Judgments

Borough Council of Kings Lynn and West Norfolk v Secretary of State for Communities and Local Government

Town and country planning - Permission for development - Housing supply - Claimant local planning authority challenging decision of inspector appointed by first defendant Secretary of State granting second defendant developer planning permission for 40 dwellings - Whether inspector erring in relying on second defendant's adjustments to full objectively assessed need for housing based on census data - Whether inspector giving inadequate reasons - Whether inspector's procedure being unfair

[2015] EWHC 2464 (Admin), CO/914/2015, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

QBD, ADMINISTRATIVE COURT

DOVE J

9 JULY 2015

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T Leader (Marc Samuels for judgment only) for the Appellant/Claimant

Z Simons for the Defendant

J Corbet Burcher (Nina Pindham for judgment only) for the Second Defendant

Borough Council of Kings Lynn; Government Legal Department

DOVE J:

[1] Clenchwarton is a village to the west of King's Lynn. In the July 2011 Core Strategy published and adopted by the Claimant, it is identified as a key rural service centre which is suitable for local scale development. The Claimant is the local planning authority for the area concerned and the Second Defendant is the owner of the Foster's Sports Ground, Main Road in Clenchwarton. It is a site towards the western end of the settlement within land designated countryside in the proposals map of the 1998 King's Lynn and West Norfolk local plan.

[2] On 2 November 2011 the Second Defendant applied for outline planning permission for 75 dwellings which was refused by the Claimant and there was an appeal to the First Defendant. That appeal was dismissed on 12 November 2012. The issues which were included in the determination of that appeal were whether or not the Claimant could demonstrate a five-year supply of housing land. The Inspector in determining that appeal concluded as follows:

> "8 Taking account of the housing completions between 2001 and 2011, there is a total five year housing requirement for 3,275 dwellings. Adding an additional 5% buffer, in accordance with paragraph 47 of the National Planning Policy

> Framework (framework). The five year requirement rises to 3,439 dwellings, which is equivalent to 688 dwellings per annum.
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> 9 The Council's Annual Monitoring Report, December 2011, published in April 2012, identifies a supply of sites for 3,276 which equates to some 4.76 years' supply. However, paragraph 48 of the Framework permits making an allowance for windfall sites within the five year supply where Councils have compelling evidence that such sites have consistently become available in the local area and will continue to provide a reliable source of supply. Given the Council's experience of the contribution of windfall sites to the housing supply over an 11 year period, together with the unusually large geographical area of the Borough and the high number of settlements within the Borough, I accept that the Council's suggested allowances for windfall sites based on 70% of past rates, is realistic in this instance. On this basis, there is a deliverable housing land supply of around 6.03 years."

[3] Following that decision, the Second Defendant reconsidered its position. It amended its proposal to 40 dwellings to respond to criticisms raised by the Inspector in respect of landscape impact. On 12 December 2013 the Court of Appeal decision in the case of *City and District Council of St Albans v Hunston Properties Ltd and the Secretary of State* [2013] EWCA Civ 1610, [2014] 1 EGLR 79 was handed down with its implications in relation to the interpretation of para 47 of the NPPF (hereafter "the Framework") to the housing requirement when calculating a five-year supply of housing. It is worthwhile at this stage to set out the relevant provisions of the Framework in para 47 which are as follows:

> "47 To boost significantly the supply of housing, local planning authorities should:
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> - 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 planned period;
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> - identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land . . . ."

[4] On 27 July 2013 the Second Defendant applied for outline planning permission for 40 dwellings. The application was refused on 22 November 2013 by the Claimant and the Second Defendant appealed. The appeal was determined by one of the First Defendant's Inspectors using the hearing mode of appeal determination. The procedures in relation to the hearing evolved in the following manner. Firstly, the Second Defendant's statement of case prepared in May 2014 arrived with the Claimant in early June. Secondly, on 12 September 2014, the Claimant prepared and submitted a response to that document. Thirdly, on 28 November 2014, the Second Defendant responded to the Claimant's case in relation to housing land supply. Fourthly, on 2 December 2014, the planning Inspectorate on behalf of the First Defendant requested that the Claimant clarify its position on the housing land supply evidence provided by the Second Defendant in a further submission due by 5 December 2014. Fifthly and finally, on 5 December 2014, the Claimant submitted (in accordance with the request which had been made by the Planning Inspectorate) further documentation in support of its position in relation to housing land supply.

