that the Leicestershire SHMA figures had not been formally tested through the examination process (paragraph 5.2).

ii) On the basis of the 2012-based SNPP and using projections generated using the Chelmer Population and Housing Model, he calculated assessment of housing need on four different scenarios. Scenario 1 was based on short-term (5 and 6 year) migration trends: it indicated a need or 72 dpa or 91 dpa including backlog. Scenario 2 was based on 10 year migration trends: it indicated a need of 147 dpa. Those figures did not include any increase in need driven by employment trends. Scenarios 3 and 4 assessed how many houses would be required to match the working age population with jobs. Scenario 3 indicated a need for 161 dpa. During the course of the hearing before the Inspector, as I understand it, Mr Longley conceded that his approach to the migration figures in Scenarios 2 and 3 was flawed, and consequently the basis for his figures of 147 dpa and 161 dpa was undermined.

iii) The figures adopted in the SHMA, in Mr Longley's view, did not include the full and unconstrained figure for affordable housing need. However, he did not adjust his assessment of need to take account of the need for affordable housing. Mr Rose dealt with that issue. He relied on the SHMA evidence for affordable housing need (i.e. a net 160 dpa), but did not specify an uplift to the housing provision for affordable housing. As I understand it, before the Inspector, Mr Rose would not commit to a specific uplift figure.

31. On the basis of this evidence, in his closing submissions before the Inspector, Mr Taylor for the Developer submitted that 90 or 100 dpa does not represent the FOAN for housing, because:

i) It failed to take into account the employment-related housing requirement. The SHMA itself identified that requirement as 173 dpa (see paragraph 26 above). The Council's justification for not adopting a FOAN figure incorporating housing needs based on employment projections – i.e. that those needs could be met by increased commuting, coupled with increased housing in (say) Leicester City for those commuters – was a policy on decision by the Council not to meet an element of identified need for housing in the borough. There was no evidence that that need would in fact be satisfied in any adjacent authority. The Memorandum of Understanding did not do so: it simply said that each authority in the Leicestershire HMA could satisfy its full housing

requirement within its area (see paragraph 28 above). On the basis of the SHMA, Mr Taylor submitted, assessment of housing needs to meet employment requirements demonstrated "that a figure substantially in excess of 150 dpa is appropriate to adopt as the housing requirement in this section 78 appeal process" (paragraphs 71-95 of Mr Taylor's written closing submissions, the quotation coming from paragraph 95).

ii) Similarly with affordable housing. The SHMA identified the net affordable housing requirement as 160 dpa (see paragraph 26 above). The Council's determination of a FOAN of 80-100 dpa, because the affordable housing needs could in effect be met by the private sector and/or by adjacent areas, was again a policy on decision. Again, Mr Taylor submitted, on the basis of the SHMA assessment of housing needs to meet affordable housing requirements, "the only reasonable conclusion is that a figure substantially in excess of 150 dpa is the appropriate figure to adopt as the housing requirement" (paragraphs 96-123 of Mr Taylor's written closing submissions, the quotation coming from paragraph 120).

32. In his decision letter, the Inspector clearly accepted Mr Taylor's submission that the housing requirement range of 80-100 dpa was policy on, substantially for the reasons given by Mr Taylor. In particular, the Inspector considered that, even if the SHMA figures were policy off for the HMA looked at as a whole, they were policy on for the Council looked at individually – because the distribution of the identified need across the HMA would be a policy on decision, and there was no evidence that the apportionment had been agreed or tested at a local plan examination (paragraph 30 of his decision letter). He went on to find that, with regard to the FOAN, "the figure could be in the order of 147 per annum" (paragraph 33), i.e. 735 over the five-year period, to which had to be added the 20% buffer (147) and the backlog (93). That was an aggregate of 975 dwellings, or 195 dpa. The housing supply figure of 705 dwellings (see paragraph 21(i) above), represented only 3.6 years' housing on that basis, and the Council had failed to demonstrate a five year housing land supply.

Discussion

33. Although the SHMA purports to be policy off, I agree with the Inspector's conclusion that it is policy on, for the reasons put forward by Mr Taylor.

34. The Council's case had within it this conundrum: on the basis of the SHMA, the Council was working to a purportedly policy off housing requirement figure of 80-100 dpa – but the SHMA 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. However:

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.

ii) 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: and see paragraph 9 above). 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.

35. Given the Council's reliance on adjacent authorities providing housing deriving from employment need and from those who require affordable housing, I understand why the Inspector described the SHMA as possibly policy off when the HMA was looked at as a whole. Mr Leader submitted 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. In support of that proposition, he relied upon Satnam Millennium Limited v Warrington Borough Council [2015] EWHC 370 (Admin) at [25(iii)], where Stewart J said in terms:

> "… [The local planning authority] has to have a clear understanding of their area housing needs, but in assessing these needs, is required to prepare an SHMA which may cross boundaries."

