AS/9

IN THE MATTER OF

EMERGING TORBAY LOCAL PLAN
A LANDSCAPE FOR SUCCESS:
THE PLAN FOR TORBAY TO 2032

ADVICE NOTE

No5 CHAMBERS

BIRMINGHAM · LONDON · BRISTOL

The Background

1. In this matter I am instructed by Bloor Homes (hereinafter "the Client"), in respect of the emerging Torbay Local Plan, which is entitled ***"A Landscape for Success, the Plan for Torbay to 2032"*** (hereinafter "the Local Plan". The Local Plan is to be the subject of an Examination in Public this week. The Inspector is Mr. Keith Holland.

2. The Local Planning Authority is Torbay Council (hereinafter "the Council").

3. I have been advising and acting for the Client in respect of a number of planning applications at Churston for several years. This includes,

   (i) the housing application at the present site of the Churston Golf Clubhouse and the 1st and 18th tee, which now has planning permission for housing;

   (ii) a replacement golf clubhouse and extension to the golf course in the South Devon Area of Outstanding Natural Beauty (to replace the facilities lost to the housing development); these planning proposals were recommended for approval by the professional officers of the Council, but subsequently refused by members;

   (iii) a new golf clubhouse site near the junction of Bridge Road and Bascombe Road, in a location outside of the AONB, together with the previously agreed golf course extension.

   (iv) an application for the golf course extension land only, which was also written up for approval by the professional officers of the Council, but subsequently withdrawn.

4. The proposals listed under (iii) have been the subject of a four week planning inquiry which finished on Friday, before Inspector Paul Dignan (hereinafter "the Churston inquiry").

5. At that appeal, I was also instructed Churston Golf Club (hereinafter "the Club"). The Club leasehold interest in the golf course. The Council however, is the freehold owner.

6. The appeal proposal have been the subject of strenuous objection from a local objection group called RAGS representing various people, some of them live in the vicinity of either the housing site or the new replacement clubhouse.

7. The inquiry was originally programmed to last for two weeks. But it quickly became clear that it would not finish in the time allotted. After the first two weeks, it had to be adjourned for a period of 6 – 7 months. During which time, the Client's contract with the Council on the housing site lapsed. The Council has refused to enter into a new contract with Bloors. Yet at the same time the Council continue to rely upon the site in their five year housing land supply.

8. The Client has a separate contract with the golf club which lasts until 2020. No other party can develop the land during that period.

9. The Client also has a contract with the Churston Barony, in respect of the Offsite Mitigation Land (OSML) which has been needed to reach agreement (as it existed in March 2013) with Natural England over the golf course extension site, for reasons which relate to the Conservation of Habitats and Species Regulations 2010 (Habitats Regulations – "HR"). These Regulations transpose the requirements of the EC Directive on the Conservation of Natural Habitat and of Wild Flora and Fauna – the Habitats Directive ("HD"). The Client also has a contract with the Barony on this land until 2020.

10. In recent months, local residents have persuaded the Mayor to consider imposing a covenant on the Council owned Churston Golf Course, which would not allow development of Churston Golf Course without first obtaining the agreement of the majority of the residents of the ward at a referendum. It was triggered by a petition of more than 1,000 names. I understand the final decision has not yet been made, and nor will it until 4 December 2014.

11. This action concerns the Council acting in its capacity as a land owner, rather than as a local planning authority. But a report written for a Full Council meeting of 25 September by the Senior Service Manager, Strategic Planning and Implementation (commonly known as the Head of Planning) Patrick Steward[1], raised fundamental concerns about the Mayor's proposed course of action. The report addresses the Mayor's proposed covenant and concludes there will be serious and significant consequences for the Local Plan, the creation of a precedent for other Council owned sites proposed for development, local investment and Council finances.

12. The wording of the report from the Senior Service Manager could not be clearer. Nor could the far reaching consequences of the covenant be made any more obvious. In an extraordinarily candid report, the Senior Service Manager, openly states that:

[1] As confirmed by David Pickhaver (Council policy officer) in cross examination at the Churston inquiry

"3.2 The proposed covenant has significant implications in respect of the Local Plan."

"3.3 The proposed covenant has significant implications in respect of the Council's future income and ability to fund the Capital Programme."

"A1.3 Planning Implications of the proposed covenant
A1.3.1 It is the professional planning view that any decision to support the petition (and impose a "no development" clause re Churston Golf Course would result in the new Local Plan being unsound and undeliverable; would be contrary to a decision previously made by Development Management Committee; and would seriously undermine efforts to secure investment in the Bay." (my emphasis)

13. The report specifically highlights the precedent that would be created by the Mayor's proposals for the Churston covenant in terms of other land proposed for development in the Council's ownership. Appendix 2 of the report actually lists the sites which in the view of the professional officers ***"may no longer be in the Council's 5 year housing land supply."***

14. This matter has also been the subject of a further report to the Council's Overview and Scrutiny Committee of the Council, dated 16 October 2014. This report was also written in part by Patrick Steward. But contains far more information about the financial implications for the Council flowing from the proposed covenant in terms of the Council's assets. These sections were written by Anne-Marie Bond who is the Head of Legal Services.[2] It concludes, ***"the potential change in value of the above assets is considered to be I the region of £47,375,000."*** (end of section 8).

Advice Sought

15. I have been asked to provide advice on the implications of the abovementioned report for the progress of the Local Plan.

ADVICE

16. I should make clear from the outset that I am not asked to advise on the full remit of the Local Plan or the Client's evidence on the issues of full objectively assessed need and five year housing land supply. This is to be addressed on behalf of the Client by the various planning consultants attending the inquiry this week. But I am asked to advise on the implications of the covenant and in particular the report to Full Council of 25 September 2014.

[2] As confirmed by David Pickhaver (Council policy officer) in cross examination at the Churston inquiry

17. Plainly, the report was written to encourage the Full Council to try and stop the Mayor's proposed course of action. But to date it has not worked.

18. Given the close proximity of the Local Plan Examination at the time the report was written, in my opinion it would be inconceivable to imagine that the Service Manager would not have chosen his words very carefully and after much consideration. I do not understand the Council to suggest the report was anything other than carefully drafted by the appropriate person, given the significant implications of its content.

19. Last week at the Churston appeal, during the cross examination of David Pickhaver (one of the Council's policy officers), my notes record that he agreed with the proposition put to him, that in terms of the wording in paragraph 3.2 of the 25 September 2014 report (the first one), it would be difficult to think of anything more clear.

20. Moreover, the wording in paragraph A1.3.1 is also very clear. The use of the word **"would"** demonstrates that the professional view is that the imposition of the proposed covenant will mean the Local Plan is found unsound. One simply could not read the text in any other way.

21. In my opinion, to start to suggest that carefully considered documents written by Council officers do not mean what they say would render the entire evidence base behind the Local Plan meaningless. That cannot be a credible position to adopt.

22. I anticipate that at the Examination this week, the Council officers will have little option but to try and distance themselves from their own words. But when the wording of the report is so clear, that would lack all credibility.

23. Officers may also try to suggest, as was argued on Thursday and Friday last week at the Churston inquiry, that no decision has been made in respect of the covenant issue. But if that is the Council's position then plainly the Examination this week should be suspended until such time as there is clarity over the issue. This is not some minor or inconsequential matter, and the report of 25 September 2014 is lucidly clear on its face as to why it cannot be dismissed as such.

24. Finally, during cross examination, David Pickhaver made clear that Mr Holland had provided the Council with advice on the implications of the covenant. Mr Pickhaver was not willing to provide a copy of the advice, but merely sought to rely on parts of it. The reliance of selective parts of a document is neither fair nor transparent, and not what one would respect from a local planning authority. Advice from Mr Holland would not be protected under legal professional privilege. None of the advice received by

the Council from the Local Plan Inspector should be kept secret. I am not aware of any basis upon which such advice from PINS should be considered incapable of disclosure.

25. To be of value to participants in the Local Plan, that advice should be disclosed with sufficient time to allow reasonable consideration of its contents.

26. I trust I have dealt with all the matters concerning my instructing consultant, but needless to say if there are any other matters arising please do not hesitate to contact me, upon the telephone if necessary.

17 November 2014

CHRISTOPHER YOUNG

No5 Chambers

Birmingham - Bristol - East Midlands - London

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EMERGING TORBAY LOCAL PLAN
A LANDSCAPE FOR SUCCESS:
THE PLAN FOR TORBAY TO 2032

ADVICE NOTE

Barton Willmore

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Contact: Kate Spencer
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Date: Wednesday, 22 October 2014

Overview and Scrutiny
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Dear Member

OVERVIEW AND SCRUTINY BOARD - WEDNESDAY, 22 OCTOBER 2014

I am now able to enclose, for consideration at the Overview and Scrutiny Board to be held on Wednesday, 22 October 2014, the following reports that were unavailable when the agenda was printed.

Agenda No	Item	Page
2.	**Proposed Covenant protecting Churston Golf Course from development**	(Pages 87 - 95)

Yours sincerely

Kate Spencer
Overview and Scrutiny Lead

Churston Covenant – Additional Information Requested

1. **Valuation of the land by an independent valuer**

   It has not been possible to gain an independent valuation of the land in the timescales available.

2. **Mr Haddock's points:**
   a. **There is already a covenant on the land. It has been breached on a number of times. The Council has failed in its statutory duty to enforce the current covenant.**
   b. **Clarification requested by Cllr Tyerman – is there an existing covenant or are there issues around the conditions of existing leases**

   The golf club lease is subject to covenants that are detailed in a conveyance dated 20.12.72. This conveyance is referred to in the 2003 golf club lease. The relevant covenant states that the purchaser (Torbay Council in 1972) will not use the golf club land except in such a way that there will always be an 18 hole golf course as long as there is public demand for such a course. This is consistent with the permitted user clause of the lease.

3. **Mr Billings' points:**
   a. **The report wrongly assumes that the planning permission for the 1st and 18th hole is undeliverable.**

      At the last meeting of the Overview & Scrutiny Board officers advised of the risk that discussions held at Board meeting and recommendations by the Board could undermine the Council's position at the forthcoming Public Inquiry (relating to the Council's refusal of planning permission for a new clubhouse) and at the Local Plan Examination. The Council's position, as Local Planning Authority, on this site is quite clear – the 1st & 18th is a deliverable site, featuring in the Council's 5 year land supply and in the Local Plan. The Council's position as landowner is also clear – there is no contract that allows development of the 1st & 18th, but this or a future Administration could agree a new contract, relatively quickly.

      Outline planning permission, for delivery of 132 new homes on the 1st & 18th, was granted on 20/12/2012. Consequently, all Reserved Matters need to be submitted by 20/12/2015 in order to keep the outline planning permission 'alive'. There is then two years, from the date of approval of the final reserved matters, within which development must be commenced. A reserved matters application (covering design and appearance) has already been submitted and approved for the 42 sheltered units. As the principle of development has been accepted by the Council, reserved matters applications will deal with issues such as design and landscaping. Reserved matters applications could be submitted, and the outline permission kept alive, even if the Clubhouse appeal was dismissed (i.e. planning permission not granted by the Inspector).

The one planning 'barrier' to delivery of the development at 1st & 18th is planning permission for a relocated clubhouse. The Appellants, in relation to the Clubhouse appeal, argue that the 1st & 18th is an important site for housing as the Council does not have (they contend) a 5 year housing land supply. They argue this is a good reason for the Inspector to allow the appeal for the Clubhouse. As such it seems odd for the community to suggest, at this time, the 1st & 18th is not deliverable, as this might be considered as providing support for the proposed clubhouse. If the Inspector allows the appeal (and hence gives permission for the proposed clubhouse), there is nothing in planning terms to prevent delivery of the 1st & 18th.

Until the outcomes of the Churston Golf Club planning appeal and the Local Plan Examination are known, the Council should continue to consider the site as deliverable. It should be noted that the site is considered as deliverable in the Council's refreshed Strategic Housing Land Availability Assessment (July 2013), which forms a key piece of evidence to support the new Local Plan. That work was undertaken with the Council, landowners, the community and housebuilders / developers.

The National Planning Policy Framework (NPPF) defines 'deliverable' as follows:

"To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

That raises a number of 'tests':

1. **Availability** – in planning terms the site is considered as available, especially as it has planning permission. In land ownership terms, a new contract with Bloors (or another developer) and the Golf Club could be in place relatively quickly.
2. **Location** – the Council's Development Management Committee has agreed the location of the site to be suitable for development, by granting outline planning permission; Council has agreed to inclusion of the site within the new Local Plan.
3. **Achievable** – in the current market conditions the development is considered as achievable, viable and capable of being delivered in the next 5 years (note: even if the site is not considered as deliverable – in whole or in part – in the next 5 years, the site is still categorized as developable in NPPF terms: "To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged.")

Consequently, officers consider the site to be deliverable in accordance with the NPPF.

b. The report ignores the other housing sites identified in the Neighbourhood Plan.

See answer to question 6 below

c. The report wrongly assumes the covenant is a "no development" covenant.

The covenant is not a 'no development' covenant. Firstly the proposed covenant does not apply to any development that is within the permitted user clause of the lease (i.e. Golf Club or agriculture). Secondly the proposed covenant only prevents development on the land without first obtaining the agreement of the majority of the residents of the ward at a referendum.

d. The report wrongly fails to explain that the covenant is not a disposal.

Council Officers are of the firm belief that the proposed covenant is classed as disposal under the Local Government Act 1972.

'Land' is defined in s.270(1) of the 1972 Act as including 'any interest in land and any easement or right in, to or over land'.

The benefit of a restrictive covenant is an equitable interest in land and the grant of this restrictive covenant therefore involves a disposal of land within s.123 of the Act.

It is therefore incumbent on the Council in pursuance of s.123 of the Act to achieve the best consideration reasonably obtainable for the covenant unless the Council is able to rely on the 2003 General Disposal Consent Order or unless the specific consent of the Secretary of State is obtained.

4. Does the Mayor's decision bind future administrations?

The decision to grant the covenant would bind future administrations. Although the Council could in theory apply to the Land Tribunal to discharge the covenant (although at significant cost) it is highly unlikely that the covenant would be discharged. The Tribunal applies stringent rules. Whilst there are identifiable beneficiaries (i.e. people benefiting from the covenant) it is probable that the Tribunal would uphold the covenant.

Obtaining a beneficiary's consent to a discharge of a covenant can be a route to discharge the same. However in this case there are a large number of beneficiaries meaning that obtaining all of the beneficiaries' agreement to discharge the covenant would be practically difficult if not virtually impossible.

5. **Is it possible for the development on the 1st and 18th holes to go ahead without a Mayoral signature on a variation to the lease?**

The user clause in the lease specifies that the land must be used as a Golf Club or as agricultural land. Any amendment to this lease would require the consent of the Mayor and the Golf Club.