[5] As will be evident from that chronology, once again the question of whether or not the Claimant enjoyed a five year supply of housing land was in issue. A number of the ingredients of the calculation were, in particular, at odds between the Claimant and the Second Defendant so far as is relevant to this case. They were as follows:

> "(a) The requirement. The Claimant still relied upon the requirement from its Core Strategy as representing their Full Objectively Assessed Need for housing (FOAN) reliant on the Core Strategy housing figure of 660 dwellings per annum. They had taken into account work which they had commissioned as a Strategic Housing Market Assessment (SHMA) and considered that it corroborated the figure which was in their Core Strategy. This SHMA exercise which

> was prepared as part of the evidence base for the emerging local plan showed a FOAN of 690 dwellings per annum. The Second Defendant's consultants contended that the SHMA analysis was incomplete and did not account for either existing unmet need (which had been deduced from the SHMA as standing at around 1500 dwellings at the time of the Second Defendant's analysis), or the rate of vacancies at a rate of 3% derived from the 2011 census, or second homes together with the vacancies at a rate of 14.9% (again derived from the figure for household spaces with no usual residents which was provided by the 2011 census data). Adding vacancies alone gave (in the Second Defendant's analysis) an annual figure of 711 dwellings per annum; adding vacancies and second homes gave a figure of 793 dwellings per annum and finally, adding an element of unmet need together with vacancies and second homes, gave a total figure of 872 dwellings per annum.
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> (b) The buffer. The second issue was whether the Claimant was a five per cent or a 20% authority. Although initially the Second Defendant's consultants had accepted that the Claimant was a five per cent authority, they subsequently contended for 20% on the basis that in the previous six years the Claimant had not met the Core Strategy requirement of 660 dwellings per annum, and that since 2001 the annual average of completions had been 622 dwellings per annum, again below the Core Strategy target. The Claimant responded by pointing out that the 622 dwellings per annum figure covered a period of economic recession and further argued that development rates were rising as a result of the production of a site allocation document which was about to proceed to its pre-submission stage. A graph was produced by the Claimant illustrating the broad correlation between completion rates and the Core Strategy requirements.
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> (c) The question of windfalls. By the time of the hearing, the differences between the Claimant and the Second Defendant were as follows. The Claimant, based on past trends, relied upon a supply from large windfalls of 670 dwellings and the Second Defendant allowed for none. In relation to small windfalls, again based on past trends, the Claimant included 470 dwellings within their five-year supply and the Second Defendant, who had vacillated between a number of positions on this issue, finally decided to include 268 dwellings.
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> (d) Allocations emerging in the pre-submission Site Allocations and Development Management Document. These were also the subject of contention. They were contained in a document which had been approved for consultation by the Claimant on 27 November 2014. That consultation was due to occur in January and February 2015. The Claimant included some 2,303 dwellings from this source of supply in their five-year calculation. The Second Defendant allowed none."

[6] The hearing was allocated two days. At the hearing the Inspector led a discussion of the issues following an agenda which he had constructed for this purpose. The third issue on that agenda was housing land supply. When the Claimant came to present its case following the submissions on behalf of the Second Defendant, it became clear that owing to computer problems the Claimant's submissions of 5 December 2012 together with the supporting documentation had not in fact been received by the Inspector and he had not seen them. Copies were provided to him at the hearing. The Inspector chose to press on without adjourning to read the documentation. Mr Jermany who was not leading the counsel's case (which was in fact led by the case officer for the application, Mrs Wood-Handy) but who was its expert on housing land supply, records his concerns in relation to what occurred in a witness statement as follows i. "I felt at a disadvantage trying to pick out relevant parts of my statement, without reading it in full, while knowing that Inspector had not had a chance to read it and had not had a chance to understand and review the supporting documents in advance and to properly question me and Hannah [Mrs Wood-Handy] about them".

