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Neutral Citation Number: [2019] EWCA Civ 2200

Case No: C1/2019/0140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
SIR ROSS CRANSTON (sitting as a judge of the High Court)
[2018] EWHC 3400 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2019

Before:

Lord Justice Underhill
Lord Justice Lindblom
and
Lord Justice Irwin

Between:

R. (on the application of East Bergholt Parish Council)	**Appellant**
- and -	
Babergh District Council	**Respondent**
- and -	
(1) Mr and Mrs P. Aggett **(2) Countryside Properties Plc** **(3) Mr Michael Harris and Mr James Harris** **(4) Hills Residential Construction Ltd.**	**Interested Parties**

Ms Sasha Blackmore (instructed by **Teacher Stern LLP**) for the **Appellant**
Mr Michael Bedford Q.C. (instructed by **Babergh District Council Legal Services**) for the **Respondent**
The Interested Parties did not appear and were not represented.

Lord Justice Lindblom:

Introduction

1. The main question in this appeal is whether a local planning authority, when assessing the five-year supply of housing land, misdirected itself on the relevant policies in the National Planning Policy Framework ("the NPPF") published by the Government in March 2012. It is not the first case of its kind. And no new issue of law is involved.

2. The appellant, East Bergholt Parish Council, appeals against the order dated 7 December 2018 of Sir Ross Cranston, sitting as a judge of the High Court, by which he dismissed its claim for judicial review of three grants of planning permission by the respondent, Babergh District Council, for housing development on sites in East Bergholt. In total, the three developments would provide up to 229 new dwellings: 10 for residents over the age of 55 on a site at Hadleigh Road, for which planning permission was granted on 10 November 2017; 144 on a site at Moores Lane, for which permission was granted on 23 November 2017; and up to 75 on a site at Heath Road, for which permission was granted on 9 February 2018. The district council's Planning Committee resolved to approve all three proposals on 2 August 2017. In each case the proposal did not accord with the development plan, which included the Babergh Core Strategy, adopted by the district council in February 2014, and the East Bergholt Neighbourhood Plan, made in September 2016. But the district council concluded that the five-year housing land supply required under government policy in paragraph 47 of the NPPF did not exist, so that, under the policy in paragraph 49, the policy for the "presumption in favour of sustainable development" in paragraph 14 was engaged and a decision to grant planning permission was justified.

3. The thrust of the parish council's challenge is that the district council's approach to the assessment of housing land supply when it decided to grant planning permission for these three developments, was flawed by its misunderstanding of the concept of "deliverability" in the NPPF, wrongly equating it to "certainty" or even "absolute certainty" of delivery. A further complaint is that in approving these developments the district council was influenced by the potential cost of opposing subsequent appeals if it refused permission. These grounds were rejected by the judge. Permission to appeal was granted by Singh L.J. on 18 February 2019, on two of the four grounds in the appellant's notice – grounds 1 and 2.

The issues in the appeal

4. Two main issues arise. First, did the district council err in law in its assessment of housing land supply, misinterpreting and misapplying NPPF policy, and including only sites on which it was certain, or absolutely certain, that housing would be delivered within five years – an approach said to be contrary to the decision of this court in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2018] P.T.S.R. 746 (ground 1 and ground 2 in part, and the district council's respondent's notice)? And second, did it improperly take into account the possible financial consequences for itself of fighting appeals against the refusal of planning permission (ground 2 in part).

> "To be considered deliverable, sites for housing 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. In particular:
>
> a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).
>
> b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years."

The guidance in the Planning Practice Guidance ("the PPG")

9. The policy in paragraph 47 of the NPPF was amplified in the PPG, first published by the Government in March 2014 and later updated. I shall consider the guidance as it was at the time of the district council's decisions.

10. Paragraph 3-019-20140306 of the PPG explained the factors to be considered when assessing the "suitability" of sites for development. It said that "[sites] in existing development plans or with planning permission will generally be considered suitable for development although it may be necessary to assess whether circumstances have changed which would alter their suitability".