6. **If it is the case that the Brixham Neighbourhood Forum can identify sites with the capacity to offset the loss of the 1st and 18th holes, would that be considered?**

The suggestion is to 'offer up' the sites identified by the community, as part of the Brixham Neighbourhood Planning process, as a substitute for the loss of new homes on the 1st & 18th.

In summary, the suggestion – if implemented – would leap-frog essential, legally required components of the plan making process. It would, if those sites were put forward now by the Council for the Local Plan, result in postponement of the Local Plan Hearing and a significant delay to the Local Plan – for the reasons given in the answer to Question 3 of the Call-in Notice. For reasons given below, the sites could not be included in the Council's 5 year land supply. There is simply no certainty, yet, that the sites will remain within the Neighbourhood Plan; the sites need to be fully tested; they don't have planning permission; there is a lack of clarity and consistency on the numbers of new homes for some sites. For all these reasons the substituting of the 1st & 18th by other, smaller sites identified by the community could not be supported by officers. This is supported by advice from consultants appointed by the Brixham Peninsula Neighbourhood Forum.

The Council's professional planning officers, and the Neighbourhood Forum's own consultants, have provided advice to the BPNF about the status of those sites, in strategic planning terms. The BPNF's own consultant has provided lots of comment on the emerging draft Neighbourhood Plan and expressed real concern about the deliverability of some sites and the sorts of housing numbers that the community has suggested for some sites.
There has long been an agreement between the Council, producing a Local Plan, and Forums producing Neighbourhood Plan namely:

- That the Council would allocate the sites to come forward in the first five years, at least, of the Local Plan and those strategic sites / areas, such as Torquay Gateqay, that might come forward over the much longer term.

- That Neighbourhood Forums, in their Neighbourhood Plans, would allocate sites for the medium term – roughly 2018 – 2027 – although it is acknowledged that some sites may come forward sooner, some later. This is explicitly recognised in the emerging draft BPNP (see para 53). The Local Plan provides a 'pool' of sites for each Forum to choose from.

This approach recognises the importance of Localism and neighbourhood planning, but also gives comfort to the Local Plan Inspector that the Council has identified, in its Local Plan, sufficient land to deliver the 9,300 (approx) new homes set out in the Local Plan.

1. **Status of the Neighbourhood Plan**

The BPNP has not been through a pre-submission consultation process, is nowhere near a referendum and has not been through a sustainability appraisal. Under this test the BPNP has no weight in planning terms. New National Planning Practice Guidance makes it clear that: *"Whilst a referendum ensures that the community has the final say on whether the neighbourhood plan comes into force, decision makers should respect evidence of local support prior to the referendum when seeking to apply weight to an emerging neighbourhood plan. The consultation statement submitted with the draft neighbourhood plan should reveal the quality and effectiveness of the consultation that has informed the plan proposals."* From this Guidance it is clear, to the Council, that the evidence of local support can only be assessed at the time of production of a draft neighbourhood plan, with a supporting consultation statement, and that 'local' in this case should be defined as Brixham Peninsula, not just a community partnership area. However, the Council could (if O & S think it worthwhile) seek DCLG's further advice (in addition to NPPF and NPPG) if required. This will take time.

2. **Status of the sites put forward by CGB CP**

A) <u>There has been no formal assessment of whether the sites are acceptable or deliverable</u>. The Council has suggested a mini SHLAA process, to assess the sites in terms of constraints and deliverability. This has not yet been undertaken, but is particularly important as, for example, the community has identified sites for development that the Local Plan SHLAA work rejected. In addition, the community has added sites, and increased housing numbers on those sites. For example:

- Broadhaven, Broadsands – current planning application is for 8 residential units (P/2014/0899). The Community Partnership has objected to it on the grounds of impact on the residential area. The SHLAA suggests up to 8 units.
- Waterside Quarry – Local Plan SHLAA says the site as a whole is unlikely to achieve 6 new homes, but the community has identified the site as capable of accommodating 10 homes. (Development Management Committee has resolved to approved outline permission for 3 detached dwellings on the northern part of the site)
- Notwithstanding the professional advice contained in the Local Plan SHLAA, and the community's objection to 8 homes on the Broadhaven site, the community has suggested that the emerging Neighbourhood Plan (BPNP35) identifies 15 – 25 units in total for the two above sites. A figure of 14 in total is more likely. So the mini SHLAA suggested by the Council will also need to check that numbers proposed in the Neighbourhood Plan are actually deliverable.
- The Council is also aware of another substantial site, promoted by a land owner to the community, which has not been considered at all by the community. It's important, to the robustness of the plan making process, that all suggested sites are given consideration. The mini SHLAA process needs to ensure that happens or the Neighbourhood Plan could be challenged.

B) The sites have not been through any sustainability appraisal, which is an essential part of the planning process. This is even more important for CGB as the strategy of 'spread the jam thin, using a high number of small sites' is different to the strategy set out in the new Local Plan, for which a sustainability assessment has been undertaken. For example:

- The community has included Greenway Park for development. The Local Plan SHLAA suggested no more than 6 units; the community suggests 10 units. This site is partly within the AONB, so any development will have an impact on the AONB. It is these sorts of impacts that need to be assessed in a formal Sustainability Appraisal.

If the sites promoted by CGP CP were now added to the Council's 5 year land supply, and therefore to the Local Plan, extra work would need to be undertaken to cover the lack of sustainability appraisal. This is exactly what the Local Plan Inspector has warned against. It would require the Local Plan Hearing to be postponed and the Local Plan to be delayed.

3. Windfall sites

Based on Torbay's past record, and NPPF advice, the Council's 5 year housing land supply allows for 130 new homes per annum on windfall sites. These are defined, in Torbay, as sites of less than 6 homes and are not identified in the Local Plan.

The community has identified quite a large number of small sites in Churston, Galmpton and Broadsands, many of which will deliver less than 6 homes. Some of these will be delivered as windfall sites in the next 5 years (e.g. Waterside Quarry; Weary Ploughman site), following the appropriate assessment of each site as part of the planning process and granting of planning permission. As such, sites in Churston, Galmpton and Broadsands are already contributing to the Council's 5 year land supply.

Other sites, which will be allocated in the Neighbourhood Plan following proper assessment and consultation / referendum, will usefully form part of Torbay's housing land supply over the medium to long term. However, these sites are not yet included in a Neighbourhood Plan that has reached an advanced stage, so cannot be guaranteed to remain within the Plan. By definition these sites don't have planning permission. There is absolutely no guarantee that they can be delivered in 5 years. So they cannot realistically be included in the Council's 5 year land supply and, for the reasons given above, they cannot be included in the Local Plan.

7. In terms of setting a precedent, what characteristics of each site would be considered?

This is a question that is almost impossible to answer, as each decision will turn on its own facts. As previously stated, as a public authority the Council should act consistently and fairly in all of its dealings. If the Council were to receive further requests to grant covenants,

then unless it is possible to differentiate decisions on their own facts, then the Council could face a Judicial Review Challenge if it acted inconsistently, on the ground of irrationality.

When considering the previous covenants at Babbacombe and Paignton Green, the characteristics of the same are inter alia;

- Freely open to all members of the public without charge,
- Events are hosted which the public can attend,
- The areas are important for local tourism,
- They had received requests to register the same as Town or Village Greens.

These characteristics could form the basis of criteria by which future requests for covenants could be judged and could form the basis of a Covenants Policy. If such characteristics were met, then absent other differentiating factors, the Council could face legal challenge if it did not act consistently.
The granting of a covenant at Churston would mean that the characteristics by which future requests would be judged against would be much wider, therefore making it more difficult to refuse future requests, if acting consistently.

8. Further explanation of why no compensation could be claimed.

Any proposed covenant over land cannot be in conflict with the terms of a lease over the land unless both parties agree to vary the terms of the lease to reflect the covenant.

If the Council imposes a covenant in its capacity as Landlord and it subsequently frustrates a Tenant from carrying out its terms under the lease, the Tenant could seek damages.

However the wording of the proposed covenant has been carefully drafted so as to ensure that it does not interfere with the terms of the lease. Specifically the covenant does not include within its definition of development any use that is allowed in accordance with the Permitted User Clause of the lease i.e use as a golf course or agriculture. An example of this would be the building of a new club house. This would be classed as a development in accordance with the permitted user clause, and therefore the Golf Club would not need to seek the consent of the Council (other than in its capacity of Local Planning Authority), and there would not be a requirement to hold a referendum of the ward. A contrasting example would be a proposal to build a hotel anywhere on the existing course. The covenant would require that the Council undertook a referendum and obtained the agreement of the majority of the ward prior to entering into an agreement to amend the existing lease.

These examples demonstrate how the proposed covenant does not impact upon the terms of the existing lease.

9. **Clarification of the number of people who signed the petition – 2000 or 4000?**

The Petition deadline is 10 clear working days before the Council Meeting. The number of signatures received by this deadline is the number which is officially reported and recorded. However some petitioners leave their petitions open and continue collecting signatures, and they may reference different numbers of signatories. However as explained, from the Council perspective the official number is the number received by the petition deadline, which in this case was reported to be 'approximately 2000'. Following a request to the Board a count based on postcodes was undertaken and resulted in the figure of 2053.

10. **It is most likely that there will be a legal challenge or possibly three legal challenges (Bloor Homes, Churston Golf Club and the Churston and Galmpton Residents) to the decision that the Mayor may make. If such litigation is forthcoming, does the Council:**
    a. **have the necessary finances to defend the action and make any payment ordered and how might this effect the Councils ability to continue its other duties and function; and**
    b. **the staffing levels to engage with what could be a long drawn out process.**

(a) The Council has a modest budget for external legal fees, however any sums in excess of that would need to be met from the Comprehensive Spending Review Reserve. The CSR Reserve is a finite reserve, and therefore any use of it limits its ability to be used in the future.

(b) As with all Council departments, staffing resources within the legal team have reduced in the last few years. The legal team constantly have to prioritise its workload so as to meet the many demands that are placed upon it. If there were to be legal challenge of the Mayor's decision, then this work would have to take priority over some of the other work of the team.

11. **Could such litigation mean that the Local Plan is put on hold during this litigation period and what could the impact be of the legal process if it takes two or more years to resolve.**

Officers do not believe that litigation, if brought against the Council, would automatically stop the Local Plan. However, the decision about whether the Local Plan should proceed to a Hearing in November, and whether the Local Plan is sound or not, rests with the Local Plan Inspector. The Inspector is aware of the situation regarding Churston and has provided advice, as previously reported to the Board, to the extent that loss of the 1st & 18th is potentially a problem, given the impact on 5 year supply of housing land and deliverability of the Plan.

12. **Is Graham vs Easington District Council (2008) is relevant to this situation?**

In Graham v Easington District Council, the council was the beneficiary of a restrictive covenant not to use the land for anything other than a coach depot, however they subsequently granted planning permission to the owner of the land for residential development. The court held that there was a 'close coincidence' between the council's role as landowner and its role as planning authority. The grant of planning permission

demonstrated that the practical benefits secured by the covenant were not of substantial advantage to the council (the balance of industrial land versus housing land in the district had changed) and so the covenant could be discharged.

In the case of the proposed covenant at Churston, the council would not be the beneficiary of the covenant. The owners of properties around the golf course would be the beneficiaries of the covenant. This is a significant difference to the Graham case. Torbay Council's permission as landowner to discharge the covenant is irrelevant; the permission or establishment of one of the Tribunal's grounds against all the beneficiaries would be necessary to discharge the covenant.

It is very possible that in the future Churston may be a very different place. Development may surround the area in question and it may be possible to argue for example, one of the Tribunal's grounds, i.e. that the covenant does not secure to the beneficiaries 'any practical benefits of substantial value or advantage'.

The point is that any removal of a covenant is centred around the beneficiaries of the covenant. The Land's Tribunal would focus on whether the covenant still secures any benefit to the beneficiaries.

13. A detailed appraisal of the Bloor Homes Solicitors letter with opinion regarding the weight we should be giving to each of the 4 reasons they give for the covenant being illegal.

The answer to question 13 is detailed for members in a separate report which is exempt from publication by virtue of paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972.

14. What is the possibility of the covenant being removed by reference to the Lands Chamber?

An application to the Land's Tribunal is often a lengthy process. If no objections are raised, an application can take 3 months and much longer in a disputed case. The Tribunal has power to order the applicant to pay compensation to all people entitled to the benefit of the covenant for any loss or disadvantage suffered as a result of the discharge of the covenant. In reality, it would be difficult to discharge this covenant as described in response to question 4 above.

Minutes of the Overview and Scrutiny Board

22 October 2014

-: Present :-

Councillor Thomas (J) (Chairman)

Councillors Bent, Darling (Vice-Chair), Davies, Doggett, Hytche, Kingscote, Stockman and Tyerman

(Also in attendance: The Mayor and Councillors Addis, Amil, Brooksbank, Cowell, Ellery, Excell, Lewis, Mills, Morey, Parrott and Pritchard)

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23. Apologies

It was reported that, in accordance with the wishes of the Liberal Democrat Group, the membership of the Board had been amended to include Councillor Doggett in place of Councillor Pentney.

24. Proposed Covenant protecting Churston Golf Course from development

The meeting of the Board had reconvened to continue to the consider the details of a call-in by nine Members of the Council of the decision by the Mayor to enter into a deed covenanting with the residents of Churston and Galmpton ward that, amongst other things, the Council will not allow any development of Churston Golf Club without any such proposal first obtaining the majority of votes in a referendum of the registered electors of that ward.

Consideration was given to a paper which had been prepared by Council officers setting out answers to a number of questions which had been raised by members of the Board at the end of their last meeting.

The Board went on to hear from the Mayor the reasons for his decision which he had taken at the meeting of the Council held on 25 September 2014. Members of the Board had the opportunity to ask questions of the Mayor.

Councillor Morey (as Call-in Promoter) and the Mayor were given the opportunity to sum up prior to the Board debating the issues that they had heard over the course of the meeting.

Resolved: that the issue be referred to the Council for consideration for the following reasons:

A range of additional information has been made available since the original decision was made and therefore due consideration should be given to the:

- legal implications of the decision
- financial implications of the decision
- implications for the Local Plan
- fairness of the decision on other wards in Torbay
- potential damage to the economy

The original recommendation of the Council was that the decision be deferred to allow further investigation by the Place Policy Development Group. Given the additional information now available, councillors should be given the opportunity to consider that information and make their recommendation.

(**Note 1:** During consideration of the item in Minute 24, the press and public were formally excluded from the meeting on the grounds that the item involved the likely disclosure of exempt information as defined in paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972 (as amended).)

(**Note 2:** In accordance with Standing Order A19.5, Councillor Hytche requested his vote against the decision to be recorded.)

