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Wavendon Properties Ltd v Secretary of State of Housing, Communities and Local Government and another

[2019] EWHC 1524 (Admin)

Queen's Bench Division, Administrative Court (London)

Dove J
14 June 2019

Judgment

Peter Goatley and James Corbet Burcher (instructed by Clyde & Co) for the Claimant

Richard Honey (instructed by Government Legal Department) for the 1st Defendant

Daniel Stedman Jones (instructed by Milton Keynes Legal Department) for the 2nd Defendant

Hearing dates: 7th & 9th May 2019

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Approved Judgment

Mr Justice Dove :

The Facts

1. On the 20th July 2016 the Claimant submitted an application in outline for development of up to 203 dwellings together with other ancillary infrastructure. The application was reported to the Second Defendant's planning committee and, contrary to the officer's recommendation that development should be approved, it was refused on the 5th December 2016. The reasons for refusal were as follows:

"1. The Committee resolved to refuse planning permission on the basis that any such development of this site would result in the loss of future development and infrastructure options, causing significant and demonstrable harm and is therefore not sustainable development in accordance with Resolution 24/187 of the United Nations General Assembly definition of sustainable development and the National Planning Policy Framework (NPPF) in respect of future generations. The development would also therefore be contrary to paragraphs 14 and 19 of the National Planning Policy Framework, Saved Policy D1 of the adopted Milton Keynes Local Plan 2001-2011 (adopted 2005) and policy WS5 of the Woburn Sands Neighbourhood Plan 2014-2026 (adopted 2014). This does not constitute sustainable development in terms of paragraph 14 of the National Planning Policy Framework.

appeal were maintained. The Claimant's solicitors responded by contending that there was nothing in the new Framework which was adverse to the Claimant's case put at the inquiry, and that there remained a shortfall in the Second Defendant's five year housing land supply.

7. On the 27th September 2018 the First Defendant wrote to the Claimant and the Second Defendant seeking views in relation to a number of further developments since the previous correspondence. First, on the 13th September 2018, revised guidance had been issued in relation to how local planning authorities should assess their housing needs. Secondly, new household projections for England had been published by the Office of National Statistics on the 20th September 2018 and, thirdly, interim findings had been issued in relation to the emerging Milton Keynes Local Plan.

8. At paragraph 5 of the letter the First Defendant sought views on the following issue:

"5. The Secretary of State particularly seeks parties' views on the applicability of paragraph 73 of the new Framework to this case, and if applicable, any implications for housing land supply. He further seeks views on the consistency of Local Plan Policy H8 (Housing Density) with the new Framework."

9. On the 5th October 2018 the Claimant responded to the letter of the 27th September from the First Defendant. In the letter the Claimant's planning consultant addressed issues in relation to the consistency of policy H8 with the new Framework. He contended that policy H8 remained consistent with the Framework in particular in seeking a flexible approach to the density of new residential development which responded to the character and appearance of the surrounding area. Accompanying the letter was material from the Strategic Planning Research Unit of DLP Planning, addressing issues associated with the five year housing land supply (the "SPRU Report"). The SPRU Report noted that the most recent document published by the Second Defendant on housing land supply issues accepted that the Second Defendant could not demonstrate a five year housing land supply. The SPRU Report then went on to address issues arising from the new policy contained within the revised Framework. The SPRU report noted that as the housing requirement in the Second Defendant's development plan was more than five years old paragraph 73 of the Framework required the decision-taker to undertake a calculation of local housing need using the standard methodology. That calculation produced a figure for the housing requirement of 1,604 dwellings per annum.

10. Having reached conclusions as to the appropriate requirement the SPRU Report then went on to consider the calculation of the available housing land supply, applying the definition of "deliverable" provided in the Framework, and using the housing land trajectory which had been published alongside the Second Defendant's most recent assessment of their housing land supply. The SPRU Report contained some key tables which are appended to this judgment and which contain the following information. Table 10 was an analysis of extant housing allocations which the SPRU Report contended should not be counted within the housing land supply for the purposes of calculating the five year housing land supply. As a consequence of the analysis in Table 10, 1,156 units were removed from the supply. Table 11 in the SPRU Report addressed sites which had outline planning permission only, and identified from that category of site those which should not be counted as deliverable for the purposes of the five year housing land supply calculation. This analysis led to a reduction of 4,101 from the housing land supply. Table 12 contained an analysis of sites which had detailed planning permission, and provided for an adjustment in the applicable build out rates leading to a further reduction in the deliverable supply for the purposes of calculating the five year housing land requirement. Finally, Tables 13 and 14 provided two alternative calculations of five year housing land supply incorporating the adjustments to the supply from the Second Defendant's figure to reflect the SPRU Report's analysis of whether or not that supply was deliverable, coupled with the alternative requirements of the local housing needs requirement calculated using the standard methodology and a calculation using the housing requirement from the emerging local plan. All of this analysis demonstrated that, in addition to

However, while aiming to secure higher densities in future, Policy H8 recognises the unique character of the Borough- particularly its diverse character- and seeks realistic increases in density in the appropriate locations. Well designed development can facilitate higher densities and will be crucial in ensuring the new development is successfully integrated into the Borough.

9.54 The policy promotes lower densities in the smaller rural settlements outside the City so that new development will be more compatible with their character and also to allow choice and diversity in the type of residential development that is available within the Borough.

HOUSING DENSITY

POLICY H8

The density of new housing development should be well related to the character and appearance of development in the surrounding area.