11. Paragraph 3-030-20140306 advised that the starting point for calculating the five-year housing land supply should be "the Housing requirement figures in up-to-date adopted Local Plans", but went on to say that "[where] evidence in Local Plans has become outdated and policies in emerging plans are not yet capable of carrying significant weight, information provided in the latest full assessment of housing needs should be considered". Paragraph 3-031-20140306, under the heading "What constitutes a 'deliverable site' in the context of housing policy?", said:

> "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 5-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

14. In his witness statement dated 23 May 2018 Mr Deakin explains (at paragraph 32) the reference to sites "affected by JR". These were sites on which the district council had granted planning permission or resolved to grant planning permission for housing development, relying on an incorrect understanding of development plan policy. The court had quashed the permission for the development on a site called "Gatton House" in East Bergholt in December 2016, but the proposals – for that site and for the site at Moores Lane – had yet to be taken back to the Planning Committee for redetermination at "the base date [for the annual monitoring report for 2016-2017] of 31 March 2017" (see *R. (on the application of East Bergholt Parish Council) v Babergh District Council* [2016] EWHC 3400 (Admin)).

15. Councillor Miller's note also records that the parish councillors were told the methodology used by the district council was the one advocated in the NPPF, and the figures to be published in June 2017 would "nail the AMR number".

16. On 22 May 2017, in response to a request made by a local resident, Mr Cave, under the Freedom of Information Act 2000, the district council sought to explain why 14 applications for planning permission for a total of 674 dwellings had not been included in the calculation of housing land supply. It said:

> "The sites listed have not been granted planning permission, nor are they sites allocated in the Local Plan. They would therefore fail to meet the tests of footnote 11 of [the NPPF] and have not been included within the Babergh Interim 5 year housing land supply assessment."

In a subsequent email sent on 12 July 2017, responding to Mr Cave's request for a re-calculated housing land supply taking into account the 14 applications, the district council's Chief Executive contended that such a calculation "would not be consistent with how we are required to establish 5 year land supply".

The annual monitoring report for 2016-2017

17. The "Babergh and Mid Suffolk Joint Annual Monitoring Report 2016-2017" was published by the district council and Mid Suffolk District Council on 13 June 2017. It stated (in paragraph 1.1) that "[all] of the information reported is the most up-to-date available at the time of publication". It referred (in paragraph 1.2) to the duty of local planning authorities to co-operate, under section 33A of the Planning and Compulsory Purchase Act 2004. And it confirmed (in paragraph 3.1) that the two authorities had "taken the key decision to produce a Joint Local Plan for Babergh and Mid Suffolk districts", and that "[a] new joint [local development scheme] was agreed in March 2017".

18. Under the heading "Housing Trajectory & Five-Year Land Supply", the annual monitoring report referred (in paragraph 4.9) to the policy in paragraph 47 of the NPPF "[requiring] Councils to identify and update on an annual basis a supply of specific deliverable sites sufficient to provide for five years' worth of housing against their identified requirements". It acknowledged that, under the policy in paragraph 47 of the NPPF, "[for] sites to be considered deliverable they have to be available, suitable, achievable and viable". It said (in paragraph 4.11) that the district council "has identified a housing land supply of 4.1 years

> resource-intensive both financially and with regard to officer time, and there is a risk of a costs award if [the district council] is found to have acted unreasonably, [the district council], like many other planning authorities, seeks to ensure that its 5YHLS assessment is robust and able to withstand scrutiny. This helps to ensure sound decision-making, deter unjustified appeals, and minimise the risks of [the district council] losing appeals."

23. Mr Deakin stresses the importance of using a "consistent base date for monitoring", which in the annual monitoring report for 2016-2017 was 31 March 2017 (paragraph 21). In preparing the five-year housing land supply assessment, as in previous years, he first considered whether a site was "suitable" for housing development before going on to consider whether it was "available" and "achievable". Bearing in mind that the question of whether a site was "suitable" involved questions of judgment on which opinions might differ, and that he was seeking to achieve a "robust and defendable assessment", he took the view that "there should be some confirmation of the suitability of development from some prior decision of [the district council] or from an appeal Inspector". Sites with planning permission that remained capable of implementation he regarded as suitable for housing development; and so too sites without planning permission but the subject of a policy in the development plan or in a "made" neighbourhood plan. Where a site did not have planning permission and was not an allocated site, but had a Planning Committee resolution to grant permission subject to the entering into of a planning obligation, "this meant that the ... Planning Committee had accepted that the site could be developed for housing", and he "therefore regarded such a site as also suitable for housing development" (paragraph 26). But where an application for planning permission had been made and there was "no resolution or decision of the Planning Committee on the acceptability of the proposal", he "considered that the suitability of the site was not established or confirmed, and ... made the judgment that such a site should not be regarded as suitable for housing development at that point of time" (paragraph 27).