Chairman

Neutral Citation Number: [2014] EWHC 1283 (Admin)

Case No: CO/17668/2013

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

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street,
Birmingham

Date: 30/04/2014

Before:

MR JUSTICE HICKINBOTTOM

Between:

(1) GALLAGHER HOMES LIMITED
(2) LIONCOURT HOMES LIMITED

Claimants

- and -

SOLIHULL METROPOLITAN BOROUGH COUNCIL

Defendant

Christopher Lockhart-Mummery QC and Zack Simons (instructed by **Pinsent Masons LLP**) for the **Claimants**
Ian Dove QC and Nadia Sharif (instructed by **Solihull Metropolitan District Council**) for the **Defendant**

Hearing dates: 14-15 April 2014

Approved Judgment

Mr Justice Hickinbottom:

Introduction

1. The Claimants have interests in two sites in the Tidbury Green area of Solihull, namely Lowbrook Farm and Tidbury Green Farm ("the Sites"), which they wish to develop with housing. Their difficulty is this. On 3 December 2013, the Defendant local planning authority ("the Council") adopted the Solihull Local Plan ("the SLP") which placed both sites within the Green Belt. Neither had previously been in the Green Belt. Any application for planning permission for housing will almost inevitably now be refused, on the ground that the proposed development would be inappropriate in the Green Belt and there are no "very special circumstances" that warrant such development there.

2. In this application, made under section 113(3) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), the Claimants claim that the Council acted unlawfully in adopting the SLP, with its allocation of the Sites to the Green Belt, on three grounds:

   Ground 1: The Council adopted a plan that was not supported by a figure for objectively assessed housing need, contrary to the requirements to (i) have regard to national policies issued by the Secretary of State (section 19(2)(a) of the 2004 Act), and (ii) adopt a sound plan (sections 20 and 23 of the 2004 Act).

   Ground 2: The Council adopted a plan without cooperating with other local planning authorities, contrary to the duty to cooperate (section 33A of the 2004 Act).

   Ground 3: The Council adopted a plan without regard to the proper test for revising Green Belt boundaries set out in the national policy, again contrary to the requirements to have regard to national policies and adopt a sound plan.

3. The Claimants seek a declaration that adoption of the SLP was unlawful, and for an order quashing various parts of the Plan. In practice, they wish ultimately to have the Sites removed from the Green Belt, which they believe will improve their chances of obtaining planning permission to develop them with housing.

4. Before adoption, in accordance with required procedure, the SLP had been submitted to the Secretary of State for examination on 14 September 2012. He appointed Mr Stephen J Pratt BA (Hons) MRTPI ("the Inspector") to conduct the examination in public and report. Examination hearings were held between 10 January and 11 October 2013; and, on 14 November 2013, the Inspector published a report ("the Inspector's Report"), which concluded that the SLP could not be approved as submitted, but it provided an appropriate basis for the planning of the district for the period to 2028 providing a number of modifications (all proposed by the Council itself) were made to it. The Council duly adopted the SLP with those modifications. It is the SLP thus adopted which is the subject of challenge in these proceedings; but, as the Council can only adopt a development plan document which has been approved after an examination in public in accordance with the statutory scheme, the focus of this application is on the Inspector's Examination and Report.

5. With regard to the Sites, the current position with regard to planning applications is as follows. The First Claimant lodged an application for outline planning permission for the Lowbrook Farm site on 18 October 2012, before the Inspector had reported and before the site had been allocated to the Green Belt. The proposed development was for 200 dwellings and associated works. That application was refused by the Council on 31 January 2013. The First Claimant has appealed, and an inspector's inquiry is on-going. The inquiry was concluded in September 2013, and the report is due. On 11 October 2013, the Second Claimant applied for outline planning permission for the Tidbury Green Farm site, for 190 dwellings and associated works. The Council refused that application on 30 January 2014, after the allocation of the site to the Green Belt and on the ground that the proposal was for inappropriate development in the Green Belt. The Second Claimant intends to appeal. For obvious reasons, the outcome of this application is highly significant for both appeals; and, of course, the Council continues to determine planning applications on the basis of the SLP now under challenge. This application has consequently been expedited since its issue on 23 December 2013.

6. At the hearing before me, Christopher Lockhart-Mummery QC and Zack Simons appeared for the Claimants, and Ian Dove QC and Nadia Sharif for the Council. At the outset, I thank them all for their invaluable contributions.

The Sites

7. Solihull lies to the south-east of Birmingham. In the north of the borough, there is a built-up area comprising Castle Bromwich, Chelmsley Wood, Birmingham Airport and the NEC. In the west, there is another, including Elmdon and Shirley. However, most of the district – about two-thirds – is Green Belt land. That includes the Meriden Gap, an important Green Belt separating the conurbations of Birmingham and Coventry.

8. Tidbury Green is in the south-west of the borough. As a settlement, it is Green Belt "washed". Tidbury Green Farm is immediately to the east of the settlement. To the west of Tidbury Green, there is greenfield land running to the boundary with Bromsgrove District, and then a railway line. Lowbrook Farm is situated between the settlement of Tidbury Green and that district boundary line.

9. On the other side of that line, there is the settlement of Grimes Hill. Between Grimes Hill and the boundary, on the Bromsgrove side, there are two sites that feature in this application, known as land at Selsdon Close (to the west of the railway line) and land at Norton Lane (to the east of that line).

The Statutory Framework

10. The 2004 Act introduced a scheme of strategic planning with two tiers: regional and local. Part 1 of the Act established "regional planning bodies" that were each required to draw up a "regional spatial strategy" (renamed simply "regional strategies" by the Local Democracy, Economic and Construction Act 2009) which, in replacement of earlier regional planning guidance, set out the Secretary of State's policies in relation to the development and use of land within the region. At a local level, section 15 of the 2004 Act required each local planning authority to prepare and maintain a "local development scheme" which set out the authority's policies in

relation to the development and use of land within its area, and which had to specify (amongst other things) documents which were to be "development plan documents". Local plans were effectively required to comply with the relevant regional strategy, because the local development scheme had to be submitted to both the relevant regional planning body and the Secretary of State – and the latter had wide powers to direct amendments. The "development plan" for an area comprised the "development plan documents" and relevant regional strategy for that area.

11. Under those provisions, strategic decisions as to future housing supply thus ultimately lay with central and regional government, and, after appropriate liaison, housing targets were effectively imposed upon local planning authorities from above.

12. Solihull fell within the West Midlands region, and, from 2004, the relevant regional document was the West Midlands Regional Spatial Strategy ("the WM RSS"). At the time of its adoption, it was proposed to undertake further work on the regional strategy, which was divided into three phases. Phase 1 concerned the strategy for the Black County area, and the WM RSS with Phase 1 Revisions was adopted in January 2008. Phase 2 included housing. A review of the WM RSS including housing strategy was undertaken from 2007, including an examination in public in 2009.

13. However, the WM RSS with Phase 2 Revisions was never adopted. In a statement to Parliament on 6 July 2010, the Coalition Government announced an intention to revoke regional strategies, and return decisions relating to strategic housing supply to local planning authorities. This was a substantial change of direction, at national level. Section 109(3) of the Localism Act 2011 authorised the Secretary of State to revoke regional strategies; and, before any Phase 2 Revisions were adopted, the WM RSS was duly revoked on 20 May 2013, leaving housing supply strategy in the hands of local authorities, such as the Council, to be dealt with in their respective development plans.

14. That does not, of course, mean that a local authority now has a free hand. It is constrained by various national policies and procedural requirements, as follows.

15. Section 19(2) of the 2004 Act provides that, in preparing a development plan document, an authority must have regard to "national policies and advice contained in guidance issued by the Secretary of State", i.e. now the National Planning Policy Framework ("the NPPF") to which I return below (see paragraphs 23 and following). Sustainability of development is the NPPF's core concept, and, by section 19(5) the local authority is required to carry out an appraisal of the sustainability of the proposals in each development plan document and prepare a report on the findings of the appraisal.

16. Furthermore, section 20 of the Act provides for independent examination of development plans by an inspector appointed by the Secretary of State, in the following terms:

> "(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.

(2) But the authority must not submit such a document unless—

(a) they have complied with any relevant requirements contained in regulations under this Part, and

(b) they think the document is ready for independent examination.

(3) ...

(4) The examination must be carried out by a person appointed by the Secretary of State.

(5) The purpose of an independent examination is to determine in respect of the development plan document—

(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound; and

(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

(6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

(7) Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) considers that, in all the circumstances, it would be reasonable to conclude—

(i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and

(ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,

the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) is not required by subsection (7) to recommend that the document is adopted,

the person must recommend non-adoption of the document and give reasons for the recommendation.

(7B) Subsection (7C) applies where the person appointed to carry out the examination—

(a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

(a) satisfies the requirements mentioned in subsection (5)(a), and

(b) is sound …".

17. Although, unlike section 20(7) and (7A), section 20(7C) does not expressly refer to an obligation to give reasons, where the recommendation is for modifications to be made, an inspector is nevertheless required to give reasons (University of Bristol v North Somerset Council [2013] EWHC 231 (Admin) at [72]-[73]).

18. Section 33A (to which reference is made in section 20(7)(b)(ii) and (7B)(b)) imposes upon a local planning authority a duty to cooperate, in the following terms:

"(1) Each person who is—

(a) a local planning authority,

(b) a county council in England that is not a local planning authority, or

(c) a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c)… in maximising the effectiveness with which activities within subsection (3) are undertaken.

(2) In particular, the duty imposed on a person by subsection (1) requires the person—

(a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken...

…

(3) The activities within this subsection are—

(a) the preparation of development plan documents

…

(d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c) that are, or could be, contemplated, and

(e) activities that support activities within any of paragraphs (a) to (c),

so far as relating to a strategic matter.

(4) For the purposes of subsection (3), each of the following is a "strategic matter"—

(a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas…

(5) In subsection (4)… "planning area" means—

(a) the area of—

(i) a district council (including a metropolitan district council)…

(6) The engagement required of a person by subsection (2)(a) includes, in particular—

(a) considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection (3), and

> (b) if the person is a local planning authority, considering whether to agree under section 28 to prepare joint local development documents.
>
> (7) A person subject to the duty under subsection (1) must have regard to any guidance given by the Secretary of State about how the duty is to be complied with.
>
> ...".

19. Once the section 20 examination is complete, section 23 of the 2004 Act provides, so far as relevant to this application:

> "(2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document—
>
> (a) as it is, or
>
> (b) with modifications that (taken together) do not materially affect the policies set out in it.
>
> (2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—
>
> (a) recommends non-adoption, and
>
> (b) under section 20(7C) recommends modifications ("the main modifications").
>
> (3) The authority may adopt the document—
>
> (a) with the main modifications, or
>
> (b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.
>
> (4) The authority must not adopt a development plan document unless they do so in accordance with subsection (2) or (3).
>
> (5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority."

20. In summary, these provisions mean that each development plan document is subject to an examination in public by an independent inspector appointed by the Secretary of State, who determines (i) whether the plan complies with various procedural requirements, (ii) whether the plan is "sound" (a concept to which I shall return: see

paragraphs 33 and following below), and (iii) whether it is reasonable to conclude that the local planning authority has complied with any duty to cooperate. Having done so, there are three courses open to the inspector:

i) If he is satisfied that the plan meets the procedural and "soundness" requirements, he must recommend adoption of the plan and the authority may adopt the plan.

ii) If he is not satisfied as to these two matters, and is not satisfied that the authority has complied with its duty to cooperate, he must recommend non-adoption and the authority must not adopt the plan.

iii) If he is not satisfied as to these two matters, but is satisfied that the authority has complied with its duty to cooperate, he must recommend non-adoption; but, on the authority's request, he must also recommend modifications to the plan that would make it satisfy those two requirements. The authority may then adopt the plan with those modifications.

21. Where a development plan is adopted or revised, section 113 of the 2004 Act makes provision for it to be challenged in this court, on the basis of conventional public law principles (Blyth Valley Borough Coucnil v Persimmon Homes (North East) Limited [2008] EWCA Civ 861 at [8] per Keene LJ).

22. So far as relevant to this application, section 113 provides:

> "(3) A person aggrieved by a relevant document may make an application to the High Court on the ground that—
>
> (a) the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with.
>
> ...
>
> (6) Subsection (7) applies if the High Court is satisfied–
>
> (a) that a relevant document is to any extent outside the appropriate power;
>
> (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.
>
> (7) The High Court may—
>
> (a) quash the relevant document;
>
> (b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.

(7A) If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.

(7B) Directions under subsection (7A) may in particular—

(a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;

(b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;

(c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);

(d) require action to be taken by one person or body to depend on what action has been taken by another person or body.

(7C) The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

...

(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document...".

The Relevant National Policies

23. Section 19(2) of the 2004 Act requires a local authority to have regard to national policy and guidance when preparing development plan documents (see paragraph 15 above). It is now well-settled that those involved in plan-making and decision-taking in a planning context must interpret relevant policy documents properly, the true interpretation of such documents being a matter of law for the court (see, e.g., Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 at [17]-[23] per Lord Reed).

24. It is rightly common ground that the only extant national policy guidance and advice relevant to this application is found in the NPPF, which replaced much earlier guidance in March 2012.

25. As I have indicated (paragraph 15 above), sustainable development is at the heart of the NPPF. There is no specific definition of "sustainable development" in the NPPF, but it is to be defined in terms of development which meets the needs of the present without compromising the ability of future generations to meet their own needs. That is reflected in the very first words of the Ministerial Foreword to the NPPF, which state:

> "The purpose of planning is sustainable growth.
>
> *Sustainable* means ensuring that better lives for ourselves don't mean worse lives for future generations.
>
> *Development* means growth. We must accommodate the new ways in which we will earn our living in a competitive world. We must house a rising population…".

It is said in paragraph 6 of the NPPF that the policies set out in paragraphs 18-219, taken as a whole, constitute the Government's view of what sustainable development means in practice for the planning system. "Sustainability" therefore inherently requires a balance to be made of the factors that favour any proposed development, and those that favour refusing it, in accordance with the relevant national and local policies. However, policy may give a factor particular weight, or may require a particular approach to be adopted towards a specific factor; and, where is does so, that weighting or approach is itself a material consideration that must be taken into account.

26. Paragraph 14 provides:

> "At the heart of the [NPPF] is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> For **plan-making** this means that:
>
> - local planning authorities should positively seek opportunities to meet the development needs of their area;
> - Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
>   - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>   - specific policies in this Framework indicate development should be restricted…".

27. Part 6 of the NPPF deals with, "Delivering a wide choice of high quality homes". It replaced Planning Policy Statement 3: Housing ("PPS3") which, in 2006, itself replaced Planning Policy Guidance 3: Housing ("PPG3").