The Council will seek the average new densities set out below for development within each zone as defined on the accompanying plan:

Zone 1: CMK (including Campbell Park) 100 dws/ha

Zone 2: Adjoining grid squares north and south of CMK, Bletchley, Kingston, Stony Stratford, Westcroft and Wolverton: 40 dws/ ha

Zone 3: The rest of the City, City Expansion Areas, Newport Pagnell, Olney and Woburn Sands 35 dws/ha

Zone 4: The rest of the Borough 30 dws/ha

Developments with an average net density of less than 30 dwellings per hectare will not be permitted."

14. The development plan also included the Woburn Sands Neighbourhood Plan 2014-2026 (the "Neighbourhood Plan") which contained policy WS5. That policy and the relevant explanatory text provides as follows:

"Development Boundary

6.5 The attractiveness of the wider Woburn Sands area depends to a very significant extent upon the preservation of the existing countryside both within the Woburn Sands parish and neighbouring parishes. It is essential for the health and wellbeing of the population that the current network of public footpaths and links through the wider area be maintained and this would not be possible if development encroaches on the countryside around Woburn Sands. This is the unanimous view of all the Parish Councils and residents in the area.

...

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date7, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed6; or

ii. 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. "

17. Footnote 7 pertaining to paragraph 11 of the 2018 Framework provides as follows:

" 7 This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1."

18. Footnote 7 cross-refers to the requirement to demonstrate a five year supply of deliverable housing sites (together with an appropriate buffer) from paragraph 73 of the Framework. Paragraph 73 provides as follows:

"73. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of:

a) 5% to ensure choice and competition in the market for land; or

10% where the local planning authority wishes to demonstrate a five year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or

b) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply"

19. Paragraphs 212 and 213 of the 2018 Framework address the question of the assessment of whether or not existing policies should be considered to be out-of-date. The paragraphs provide as follows:

"212. The policies in this Framework are material considerations which should be taken into account in dealing with applications from the day of its publication. Plans may also need to be revised to reflect policy changes which this replacement Framework has made. This should be progressed as quickly as possible, either through a partial revision or by preparing a new plan.

22. The 2018 Framework provides policies in relation to achieving appropriate densities in paragraphs 122 and 123. These paragraphs provide as follows on this topic:

"122. Planning policies and decisions should support development that makes efficient use of land, taking into account:

a) the identified need for different types of housing and other forms of development, and the availability of land suitable for accommodating it;

b) local market conditions and viability;

c) the availability and capacity of infrastructure and services both existing and proposed as well as their potential for further improvement and the scope to promote sustainable travel modes that limit future car use;

d) the desirability of maintaining an area's prevailing character and setting (including residential gardens), or of promoting regeneration and change; and

e) the importance of securing well-designed, attractive and healthy places.

123. Where there is an existing or anticipated shortage of land for meeting identified housing needs, it is especially important that planning policies and decisions avoid homes being built at low densities, and ensure that developments make optimal use of the potential of each site. In these circumstances:

a) plans should contain policies to optimise the use of land in their area and meet as much of the identified need for housing as possible. This will be tested robustly at examination, and should include the use of minimum density standards for city and town centres and other locations that are well served by public transport. These standards should seek a significant uplift in the average density of residential development within these areas, unless it can be shown that there are strong reasons why this would be inappropriate;

b) the use of minimum density standards should also be considered for other parts of the plan area. It may be appropriate to set out a range of densities that reflect the accessibility and potential of different areas, rather than one broad density range;

and

c) local planning authorities should refuse applications which they consider fail to make efficient use of land, taking into account the policies in this Framework. In this context, when considering applications for housing, authorities should take a flexible approach in applying policies or guidance relating to daylight and sunlight, where they would otherwise inhibit making efficient use of a site (as long as the resulting scheme would provide acceptable living standards)."

23. The earlier provisions of the 2012 Framework required local planning authorities to "set out their own approach to housing density to reflect local circumstances" as recorded by the Inspector in paragraph 9.43 of his report (see below).

The decision

26. Having made this assessment of this area of disagreement, he moved to consider the rival contentions in relation to delivery on large sites, and sites in the Site Allocations Plan. His conclusions were as follows:

"9.11 It is hard to see what special circumstance might occur because, although delivery on some sites in Milton Keynes has been spectacular in the past, the current forecasts entail even greater feats in the future. As an example, the 'eastern expansion area' (consisting of sites at Broughton Gate and Brooklands) achieved the second highest average delivery rate in the country recorded in the NLP research into the delivery of dwellings on 'large' sites; an average of 268 dwellings were delivered annually over the 5 year period between 2008/9 to 2013/14. That was achieved because serviced parcels of land were delivered to the market, allowing several builders to commence building houses almost immediately; and, it partly occurred before the MK Partnership Committee was disbanded in 2011. But the current forecasts for the remaining sites at Brooklands are about 16% higher, entailing an average of about 310 dwellings per annum over the 5 years from 2017/18 to 2021/22 with peaks of around 400 dwellings delivered within 2 of those years. Moreover, the forecast delivery on 4 of the 'outlets' on the parcels that make up this site are substantially higher than might be expected from much of the research undertaken, including that by Savills, the HBF and NLP. Similar findings apply to several, though not all, of the other strategic sites. The implication is clear. The delivery rates implied by the forecasts used to demonstrate a 5-year provision of housing land seem unlikely to be achievable.

...