24. He then went on to consider whether the sites that were suitable for housing development were "available", and "how many dwellings, if any, should be included in the 5YHLS assessment". For developments of 10 dwellings or more, he took into account what he had been able to discover from landowners, agents or developers in response to a letter he sent to each of them in April 2017. He then made his own assessment, which he discussed with colleagues (paragraph 28). The results of this work were in Appendix 1 to the annual monitoring report for 2016-2017 (paragraph 29).

The Planning Committee meeting on 5 July 2017

25. After the annual monitoring report for 2016-2017 had been published, the district council's Planning Committee relied on the assessment of housing land supply in it when determining applications for planning permission – for example, at its meeting on 5 July 2017 when it considered proposals for housing development in Capel St Mary and Long Melford. At that meeting, when called upon by a member of the public, Mr Watts, to account for the change in the district council's position on housing land supply since 2016, the Chairman of the committee, Councillor Ridley, mentioned two things: first, the change in the relevant housing target in the SHMA; and second, the district council's review, site by site, of the expected dates of delivery – the annual target not having been met in any of the previous three years. In his witness statement Mr Deakin acknowledges that Councillor

28. The committee had an officer's report for each of the three proposals. It is common ground that the assessment in his report on the development proposed on the site in Moores Lane corresponds to the essential parts of the assessment in the other two.

29. In the "Summary" at the beginning of the report, having referred to section 38(6) of the 2004 Act, and having acknowledged that the proposal was contrary to several policies of the development plan, the officer recommended that planning permission be granted. He said:

> "... Whilst the proposal is found to be contrary to development plan policies CS2, CS11 and CS15, the authority cannot currently demonstrate a five year housing land supply and the adverse impacts of the development, including those areas of non-conformity with the development plan policies referred to, are not considered to significantly and demonstrably outweigh the benefits of the development."

The officer recognized that there would be harm to "heritage assets", but this, in his view, was "less than substantial" and was outweighed by the "public benefits" of the proposed development. The proposal was for "sustainable development". Under the NPPF, there was a "presumption in [its] favour".

30. The points made in response to consultation and in objections were set out (paragraph 8 of the report). In Appendix 1 to the report a large number of objections were summarized. They included an objection complaining that the district council had manipulated the housing land supply figures in the interim statement to distort the supply from 5.7 years to three years. The objections of the East Bergholt Society and Mr Brigden were before the committee when it met.

31. The officer explained the relevant policies in the NPPF and guidance in the PPG (paragraphs 35 to 38). He said the new SHMA was "important new evidence for the emerging Babergh and Mid Suffolk Joint Local Plan", and confirmed that "the 5 year land supply has been calculated for both the adopted Core Strategy based figures and the new SHMA based figures". He reminded the committee that "it will be for the decision taker to consider appropriate weight to be given to these assessments and the relevant policies of the development plan" (paragraph 39). His advice was that the housing land supply was either 4.1 years (based on the core strategy) or 3.1 years (based on the SHMA) (paragraph 40). He went on to say (in paragraph 41):

> "... Since there is not, on any measure, a 5 year land supply, paragraph 49 of the NPPF deems the relevant housing policies of the Core Strategy to be out-of-date, so triggering both the 'tilted balance' in paragraph 14 of the NPPF, and the operation of Policy CS1."

32. Weighing the "Planning Balance" at the end of his report, the officer concluded that "[in] consideration of the contribution towards the Council's housing targets (that has now become more acute due to the accepted lack of five year housing land supply), the provision of affordable housing and economic and infrastructure benefits which arise from the development, ... these material considerations would outweigh the less than significant harm to the heritage [assets]" (paragraph 274).

"already decided in light of planning judgment". It was unsurprising that other authorities should carry out their assessments in different ways, "given the broadly worded requirement in paragraph 47 of the NPPF and the absence of any prescribed method of assessment" (paragraph 63). But in any event the planning judgments involved in the assessments undertaken by the district council were not flawed. In *St Modwen Developments Ltd.* the Court of Appeal did not hold that a site must be included in the five-year housing land supply if there was "any realistic prospect" of delivery; this was "not the only element of the test". And it was not to be assumed that sites excluded from the assessment of supply in the annual monitoring report had been left out of account "because [the district council] misapplied the realistic prospect criterion, rather than that other planning judgments were exercised that the site was not suitable, available or viable" (paragraph 64).