28. In PPS3, under the heading, "Assessing an appropriate level of housing", the advice (written, of course, at a time when planning strategy was considered at a regional, as well as local, level) was as follows:

> "32. The level of housing provision should be determined taking a strategic, evidence-based approach that takes into account relevant local, sub-regional, regional and national policies and strategies achieved through widespread collaboration with stakeholders.
>
> 33. In determining the local, sub-regional and regional level of housing provision, Local Planning Authorities and Regional Planning Bodies, working together, should take into account:
>
> - Evidence of current and future levels of need and demand for housing and affordability levels based upon:
>
> • Local and sub-regional evidence of need and demand, set out in Strategic Housing Market Assessments ["SHMAs"] and other relevant market information such as long term house prices.
>
> • Advice from the National Housing and Planning Advice Unit on the impact of the proposals for affordability in the region.
>
> • The Government's latest published household projections and the needs of the regional economy, having regard to economic growth forecasts.
>
> - Local and sub-regional evidence of the availability of suitable land for housing using Strategic Housing Land Availability Assessments ["SHLAAs"] and drawing on other relevant information....
>
> - The Government's overall ambitions for affordability across the housing market, including the need to improve affordability and increase housing supply.
>
> - A Sustainability Appraisal of the environmental, social and economic implications, including costs, benefits and risks of development. This will include considering the most sustainable pattern of housing, including in urban and rural areas.

> - An assessment of the impact of development upon existing or planned infrastructure and of any new infrastructure required.
>
> 34. Regional Spatial Strategies should set out the level of overall housing provision for the region [expressed as net additional dwellings (and gross if appropriate)], broadly illustrated in a housing delivery trajectory, for a sufficient period to enable Local Planning Authorities to plan for housing over a period of at least 15 years. This should be distributed amongst constituent housing market and Local Planning Authority areas.
>
> 35. Regional Spatial Strategies should also set out the approach to coordinating housing provisions across the region…."

29. Therefore, under PPS3, in a classic planning exercise of balancing all material factors, the regional authority had to arrive at a housing provision figure for each area, taking into account evidence of need and demand (including household projections, SHMAs, SHLAAs and other relevant market information) and policy matters such as the most sustainable pattern of housing.

30. Paragraph 47 of the NPPF – the opening paragraph of Part 6 – now provides:

> "To boost significantly the supply of housing, local planning authorities should:
>
> - use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
>
> - identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land…".

31. Thus, the NPPF departed from the previous national guidance in two important ways.

i) In line with the Localism Act 2011, the NPPF abandoned the regional, top down, approach to housing strategy in favour of localism with a duty to cooperate with neighbouring authorities. The burden of developing housing strategy now falls on local planning authorities.

ii) Whilst clearly subject to a requirement that both plan-making and decision-taking must be consistent with other NPPF policies – including those designed to protect the environment – the NPPF put considerable new emphasis on the policy imperative of increasing the supply of housing. As reflected in the first words of the Ministerial Foreword quoted above (paragraph 25), in relation to dwellings, there was a policy objective to achieve a significant increase in supply. Therefore, the NPPF imposed the policy goal on a local authority of meeting its full, objectively assessed needs for market and affordable housing, unless and only to the extent that other policies were inconsistent with that goal. Thus, paragraph 47 makes full objectively assessed housing needs, not just a material consideration, but a consideration of particular standing.

32. "Plan-making" is specifically dealt with in the NPPF in paragraphs 150 and following. Under the heading, "Using a proportionate evidence base", and sub-heading "Housing", paragraph 159 states:

> "Local planning authorities should have a clear understanding of housing needs in their area. They should:
>
> - prepare a [SMHA] to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The [SMHA] should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:
>
> - meets household and population projections, taking account of migration and demographic change;
>
> - addresses the need for all types of housing, including affordable housing and the needs of different groups in the community (such as, but not limited to) families with children, older people, people with disabilities, service families (and people wishing to build their own homes); and
>
> - caters for housing demand and the scale of housing supply necessary to meet this demand..."
>
> - prepare a [SHLAA] to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period."

Therefore, the NPPF supposes that full, objective assessment of housing needs referred to in paragraph 14 will be informed by a SHMA.

33. Paragraph 182 of the NPPF gives advice as to what is meant, in section 20 of the 2004 Act, by a local plan being "sound":

> "The Local Plan will be examined by an independent inspector whose role is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and whether it is sound. A local planning authority should submit a plan for examination which it considers is "sound" – namely that it is:
>
> - **Positively prepared** – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;
>
> - **Justified** – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;
>
> - **Effective** – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities; and
>
> - **Consistent with national policy** – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework."

34. In Barratt Developments Plc v City of Wakefield Metropolitan Borough Council [2010] EWCA Civ 897, Carnwath LJ (as he then was) considered "soundness", then found in a similar context in the pre-NPPF Planning Policy Statements. His guidance remains apposite (see Zurich Assurance Limited v Winchester City Council [2014] EWHC 758 (Admin) at [114] per Sales J). Carnwath LJ said:

> "11. I would emphasise that this guidance, useful though it may be, is advisory only. Generally it appears to indicate the Department's view of what is required to make a strategy 'sound', as required by the statute. Authorities and inspectors must have regard to it, but it is not prescriptive. Ultimately it is they, not the Department, who are the judges of 'soundness'. Provided that they reach a conclusion which is not 'irrational' (meaning 'perverse'), their decision cannot be questioned in the courts. The mere fact that they may not have followed the policy guidance in every respect does not make the conclusion unlawful.
>
> ....
>
> 33. ... As I have said, 'soundness' was a matter to be judged by the inspector and the Council, and raises no issue of law, unless their decision is shown to have been 'irrational', or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law."

In other words, whether a plan is "sound" for the purposes of Section 20(5) of the 2004 Act is a matter of planning judgment for the inspector, and is subject to challenge only on normal public law grounds. This court is not concerned with the merits, which are a matter entirely for the inspector. However, in accordance with those principles, an inspector errs in law if he fails to take relevant guidance into account, or fails to deal with a "material controversy" (see Barratt at [45]).

Ground 1

Introduction

35. The SLP submitted for examination proposed a housing provision of 11,000 new dwellings in the period 2006-28, and the Inspector agreed that that was an appropriate provision.

36. As his first ground of challenge, Mr Lockhart-Mummery submits that that provision was not supported by any figure for objectively assessed housing need – as the NPPF required it to be – and, as such, in adopting the SLP, the Council acted ultra vires, and contrary to the statutory procedural and statutory soundness requirements.

37. As a preliminary point, it will be helpful to deal briefly with the different concepts and terms in play.

i) Household projections: These are demographic, trend-based projections indicating the likely number and type of future households if the underlying trends and demographic assumptions are realised. They provide useful long-term trajectories, in terms of growth averages throughout the projection period. However, they are not reliable as household growth estimates for particular years: they are subject to the uncertainties inherent in demographic behaviour, and sensitive to factors (such as changing economic and social circumstances) that may affect that behaviour. Those limitations on household projections are made clear in the projections published by the Department of Communities and Local Government ("DCLG") from time-to-time (notably, in the section headed "Accuracy").

ii) Full Objective Assessment of Need for Housing: This is the objectively assessed need for housing in an area, leaving aside policy considerations. It is therefore closely linked to the relevant household projection; but is not necessarily the same. An objective assessment of housing need may result in a different figure from that based on purely demographics if, e.g., the assessor considers that the household projection fails properly to take into account the effects of a major downturn (or upturn) in the economy that will affect future housing needs in an area. Nevertheless, where there are no such factors, objective assessment of need may be – and sometimes is – taken as being the same as the relevant household projection.

iii) Housing Requirement: This is the figure which reflects, not only the assessed need for housing, but also any policy considerations that might require that figure to be manipulated to determine the actual housing target for an area. For example, built development in an area might be constrained by the extent of land which is the subject of policy protection, such as Green Belt or Areas

of Outstanding Natural Beauty. Or it might be decided, as a matter of policy, to encourage or discourage particular migration reflected in demographic trends. Once these policy considerations have been applied to the figure for full objectively assessed need for housing in an area, the result is a "policy on" figure for housing requirement. Subject to it being determined by a proper process, the housing requirement figure will be the target against which housing supply will normally be measured.

Housing Provision: Background

38. The WM RSS, adopted in 2004, was based on a number of principles, identified to guide development plans within the region, including (in Chapter 4) the need to counter outward movement of people and jobs from the urban areas which had been facilitated by earlier strategies, but which by 2004 was regarded as unsustainable. The policy of "urban renaissance" therefore broadly sought to discourage migration from the urban areas to the rural areas. Parts of Solihull fell within a major urban area but, as I have indicated, most of the borough comprised greenfield land. Because of the policy effect on restraining population movement out of Birmingham, the net effect of the policy was to reduce the number of new dwellings in Solihull that would otherwise have been required.

39. The WM RSS did not specifically identify objectively assessed housing need. Policy CF2 dealt with housing beyond the major urban areas, by providing that, outside identified towns, housing development should generally be restricted to meeting local needs only, i.e. it should not accommodate migration. Policy CF3, having taken into account relevant policies (including urban renaissance), simply provided that development plans should make provision for additional dwellings at annual rates set out in Table 1. Notably, the regional figures showed a significant movement of housing to major urban areas from other (i.e. non-major) urban areas, the ratio shifting from 1:1.6 to 1:0.7 over the period. The rate for Solihull was 400 dwellings per annum ("dpa") to 2011, and 470 dpa in the ten year period 2011-21 as a contribution to a post-2011 annual regional target of 14,650 dpa.

40. These figures were reviewed as part of the WM RSS Phase 2 Review. By this time, in March 2009, the DCLG had published 2006-based housing projections for 2006-26, which, on the basis of purely demographic trends, projected a growth for Solihull of 16,000 dwellings at 800 dpa. At the examination in public held as part of the review, the Council argued that Solihull should not be meeting all of its DCLG projection figure on policy grounds, notably because of the implications this would have for the quality of the environment in the borough and for the strategically important Meriden Gap. On the basis of the DCLG projection and these factors, the Council submitted that provision for new housing in the borough for that period should be restricted, on policy grounds, to 10,000. The WM RSS Phase 2 Revision Panel Draft Report in the event recommended a housing requirement figure for Solihull of 10,500 for the 20 year period 2006-26 (i.e. a net figure of 525 dpa). As I have explained, that Revision was never adopted because it was overtaken by the move towards localism.

41. The preparation of the SLP began in 2007, still in the era of regional planning strategy and thus on the basis that the SLP would have to be in conformity with the WM RSS (which, as I have described, was itself then the subject of the Phase 2 Review, which

particularly focused on housing). Policy 4 of the Emerging Core Strategy of the Council, published for consultation in September 2010, adopted the WM RSS Revision Panel Draft figure of 10,500 at 525 dpa.

42. By the time the SLP Pre-Submission Draft was published in January 2012 – still pre-NPPF – the DCLG had published 2008-based household projections. These showed a projected increase in dwellings for Solihull for the period 2006-2028 of 14,000 at 636 dpa, a significant reduction compared with the earlier projections on the basis of 2006 figures. The SLP Pre-Submission Draft noted that new projection (paragraph 8.1.4), but went on as follows (at paragraph 8.4.1):

> "The Council has assessed housing land supply taking a 'bottom-up' approach through detailed site assessment and the [SHLAA]. It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 households (2006-2028). This is the level of housing provision that the Council considers can be provided without adverse impact on the Meriden Gap, without an unsustainable short-term urban extension south of Shirley and without risking any more generalised threat to Solihull's high quality environment. This level of growth supports the West Midlands Urban Renaissance Strategy to develop urban areas in such a way that they can increasingly meet their own economic and social needs in order to counter the unsustainable movement of people and jobs facilitated by previous strategies, including the need to direct development to those parts of the West Midlands Region needing housing."

43. As I understand it, the 10,500 figure from the WM RSS Revision was amended to 11,000 as a result of two factors:

i) a reduction to 10,000 (500 dpa) because town centre capacity had fallen due to the recession and sufficient town centre housing capacity could not be found; and

ii) because the SLP period was not the 20-year period 2006-26 but rather the 22-year period 2006-28 (to ensure the development plan covered at least 15 years from the date of its adoption), an extra two-years at 500 dpa (i.e. 1,000) was added.

Thus, an aggregate figure of 11,000 was proposed, at 500 dpa.

44. There were two further sources of housing data available to the Inspector by the time of his November 2013 report. First, in addition to the 2006-based and 2008-based DCLG household projection figures, in April 2013 the DCLG interim 2011-based housing projection figures were published. These covered only a ten-year period, 2011-21. The projection for Solihull was a dwelling increase of 6,326 in that period, at a rate of 633 dpa. That was not significantly different from the earlier 2008-based figure of 636 dpa.

45. Second, there were SHMAs. A joint SHMA covering Birmingham, Lichfield and Tamworth as well as Solihull was prepared in 2007-8. That was updated for Solihull in 2009 ("the 2009 SHMA"). The 2009 SHMA notes that the draft WM RSS Phase 2 Revision Draft called for a 10,500 increase in dwellings up to 2006 (page (iii)); and then it continues (at page 4):

> "The (draft) West Midlands Phase 2 Revision, containing housing provision targets per authority, concluded its Examination in Public stage at the end of June [2009] with the Panel report published on 28 September. This [SHMA] and the housing needs analysis it includes will therefore not have a bearing on the allocation of new build housing target numbers for the Authority. Instead, its primary function is to inform those parts of the housing policy framework which are to be determined through local policy setting, most notably the determination of housing need, the type and tenure of new build, the requirement for affordable housing to meet that need and inform decisions on the spatial aspect of new development."

The 2009 SHMA therefore provided considerable data on housing market trends and by reference to various characteristics including (in section 5) affordable housing. However, the data on future housing need were deliberately limited: on pages (iii) and (iv) there were figures for "total demand" for housing, and estimated social rented housing need and intermediate need for 2006-11. Other than the references to the WM RSS Revision figures, there do not appear to any longer-range estimates of housing needs.

A Technical Issue

46. There was an issue before the Inspector as to the correct application of the DCLG projections to Solihull.

47. The Council said that it was appropriate to use the figures taken from the various tables in those projections, which had been rounded to the nearest thousand – which (the projection notes themselves said) had been used "to facilitate onward processing". Objectors contended that a more informed decision could be made using unrounded figures, which could be extrapolated from the tables themselves. It seems uncontentious that such extrapolation can be done, and the figures extrapolated by the objectors were not (and are not) in issue. The issue concerned the appropriate approach.