9.13 There is some agreement that not all the dwellings on sites identified in the Site Allocations Plan are likely to materialise, due to outstanding objections to the Plan and other reasons outlined by the parties. However, all the doubtful sites identified by the appellants would accommodate only some 236 dwellings (about 3% of the 5- year requirement), so that the contribution from these sites would be insufficient to affect the existence, or otherwise, of the 5-year housing land supply."

27. The Inspector's overall conclusions in relation to the housing land supply issues were set out in paragraph 9.18 of his report as follows:

"9.18 Applying any one of the indicated 'corrections' to the estimation of the housing land supply would be sufficient to reduce it to less than 5 years. Applying them all (the 'Sedgefield' approach, a reasonable reduction to reflect non-implementation and slippage and realistic estimates of delivery on some of the strategic sites) would reduce the estimated supply of housing land to 4 years or less. Allowing for sites that might not materialise at all, including those in the Site Allocations Plan subject to objections or still in some other productive use, would reduce the provision still further. Hence, I consider that a 5-year supply of housing land cannot be demonstrated now and, worse still, that the mechanisms specifically intended to boost the supply of housing significantly here are not in place. In those circumstances it is necessary to set the statutory requirements of the Development Plan against the important material consideration (as espoused in the Framework) derived from the absence of a 5-year supply of housing."

28. A further issue which the Inspector had to address was the question of whether or not the scheme was at an unsustainably low density. His conclusions in that connection were as follows:

"9.43 'Saved' policy H8 seeks an average net density of 35dph here, over twice the 16dph actually proposed, and it insists that projects achieving less than 30dph should be prevented. But the guidance advocating such minimum densities has long since been revoked and the Framework now advises that Local Planning Authorities should devise their own approach to density in order to reflect local circumstances, taking account of neighbouring buildings and

educational and medical facilities required. Although the proposal would entail building at a relatively low density, it would reflect the character of the surroundings and safeguard the amenities of those nearby; the density could not be regarded as unsustainable, as it would reflect the tests advocated in Government guidance and operative planning policy. Adequate measures would be in place to appropriately attenuate surface water run-off from the site and although the development would affect the local flora and fauna, mitigation measures would prevent damage and, potentially, contribute to some enhancement.

9.50 Hence, the potential impediments identified here would not be sufficient to prevent a sustainable housing development from proceeding, especially in the absence of a 5- year supply of housing land. As the Framework advises, housing applications should be considered in the context of the presumption in favour of sustainable development and, in the absence of an up-to-date Development Plan, receive planning permission unless adverse impacts of the scheme significantly and demonstrably outweigh the benefits (as assessed against the Framework as a whole), or specific policies in the Framework indicate otherwise. No specific policies in the Framework have been identified that would indicate that the scheme should be prevented.

9.51 In this case, there would be other benefits associated with the scheme. It is recognised (in the Ministerial Statement of November 2014 and in the White Paper) that the supply of housing can be 'boosted' by involving a greater range of developers in local housing markets and encouraging smaller house builders, thereby utilising sites of differing sizes, appealing to different sub-markets and offering distinct products. This scheme could potentially provide a product not typically available elsewhere, due to the low density proposed and the intention to create an 'outstanding development of exceptional quality'. Moreover, the aim is to deliver the scheme within 5 years, an aim backed by a legal commitment to do so. And, although that cannot be guaranteed, for the reasons already outlined, it reflects one suggestion made in the recent White Paper.

9.52 Of course, this development would entail economic benefits. There would be temporary construction employment, both on and off-site: the range of homes to be provided would be suitable for a wide cross-section of working people: secondary employment would be generated through increased spending in the local area by prospective residents (estimated to amount to some £5m, with £3.9m spent within the Borough): a 'new homes bonus' would be paid and additional Council Tax would accrue.

9.53 The scheme would also offer social benefits. Most importantly, it would provide 60 (or possibly 63) affordable dwellings in accordance with Council policy. This would contribute to meeting a substantial current need for such accommodation (estimated as almost 1,600 households in need of an affordable home) and meet a proportion (albeit modest) of the estimated annual future requirement for some 540 affordable dwellings. And, in providing some of the market housing needed, the scheme could contribute to improving the balance between employment and housing, reducing the need to live beyond the Borough and commute for work. Provision would also be made for any additional educational and medical facilities required.

9.54 Environmentally, the proposal would result in the loss of greenfield land. But, the visual effects would be confined and the landscape, although pleasant, is not protected or obviously 'special'. Sufficient space could be made available to mitigate the impact of the new homes on the Listed farmhouse. The new road through the site could reduce the potential use of an awkward junction. The low density would reflect the character of the surroundings and safeguard the amenities of those nearby. Adequate measures would be in place to appropriately attenuate surface water run-off and overcome some inadequacies in existing drainage arrangements. And, although the development would affect the local flora and fauna, mitigation measures would prevent damage and, potentially, contribute to some enhancement.

buffer added), as the agent proposes, there would still be an estimated deliverable housing land supply of over 5 years.

Location of site

19. The Secretary of State agrees with the Inspector at IR9.19 and IR9.20 that as the appeal site is beyond the development boundary of Woburn Sands and is in open countryside, it is contrary to saved LP policy S10 and NP policy WS5. He further agrees that the boundary is tightly drawn, and is defined in a Local Plan intended to guide development only up to 2011. For these reasons the Secretary of State considers that policies S10 and WS5 are out of date, and that only moderate weight attaches to them.

...

22. The Secretary of State agrees with the Inspector's analysis at IR9.21-9.22 and with his conclusion at IR9.48 that the scheme would accord with the aims and some specific policies of the Core Strategy, and given the characteristics and explicit designation of Woburn Sands as a 'key settlement', would be in a sustainable location.