38. In the judge's view the officer's reports for the 2 August 2017 committee meeting were not misleading (paragraph 65). They had to be read in the context of what had happened at the Planning Committee meeting on 5 July 2017, in particular what had been said by Councillor Ridley (paragraph 66), and at the Full Council meeting on 18 July 2017, when Councillor Parker had "echoed the language of footnote 11 in explaining that [the district council's] approach was to include in the 5YHLS only sites with planning permission, with an allocation, or with a resolution to approve subject to a legal agreement" (paragraph 67). The members of the Planning Committee "should have known by the time of the 2 August meeting that [the district council's] position was that it did not have a 5YHLS, and should have been aware of the reasons for the officers including some sites but not others in the calculation". If not, they would have enquired – because for some time the district council's approach to housing land supply had been generating discussion in the community. The judge accepted that it was "not necessary for the officer's reports … to set out the detailed reasoning which had led [the district council] to conclude that it could not demonstrate a 5YHLS". That reasoning was "generally available to those who attended and in the minutes of the 5 July [Planning Committee] meeting and the 18 July Full Council meeting", and it met "the requisite standard" (paragraph 68). At the meeting on 2 August, objectors who questioned the calculation of housing land supply addressed the committee; their written representations were before the members; the officer dealt with housing land supply in an oral presentation; there was a member's question about it; and the speakers were questioned at length (paragraph 69).

39. Adding two "footnotes" to his conclusions, the judge said the meeting on 22 May 2017 had taken place before the annual monitoring report was finalized in June 2017. But if the district council had really been "working on certainties" in calculating the housing land supply, this "would not be impermissible as a matter of planning judgment and would not conflict with the legal principles in [*St Modwen Developments Ltd.*]". And the consideration of housing land supply by the Oversight and Scrutiny Committee on 15 March 2018 "says nothing about the understanding of [the Planning Committee] on 2 August 2017" (paragraph 70).

40. The judge did not accept that the district council had "misdirected itself on the applicable test", or "failed to give adequate reasons for its approach" (paragraph 71). In *St Modwen Developments Ltd.* the Court of Appeal had not "[altered] the meaning of "deliverable" in footnote 11 of the NPPF or … [established] a lower bar" (paragraph 72).

45. Judgment on the appeal in *St Modwen Developments Ltd.* was handed down on 20 October 2017 – after the Planning Committee had resolved to approve these three proposals. In that case the inspector had accepted that sites could properly be included in the five-year supply of housing land even though they were not certain of delivery, and the Secretary of State had agreed. At first instance Ouseley J. had found no error of law in the inspector's approach. Upholding Ouseley J.'s conclusion, this court emphasized the distinction between the concept of "deliverability" under the policy in paragraph 47 of the NPPF and the concept of an "expected rate of delivery" (paragraphs 34 to 37 of my judgment). The fact that a site is "capable of being delivered" within five years "does not mean … it necessarily will be" (paragraph 35). Each of the considerations referred to in footnote 11 to paragraph 47 went to "a site's capability of being delivered within five years: not to the certainty, or … the probability, that it actually will be". To be included in the five-year supply, a site did "not necessarily have to have planning permission already granted for housing development on it". Sites "may be included … if the likelihood of housing being delivered on them within the five-year period is no greater than a "realistic prospect"". This "[did] 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" (paragraph 38). The judge had acknowledged that the evaluation of housing land supply involved the exercise of "planning judgment" (paragraph 43). And it was "not open to [the appellant] now to go behind the inspector's conclusions on the credibility and reliability of the parties' respective cases on housing land supply". Such conclusions, the court stressed, were "well within the exclusive province of planning judgment" (paragraph 51).

46. This court's decision in *St Modwen Developments Ltd.* did not create new law. The court applied basic legal principles often put to the test in challenges to planning decisions involving the application of national planning policy and guidance – and on several occasions in cases where NPPF policy for housing development has been in issue (see, for example, the decisions of this court in *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808; [2019] J.P.L. 63, and *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040; [2017] J.P.L. 358; and the first instance judgments of Dove J. in *Eastleigh Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin), and Stuart-Smith J. in *Wainhomes (South West) Holdings Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin); [2013] J.P.L. 1145).