48. As a matter of mathematics, the difference between the two methods seems to have resulted primarily from the interim 2011-based aggregate projection figure for 2021 being 92,424 rounded to 92,000. There were also some differences in the assumptions made by the two parties, but these appear to have been relatively minor. These differences as a whole resulted in the Council calculating the projection for the borough for the period 2011-21 at 533 dpa (or, when that rate is projected through to 2028, an aggregate number of new dwellings of 11,731 which the Council rounded to 11,700), and the objectors calculating it to be 633 dpa for that period and 605 dpa for the period through to 2028 (an aggregate of 13,311 new dwellings to 2028).

49. On the basis of these figures, the Council contended before the Inspector that the 2011-based figures were similar to the figures derived from the WM RSS Phase 2 Revision Panel Draft target (525 dpa amended down to 500 dpa); whilst the objectors submitted that, far from suggesting that the rate of growth was declining to the point where it was converging with the figure of 500 dpa in the draft SLP, the 2011-based projection was consistent with the 2008-based projection of 636 dpa.

The Abandoned Justifications

50. Before turning to how the Inspector dealt with the housing provision issue, it would be helpful to clear the decks. The Council's case on housing need – and its justification for the figure of 11,000 as the provision for housing – has not been consistent. In addition to the manner in which the Inspector dealt with the issue – which, the Council contends before me, was appropriate and lawful – the Council has sought to justify the SLP figure on at least two other bases, no longer pursued.

51. First, the Council sought to justify its housing provision figure of 11,000 in what it described as a "bottom up" approach, i.e. it began with available housing supply.

52. As I have indicated (paragraph 42 above), in the January 2012 Pre-Submission Draft (paragraph 8.1.4), there is reference to the 14,000 increase in households projected by the DCLG on the basis of the 2008 data; then, as justification for the provision of housing target, it said that, on the basis of a detailed assessment of land availability, it considered that 11,000 net additional homes could be delivered towards that projected figure. It went on to say that the Council considered that this was the level – presumably the maximum level – of housing that could be delivered without risk to the Meriden Gap, without unsustainable urban extension to the south of Shirley and "without risking any more generalised threat to Solihull's high quality environment". It was also considered that this level of growth supported the urban renaissance policy.

53. Insofar as that was intended to justify the housing requirement, it clearly falls very far short of the approach advocated and required by the NPPF, which involves starting with housing need and requiring justification for any requirement falling short of full and objectively assessed need. This "bottom-up" approach appears to start with the number of homes that, in the light of relevant policies, can be delivered during the period. That is the wrong way round.

54. That justification was removed as part of the modifications to the SLP. It is, as I have said, no longer pursued by the Council as justifying the figure.

55. Second, the Council contended that, in determining the full objectively assessed housing need, it was necessary to take into account inconsistency with other policies, i.e. it was a policy on assessment.

56. The Council's approach evolved from the first justification to which I have referred, the focus turning to the WM RSS Phase 2 Revision which, although never adopted for the reasons I have given, was examined by a panel which recommended a housing allocation to Solihull of 10,500 for the period 2006-2026 (or the amended figure of 11,000 for the plan period 2006-2028 at 500 dpa: see paragraph 43 above). The Council contended before the Inspector that, in determining the full objectively

assessed housing need, it was necessary to take into account inconsistency with other policies; and this policy on figure was in itself the figure for full, objectively assessed need for housing which the Council adopted. For example, in the Council's Supplementary Statement for the Examination dated 18 January 2013, the Council said (at paragraph 1):

> "The level of housing need in Solihull has been objectively assessed (considering all evidence and consistency with other policy) through the [WM RSS] Phase II Revision and was examined by the Panel. The Panel examined household and population projections, taking account of migration and demographic change and made recommendations to cater for housing demand and the scale of housing supply necessary to meet this demand. Sub-regional and local Strategic Housing Market Assessments address the need by type and tenure. Evidence of housing land availability was also considered by the Panel to establish realistic assumptions about availability, suitability and the likely economic viability of land in the region and each sub-region. This meets with the requirements of NPPF paragraph 159."

Then, after referring to various housing projection models, it continued (at paragraph 15):

> "Such predictions are nothing more than a theoretical, mathematical calculation providing an indication of how housing need could change in the future. *Objectively assessing need involves a more sophisticated policy analysis of both needs and what level of growth an area can realistically sustain. In Solihull, the [WM] RSS Phase II Panel Report is the latest assessment of housing need.*" (emphasis added).

57. The Council's response of 7 March 2013 to further representations on behalf of the Claimants similarly relied upon the approach of another inspector in respect of another site on a section 78 appeal, which, of the WM RSS Phase 2 Revision Draft figure for Stafford, said (at paragraph 10): "These are the most recent objectively assessed figures available". The Council's response went on (at paragraph 17) to say, explicitly:

> "… [I]t is asserted that the Council has decided 'that it is not going to meet its own objectively assessed need'. That is again at best a misconception. *The figure of 11,000 which informs the housing requirement is the objectively assessed need for the borough for which it is planning.* Paragraph 8.4.1 of the [SLP] quotes projected household growth and thus the objectors have confused that with the objectively assessed need which the plan seeks to meet. The objectively assessed need is one which has been derived through the Phase 2 RSS process on a 'policy on' basis…". (emphasis added).

It contended, in terms, that the WM RSS Phase 2 Revision "engaged with and discharged the functions of a SHMA set out in paragraph 159 of the [NPPF]" (paragraph 8).

58. On this basis, full, objective assessment of housing need would involve taking into account policy constraints on housing, and the assessment of the WM RSS Revision Draft performed that assessment, coming up with the figure of 10,500, from which the figure of 11,000 for the plan period is derived. But that, too, is clearly wrong: for the reasons I have given, full, objective assessment of housing need is a "policy off" figure, in respect of which constraining policies might give a lower "policy on" housing requirement figure.

59. However – rightly – the Council no longer rely on this second justification, either.

60. Although the Council no longer seek to justify the housing provision in either of these ways, it is noteworthy that the Council appeared to arrive at – and sought to justify – its housing provision figure of 11,000 for the period 2006-28 in a manner clearly inconsistent with the NPPF. Of course, that was not surprising at the Pre-submission Draft stage in January 2012 – two months before the NPPF was published in March 2012 – but it is more surprising that such justifications continued in the document submitted for examination in September 2012, and indeed during the course of the examination.

61. However, if that figure of 11,000 for housing provision was in fact justifiable and justified by the Inspector as in accordance with the NPPF and sound, any earlier defective thinking by the Council would be irrelevant. It was open to the Inspector to cure such defects.

The Approach of the Inspector

62. It is therefore to the Inspector's Examination and Report I now turn. It is trite law that such a report must be read fairly as a whole, it being inappropriate to subject it to the close textual analysis that might be required when construing statutory provisions.

63. The Inspector, of course, had to consider a number of issues in respect of the SLP. His report is over 150 paragraphs long: the focus of this ground, housing provision, occupies only 15 paragraphs (i.e. paragraphs 50-64). However, he fully understood that the housing provision issues, including "the basis for the overall number of houses to be provided in terms of housing requirements", were "the most contentious" (paragraph 50). The Council and those objecting to the proposed housing provision repeatedly submitted voluminous responses to representations made to the Inspector by the other. There was no doubt that this was a material and main issue with which the Inspector had to deal.

64. The Inspector set out the Council's approach in paragraph 10 (which closely followed paragraph 8 of his interim conclusions) and paragraph 24 of his report:

> "10. … [The Council has adopted a consistent approach, basing the SLP on the most recent independent objective assessment of housing requirements undertaken for the WM RSS Phase 2 Revision, including policy elements relating to the

> urban renaissance strategy and its associated distribution of development; the level of housing provision proposed in the SLP fully accords with this assessment. [The Council] has also considered the implications of more recent 2008 & 2011 household projections and undertaken further work to ensure that the proposed housing provision figure remains sound and robust. There is insufficient evidence to demonstrate that Solihull does not intend to full meet its objectively assessed housing requirements and has thus failed to meet the requirements of the Duty to Cooperate. [In paragraph 8 of the interim conclusions, he put that point thus: 'It cannot therefore be assumed that Solihull does not intend to fully meet its objectively assessed housing requirements and has thus failed to meet the requirements of the Duty to Cooperate.'] Detailed concerns about the overall housing provision level, including the [SHMA], are dealt with under the housing issues, later in this report."
>
> "24. The Spatial Strategy is based on two main elements: firstly, the former WM RSS Phase 2 Revision, which established the overall scale and pattern of development in the Borough; and, secondly, the needs and opportunities identified in more recent studies through the process of preparing the SLP…."

In other words, in respect of the housing provision figure of 11,000, the Council relied upon the WM RSS Phase 2 Revision Draft figure as amended, together with the more recent DCLG projections and the 2009 SHMA.

65. The general approach taken by the Inspector is apparent from paragraph 51 of his report (the first substantive paragraph of his report specifically devoted to this issue):

> "51. Dealing first with the overall level of housing provision, the NPPF (¶ 14/47) indicates that local plans should meet the full, objectively assessed needs for market and affordable housing in the housing market area, unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF, including development constraint policies such as the Green Belt. Although household projections are the starting point in assessing overall housing needs, they are only one element; they are a snapshot in time and, being based on demographic trends, do not model other aspects of housing need or the effective demand for homes. In establishing the appropriate level of housing provision for the area, the key drivers of housing need and demand related to demographic, economic and social factors have to be balanced alongside supply-side factors and wider national/local objectives and strategic priorities relating to sustainability, deliverability, infrastructure, viability, land availability and environmental capacity.

> Evidence should be relevant, robust, proportionate and up-to-date."

66. He then proceeded to take the Council's justification for the figure, and test it, as follows:

i) He noted that paragraph 218 of the NPPF allows authorities to continue to draw on evidence that informed the preparation of regional strategies in support of local strategies, supplemented as needed by up-to-date, robust local evidence (paragraph 52). That is correct. Paragraph 218 provides:

> "Where it would be appropriate and assist the process of preparing or amending Local Plans, regional strategy policies can be reflected in Local Plans by undertaking a partial review focusing on the specific issues involved. Local planning authorities may also continue to draw on evidence that informed the preparation of regional strategies to support Local Plan policies, supplemented as needed by up-to-date, robust local evidence."

ii) He noted that the SLP proposal of 11,000 dwellings in the period 2006-28 reflected the figure recommended in the WM RSS Phase 2 Revision Panel Draft. Although that had never been approved by the Secretary of State and the regional strategy had now been revoked, "the Panel's assessment represents the most recent independently examined assessment of housing requirements in the West Midlands, taking account of cross-boundary housing issues and market areas, environmental capacity and the strategic housing distribution policy elements related to the urban renaissance strategy" (paragraph 52).

iii) He noted that, in addition to the WM RSS Phase 2 Revision Draft recommendation, the SLP relied upon further work and evidence, including the household projections from the more recent 2008-based and 2011-based household projections, and the 2009 SHMA (paragraph 52). With regard to the CLG household projections, he noted that the 2006-based projections were for 16,000 new households in Solihull in the period 2006-26; and the 2008-based projections were for 14,000 in the period 2006-28 (paragraph 53). He noted (in paragraph 55) that some had argued that the plan should make minimum provision of 14,000 new dwellings on the basis of this projection: but this was only one projection and did not represent the objectively assessed need for housing in the borough. Finally, he noted that the latest 2011-based projections were for 6,000 households in the period 2006-21 at 533 dpa (paragraph 52), an apparent reference to the Council's calculation, based on the 2011-based DCLG projection (see paragraphs 42-44 above). He concluded:

> "52. … This work confirms that the underlying housing requirement proposed in the SLP remains valid, robust and sound…

> 53. … Even though the former WMRSS EiP Panel report figure did not fully meet all the housing needs of Solihull at that time, more recent projections confirm that the number of new households anticipated in Solihull between 2006-28 has significantly reduced since then, and that the annual need may only be slightly above that planned for the submitted SLP."

The last reference appears to be to the Council's calculation, based on the 2011-based DCLG projection, that the projected need for Solihull was 533 dpa, compared with the 500 dpa in the SLP.

iv) With regard to the SHMA, the Inspector said this:

> "57. There is also some concern about the adequacy of the SHMA. However, a joint SHMA, covering Birmingham, Solihull, Lichfield and Tamworth was undertaken and was updated specifically for Solihull in 2009, using 2006-based projections, in line with the emerging former WMRSS Phase 2 Revision and national guidance at the time, which supports the proposed level of housing provision. It assessed the likely need for market and affordable housing over the plan period and, taken together with the more recent work on housing need produced for the examination of the SLP and that of the former WMRSS Phase 2 Revision and EiP Panel, this meets the requirements of the NPPF (¶ 159; 178-181)
>
> 58. [The Council] recognises that the existing SHMA will need to be reviewed and updated in 2014, to take account of more recent and forthcoming household projections and the needs of the wider housing market. This review will also need to update the original assessment of housing requirements undertaken for the former WMRSS Phase 2 Revision insofar as it relates to the relevant housing market area, and may necessitate a review of the SLP. The firm commitment to undertake this review is to be confirmed in the SLP, to ensure that the plan remains up-to-date and soundly based, as required by the NPPF (¶ 158)."

v) He noted that some had questioned the continuing relevance of the urban renaissance strategy; but he found it "continues to be relevant and significant in the planning of the sub-region", as illustrated by the adopted Black Country Core Strategy (paragraph 58).

vi) He noted (at paragraph 8) that:

> "… [T]here are no specific or agreed requirements for Solihull to meet the housing or other needs of adjoining

> authorities, or for any neighbouring authorities to meet any of Solihull's housing or other needs";
>
> and it would be unreasonable to delay its work on the SLP to await the results of further work on the housing needs of Birmingham (which might result in unmet need there, which Solihull might be asked to meet), particularly as Solihull currently lacked a 5 year housing supply (paragraphs 9, and 59-61)

67. The Inspector summed up the issue, and his conclusions on it, as follows:

> "62. [The Council] maintains that the SLP is fully meeting the identified housing needs of the Borough, but has considered higher levels of housing at the option stage. In considering the possibility of higher housing figures, it is important to bear in mind the significant policy constraints in Solihull, particularly the Green belt, including the strategically important Meriden Gap, and the implications of higher levels of development on the recognised environmental quality of the Borough. [The Council] proposes to amend the SLP to explain the adverse implications of higher levels of housing provision on the quality of the environment and the Green belt, particularly the Meriden Gap. This is supported by evidence, including the SHLAA and site assessments.
>
> 63. In terms of the overall housing requirement, [the Council] has taken a consistent and pragmatic approach, having produced a positively prepared and effective plan, of cross-boundary housing requirements undertaken for the former WMRSS Phase 2 Revision, and backed up with more up-to-date, robust and reliable evidence, projections and studies. The commitment to review the SLP if it becomes necessary to address the issue of Birmingham's shortfall in future housing provision will ensure that cross-boundary housing issues are addressed when the results of these studies are finalised, reflecting the guidance of the NPPF (¶ 179). The commitment to early review of the SHMA will ensure that Solihull's housing needs are kept up-to-date, including reviewing the SLP, if necessary.
>
> 64. Taking account of all the evidence and having examined all the elements that go into making an objective assessment of housing requirements, a total level of 11,000 dwellings or 500 dwellings/year represents an effective, justified and soundly based figure which would meet the current identified housing needs of the district over the plan period and, with the agreed amendments, is consistent with the overall requirements of national policy in the NPPF."