[7] It is apparent from a contemporaneous note provided by one of the Second Defendant's team at the hearing, that the discussion ranged over each of the disputed elements which I have set out above. In relation to the emerging allocations, reference was made during the course of the of discussion to the case of *Wainhomes (South West) Holdings Ltd v Secretary of State* [2013] EWHC 597 (Admin) to which I shall turn shortly. In relation to the appropriate FOAN for consideration in calculating the five-year housing supply, mention was made of the case of *Hunston Properties*.

[8] On 2 January 2015 the decision on the appeal was published and the appeal was allowed. The Inspector's conclusions on housing land supply were set out as follows:

> "6 The Council considers the CS figure of 16,500 dwellings in the period 2001 to 2026 (660 dwellings per annum) to be the correct requirement and claims that the 2013 Strategic Housing Market Assessment (SHMA) update still supports

> that as a realistic figure. The Council's methodology was used in the previous appeal relating to 75 dwellings and was not challenged in the High Court. However, the CS is based on what are now old household projections. Indeed the Council notes that the Framework 'makes reference to keeping plans up to date and therefore under review' and the Inspector in the previous appeal states at paragraph 12 of her decision, issued in November 2012, that 'The Council will need to re-visit its housing provision in the light of more recent household projections and to keep its housing supply in line with the evidence base in the future'. That is the approach adopted by the Appellant in this case.
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> 7 Indeed, the SHMA explains that there would be a requirement of 690 households per annum. Households do not equate to dwellings and allowance should be made for vacancies and second homes. The 2011 census records that King's Lynn has 14.9% vacancies and second homes, which would give a full objectively assessed need (FOAN) of 793 dwellings a year. If, as a minimum, only vacancies are considered, it is generally recognised that a figure of 3% should be used giving a requirement of 711 dwellings per annum. A minimum of 51 additional dwellings a year, and possibly as many as 133, over and above the CS requirement of 660 does not suggest that the CS requirement is still realistic. Indeed, over a 15 year period that equates to a minimum need for in excess of 750 additional dwellings."

[9] Considering the appropriate buffer to be applied, Framework para 47 indicates that a 5% buffer should be added "to ensure choice and competition". However, where there has been a record of persistent under delivery, the buffer should be increased to 20%. The Guidance confirms that there is no universal test for persistent under delivery and sets out that the assessment of local delivery is likely to be more robust if a longer term view is taken.

[10] In each of the last six years the Council has failed to achieve its requirement of 660 dwellings per annum and has only averaged 447 dwellings a year. The Council notes that the trend from 2011 to 2014, which includes the recession between 2008 and 2013, is running at 622 dwellings per annum. Although development rates are rising, and the Council published its Pre-Submission Site Allocations and Development Management Document in October, which it is acknowledged would release the full plan provision of new sites, the long term trend is behind the target of 660 dwellings per annum with a shortfall of some 487 dwellings in the period to date. This indicates that the Council has persistently under provided and so a 20% buffer should be applied . . . .

[11] In relation to windfalls, para 48 of the Framework states that an allowance can be made in the five year supply if there is compelling evidence that such sites have consistently become available in the local area, and will continue to provide a reliable source. Between 2001 and 2014, 49% of total completions in the Borough were from windfall sites, and 59% of those were from large sites of more than ten dwellings. Given that the Council is seeking to adopt a new policy to allow infilling in the smaller villages and hamlets, small sites are likely to continue to provide a reliable source of windfalls. However, given the publication of the Pre-Submission Site Allocations and Development Management Document releasing the full plan provision of new sites, it is likely that the majority of large sites would come from allocations. Rather than there being compelling evidence, as the Framework requires, there is at best only a possibility that some completions would come from large site windfalls and these should therefore be discounted.