47. The principles themselves are well established. The court will not intrude into the territory of planning judgment, which is the exclusive domain of the decision-maker, nor will it subject the decision-maker's own exercise of planning judgment to review beyond the range of public law (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). Formulating national planning policy and guidance is the Government's responsibility, not the court's. Where the meaning of statements of policy is in dispute, the court has a proper role in construing the policy (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13; [2012] P.T.S.R. 983, at paragraphs 17 to 22). A decision-maker's failure to understand relevant policy is an error of law, and the court may then intervene (see the judgment of Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] P.T.S.R. 623, at paragraphs 22 to 26; and the judgment of Stephen Richards L.J. in *R. (on the application of Timmins) v Gedling*

52. The latitude in the policy itself is also reflected in the relevant guidance in the PPG. Paragraph 3-031-20140306 says that deliverable sites "could" – not "must" – include those allocated for housing in the development plan, and also that a planning permission or allocation is "not a prerequisite" for a site's inclusion in the five-year supply. But it does not say that any site merely with a resolution to grant, subject to a planning obligation, must be included. It calls for "robust" evidence to support an authority's assessment of deliverability. Paragraph 3-033-20150327 uses the same adjective in its advice on annual assessments. The guidance does not, in principle, disqualify as insufficiently "robust" an assessment that excludes from the five-year housing land supply a site or sites yet to receive a grant of planning permission.

53. It is clear then that the policy in paragraph 47, and the PPG guidance upon it, accommodate different views on a "realistic prospect" of delivery. A local planning authority can take a more cautious view on this question, or a more optimistic view, than other authorities might. If it does, it is not for that reason acting contrary to the policy, or unreasonably. Had the Government meant to impose a rigid approach, or greater consistency than the policy and guidance require, it would surely have done so. If it had wanted to define exactly what it meant by a "realistic prospect" it could and would have done that. But it has not – either in the policy it originally issued or in the two revisions, or in the PPG.

54. As the judge recognized, "achievability" was only one of four elements that together went to the question of "deliverability", the other three being "availability", "suitability" and "viability" (see paragraph 38 of my judgment in *St Modwen Developments Ltd.*). All four elements must be present if a site is to be regarded as "deliverable". And all of them entail the exercise of planning judgment. Thus, for example, a site judged by the local planning authority not to be "a suitable location" for housing development "now" could properly be excluded from the calculation of the five-year housing land supply even if it was clearly "available now", and also "achievable with a realistic prospect that housing will be delivered on the site within five years", and development "viable". In those circumstances, and despite the existence of a "realistic prospect" of the site's development, however strong that prospect might be, the site could properly be judged by the authority not to qualify as "deliverable" under the policy.

55. With those points in mind, I do not think the assessment of the five-year housing land supply underlying the officer's advice to the Planning Committee at its meeting on 2 August 2017 was at odds with the approach endorsed by this court in *St Modwen Developments Ltd.*. It does not, in my view, betray any misdirection on the meaning and effect of the policy in paragraph 47 of the NPPF, or the relevant guidance in the PPG, or a misapplication of that policy and guidance. None of the planning judgments embodied in it were unlawful.

56. The real challenge in this claim, as the judge said (in paragraph 62 of his judgment), is to the assessment of the five-year housing land supply in the recently published annual monitoring report for 2016-2017, which was relied upon by the officers in their reports to committee on the applications for planning permission. The assessment set out in Appendix 1 to the annual monitoring report was an up to date assessment, published in June 2017 – only two months before the Planning Committee met on 2 August 2017. It was informed by an up to date SHMA, published in May 2017. It expressly referred to the relevant policy, in paragraph 47 of the NPPF, including the essential content of footnote 11, and it did so

granted, to which a degree of uncertainty in both the amount and timing of development must attach. How much uncertainty may be moot.

60. Ultimately, as I have said, this was a matter for the district council's planning judgment. It may or may not be fair to describe its exercise of planning judgment as more circumspect than other local planning authorities' in similar circumstances would have been – or indeed the Secretary of State or his inspector on appeal. And it may or may not be right to suggest, as the parish council does, that there was a strong case for including developments on smaller sites, such as Artiss Close and the former Brett Works, in the five-year supply. Such arguments, however, tend dangerously close to the merits of including individual sites in the five-year supply, which it is not the court's role to consider. They do not, in my view, demonstrate a failure by the district council to understand government policy in paragraph 47 of the NPPF or guidance in the PPG, or a misapplication of that policy and guidance, or an exercise of planning judgment outside the generous scope that public law permits.