68. Thus, Policy P5 of the adopted SLP (which assumed all of the modifications recommended by the Inspector) provides that the Council will allocate land to

sufficient housing supply to deliver 11,000 additional homes in the period 2006-28, with an annual housing land provision target of 500 net additional homes per year.

69. The justification for this policy – and the linked policies concerning housing supply – was given in the accompanying notes as follows:

> "8.4.1 The housing land provision target of 11,000 net additional dwellings (2006-2028) reflects the requirement recommended by the [WM RSS] Phase II Revision Panel Report which objectively assessed housing need. Around 65% of growth is projected to emerge from net immigration into Solihull on the basis of past trends. The projected level of growth may reduce with the successful continued implementation of the West Midlands Urban Renaissance Strategy which seek to develop urban areas in such a way that they can increasingly meet their own economic and social needs in order to counter the unsustainable movement of people and jobs facilitated by previous strategies, including the need to direct development to those parts of the West Midlands Region needing housing. The Panel's assessment of housing need took the 2006-based household projections into account. Subsequent 2008-based and interim 2011-based household projections project a lower level of household growth for Solihull, providing further confidence that the provision target mill meet need
>
> 8.4.2. Solihull is recognised for its high quality environment which attracts residents and investors to the Region. The key Regional objective of stemming out migration can be best served by preserving and enhancing Solihull's environment. The Council is assessing housing land supply throughout the development of the West Midlands Regional Spatial Strategy taking a 'bottom-up' approach through detailed assessment and the [SHLAA]. It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 households (2006-28). This is the level of housing provision that the Council considers can be provided without adverse impact on the Meriden gap, without an unsustainable short-term urban extension south of Shirley and without risking any more generalised threat to Solihull's high quality environment…".

Housing Provision: The Parties' Respective Cases

70. Mr Dove for the Council accepted that neither the SLP nor the Inspector's Report identified, in terms, a specific figure for objectively assessed housing need over the period; but, he submitted, it was not necessary for a plan to identify such a figure and, on a proper analysis of the Inspector's Report, the substantive requirements of the NPPF (including those of paragraphs 47 and 159) were satisfied in this case.

71. He relied upon the guidance from the Secretary of State when, in July 2010, he announced the revocation of the regional strategies. The advice was in question and answer form. Mr Dove particularly relied upon the following (italicised emphasis added):

> "**9. Will data and research currently held by Regional Authority Leaders' Boards still be available?**
>
> Yes. The regional planning function of Regional LA Leaders' Boards – the previous Regional Assemblies – is being wound up and their central government funding will end after September of this year. *The planning and research they currently hold will still be available to local authorities for the preparation of their local plans whilst they put their own alternative arrangements in place for the collection and analysis of evidence....*
>
> **10. Who will determine housing numbers in the absence of Regional Strategy targets?**
>
> Local planning authorities will be responsible for establishing the right level of local housing provision in their area, and identifying long term supply of housing land without the burden of regional housing targets. *Some authorities may decide to retain their existing housing targets that were set out in the revoked Regional Strategies.* Others may decide to review their housing targets. We would expect that those authorities should quickly signal their intention to undertake an early review so that communities and land owners know where they stand.
>
> **11. Will we still need to justify the housing numbers in our plans?**
>
> Yes – it is important for the planning process to be transparent, and for people to be able to understand why decisions have been taken. Local authorities should continue to collect and use reliable information to justify their housing supply policies and defend them during the LDF examination process. They should do this in line with the current policy in PPS3.
>
> **12. Can I replace Regional Strategy targets with "option 1 numbers" [i.e. the policy on figures submitted by local authorities to the regional authorities as part of the regional process of fixing housing provision]?**
>
> Yes, if that is the right thing to do for your area. *Authorities may base revised housing targets on the level of provision submitted to the original Regional Spatial Strategy Examination (Option 1 targets), supplemented by more recent information as appropriate.* These figures are based on

> assessments undertaken by local authorities. However, any target selected may be tested during the examination process especially if challenged and authorities will need to be ready to defend them."

Mr Dove also relied upon paragraph 218 of the NPPF (quoted at paragraph 66(i) above).

72. He submitted that the 11,000 figure reflected the WM RSS Phase 2 Revision Panel Draft target, which had taken into account the evidence of housing need (including the DCLG projections and the 2009 SHMA) as well as constraining policy factors (including, in particular, policies relating to urban renaissance policy, the Green Belt and the wish to maintain the high quality environment in Solihull which was important for the maintenance of the infrastructure which sustains the area). That Revision Draft housing provision figure was set only after a full review including an examination in public. Since then, there had been no significant change in demographic trends or other factors that went to housing need (as evidenced by the 2008-based and the interim 2011-based DCLG projections, and the 2009 SHMA). Nor had there been any significant change in policy; notably, the urban renaissance policy was still extant, as were the other policies which led to the constraint to the WM RSS Revision Panel Draft target, namely the Green Belt policy and the policy of protecting the quality of the living environment in Solihull. In those circumstances, the SLP was justified in using the housing requirement figure of 11,000 which directly reflected the WM RSS Phase 2 Revision Draft target.

73. Mr Lockhart-Mummery's primary submission was that the Council and the Inspector had simply failed to understand and apply the stepped approach to housing strategy in a local development plan required by the NPPF. The vital first step in the process is to assess, fully and objectively, the need for market and affordable housing in a SHMA, in accordance with the requirements of paragraph 159 of the NPPF. Only once that assessment has been made can the other steps be taken, namely:

i) considering whether there are policies in the NPPF which are consistent/inconsistent with those full needs;

ii) constraining the figure which represents the full objectively assessed needs where any adverse impacts of meeting those needs "would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole or specific policies in [the NPPF] indicate development should be restricted" (paragraph 14 of the NPPF); and

iii) where the result is a constrained figure (i.e. a figure which, on policy grounds, is less than the full objectively assessed figure for housing need in that area), cooperating with adjoining or other near-by local planning authorities on the strategic matter of meeting that otherwise unmet need (section 33A of the 2004 Act).

74. That first, mandatory step of assessing housing need, fully and objectively, was not performed in this case, with the result that the SLP was ultra vires the Council and in breach of the procedural and soundness requirements for such a plan. That view was consistently taken by the Claimants in their representations to the Inspector during the

Examination in Public (see, e.g., paragraph 11 of their response to the Inspector's Interim Conclusions). He erred in law in rejecting it.

75. As a separate but linked issue, Mr Lockhart-Mummery submitted that the NPPF requires the specific assessment of affordable housing needs. The evidence (recorded in the Inspector's Report, at paragraph 105) was that there was a need for 1,652 dpa affordable housing; but the SLP only provides for 2,457 affordable homes throughout the period of the plan. He accepts that quantified need for affordable housing does not simply translate into an equivalent need for new homes – and that affordable housing can only sensibly be expressed as a percentage of aggregate housing development – but he criticises the SLP and the Inspector for nowhere assessing the full objective need for affordable housing, as required by the NPPF.

Discussion

76. Mr Dove's submissions were, as ever, coherent, forceful and enticing. However, I am unpersuaded by them: in my firm view, with regard to his approach to the housing provision, the Inspector did err in law. Mr Lockhart-Mummery put the matter in a variety of ways, including that the Inspector failed to have regard to the key requirements of the NPPF, particularly the requirement to base housing provision targets on an objective assessment of full housing needs as identified through a SHMA; he misdirected himself as to the requirements of the NPPF; he misunderstood documents such as the 2009 SHMA; and he failed to give adequate reasons for the housing provision he approved as compliant with the statutory requirements. Each of those reflects, to some extent, the substantive error which was, in my judgment, made by the Inspector, namely a failure to grapple with the issue of full objectively assessed housing need, with which the NPPF required him, in some way, to deal.

77. In coming to that conclusion, I have had particular regard to the following.

78. There was no doubt that the full objectively assessed housing need was in issue: the parties to the examination made voluminous representations to the Inspector on that issue, including submissions in relation to how projections informed that issue. The technical issue to which I have referred (paragraphs 46-49 above) was simply one aspect of those submissions.

79. Although the NPPF is mere policy – and a plan-maker, including an inspector, may therefore depart from it, if there is good reason to do so – the Inspector in this case purportedly dealt with the issue of housing provision by applying the policies of the NPPF, not going outside them.

80. As Barratt emphasises, whether a plan is "sound" is essentially a matter of planning judgement for the Inspector (see paragraph 34 above). However, "soundness" requires a plan to be "positively prepared" (i.e. based on a strategy which seeks to meet objectively assessed development requirements) and consistent with national policy (paragraph 182 of the NPPF, quoted at paragraph 33 above). Relevant national policy here includes paragraphs 14 and 47 of the NPPF. For a plan to be sound, it therefore needs to address and seek to meet full, objectively assessed housing needs for market and affordable housing in the housing market area, unless (and only to the extent that) any adverse impacts of doing so would significantly and

demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole.

81. Although in paragraph 51 of his report (quoted at paragraph 65 above), the Inspector adequately summarised those requirements of paragraph 14 and 47 – more or less in the terms I have set out – looking at the report as a whole, and following similar confusion which appeared at times in the Council's submissions to him (see paragraphs 50-61 above), the Inspector appears to have confused policy off "housing needs" with policy on housing requirement targets. I make that comment well aware of the need to avoid exegetical analysis of Inspector's reports, and the requirement to consider such reports fairly and as a whole.

82. However, for example, the Inspector says (in paragraph 62):

> "[The Council] maintains that the SLP is fully meeting the identified housing needs of the Borough, but has considered higher levels of housing at the option stage."

That can only be explained by "housing needs" being used in a policy on sense. Leaving aside any obligation to meet unmet need from an adjacent authority (not in play here, because the Inspector throughout worked on the basis that there was no such need), the Council of course need not – and would not – consider meeting levels of housing higher than the full objectively assessed need.

83. Further, the Inspector found that 11,000 new dwellings over the period of the plan (i.e. 500 dpa) "represents an effective, justified and soundly based figure which would meet the current identified housing needs of the district over the plan period..." (paragraph 64 of his report, quoted at paragraph 67 above). Mr Dove submitted that "the current identified housing needs" was a tacit reference to the interim 2011-based projection of 533 dpa; but, reading the report as a whole (as I must), I cannot accept that proposition, because (i) the interim 2011-based projection of 533 dpa was only for the period to 2021, not for the plan period (to 2028); (ii) the Inspector (rightly) made clear that a single household projection does not represent objectively assessed need for housing (paragraph 55); and (iii) as Mr Dove properly conceded, nowhere in either the Inspector's Report or the WM RSS Phase 2 Revision Panel Report, by reference to the interim 2011-based projection or otherwise, is any full, objectively assessed need for housing in Solihull "identified". The reference in paragraph 53 of the report to "the annual need may only be slightly above that planned for in the submitted SLP" cannot be stretched to amount to an identification of housing need of 11,700 in aggregate or 533 dpa. Again, the Inspector appears to use the term "housing need" here to mean a policy on figure for housing requirement.

84. In any event, whether or not the Inspector confused policy off housing need with policy on housing requirement, nowhere in the report does he objectively assess full housing need, a matter to which I shall shortly return.

85. The importance of the difference between full objectively assessed housing need and any policy on figure was recently emphasised in City and District Council of St Albans v Hunston Properties Limited and the Secretary of State for Communities and Local Government [2013] EWCA Civ 1610 ("Hunston"), upon which Mr Lockhart-

Mummery relied for his proposition that, in plan-making, an authority must, as a first step, fully and objectively assess housing need.

86. The case itself concerned, not the preparation of a development plan, but a development control application for planning permission for housing within the Metropolitan Green Belt, in circumstances in which no local plan existed so that there was a "policy vacuum" in terms of the housing delivery target. Planning permission was refused by the local planning authority, and by an inspector on appeal. However, this court (His Honour Judge Pelling QC) quashed that decision ([2013] EWHC 2678 (Admin)), a determination upheld by Sir David Keene giving the only substantive judgment in the Court of Appeal ([2013] EWCA Civ 1610).

87. An issue in the case was the proper interpretation of paragraph 47 of the NPPF: indeed, in granting permission to appeal, Sullivan LJ considered that the local authority did not have a real prospect of success of overturning Judge Pelling, but in his view there was a compelling reason for the appeal to be heard namely to enable the Court of Appeal to give a "definitive answer to the proper interpretation of paragraph 47" and, in particular the interrelationship between the first and second bullet points in that paragraph, quoted at paragraph 27 above (see Hunston at [3]).

88. I respectfully agree with Sir David Keene (at [4] of Hunston): the drafting of paragraph 47 is less than clear to me, and the interpretative task is therefore far from easy. However, a number of points are now, following Hunston, clear. Two relate to development control decision-taking.

    i) Although the first bullet point of paragraph 47 directly concerns plan-making, it is implicit that a local planning authority must ensure that it meets the full, objectively assessed needs for market and affordable housing in the housing market, as far as consistent with the policies set out in the NPPF, even when considering development control decisions.

    ii) Where there is no Local Plan, then the housing requirement for a local authority for the purposes of paragraph 47 is the full, objectively assessed need.

89. As I have said, those matters – the ratio of the decision of the Court of Appeal – go to development control decision-taking. To that extent, Mr Dove was correct in pointing out that both Judge Pelling (at [11]) and Sir David Keene (at [21]) emphasised that the case before them did not concern plan-making, but decision-taking where there was no plan.

90. However, reflecting comments made by Judge Pelling at first instance, Sir David Keene also made some important observations about the construction of paragraph 47 in the context of plan-making. Consequently, the Inspector's Report in this case (published on 14 November 2013, between the judgments of Judge Pelling and the Court of Appeal in Hunston) was not in the event entirely correct when it said (at paragraph 55) that Hunston was not relevant to his inquiry because "this case relates to the process of determining planning applications rather than plan-making"; nor was the submission of Mr Dove that "[Hunston] is solely concerned with the development control process where there is a policy vacuum in relation to housing requirement" (skeleton argument, footnote 10).

