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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
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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.