61. This analysis does not yield to Ms Blackmore's submissions on events before and after the publication of the annual monitoring report, and after the Planning Committee's meeting on 2 August 2017. The meeting with parish councillors on 22 May 2017 took place before the publication of the annual monitoring report for 2016-2017. The parish councillors were told, in effect, that the new annual monitoring report would settle the question of the five-year housing land supply in the light of government policy in the NPPF. Mr Newman's reference to there being "no certainty" that some of the sites discussed would deliver housing within five years, and his comment that the list of sites included "absolute certainties rather than ones affected by JR" – whether or not this was, as Mr Bedford submitted, merely a "hyperbolic contrast" with the sites and proposals yet to be reconsidered by the Planning Committee – does not negate the assessment of the five-year supply later to emerge in the annual monitoring report. That assessment was plainly not confined to "certainty" of delivery or "absolute certainties". And at the time of the meeting, the district council could not be sure that the sites "affected by JR" were "suitable for development now".

62. The district council's response on 22 May 2017 to Mr Cave's Freedom of Information Act request also preceded the publication of the new annual monitoring report. As Mr Deakin explains in his witness statement (at paragraph 31), the sites in question "did not benefit from a Planning Committee resolution to approve or a development plan allocation", and "were not regarded … as having sufficient confirmation that they were suitable for housing development so as to be included in the 5YHLS".

63. After the new annual monitoring report was published and before the Planning Committee met on 2 August 2017, the district council did not change its stance on the five-year housing land supply. It relied on the assessment in the annual monitoring report. As the judge said (in paragraph 68 of his judgment), the explanation for it is to be found in the minutes of the Planning Committee's meeting on 5 July 2017 – including the reasons given by Councillor Ridley for the changed situation since 2016 – and the meeting of the Full Council on 18 July 2017 – including Councillor Parker's answer to Mr Cave's question, in which he distinguished between the concepts of "suitability", "availability" and "achievability".

64. It is clear from what Councillor Parker said that, in assessing "deliverability", the district council had regard to each of these considerations, not just "achievability". It is also clear

69. Before us, Ms Blackmore argued that the judge's conclusion was wrong. The financial burden for the district council in defending its position on housing land supply on appeal, and the financial risk of an award of costs being made against it if its position were found to be indefensible, were not considerations "[relating] to the use and development of land" (see the judgment of Cooke J. in *Stringer v Minister of Housing and Local Government* [1971] 1 W.L.R. 1281, at p.1295), or as Jonathan Parker L.J. put it in *R. (on the application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370; [2003] 1 P. & C.R. 19 (at paragraph 121), "rationally related to land use issues". They had nothing to do with the approach to assessing the deliverability of sites under government policy in paragraph 47 of the NPPF endorsed in *St Modwen Developments Ltd.*, or the guidance in paragraph 3-033-20150327 of the PPG calling for "robust" assessment. Having regard to them was impermissible as a matter of law. There was no warrant for doing so in section 70(2)(b) of the Town and Country Planning Act 1990, which requires a local planning authority to have regard to "any local finance considerations, so far as material to the application [for planning permission]". They were not financial considerations "material to the application". This was not a case where the financial viability of a development was at stake or where two or more developments were financially dependent on each other (see the speech of Lord Collins of Mapesbury in *R. (on the application of Sainsbury's Supermarkets Ltd.) v Wolverhampton City Council* [2010] UKSC 20; [2010] 2 W.L.R. 1173, at paragraph 70; and the speech of Lord Walker of Gestingthorpe, at paragraphs 86 and 87). The prospect of savings to the public purse if the cost of fighting appeals were avoided was an immaterial consideration. It was a free-standing "financial [consideration] unrelated to the use and development of land" (see, for example, the judgment of Kenneth Parker J. in *Samuel Smith Old Brewery Tadcaster v Selby District Council* [2013] EWHC 1159 (Admin), at paragraphs 39 and 40).

70. In my view this argument is not cogent. The reality here is that the district council made its decisions to grant planning permission lawfully, with a true understanding of relevant policy and on the strength of land use considerations that were material; it did not resort to considerations that were immaterial.