91. Sir David Keene, at [25]-[26], drew the very clear distinction between the full objectively assessed needs figure; and the policy on, housing requirement figure fixed by the Local Plan. In considering the first bullet point in paragraph 47 of the NPPF, which of course expressly concerns plan-making, he said:

> "... The words in [the first bullet point of paragraph 47], 'as far as consistent with the policies set out in the Framework' remind one that the Framework is to be read as a whole, but their specific role in that sub-paragraph seems to me to be related to the approach to be adopted in producing the Local Plan. If one looks at what is said in that sub-paragraph, it is advising local planning authorities:
>
> > 'to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework.'
>
> That qualification contained in the last clause quoted is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs. The needs assessment, objectively arrived at, is not affected in advance of the production of the Local Plan, which will then set the requirement figure."

That makes clear that, in the context of the first bullet point in paragraph 47, policy matters and other constraining factors qualify, not the full objectively assessed housing needs, but rather the extent to which the authority should meet those needs on the basis of other NPPF policies that may, significantly and demonstrably, outweigh the benefits of such housing provision. It confirms that, in plan-making, full objectively assessed housing needs are not only a material consideration, but a consideration of particular standing with a particular role to play.

92. I was also referred to the recent case of South Northamptonshire Council v Secretary of State for Communities and Local Government [2014] EWHC 573 (Admin), in which Hunston was considered. Mr Dove particularly relied upon the emphasis Ouseley J gave in that case to the fact that Hunston "did not decide that [a] revoked RSS was expunged". However, that case was very different from this. It was a section 288 challenge to two refusals of planning permission for housing development, on the basis that the approach the planning authority adopted to the calculation of the 5 year housing supply was unlawful in the light of the NPPF. In addition to the revoked regional strategy, there was a new core strategy, but that had not been adopted and was still subject to examination. There was no issue as to the housing requirement over the relevant plan period (see [8]), the issue being how the shortfall of 626 homes by 2012 was to be dealt with for the purposes of assessing whether there was a 5 year supply. The case is of little consequence to this application because, it appears, the regional strategy figure for housing provision was (unlike in the case of Hunston and here) not constrained (see [29]), nor inflated over objectively assessed need because of a regional growth strategy for the area (see [36]). The regional strategy figures were very similar to the figures from the emerging core strategy. In those circumstances, Ouseley J held, unsurprisingly, that, in considering

how the shortfall should be made up (i.e. whether the future supply should be front- or end-loaded), it was relevant to see how supply had fared against the regional strategy requirement when it was in force, as the inspector in that case had done (see [37]). Importantly, the judge emphasised the need for caution in using figures from revoked regional strategies: he considered that, by treating the regional strategy figure as relevant, "there [was] potential for an error of law", but he was satisfied that there was no error in that case on its specific facts. This case does not give Mr Dove any assistance. Indeed, in my view, it gives Mr Lockhart-Mummery some support.

93. As I have said, neither the SLP nor the Inspector made any objective assessment of full housing need, in terms of numbers of dwellings. Mr Lockhart-Mummery submitted that, if the plan-makers have to assess whether the full objectively assessed housing need is outweighed by other policy factors and cooperate with adjacent authorities with regard to any shortfall between full objectively assessed housing need and any constrained housing requirement target (as they do), they must, first, determine a figure for the full objectively assessed need by preparing a SHMA in accordance with paragraph 159 of the NPPF. Paragraph 159 requires local planning authorities to have a clear understanding of housing needs in their area and, specifically, to prepare a SHMA to assess their full housing needs.

94. Those submissions have considerable force. Whilst I do not need to endorse Mr Lockhart-Mummery's precise propositions for the determination of this application – for example, I see that, in practice, full housing needs might be objectively assessed using data other than a SHMA – it is clear that paragraph 47 of the NPPF requires full housing needs to be assessed in some way. It is insufficient, for NPPF purposes, for all material considerations (including need, demand and other relevant policies) simply to be weighed together. Nor is it sufficient simply to determine the maximum housing supply available, and constrain housing provision targets to that figure. Paragraph 47 requires full housing needs to be objectively assessed, and then a distinct assessment made as to whether (and, if so, to what extent) other policies dictate or justify constraint. Here, numbers matter; because the larger the need, the more pressure will or might be applied to infringe on other inconsistent policies. The balancing exercise required by paragraph 47 cannot be performed without being informed by the actual full housing need.

95. Nor can an assessment of whether a planning authority has complied with its duty to cooperate under section 33A of the 2004 Act, which may be triggered by an unmet housing need in one area resulting from a shortfall between full housing need and a housing target based on policy on requirements.

96. Mr Dove submitted that paragraph 218 of the NPPF encouraged – or at least allowed – the use of regional strategy policies and evidence that informed the preparation of regional strategy in the preparation of Local Plans. It was therefore open to the Inspector to take the policy on figure derived from the WM RSS Phase 2 Revision process, into which relevant demographic and other housing need evidence had gone, together with the relevant policy considerations, and which had been tested at an examination in public; and then see whether any more recent housing need evidence (e.g. later projections and SHMAs), or change in policy, undermined the Panel's figure. That there had been no material alteration in circumstances was a matter for the planning judgment of the Inspector. The conclusion he reached had a clear evidential foundation, and was unimpeachable in law.

97. However, that fails to acknowledge the major policy changes in relation to housing supply brought into play by the NPPF. As I have emphasised, in terms of housing strategy, unlike its predecessor (which required a balancing exercise involving all material considerations, including need, demand and relevant policy factors), the NPPF requires plan-makers to focus on full objectively assessed need for housing, and to meet that need unless (and only to the extent that) other policy factors within the NPPF dictate otherwise. That, too, requires a balancing exercise – to see whether other policy factors significantly and demonstrably outweigh the benefits of such housing provision – but that is a very different exercise from that required pre-NPPF. The change of emphasis in the NPPF clearly intended that paragraph 47 should, on occasions, yield different results from earlier policy scheme; and it is clear that it may do so.

98. Where housing data survive from an earlier regional strategy exercise, they can of course be used in the exercise of making a local plan now – paragraph 218 of the NPPF makes that clear – but where, as in this case, the plan-maker uses a policy on figure from an earlier regional strategy, even as a starting point, he can only do so with extreme caution – because of the radical policy change in respect of housing provision effected by the NPPF. In this case, I accept that it was open to the Inspector to decide that the urban renaissance policy continued to be potent, and even (possibly) that the evidence of housing need had not significantly changed since the WM RSS Phase 2 Revision Draft target was set – those were matters of planning judgment, for him. However, in my judgment, in his approach, he failed to acknowledge the new, NPPF world, with its greater policy emphasis on housing provision; and its approach to start with full objectively assessed housing need and then proceed to determine whether other NPPF policies require that, in a particular area, less than the housing needed be provided. The WM RSS Phase 2 Revision Panel did not, of course, adopt that approach. Nor did the guidance provided by the Secretary of State on the revocation of regional strategies in 2010 (see paragraph 71 above) take the new policy into account. Both were pre-March 2012, when the NPPF was published.

99. The Inspector did not acknowledge, or take into account, that change. I accept that the Inspector might have taken that change into account in a number of ways. However, in one way or another, he was required to assess, fully and objectively, the housing need in the area. In the event, he made no attempt to do so. Mr Dove conceded – as he had to do – that neither the SLP nor the Inspector provided any full and objective assessment of housing need. Nor is there any evidence that the WM RSS Phase 2 Revision Panel made such an assessment, either: they had evidence of need before them, but there is no evidence that, as required by the NPPF, they assessed the full and objective housing need before considering constraints on meeting that need. Indeed, the evidence is that they went straight to policy on figures for the region in a conventional planning balancing exercise, with all material factors in play – as they were entitled to do under the pre-NPPF regime – and then proceeded to carve up that policy on requirement between the various areas within the region. Even as a surrogate, that did not comply with the NPPF requirements, properly construed. The further projections and 2009 SHMA did nothing to assist in this regard.

100. This is not a reasons case, because the approach adopted by the Inspector is in my view clear from his report: indeed, the fact that the Inspector unfortunately failed to

grapple with this important issue of housing need is, in my view, betrayed in the report. When the report is read as a whole, far from full objectively assessed housing need being a driver in terms of the housing requirement target – as the NPPF requires – it is at best a back-seat passenger. Nowhere is the full housing need in fact objectively assessed. As I have said, the reference to the work done by the WM RSS Phase 2 Revision Panel does not assist, because there is no evidence that they assessed such need either. In any event, the Inspector appears to accept that the WM RSS Phase 2 Revision Panel target did not fully meet all housing needs (paragraph 53). Further, in paragraph 10 (quoted at paragraph 64 above), he says:

> "There is insufficient evidence to demonstrate that Solihull does not intend to full meet its objectively assessed housing requirements …".

All of this makes clear, in my view, that the Inspector erred in his approach to this issue: he failed to have proper regard to the policy requirements of the NPPF.

101. For those reasons, I do not consider that the Inspector's approach to the policy requirements of the NPPF in relation to housing provision was correct or lawful. As a result, he failed to comply with the relevant procedural requirements; and the SLP with modifications, which he endorsed and the Council adopted, is not sound because it is not based on a strategy which seeks to meet objectively assessed development requirements nor is it consistent with the NPPF.

102. Therefore, on this ground, the Claimants succeed.

Ground 2

103. I have already set out the relevant provisions of section 33A, which provides for a duty to cooperate between local planning authorities (paragraph 18 above). Section 33A(7) provides that any person subject to that duty must have regard to any national guidance. Paragraph 179 of the NPPF states:

> "… Joint working should enable local planning authorities to work together to meet requirements which cannot wholly be met within their own areas – for instance, because of lack of physical capacity or because to do so would cause significant harm to the principles and policies of this Framework…".

104. Before me, Mr Lockhart-Mummery restricted his second ground. He simply submitted that, for reasons explored in Ground 1, with a provision of 11,000, the Council will not meet it own objectively assessed housing needs; but it failed to cooperate with neighbouring authorities to devise a strategy whereby its unmet need would be met by adjoining authorities. He relied particularly upon the sentence in paragraph 8.4.2 of the adopted SLP:

> "It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 (2006-2028)."

That (he submitted) accepts that there is a shortfall of 3,000 between housing needs and housing requirement; and there is no evidence of any attempts to cooperate between the Council and its neighbours to work out how and where this unmet need will in fact be met.

105. As Mr Dove submitted – and Sales J recently emphasised in Zurich Assurance (cited at paragraph 34 above) at [110]-[120] – section 33A imposes a duty to make efforts to address issues in a cooperative way, and the question of whether there has been compliance with the section 33A duty is a matter of planning judgment for the inspector.

106. Mr Lockhart-Mummery's submission is dependent upon the proposition that the Inspector found a shortfall of housing provision compared with full objectively assessed need of 3,000, i.e. 11,000 in the SLP compared with 14,000. However, the Inspector found no such shortfall. For the reasons I have given, the 14,000 figure is not a figure which represents full objectively assessed housing need: indeed, the Inspector makes clear that he did not take it as such (paragraph 55 of his report). As I have explained, he simply failed to grapple with the issue of what that need was, and there is no figure for it given or derivable from his report and/or the SLP. On the basis of the Inspector's Report, although it may be likely that, had the Inspector addressed his mind to full objectively assessed housing need, he would have found a shortfall between it and 11,000 dwellings in the plan period, he did not in the event address his mind to that issue.

107. As the Inspector did not apply himself to the prior questions of whether there is any shortfall between that need and the provision made and, if there is, the amount of that shortfall, it is impossible to say whether or not there was any breach of the duty to cooperate. Certainly, if and insofar as there is a shortfall, there does not appear to be any evidence of any attempts to cooperate with adjacent authorities, as might be required by section 33A – unsurprising, given that the Council at the time apparently considered the amended WM RSS Phase 2 Revision Draft policy on target to be the relevant need figure. Whether there was a breach of section 33A, would be a matter of planning judgment. In any event, as things stand, I cannot say that there was such a breach.

108. For those reasons, the adoption of the SLP fails to survive Ground 1; and I need not, and cannot appropriately, make any findings in relation to Ground 2.

Ground 3

Introduction

109. Mr Lockhart-Mummery submitted that the Inspector adopted the incorrect legal test for revising Green Belt boundaries as set out the national policy, namely paragraph 83 of the NPPF which provides:

> "Local planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. *Once established, Green Belt boundaries should only be altered in exceptional circumstances*, through the preparation

> or review of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period." (emphasis added)

Policy and Factual Background

110. Green belts are designed to provide a reserve supply of public open space and recreational areas, by establishing "a girdle of open space" around built up areas. They are established through development plans. The Green Belt policy outside London was codified in a number of Ministerial guidance documents, the first being in 1955. The guidance is now of course found in the NPPF. Its immediate predecessor was Planning Policy Guidance 2: Green Belts ("PPG2").

111. PPG2 emphasised that "the essential characteristic of Green Belts is their permanence" (paragraph 2.1). It set out the consequences of that characteristic as follows:

> "2.4 Many detailed Green Belt boundaries have been set in local plans and in old development plans, but in some areas detailed boundaries have not yet been defined. Up-to-date approved boundaries are essential, to provide certainty as to where Green Belt policies do and do not apply and to enable the proper consideration of future development options. The mandatory requirement for district-wide local plans, introduced by the Planning and Compensation Act 1991, will ensure that the definition of detailed boundaries is completed.
>
> ...
>
> 2.6 Once the extent of a Green Belt has been approved it should only be altered in exceptional circumstances. If such an alteration is proposed the Secretary of State will wish to be satisfied that the authority has considered opportunities for development within the urban areas contained by and beyond the Green Belt. Similarly, detailed Green Belt boundaries defined in adopted local plans or earlier approved development plans should be altered only exceptionally....
>
> 2.7 Where existing local plans are being revised and updated, existing Green Belt boundaries should not be changed unless alterations to the structure plan have been approved, or other exceptional circumstances exist, which necessitate such revision.
>
> 2.8 Where detailed Green Belt boundaries have not yet been defined, it is necessary to establish boundaries that will endure...".

112. The long-term nature of Green Belts was also reflected in provisions for "safeguarded land". Paragraph 2.12 provided:

> "When local authorities prepare new or revised structure and local plans, any proposals affecting Green Belts should be related to a time-scale which is longer than that normally adopted for other aspects of the plan. They should satisfy themselves that Green Belt boundaries will not need to be altered at the end of the plan period. In order to ensure protection of Green Belts within this timescale, this will in some cases mean safeguarding land between the urban area and the Green Belt which may be required to meet longer-term development needs.... In preparing and reviewing their development plans authorities should address the possible need to provide safeguarded land. They should consider the broad location of anticipated development beyond the plan period, its effects on urban areas contained by the Green Belt and on areas beyond it, and its implication for sustainable development..."