[12] The Appellant raised three queries relating to permissions. Whilst 302 dwellings are under construction at Hillingdon Square, the net result of development is the loss of 17 units. The Council accepts this and - 17 is now included in the Housing Trajectory. Secondly, in respect of the Nar Ouse Regeneration Area (NORA), the Appellant considers that only 300 of the 554 with outline planning permission are likely to be completed in the five year period. Whilst Reserved Matters permissions were granted for a further 185 on 1 December 2014, and a preferred bidder has been approved to deliver 600 units by 2020 on Council and Homes and Community Agency land, there is little evidence to counteract the Appellant's view. Finally, permission on a site north of Gaywood River, King's Lynn has lapsed and an application for 95 dwellings was subsequently refused although a revised application has just been submitted with the applicant claiming to have overcome the outstanding reason for refusal from appeal, i. The parties disagree on the figures but again the Appellant's are more robust, despite the Council's view that the Guidance on what are deliverable sites, would give greater flexibility and add to the potential five year supply of sites.

[13] Given the conclusions above, the Appellant's calculations are preferred and show that rather than having a 7.51 year supply (based on CS and 5% buffer) as the Council maintains, there would only be a 1.91 year housing supply (based on 2011 housing projections and a 20% buffer). Notwithstanding the Council's view that the policies in CS are consistent with the Framework, as there is no five year supply the housing policies, including policies defining settlement boundaries cannot be the regarded as up-to-date. Housing applications should, therefore, be considered in the context of the presumption in favour of sustainable development, in accordance with the aims of the Framework.

[14] Having considered all of the other matters raised in the context of the appeal, the Inspector concluded that the balance should be struck in support of the grant of planning permission subject to conditions.

PROCEDURAL ISSUES AND THE GROUNDS IN BRIEF.

[15] Before the hearing of this case commenced, I advised the parties that two of the consultants who had advised and appeared for the Second Defendants in this case were people with whom I had worked on numerous occasions whilst I was still at the Bar and one of whom I knew well personally. None of the parties raised any objection to this and the view appeared to be taken that given the nature of the practice which I had at the bar and, therefore, the knowledge of people who worked within the planning profession, together with the fact that these individuals were providing independent advice and were not the parties themselves, there were no grounds upon which to express any concern in relation to me hearing the case.

[16] At the hearing of the case, there was an application by Mr Leader who appeared on behalf of the Claimant to amend the pleadings. No one objected to that course being taken and I granted permission. In fact, as the argument evolved during the course of the case, the Claimant's claim crystallised into three grounds.

[17] The first ground was that in accepting the Second Defendant's adjustments to the FOAN for vacancies and second homes, the Inspector had unlawfully misapplied para 47 of the framework, in that this adjustment was contended to be a policy adjustment which was illegitimate when identifying the FOAN for the purpose of calculating the five-year housing land supply. It was submitted that such an allowance was not to be found in the Planning Practice Guidance which accompanies the framework as a legitimate adjustment: in fact that document only regarded vacancies as a potential source of supply.

[18] The second ground was that in a number of respects, the Inspector's reasons were inadequate. This ground focused in particular on four matters. Firstly, the Inspector's reasons in relation to the FOAN and whether he had concluded it was 793 dwellings per annum or 872 dwellings per annum. Secondly, small site windfalls and the reasons provided by the Inspector as to whether they were a legitimate source of supply were said to be inadequate. Thirdly, the draft allocated sites which were emerging and why the Inspector had discounted them were not the subject of any reasons provided by him. Fourthly, and lastly, it was submitted that the reasons which had been provided to explain why the Claimant was a 20% buffer authority, when in 2012 they had been found to be a five per cent authority, were also not legally adequate.