23. Overall the Secretary of State considers that the conflicts with current and emerging policy arising from the appeal site's location in unallocated open countryside outside the development boundary of Woburn Sands carry moderate weight.

Housing density

24. The Secretary of State has carefully considered the Inspector's assessment of the density of the appeal scheme (IR9.42-9.47). He has also taken into account paragraphs 122-123 of the revised Framework and the agent's representation of 5 October 2018. He considers that policy H8 is consistent with the revised Framework, both in its requirement that the density of new housing development should be well related to the character and appearance of development in the surrounding area, and in its use of a range of average net densities. His conclusion on this is not altered by the fact, as pointed out by the agent in their representation of 5 October, that the policies of the 2005 Local Plan 'were required to accord with government policy of the time...[and] PPG3 set out a requirement for a minimum density of 30 dwellings per hectare'.

25. He has taken into account that policy H8 also requires the density of new housing development to be well related to the character and appearance of development in the surrounding area, and that the Core Strategy and NP echo these themes (IR9.43). He has also taken into account, as set out in the agent's representation of 5 October 2018, that the draft Plan:MK does not contain a policy which sets out a minimum density, and that a higher-density scheme was put forward by the appellant (IR9.46).

26. The Secretary of State notes that policy H8 seeks an average net density of 35dph in this location, and that this is over twice the density of 16dph actually proposed (IR9.43). He considers that the proposed density is a very significant departure from policy. Even taking into account the matters set out above, the desirability of maintaining the area's prevailing character and setting, and the rest of the factors set out at paragraph 122 of the Framework, he does not consider that such a significant departure from policy is justified. He therefore considers that the proposed development is in conflict with policy H8, and he gives this conflict significant weight."

32. In contrast to the approach of the Inspector, the First Defendant did not consider that the section 106 obligation pertaining to the building out of the site within five years could

policy which was important for determining the application had been found to be out-of-date then the tilted balance under paragraph 11(d)(ii) was engaged. It followed that the First Defendant had erred in law in interpreting his own policy in failing to apply the tilted balance when reaching his overall conclusions in respect of the merits of the appeal. Alternatively, there was a failure to provide any reasons in relation to why paragraph 11(d)(ii) did not apply, in circumstances where the conclusion had been reached in paragraph 19 of the decision letter that two of the policies bearing upon the determination of the appeal were out-of-date.

37. Grounds 2 and 3 relate to the first Defendant's conclusion on housing land supply that it was "in the region of 10,000-10,500". The Claimant's contentions in respect of this conclusion are, firstly, that the First Defendant failed to correctly interpret paragraph 73 of the Framework and the glossary definition of deliverable and the relevant provisions of the PPG.

38. The Claimant contends that the First Defendant failed to properly interpret this policy material in that he failed to identify any findings on deliverability in relation to the specific sites review in the analysis of the SPRU Report (which had not been gainsaid by anything submitted by the Second Defendant). Given the requirement in the policy material for clear evidence on deliverability, the First Defendant had signally failed to correctly interpret the policy and identify any findings in respect of deliverability. Alternatively, the Claimant contends that the finding in relation to housing land supply standing at 10,000-10,500 dwellings is entirely unexplained and no reasons are provided as to why, bearing in mind the acceptance of the Inspector's conclusions in respect of the factors over which there was disagreement at the inquiry, and the appearance that the First Defendant had taken account of the evidence on progress put forward in the SPRU report, his figure for supply had been arrived at.

39. Ground 4 relates to the issue concerning density. Again, the Claimant contends that the First Defendant failed to properly interpret policy H8 in that he interpreted it as requiring a strict application of the numerical thresholds contained within it. The Claimant draws attention to the reference in the policy to the need for density to be "well related to the character and appearance of the area" and the Inspector's findings that the proposal was appropriate to the character of its surroundings. It is contended by the Claimant that the question of whether the density was well related to the character and appearance of the area was simply never addressed by the First Defendant, and no adequate reasons were provided for the departure from the approach of the Inspector. Furthermore, there were no adequate reasons to explain this beyond a bare assertion that the policy was inconsistent with the 2012 Framework but consistent with the 2018 Framework.

40. Ground 5 relates to regulation 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. The statutory framework is addressed in detail below, but the essence of Ground 5 is that the Claimant contends that the First Defendant differed from the Inspector in relation to three matters of fact which required the First Defendant to afford the Claimant the opportunity to make further representations pursuant to regulation 17(5). Those matters are, firstly, the specific sites that were considered deliverable by the First Defendant; secondly the factual basis for finding that a numerical threshold only should apply for the purposes of applying policy H8; and thirdly the basis for concluding that the presumption in favour of sustainable development under paragraph 11(d)(ii) did not apply to the decision-taking process.

41. Ground 6, for which permission does not exist, but which the Claimant contends its arguable, is the contention that the First Defendant left out of account a material consideration when he refused to take account of the planning benefits secured by the section 106 obligation. The obligation was compliant with the provisions of regulation 122 of the Community Infrastructure Regulations 2010 and should have been taken into account in reaching the First Defendant's conclusions.

The Law

(1) After the close of an inquiry, the inspector shall make a report in writing to the Secretary of State which shall include his conclusions and his recommendations or his reasons for not making any recommendations.

(5) If, after the close of an inquiry, the Secretary of State-

(a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or

(b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),

and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with the recommendation without first notifying in writing the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or matter or fact, not being a matter of government policy) of asking for the reopening of the inquiry."