113. Annex B gave further advice on safeguarded or "white" land:

> "B2. Safeguarded land comprises areas and sites which may be required to serve development needs in the longer term, i.e. well beyond the plan period. It should be genuinely capable of development when needed.
>
> B3. Safeguarded land should be located where future development would be an efficient use of land, well integrated with existing development, and well related to public transport and other existing and planned infrastructure, so promoting sustainable development.
>
> B4. In identifying safeguarded land local planning authorities should take account of the advice on housing in PPG3 and on transport in PPG13....
>
> B5. Development plans should clearly state the policies applying to safeguarded land over the period covered by the plan. They should make clear that the land is not allocated for development at the present time, and keep it free to fulfil its purpose of meeting possible longer-term development needs....
>
> B6. Development plan policies should provide that planning permission for the permanent development of safeguarded land should only be granted following a local plan or UDP review which proposes the development of particular areas of safeguarded land. Making safeguarded land available for permanent development in other circumstances would thus be a departure from the plan."

114. In line with that guidance, following inquiries in 1991 and 1995, in the 1997 Solihull Unitary Development Plan ("the UDP"), the Council took 12 sites totalling 77 hectares, including the Sites at Lowbrook Farm and Tidbury Green Farm, out of the interim Green Belt, and reserved them as safeguarded land.

115. In 2004-5, the UDP was the subject of a review inquiry, also conducted by the Inspector, Mr Pratt. The review period was until 2011. In his 2005 UDP Review Report, the Inspector (at paragraphs 3.124-3.128) noted that (i) none of the safeguarded sites had been developed; (ii) the concept of sustainability had developed since the sites were identified as safeguarded; (iii) the Council considered the allocation of some of the sites would conflict with PPG3 and the latest regional strategy, which represented a fundamental change to policy especially in moving away from development around smaller Green Belt settlements; and (iv) the Council confirmed that, in the absence of exceptional circumstances, none of these sites could be brought forward for development without a change in regional strategy. He consequently recommended as follows (at paragraph 3.128):

> "Bearing in mind the apparent conflict between the possible allocation of these sites for housing in the future and the latest regional strategy, I consider an urgent review of their suitability as long-term housing sites should be undertaken. This should not delay the adoption of the [UDP Revision], but should inform its next review under the new... regime...".

116. His overall conclusion was as follows (at paragraph 3.130):

> "Given the current adequacy of housing land supply, both within the Plan period and beyond, and bearing in mind the permanent nature of the established Green Belt boundaries, I cannot see any general justification for identifying further safeguarded land. This would require amendments to existing Green Belt boundaries which, in the absence of any exceptional circumstances, could not be justified in terms of current national policy or the latest regional strategy. Similarly, since these sites have been removed from the Green Belt relatively recently, after a thorough debate at two UDP inquiries, there would have to be some very special circumstances to justify their re-inclusion in the Green Belt. In the absence of exceptional circumstances, ad hoc amendments to the Green belt boundary to either allocate additional or alternative long-term housing sites, to remove existing safeguarded sites, would undermine the integrity and enduring nature of the existing Green Belt boundary established in the adopted UDP. Furthermore, any loss of the Green Belt land without directly supporting urban regeneration would be contrary to the latest regional spatial strategy. Consequently, I can see no general justification for any changes to existing Green Belt boundaries, and these matters are best addressed on a site-by-site basis."

117. He went on say (paragraph 3.132):

> "If further housing land is needed, during or beyond the current Plan period, safeguarded greenfield land may not necessarily be the first choice, particularly since most identified sites lie outside the [Major Urban Areas] where new housing development is to be focused, and both PPG3 and RPG11 give

> priority to *previously developed land.* Such a policy could also prejudice the release of other more suitable sites that may come forward in the future…".

118. His recommendations included modifications to the UDP as follows (paragraph 3.140):

> "… amending the text accompanying Policy H2 to confirm that, although these sites have been removed from the Green Belt and safeguarded to meet longer term housing needs, no decision has yet been taken on the positive allocation of any of these sites for housing, and that they are not intended as 'reserve' housing sites in the event of shortfalls in housing land supply;"

and

> … subject to the Council's priorities in undertaking a review of this UDP Review…, priority be given to assessing the suitability of safeguarded land for housing against current national policy and the latest regional strategy, along with an assessment of longer term housing land supply, housing strategies and potential housing sites, to inform the next review of this UDP."

119. In the event, Policy H2 of the 2005 UDP provided as follows:

> "The Council will identify sites to help to meet long-term (i.e. post-2011) housing needs. In areas excluded from the Green Belt for this purpose, strong development control measures will apply limiting any development on the land only to uses which would:
>
> (i) Be allowed in the Green Belt under Policy C2;
>
> (ii) Not prejudice the long-term use of the site for housing.
>
> The possible future designation of the land for housing will be determined through subsequent reviews of the [UDP]."

The Sites – with the other 15 sites previously identified – were again identified as safeguarded land.

The Inspector's Report

120. The SLP allocated the Sites to the Green Belt, whilst removing other sites (particularly in the north of the borough) as the most appropriate means of providing land sufficient to meet the housing requirement which it of course set at 11,000 new dwellings by 2028. There were strong objections to the reallocation of the Sites, on the basis that a reallocation could only be made in exceptional circumstances – and no such circumstances existed in this case.

121. The Inspector dealt with the issue in paragraph 137 of his Report:

> "There is also serious concern about the proposed return to the Green belt of some Safeguarded land previously identified in the [UPD]. However, when the [UDP] was examined, it was made clear that the status of this land should be reviewed in the context of the approved and emerging WM RSS strategy for urban renaissance. [The Council] undertook this review, and rejected the future development of sites at Tidbury Green because this settlement lacks the range of facilities necessary for further strategic housing growth, the scale of development envisaged would also be far too large to meet local housing needs and would threaten the coalescence with other settlements, including Grimes Hill. National policy enables reviews of the Green Belt to be undertaken (NPPF ¶ 84), including considering the need to promote sustainable development, and it is clear from [the Council's] evidence that these sites would not meet this objective. These factors constitute legitimate reasons and represent the exceptional circumstances necessary to justify returning these sites to the Green Belt."

122. The evidence the Council relied upon, and to which the Inspector referred, is largely set out in paragraphs 31 and following of the Statement of David Simpson dated 15 January 2014, prepared for this application. At the relevant time, Mr Simpson managed the Council's planning team. The preparation of the SLP was one of the team's main responsibilities.

123. The Council's decision to return the Sites to the Green Belt was based on the following:

i) The risk of coalescence between Tidbury Green and Grimes Hill, in a gap already narrowed since 2005 by the grant of planning permission by the adjacent authority for housing on land at Selsdon Close in Grimes Hill (see paragraph 9 above), which would undermine the integrity and function of this part of the Green Belt.

ii) Planning permission had been refused for the land at Norton Lane in the adjacent Bromsgrove District (again, see paragraph 9 above), on Green Belt grounds.

iii) Planning permission had been refused for the Lowbrook Farm site in January 2013, before it had been allocated to the Green Belt, as it conflicted with the SLP spatial strategy, the land not being within a village identified for strategic housing growth.

iv) The development of the Sites was out of proportion with the existing settlement, and would completely dominate it.

v) As envisaged in the 2005 review, the suitability of the Sites for housing was assessed through the SHLAA, which concluded that they did not meet the

minimum criteria for access to key services and were unsuitable to meet identified local housing needs. The Tidbury Green Farm was also considered to have "unacceptable impact on green belt functions and openness".

Those reasons were reflected in the Council's written submissions to the Inspector dated 20 December 2012, to which I was also referred.

The Legal Background

124. There is a considerable amount of case law on the meaning of "exceptional circumstances" in this context. I was particularly referred to Carpets of Worth Limited v Wyre Forest District Council (1991) 62 P & CR 334 ("Carpets of Worth"), Laing Homes Limited v Avon County Council (1993) 67 P & CR 34 ("Laing Homes"), COPAS v Royal Borough of Windsor and Maidenhead [2001] EWCA Civ 180; [2002] P & CR 16 ("COPAS"), and R (Hague) v Warwick District Council [2008] EWHC 3252 (Admin) ("Hague").

125. From these authorities, a number of propositions are clear and uncontroversial.

i) Planning guidance is a material consideration for planning plan-making and decision-taking. However, it does not have statutory force: the only statutory obligation is to have regard to relevant policies.

ii) The test for redefining a Green Belt boundary has not been changed by the NPPF (nor did Mr Dove suggest otherwise).

a) In Hunston, Sir David Keene said (at [6]) that the NPPF "seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that 'the general extent of Green belts across the country is already established'". That appears to be a reference to paragraphs 83 and 84 of the NPPF. Paragraph 83 is quoted above (paragraph 109). Paragraph 84 provides:

> "When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development…".

However, it is not arguable that the mere process of preparing a new local plan could itself be regarded as an exceptional circumstance justifying an alteration to a Green Belt boundary. National guidance has always dealt with revisions of the Green Belt in the context of reviews of local plans (e.g. paragraph 2.7 of PPG2: paragraph 83 above), and has always required "exceptional circumstances" to justify a revision. The NPPF makes no change to this.

b) For redefinition of a Green Belt, paragraph 2.7 of PPG2 required exceptional circumstances which "necessitated" a revision of the existing boundary. However, this is a single composite test; because, for these purposes, circumstances are not exceptional unless they do necessitate a revision of the boundary (COPAS at [23] per Simon

2005, despite the change in policy that meant that it was unlikely that these sites would be brought forward unless and until there was a change in (then) regional strategic policy, there was no justification for any change to the Green Belt boundary. That reflected the fact that Green Belt boundaries are intended to be enduring, and not to be altered simply because the current policy means that development of those sites is unlikely or even impossible. Indeed, where the current policy is to that effect, the amenity interests identified in the sites will be protected by those very policies as part of the general planning balance exercise. A prime character of Green Belts is their ability to endure through changes of such policies. For the reasons set out in Carpets of Worth (at page 346 per Purchas LJ) it is important that a proposal to extend a Green Belt is subject to the same, stringent regime as a proposal to diminish it, because whichever way the boundary is altered "there must be serious prejudice one way or the other to the parties involved".

133. Those are the principles. Applying them to this case, what (if anything has occurred since the Green Belt boundary was set in 1997 that necessitates and therefore justifies a change to that boundary now, to include the Sites?

134. Dealing with the reasons relied on by the Council (and effectively adopted by the Inspector), set out in paragraph 123 above, in turn:

i) I have referred to two sites beyond the Bromsgrove district boundary, namely land at Selsdon Close and land at Norton Lane (paragraph 9 above). In 2005, the former was allocated, not to the Green Belt, but as an Area of Development Restraint. Since 2005, planning permission for housing development has been granted. In the SLP examination, the Council submitted to the Inspector that there was the risk of coalescence between Tidbury Green and Grimes Hill, in a gap already narrowed since 2005 by the grant of planning permission for housing on the Selsdon Close site. However:

a) In paragraph 3.149 of his 2005 report, the Inspector found that:

> "... Both sites are well-contained and the Green Belt boundary remains firm and well-defined. There is no erosion of the gap between Solihull and Redditch and, given the retention of Green Belt around Grimes Hill in Bromsgrove DC, no risk of coalescence with this settlement...".

b) Selsdon Close was not in the Green Belt, and possible future development must have been contemplated in 2005.

c) The grant of planning permission for Selsdon Close was not referred to by the Inspector in his SLP report as a change in circumstances sufficient to support the justification of a change in Green Belt boundary (or, indeed, referred to at all).

In short, there has been no change in circumstances since 2005: the Inspector – the same inspector – appears simply to have taken a different planning view of the adverse impact of coalescence between Tidbury Hill and Grimes Hill.

ii) The land at Norton Lane was in the Green Belt in 2005, and, since then, housing development on that site has been refused on Green Belt grounds. That is unsurprising. That development control decision was presumably made in the knowledge that the Sites are white unallocated land. Again, no reference to the Norton Lane site is made by the Inspector in his SLP Report; but, in any event, it is difficult to see how the refusal of planning permission for that Green Belt site could support justification for a change in the Green Belt boundary. The reasons for the refusal of permission merely stressed the importance of the Green Belt in this area. That does not support a contention that the allocation of further land into the Green Belt is justified on grounds of exceptional circumstances.

iii) Planning permission had been refused for the Lowbrook Farm site in January 2013, as it conflicted with the SLP spatial strategy, the land not being within a village identified for strategic housing growth. I do not see how this can possibly justify a change in the Green Belt boundary. Planning permission was refused on the basis of a conventional planning balance, the land being white unallocated land with the policy restrictions in Policy HS5 I have described (see paragraph 119 above), and the policy factors from the spatial strategy being sufficient to outweigh the factors in favour of development. This simply shows the planning system functioning as it should.

iv) The development of the Sites would be out of proportion to the existing settlement, and would completely dominate it. This is the only point relied upon by the Council that concerns Green Belt factors. However, the position with regard to the sites and the settlement of Tidbury simply has not materially changed since 1997.

v) The Council also rely on the fact that, as envisaged in the 2005 review, the suitability of the Sites for housing was assessed through the SHLAA, which concluded that they did not meet the minimum criteria for access to key services and were unsuitable to meet identified local housing needs. The Tidbury Green Farm was also considered to have "unacceptable impact on green belt functions and openness". However, these conclusions were drawn on the basis of the conventional planning balanced exercise, and on the basis that the Sites were unallocated land. The SHLAA conclusions merely emphasise that, as policy currently stands, it may be unlikely that either of the Sites will be developed even if they remain as unallocated land.

135. I am persuaded by Mr Lockhart-Mummery that the Inspector, unfortunately, did not adopt the correct approach to the proposed revision of the Green Belt boundary to include the Sites, which had previously been white, unallocated land. He performed an exercise of simply balancing the various current policy factors, and, using his planning judgement, concluding that it was unlikely that either of these two sites would, under current policies, likely to be found suitable for development. That, in his judgment, may now be so: but that falls very far short of the stringent test for exceptional circumstances that any revision of the Green Belt boundary must satisfy. There is nothing in this case that suggests that any of the assumptions upon which the Green Belt boundary was set has proved unfounded, nor has anything occurred since the Green Belt boundary was set that might justify the redefinition of the boundary.

136. In my view, the Inspector's substantive error is reflected in the adopted SLP, paragraph 11.6.6 of which states, simply:

> "... Following assessment in the [SHLAA], this land is no longer considered suitable for development and is proposed to be returned to the Green Belt."

137. For those reasons, Ground 3 also succeeds.

Conclusion

138. For the reasons I have given, the application succeeds.

139. Given the breadth of available powers I have in that result (see paragraph 22 above), it was agreed that, if I found the application successful, I would give the parties an opportunity to attempt to agree an order or, failing agreement, to make written representations of the appropriate order. In the circumstances, I shall give the parties 7 days from the hand down of this judgment to lodge a consent order on the basis of this judgment or, alternatively, submissions on any outstanding consequential matters.