However, Stewart J's comments were made in the context of a challenge to a local plan under section 113 of the 2004 Act. Housing requirements in such a plan are, of course, policy on. The judge in that case 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

36. Therefore, in my view, 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.

37. That much, in my view, is clear and certain. However, when the Inspector turned to consider the appropriate figure for housing need, he was in my view less clear. In his decision letter, having concluded that the SHMA figure was policy on, he went on to say this:

> "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.
>
> 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 houses per annum as the indicative figure for calculating whether the Council is able to demonstrate a 5-year supply of housing land.
>
> 34. The 147 dwellings per year does not make any specific allowance for the number of affordable homes needed either as part of, or even in addition to, this figure. However, taking note of the need to address the 'acute levels of need' for affordable housing in Oadby & Wigston… , the 147/year should give the opportunity to make inroads into that requirement. The appeal scheme would include 45 affordable dwellings."

38. Mr Leader submitted that the Inspector used the 147 dpa figure because he must have accepted the analysis of Mr Longley's Scenario 2 – which is the only possible derivation of the figure of 147 – but Mr Longley conceded in cross-examination that that analysis was flawed, and the resulting figure based on that analysis was consequently unsound. In the event, Mr Leader submitted that the Inspector erred in adopting this flawed analysis, or at least in failing to give adequate reasons why he accepted it.

39. Mr Lewis submitted that, other than his adoption of the precise figure 147, there is no suggestion that the Inspector accepted the analysis and reasoning of Mr Longley's Scenario 2; indeed, at the beginning of paragraph 33 of his decision letter, he

expressly denied that he was adopting any of the scenarios put forward by Mr Longley. Looked at fairly and as a whole, the Inspector was simply using his planning judgment to assess the appropriate FOAN, and he chose the figure of 147, as he was entitled to do. He could equally have chosen the figure of 150 dpa as suggested by Mr Taylor; or indeed a significantly higher figure on the basis of the SHMA assessments of the needs taking into account economic factors (173 dpa alone) and/or affordable housing (net 160 dpa alone). The precise figure did not matter because, even on the highly conservative figure of 147 dpa, the housing requirements significantly outscored the available housing supply sites. As Mr Taylor calculated, the requirement would have had to have been as low as about 102 dpa for the Council to have been able to demonstrate a five-year supply on the basis of the available sites.

40. I do not find this passage of the Inspector's decision letter easy or clear. However, I am persuaded by Mr Lewis's submission.

41. In coming to that conclusion, I accept that the reason for the Inspector's references to the Chelmer Model and the absence of any specific allowance for affordable housing in the 147 figure – and his adoption of the precise figure of 147 – are not entirely clear, and are indeed curious. As Mr Lewis frankly conceded, the Inspector could equally well have used the figure of 150 suggested by Mr Taylor; and, had he done so, it would have been clearer that that was simply a judgment he had made with regard to the FOAN.

42. However, reading the decision letter fairly and as a whole, I am satisfied that the Inspector did not erroneously adopt the analysis and reasoning of the apparently discredited Scenario 2; but rather, exercising his general planning judgement on all of the evidence before him, simply assessed the housing requirement as 147 dpa. In coming to that conclusion, in particular, I have taken the following into account:

    i) The housing requirement figure for the purpose of assessing the five-year housing land supply involves an exercise of planning judgment, with which the court will not interfere unless the decision-maker errs in law by (e.g.) adopting an unlawful approach or coming to an irrational conclusion (Bloor Homes Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) at [113]-[114], and South Northamptonshire Council v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) at [33].

    ii) The Inspector was patently not attempting to fix the housing requirements for the borough – he did not have to assess the precise figure for either the requirement or available supply (see South Northamptonshire Council v Secretary of State for Communities and Local Government [2014] EWHC 573 (Admin) at [11] per Ouseley J, and Cheshire East Council v Secretary of State for Communities and Local Government [2014] EWHC 573 (Admin) at [34] per Lewis J). He was concerned with the question as to whether the Council has demonstrated a five-year supply.

    iii) At the beginning of paragraph 33 of his decision letter, the Inspector made clear that he was not persuaded by the analysis of any of the scenarios which Mr Longley had deployed, including Scenario 2.

iv) Scenario 2 concluded with a precise figure for the housing requirement, namely 147 dpa. However, from the beginning of paragraph 34, it is again clear that the Inspector was not adopting any calculated figure, including that calculated on the basis of the analysis in Scenario 2. In addressing the question of five-year land supply, the Inspector repeatedly emphasised that there was degree of uncertainty as to the actual FOAN, including the provision for affordable housing (see, e.g., paragraph 27 of his decision letter); and that the figure he chose was not a precise figure for the FOAN, but that he adopted that figure "as the indicative figure for calculating whether the Council is able to demonstrate a 5-year supply of housing land" (paragraph 34), a figure that "should not be taken as precise" but which represented a "reasonable indication of the need… situation in Oadby & Wigston…" (paragraph 55).