45. In addition, rule 18 provides as follows:

"Notification of decision

18(1) The Secretary of State shall, as soon as practicable, notify his decision on an application or appeal, and his reasons for it in writing to- (a) all persons entitled to appear at the inquiry who did appear, and (b) any other person who, having appeal at the inquiry, has asked to be notified of the decision."

46. It follows from Rule 18 of the 2000 Rules that in reaching his decision the First Defendant is under a duty to provide reasons for the decision. The question which arises is as to whether or not those reasons are legally adequate. There are two dimensions to the consideration of that issue, and I am grateful to all counsel in the case who helpfully identified agreed legal propositions which assist both as to the correct approach to section 288 challenges, and also the allied question of whether or not the reasons provided in the decision are legally adequate. So far as the approach to challenges under section 288 of the 1990 Act is concerned, Lindblom LJ in St Modwen v SSCLG [2017] EWCA Civ 1643 summarised 7 principles to be applied in considering such cases, at paragraph 19 of his judgment as follows:

"19. The relevant law is not controversial. It comprises seven familiar principles:

1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parities who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph"

2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principle important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a

Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283 at paragraph 45 of the judgment as follows:

"45 These ["absence", "silence" and "out-of-date"] are three distinct concepts. A development plan will be "absent" if none has been adopted for the relevant area and the relevant period. If there is such a plan, it may be "silent" because it lacks policy relevant to the project under consideration. And if the plan does have relevant policies these may have been overtaken by things that have happened since it was adopted, either on the ground or in some change in national policy, or for some other reason, so that they are now "out-of-date". Absence will be a matter of fact. Silence will be either a matter of fact or a matter of construction, or both. And the question of whether relevant policies are no longer up-to-date will be either a matter of fact or perhaps a matter of both fact and judgment."

49. It was uncontroversial that the approach taken by the court in Bloor was of equal application to the phrase "out-of-date" in paragraph 11 of the version of the Framework pertinent to the present case and published in 2018.

50. The Court of Appeal have relatively recently considered the provisions of the 2012 Framework in relation to the five year housing land supply in Hallam Land Management Limited v SSCLG & Eastleigh Borough Council [2018] EWCA Civ 1808; [2019] JPL 63. The facts of that case were that the appeal in question had been recovered by the First Defendant for his own consideration. There was a dispute as to the extent of the five year housing land supply. At the inquiry the Appellant contended that it was 2.9 years or 1.78 years, and the local planning authority conceded that it could not demonstrate a five year housing land supply. Further representations were made after the close of the inquiry, in particular by the local planning authority, who contended they had a 4.93 year supply. This was contested by the Appellant. Prior to the determination of the appeal under challenge, two further appeal decisions were issued, one at Bubb Lane where the Inspector found there to be a significant shortfall in housing supply, and another at Botley Road in which, again, an Inspector concluded there was a significant shortfall of housing in the local planning authority's area. In giving the principal judgment of the Court of Appeal, Lindblom LJ characterised the issue in the appeal in the following terms:

"1. In deciding an appeal against the refusal of planning permission for housing development, how far does the decision-maker have to go in calculating the extent of any shortfall in the five-year supply of housing land? That is the central question in this appeal."

51. Having considered a variety of first instance decisions Lindblom LJ concluded that there were three main points to emerge from the extant authority and they were as follows:

"50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in paragraphs 47 and 49 of the NPPF and the corresponding guidance in the Planning Practice Guidance ("the PPG"). The Government has chosen to express its policy in the way that it has – sometimes broadly, sometimes with more elaboration, sometimes with the aid of definitions or footnotes, sometimes not (see *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040, at paragraph 33; *Jelson Ltd.*, at paragraphs 24 and 25; and *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at paragraphs 36 and 37). It is not the role of the court to add to or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.

51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-

housing land supply in those two decisions, and the consequences of those conclusions for the weight to be given to local plan policies, clearly were material considerations in this appeal. They would, in my view, qualify as material considerations on the basis of the case law relating to consistency in decision-making (see the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P. & C.R. 137, at p.145, most recently followed by this court in *DLA Delivery Ltd. v Baroness Cumberlege of Newick and Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, at paragraphs 29, and 42 to 56). But leaving aside the principle of consistency, they would have been, it seems to me, material considerations if only on the basis that they represented an up to date independent assessment of housing land supply in the council's area, which had been squarely put before the Secretary of State. Yet he said nothing at all about them. Nor is there any explicit reference to the relevant content of the representations the parties had made. It is clear that the reference in paragraph 19 of the decision letter to the council's view that it was now able to demonstrate 4.86 years' supply of housing land was taken from the "Update on Housing Land Supply" that it produced on 23 June 2016. But he did not refer to the very firm and thoroughly reasoned conclusions of the inspector in the Botley Road appeal, which were reached in the light of that evidence.

63. So it is not clear whether the Secretary of State confronted the conclusions of the inspectors in the Bubb Lane and Botley Road appeals, and in particular the latter. Had he done so, he would have appreciated that the conclusions they had reached on the scale of the shortfall in housing land supply could not reasonably be reconciled with his description of that shortfall, in paragraph 17 of his decision letter, as "limited". The language used by those two inspectors was distinctly different from that expression, and incompatible with it unless some cogent explanation were given. No such explanation was given. In both decision letters the shortfall was characterized as "significant", which plainly it was. This was more akin to saying that it was a "material shortfall", as the inspector in Hallam Land's appeal had himself described it in paragraph 108 of his decision letter. Neither description – a "significant" shortfall or a "material" one – can be squared with the Secretary of State's use of the adjective "limited". They are, on any view, quite different concepts.