71. Neither in the officers' reports to the Planning Committee for its meeting on 2 August 2017 nor in the minutes of that meeting, nor in the annual monitoring report for 2016-2017, nor in the minutes of the committee meeting on 5 July 2017 or the Full Council meeting on 18 July 2017 does one find any support for the suggestion that the district council's assessment of the five-year housing land supply was undertaken contrary to the relevant policy in the NPPF and guidance in the PPG, or on the basis of any immaterial consideration. There is no evidence of an approach whose aim was to avoid for the district council the financial burden and risk of appeals, rather than one that would produce a "robust" assessment in accordance with national policy and guidance. And there is nothing there to suggest – nor does Mr Deakin say in his witness statement – that, in its assessment of the five-year housing land supply, the district council adopted a more cautious view when establishing which sites had a "realistic prospect" of housing being delivered on them within five years than it would otherwise have done because it was concerned about the possible need to expend public money in resisting appeals, or because it feared the prospect of being ordered to pay the appellants' costs if such appeals were pursued. Such considerations did not play any part in the officers' assessment of the proposals on their planning merits in the committee reports, nor are they to be seen in the members' deliberations as recorded in the minutes.

decision that is in the end overturned. As the Government's relevant guidance explains, adverse awards of costs are only made for conduct that is unreasonable, such as "preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations" (paragraph 16-049-20140306 of the PPG), and where an authority "has refused a planning application for a proposal that is not in accordance with the development plan policy, and no material considerations including national policy indicate that planning permission should have been granted, there should generally be no grounds for an award of costs against the … authority for unreasonable refusal of an application" (paragraph 16-050-20140306). "National policy" would clearly include the policy for the five-year housing land supply in the NPPF.

77. A "robust" assessment of the five-year housing land supply, which national policy and guidance expect, is synonymous with a defensible assessment. And a defensible assessment is inherently more likely to avoid the expenditure and delay for all parties – not only the local planning authority, but also applicants and objectors – of appeals against the refusal of planning permission that could have been avoided. It may deter such appeals. If there is an appeal and the five-year supply is in issue, a "robust" assessment is more likely to be capable of withstanding attack in evidence and cross-examination, more likely to be supported by the inspector, and also more likely to be proof against an award of costs being made against the local planning authority. Such an assessment will be faithful to national policy in the NPPF and national guidance in the PPG, and will also therefore be an assessment that saves unnecessary burdens on the public purse.

78. The simple point here therefore is this. National policy and guidance on the five-year housing land supply was necessarily a material consideration in the district council's decisions on these three proposals – being, as it obviously was, a consideration related to the use and development of land (see the judgment of Lord Carnwath in *Hopkins Homes Ltd.*, at paragraph 21). Essential to that national policy and guidance was the imperative of a "robust" assessment. A "robust" assessment was, by its nature, an assessment likely to reduce the district council's financial burden and risk. And the requirement in national policy for such an assessment was effectively reinforced by the guidance on awards of costs in the PPG.

79. This conclusion does not depend on the provision in section 70(2)(b) requiring "local finance considerations" to be taken into account, if "material to the application". That provision is not relevant in this case. The definition of a "local finance consideration" in section 70(4) is "(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown" or "(b) sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy".

80. Nor is there any offence to the principles in the case law governing the materiality of considerations that go to the viability of a development or to the economic interdependence of developments on different sites. Those principles are not involved here.

81. Our attention was drawn to the first instance decision in *R. v Royal Borough of Kensington and Chelsea Council, ex p. Stoop* [1992] 1 P.L.R. 58. In that case the local planning authority's committee was given advice, in closed session, on its prospects of successfully defending on appeal a refusal of planning permission for a mixed-use development,

those costs will encourage them to think carefully about any refusal decision, and that is fair enough – though of course in principle they should be doing so anyway. But that is not the same as allowing the risk of the costs associated with defending an adverse decision on appeal to influence them in the exercise of their planning judgement. That is not legitimate (Lord Carnwath's observations in the *HSE* case to which Lindblom LJ refers are directed to a different question). It is important that that distinction is not blurred; and there is a risk of that occurring if officers in their advice make express reference to the likely costs consequent on a refusal. Councillors' job is to exercise their planning judgement, and if that leads to an expensive appeal that cannot be helped. The same of course goes for planning decisions which cannot be appealed as such but which an adversely affected party may choose to challenge by way of judicial review. I therefore particularly endorse what Lindblom LJ says at para. 82.