v) The Inspector was entitled to take a conservative figure for housing requirement if, even on that figure, the Council fell well-short of demonstrating a five year housing land supply, as in this case. The Inspector said that he "sympathised" with the Developer's view that the FOAN could be considerably more than the 90 dpa in Policy CS1 or the 100 dpa in the SHMA (paragraph 27 of his decision letter). Given the (lawful) conclusion of the Inspector that the 80-100 dpa range was policy on, and failed properly to reflect the affordable housing needs and the needs generated by economic factors (which the SHMA out at 160 net dpa and 173 dpa respectively), 147 dpa appears to be a modest figure. Looking at the decision letter as a whole, it is clear that, on all the evidence before him, the Inspector considered that, although the figure if tested might prove to be higher, 147 dpa was a conservative but appropriate figure for FOAN. In respect of demonstrating a five-year housing land supply, the burden was of course on the Council: the Inspector was clearly unpersuaded on the evidence that the FOAN (and, thus the relevant housing requirement) was less than 147 dpa. It could not be suggested – nor does Mr Leader suggest – that that was an irrational conclusion on all of the evidence.

43. For those reasons, in my judgment, 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.

Grounds of Challenge

44. Mr Leader's submissions were focused on the proposition that the Inspector erred in law in approaching the housing land supply issue on the basis that the relevant housing requirement was 147 dpa. My conclusion that he was entitled to do so fatally undermines the Claimant's challenge. However, it is only right that I deal with the specific grounds of challenge relied upon in turn. Mr Leader put the matter in a number of ways, but the following four represent the main strands of his argument.

45. First, Mr Leader submitted that the Inspector failed to have regard to Mr Gardner's evidence on the 2012-based SNPP, clearly a material consideration; or, alternatively, he failed to give any adequate reasons for rejecting that evidence.

46. I do not consider there is any force in this ground. The Inspector clearly did not completely ignore either Mr Gardner's evidence or the 2012-based SNPP: the relevant

documents are listed at the end of his report as documents he considered, and he specifically referred to the 2012-based SNPP a number of times in his decision letter (see, e.g., paragraphs 11, 15 and 20). The weight he gave to this evidence was, of course, a matter for him. But, in any event, the 2012-based SNPP did not go to any principal important controversial issue. The real issue between the parties concerned whether the SHMA range for housing requirement of 80-100 dpa was truly policy off; or whether, in their treatment of employment driven housing need and affordable housing need, they were in substance policy on. The figures in the SHMA for demographic-driven need, employment housing need and affordable housing need were largely accepted by all parties; or, at least, the differences between the parties in respect of those matters was not material or determinative. That the 2012-based SNPP confirmed the SHMA demographic figures did not go to the determinative question with which the Inspector was grappling.

47. Second, Mr Leader submitted that the Inspector misconstrued paragraph 47 of the NPPF, by failing to ascertain the FOAN for market and affordable housing. Paragraph 33 indicates that 147 dpa is an approximation; but it is unclear whether the figure is more or less than the FOAN. If it is more – if, for example, he has inflated the FOAN to boost the supply of affordable housing – then that would not be in accordance with paragraph 47, which requires the housing requirement figure to be the FOAN.

48. However, as I have indicated: (a) the Inspector was not required to identify the exact housing requirement figure if, by adopting a conservative figure, it is clear that the authority could not demonstrate a five-year housing land supply; and (b) on all the evidence before him, the Inspector was unpersuaded that the policy off FOAN was less than 147 dpa. That was in accordance with paragraph 47.

49. Third, Mr Leader criticises the Inspector for not determining the FOAN for market and affordable housing. It is true that he said that the 147 dpa figure included a specific figure for affordable housing; but, whatever an appropriate specific figure for affordable housing might be, it would not diminish the 147 dpa figure which the Inspector considered to be the lowest the FOAN could likely be on the evidence before him. The reference he made to the 147 dpa figure "should give an opportunity to make inroads into the [affordable housing requirement]" (paragraph 35 of his decision letter) was simply a reflection of the fact that, whatever the specific figure for affordable housing might be, 147 dpa suggested that up to 30-50 dpa of affordable housing would be included. Hence his reference immediately after the quotation to the fact that the proposed development would include 45 affordable homes.

50. Fourth, Mr Leader submitted that the Inspector erred in disregarding the contribution to affordable housing made by the private rental sector. However, for the reasons I have given above (see paragraphs 9 and 34(ii)), private rental accommodation is not affordable housing; and the Inspector was entitled to ignore the fact that state-subsidised accommodation in the private rental sector might in practice keep people who would otherwise be accommodated in affordable housing off the streets.

51. As I have indicated, those appear to have been the main strands of Mr Leader's argument. However, I have considered all of his submissions, and I do not consider any other way in which he put the matter to be of any greater force than these. In truth, the Claimant's case could not survive the finding that, in considering whether

the Council could demonstrate that it had a five-year housing land supply, the Inspector was entitled to adopt 147 dpa as the housing requirement.

Conclusion

52. For those reasons, this claim fails; and I dismiss the application.

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**

(Transcript of the Handed Down Judgment of
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
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:
>
> ● 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;
>
> ● 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:
>
> - 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 …; 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. …
>
> (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 …
>
> (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.

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.
>
> 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.

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.