64. Quite apart from the language they used to describe it, the inspectors' findings and conclusions as to the extent of the shortfall – only "something in the order of four year supply" in the Bubb Lane appeal and only "4.25 years' supply" in the Botley Road appeal – were also substantially different from the extent of the shortfall apparently accepted or assumed by the Secretary of State in his decision in this case, which was as high as 4.86 years' supply on the basis of evidence from the council that had been before the inspector in the Botley Road appeal and rejected by him.

65. One is left with genuine – not merely forensic – confusion on this important point, and the uncomfortable impression that the Secretary of State did not come to grips with the inspectors' conclusions on housing land supply in those two very recent appeal decisions. This impression is not dispelled by his statement in paragraph 7 of the decision letter that he had given "careful consideration" to the relevant representations."

53. Lindblom LJ thus concluded that the First Defendant's reasons in that case failed to measure up to the requirements contained in the South Buckinghamshire case. In a concurring judgment Davis LJ offered further views in respect of the need where appropriate to identify the extent of the shortfall in housing land supply as follows:

"82. Here, it was common ground that there was such a shortfall. That being so, I have the greatest difficulty in seeing how an overall planning judgment thereafter could properly be made without having at least some appreciation of the extent of the shortfall. That is not to say that the extent of the shortfall will itself be a key consideration. It may or not be: that is itself a planning judgment, to be assessed in the light of the various policies and other relevant considerations. But it ordinarily will be a relevant and material consideration, requiring to be evaluated.

overall assessment is that the basket of policies is rightly to be considered out-of-date. That will, of course, be a planning judgment dependent upon the evaluation of the policies for consistency with the Framework (see paragraph 212 and 213) taken together with the relevant facts of the particular decision at the time it is being examined.

57. Mr Honey submitted that the First Defendant's decision was consistent with that approach. He drew attention to the fact that the policies referred to in paragraph 10 of the decision letter by reference to the Inspector's report ranged wider than simply policy S10 and WS5. Bearing in mind a larger basket of policies was involved in considering the application of paragraph 11(d) there was nothing in the First Defendant's decision to suggest that paragraph 11(d) had been overlooked or misinterpreted. The First Defendant could be taken to be familiar with the provisions of his own policy, and the fact that he did not apply the tilted balance to the decision in the present case carries the clear inference that his evaluation of all of the policies that were of most importance in determining the application when examined individually and then taken as a whole and in the round were not properly to be considered to be out-of-date.

58. I am satisfied that Mr Honey's interpretation of the Framework in this connection is correct. It needs to be remembered, in accordance with the principles of interpretation set out above, that this is a policy designed to shape and direct the exercise of planning judgment. It is neither a rule nor a tick box instruction. The language does not warrant the conclusion that it requires every one of the most important policies to be up-of-date before the tilted balance is not to be engaged. In my view the plain words of the policy clearly require that having established which are the policies most important for determining the application, and having examined each of them in relation to the question of whether or not they are out of date applying the current Framework and the approach set out in the Bloor case, an overall judgment must be formed as to whether or not taken as a whole these policies are to regarded as out-of-date for the purpose of the decision. This approach is also consistent with the Framework's emphasis (consonant with the statutory framework) that the decision-taking process should be plan-led, and the question of consistency with the development plan is to be determined against the policies of the development plan taken as a whole. A similar holistic approach to the consideration of whether the most important policies in relation to the decision are out-of-date is consistent with the purpose of the policy to put up-to-date plans and plan-led decision-taking at the heart of the development control process. The application of the tilted balance in cases where only one policy of several of those most important for the decision was out-of-date and, several others were up-to-date and did not support the grant of consent, would be inconsistent with that purpose.

59. Bearing in mind that the list of policies in the present case ranged beyond policies S10 and WS5, it is in my view not possible to contend either that the First Defendant did not undertake the assessment required by what is effectively the centre piece of his policy or, alternatively, that he misinterpreted that policy in his application of it. It is true to observe, as Mr Goatley does in his submissions, that these issues are not matters which are directly addressed in the First Defendant's decision letter. The conclusion that the First Defendant correctly applied the policy arises from, in effect, an inference that he properly interpreted and applied his policy in circumstances where it is entirely reasonable to infer without specific reference that he would have applied his policy, and there is no evidence to support any suggestion that he misinterpreted it. Again, I am satisfied that Mr Honey's submissions in relation to the reasons dimension of ground 1 are sound for the following reasons.

60. Mr Honey submitted that there was no need for the First Defendant to provide particular reasons for his conclusion in relation to the application of paragraph 11(d) on the basis of the most important policies for the decision being out-of-date in circumstances where it was not a principal or main controversial issue in the decision which he was reaching. Neither before the Inspector, nor in their submissions to the First Defendant, had the Claimant contended that there was any alternative justification for the application of the tilted balance apart from the shortfall in housing land supply. The contentions made in the context of this challenge have been made solely as part of the grounds of the challenge itself. As is

PPG. He further submitted that it was open to the First Defendant to have taken into account some of these sites depending on their characteristics, and that there were permutations of that exercise which would explain how the First Defendant had come to the conclusion that the housing supply was in the range of 10,000-10,500. Thus, the First Defendant's figure was explicable on the evidence before him and there was no need for him to provide further reasons on this aspect of his decision.

65. In my view it in important when evaluating these submissions to observe, firstly, that the measure of whether reasons are adequate will depend on the facts of the case. Whether reasons are legally adequate is a fact-sensitive exercise and falls to be considered against the particular facts of a case, and the principles must be applied on a case by case basis. In the present case the following factual matters are of significance.

66. Firstly, at the time when the First Defendant came to address the issue of the five year housing land supply, which was undoubtedly one of the principle important controversial issues in the case, the position in the evidence before him from both the Claimant and the Second Defendant was that a five year housing land supply could not be demonstrated. That, moreover, was the position of the Inspector in the conclusions of his report. The First Defendant was, therefore, for the first time in the decision-taking process concluding that a five year housing land supply was available to the Second Defendant. That was a decision that was open to him, obviously, but equally obviously, and in particular where the First Defendant was alighting upon a figure for housing land supply which had not featured anywhere in the material presented to him by either of the main parties or the Inspector, it called for explanation. Secondly, it is important to observe that in paragraph 17 of the decision letter the First Defendant had accepted and adopted conclusions of the Inspector in relation to uncertainty, slippage or failure in forecasting housing delivery, as well as the conclusions in relation to the delivery rates on sites being unlikely to be achievable. The Inspector had taken account of these matters generally rather than to arrive at a specific figure because, as set out in his conclusions, taking any one of the contentious consumptions against the Second Defendant would amount to a failure to demonstrate the five year supply. The First Defendant, by clear contrast, arrived at a specific and entirely new figure purporting to have taken account of the Inspector's conclusion on these issues. Thirdly, as is clear from paragraph 18 of the decision letter, the First Defendant took account of the site assessments set out in the SPRU Report in arriving at his figures for supply, figures which are clearly inconsistent with his overall assessment.

67. All of these factors lead me to the conclusion that the reasons provided by the First Defendant in relation to the figure were not adequate in the particular and perhaps unusual circumstances of this case. By simply asserting the figures as his conclusion, the First Defendant has failed to provide any explanation as to what he has done with the materials before him in order to arrive at that conclusion, bearing in mind that it would have been self-evident that it was a contentious conclusion. Simply asserting the figures does not enable any understanding of what the First Defendant made of the Inspector's conclusions which he accepted in paragraph 17 of the decision letter, and how they were taken into account in arriving at the final figures in his range. Whilst Mr Honey was in my view correct to point out in his submissions that arriving at the range of 10,000-10,500 was not inexplicable, in the sense that the First Defendant had the materials before him to alight upon those figures, nonetheless the exercise which Mr Honey undertook in his submissions set out above demonstrated the difficulty with the absence of reasons in this case. There were, no doubt, any number of adjustments or permutations which might have been taken to the figures in the SPRU Report to arrive at the First Defendant's conclusion. However, by simply asserting the figures in a range makes it a matter of pure speculation as to how the First Defendant arrived at the figures which he did. How he arrived at the range and had resolved the issues in relation to the deliverable supply on the evidence before him is entirely undisclosed.

68. Having failed to disclose how the First Defendant arrived at the range which he did, the Claimant is entitled to contend that it is left without any understanding of the treatment of the evidence (including the SPRU Report) so as to arrive at the range stated, and unable to

area, and also the use of a range of average net densities. Having reached that conclusion, the reasoning in paragraphs 25 and 28 demonstrates that the First Defendant was alive to, and took account of, the Inspector's conclusions in relation to the relationship of the density of the proposal to its surroundings. Nevertheless, the First Defendant was entitled to reach the conclusion which he did that the scale of the departure from the policy requirement of H8 was a matter which amounted to a conflict with policy H8 to which significant weight should be ascribed. I am unable to read these paragraphs as founding in Mr Goatley's contention that the First Defendant had illegitimately overemphasised the numerical requirements as compared to the analysis of the proposals suitability by reference to the surrounding area. All of these factors are clearly taken into account in the assessment undertaken in paragraphs 24-26 of the decision and the First Defendant's view is clear and properly reasoned. In my view there is no substance in the Claimant's ground 4.

72. Turning to ground 5 there are three factors relied upon by Mr Goatley as being differences on matters of fact between the Inspector and the First Defendant which called for a reference back to the parties pursuant to rule 17(5) of the 2000 rules. Those matters were the decisions in relation to deliverable sites forming part of the housing land supply, the numerical basis of policy H8 and its application and the application of paragraph 11(d) of the Framework.

73. In my view the difficulty with Mr Goatley's contentions in respect of these issues is that they are all, in truth, matters of opinion and not questions of fact. The evaluation of whether or not sites were deliverable was a question of judgement for the First Defendant to consider. "Deliverability" is obviously an exercise of judgement based upon what is known about the site or sites which are under consideration. The assessment of H8 and the application of its numerical requirements was again not a question of fact (the facts as to the density of the proposed development and its relationship to the numerical requirements of H8 being known and uncontentious). The issue which arose was a question of planning judgment as to the relationship between the proposed density and the application of policy H8 and lastly, the question of whether or not policies were out-of-date and whether or not that provided a trigger for the application of the tilted balance under paragraph 11(d) of the 2018 Framework was again a matter for the judgment of the decision-taker. Thus, whilst there were undoubtedly differences on these topics between the findings of the Inspector and the conclusions of the First Defendant none of them amounted to questions of fact which engaged rule 17(5) of the 2000 Rules.

74. I turn finally to ground 6 and the challenge to the conclusion of the First Defendant that the obligation to use reasonable endeavours to complete the development within five years was not addressed to any demonstrated planning harm and was not necessary to make the development acceptable in planning terms. As such the requirements of regulation 122 of the Community Infrastructure Levy Regulations 2010 precluded the obligation from being a material consideration. I am not satisfied that this ground is properly arguable for a number of reasons. Firstly, in circumstances where the Second Defendant could demonstrate that it had a five year supply of housing there was no harm which this obligation was addressing. Mr Goatley's response that there remains a requirement in the Framework to boost the supply of housing does not substantiate the suggestion that the obligation addressed any harm or was necessary to properly regulate the development but, rather suggests that in circumstances where there was a five year land supply, the obligation was affording a benefit and not securing a matter which was required to make the development acceptable. In the circumstances ground 6 is not arguable and must be dismissed.

Conclusions

75. I am satisfied that the Claimant must succeed under grounds 2 and 3, in particular in relation to the inadequacy of the First Defendant's reasons and that permission must be refused for ground 6 and substantive relief declined in respects of grounds 1, 4 and 5. Given the conclusions which I have reached there is no need to determine the Claimant's application for specific disclosure which was made at the hearing: such disclosure was at the

Groveway/Simpson Road (SAP13)					
Reserve Site 3, East of Snehsall Street (SAP11)	SAP Allocation	22	0	-22	No planning application submitted or approved.
Tickford Fields	NP Allocation	325	0	-325	No planning application submitted or approved.
Police Station Houses, High Street	NP Allocation/ 2005 LP Allocation	14	0	-14	No planning application submitted or approved.
Total		1,156	0	-1,156	

Annex 3:

Table 12 Adjusted Trajectory of Sites with Detailed Planning Permission

Site Address	Outline	MKC Supply (2018-2023)	SPRU Supply (2018-2023)	Difference	SPRU Comments
Land at Brooklands 2,501 Units Outline	06/00220/MKPCO	291	0	-291	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 2	06/00856/MKPCO	82	0	-82	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 3	06/00856/MKPCO	120	0	-120	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 4	06/00856/MKPCO	70	0	-70	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 5	06/00856/MKPCO	20	0	-20	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
WEA AREA 10.1 -10.3 REMAINDER	05/00291/MKPCO	912	0	-912	Outline Permission only. Only change since publication of data is there is now a RM Pending for 129 dwellings under

					Council's data. Various conditions discharged by Gallagher Estates.
Land at Skew Bridge Cottage, Drayton Road	16/02174/OUT	10	0	-10	Outline Permission only. No change since publication of Council's data. No conditions discharged. Application submitted by the landowner, not a housebuilder.
Broughton Atterbury (SAP14) Self Build Plots	SAP Allocation/ 17/00736/OUT	15	0	-15	Outline application approved in August 2018 and was submitted by Morris Homes for 15 self-build units. No RM or conditions discharged.
76-83 Shearmans	15/00268/OUT	14	0	-14	No reserved matters application submitted, and no conditions discharged. Application was submitted by the landowner not a housebuilder.
Land At Towergate, Groveway (SAP12)	17/03205/OUT	105	0	-105	Outline Permitted September 2018. Submitted by HCA. One Condition discharged.
Railcare Maintenance Depot, Stratford Road	15/02030/OUTEIS	75	0	-75	Outline planning permission only. No reserved matters application or conditions discharged. Application submitted by St Modwen.
SW of BWMC, Duncombe Street	16/01430/OUT	12	0	-12	Outline application is still pending, and therefore does not yet have planning permission. Went to committee in December 2016 recommend for approval. Committee minutes not available online, but presumption is approved subject to S106. Application was submitted by the landowner not a housebuilder.
Timbold Drive (SAP9)	17/02616/OUT	130	0	-130	Hybrid application: outline for 148 dwellings, details for 47 bed hospital. No conditions discharged. No change since publication of Council's data. Application was submitted by MKDP and Spire Healthcare, not a housebuilder.
Land east of Tillbrook Farm	16/00762/OUT	36	0	-36	Outline Permission only. No change since publication of Council's data. No

Annex 4:

Table 13 Five-year Supply Calculation using Standard Methodology

Site	MKC Supply (2018-2023)	SPRU Supply (2018-2023) (RGB Proof)	Adjusted to be 2018 Framework Compliant (Removal of outline and allocation with no clear evidence of delivery)	Adjusted to be 2018 Framework Compliant incl. Build Out Rates for Sites with FUL/RM Consent as per RGB Proof	Difference
WEA	2,820	1,600	1,358	1,358	-1,462
Brooklands	1,307	800	1,016	800	-507
Strategic Reserve	1,888	940	1,279	940	-948
Tattenhoe Park	292	300	0	0	-292
Total	6,307	3,640	3,653	3,098	-3,209

	MKC (No Adjustments)	SPRU (with adjustments to be 2018 Framework Compliant)	SPRU (with adjustments to be 2018 Framework Compliant and adjustments to delivery rates on sites with FUL/RM Consent)
Standard Methodology	1,604	1,604	1,604
5 year supply requirement (1,604x5)	8,020	8,020	8,020
5 year supply requirement (2018-2023) including 5% buffer	8,421	8,421	8,421
Annual supply required	1,684	1,684	1,684
Supply	12,920	7,663	7,108
Difference	+4,499	-758	-1,313
5 year housing land supply position	7.67 years	4.55 years	4.22 years

Annex 5:

Table 14 Five-year Supply Calculation using Inspector's Housing Requirement from LP Examination