[19] The third ground was that bearing in mind the Inspector's inquisitorial role and his responsibility to use the hearing as a process to test the evidence and delve into the issues to assist the decision making process, it was unfair and inconsistent with that duty for him not to have taken time to read and absorb the council's most recent material (which it was accepted he had not received) and then to reflect upon whether his plan for the discussion actually required revision and whether there were other questions which he ought to have posed.

THE LAW

[20] Planning application are determined under s 70 of the Town and Country Planning Act 1990 and s 38(6) of the Planning and Compulsory Purchase Act 2004. National planning policy is a material consideration for the purposes of the exercise of this discretion. Interpretation of planning policy, including national policy, is a matter of law (see *Tesco Stores v Dundee City Council* [2012] UKSC 13, [2012] 2 P & CR 162, [2012] PTSR 983). As I have set out above, para 47 of the Framework was the subject of interpretation in the *Hunston Properties* case, in particular in relation to how determination of the requirement for the five-year housing land supply was to be approached a development control decision. The context of that case was that it was a Green Belt case and the Inspector had concluded that the best available figure for use in the five-year supply calculations was that which was derived from the revoked Regional Strategy. That figure was the most recent independently tested housing figure which reflected amongst other things the Green Belt policy constraint in the local authority's area. By contrast the developer and Appellant argued that a figure representing "full objectively assessed needs" for housing should be used in the absence of any figure derived from any element of the development plan. In giving the leading judgment of the Court of Appeal, Sir David Keene observed as follows:

> "25 . . . I am not persuaded that the inspector was entitled to use a housing requirement figure derived from a revoked plan, even as a proxy for what the local plan process may produce eventually. The words in paragraph 47(1), 'as far as is consistent with the policies set out in this 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.
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> 26 Moreover, I accept Mr Stinchcombe QC's submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal. I appreciate that the inspector here was indeed using the figure from the revoked East of England Plan merely as a proxy, but the government has expressly moved away from a 'top-down' approach of the kind which led to the figure of 360 housing units required per annum. I have some sympathy for the inspector, who was seeking to interpret policies which were at best ambiguous when dealing with the situation which existed here, but it seems to me to have been mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.
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> 27 It follows from this that I agree with the judge below that the inspector erred by adopting such a constrained figure for housing need. It led her to find that there was no shortfall in housing land supply in the district. She should have concluded, using the correct policy approach, that there was such a short fall. The supply fell below the objectively assessed five year requirement.
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> 28 However, that is not the end of the matter. The crucial question for an inspector in such a case is not: is there a shortfall in housing land supply? It is: have very special circumstances been demonstrated to outweigh the Green Belt objection? As Mr Stinchcombe recognised in the course of the hearing, such circumstances are not automatically demonstrated simply because there is a less than five year supply of housing land. The judge in the court below acknowledged as much at paragraph 30 of his judgment. Self-evidently, one of the considerations to be reflected in the decision on 'very special circumstances' is likely to be the scale of the shortfall.
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> 29 But there may be other factors as well. One of those is the planning context in which that shortfall is to be seen. The context may be that the district in question is subject on a considerable scale to policies protecting much or most of the undeveloped land from development except in exceptional or very special circumstances, where because such land is an Area of Outstanding Natural Beauty, National Park or Green Belt. If that is the case, then it may be wholly unsurprising that there is not a five year supply of housing land when measured simply against the unvarnished figures of household projections. A decision-maker would then be entitled to conclude, if such were the planning judgment, that some degree of shortfall in housing land supply, as measured simply by household formation rates, was inevitable. That may well affect the weight to be attached to the shortfall."

[21] That construction of the policy in para 47 of the Framework was reflected by the Court of Appeal in the plan making context in *Solihull Metropolitan Borough Council v Gallagher Estates* [2014] EWCA Civ 1610. What the construction does not conclude upon, because the point did not arise, is what the "varnish" is that is applied to the FOAN in order to reach the Framework compliant housing requirement. Alternatively, what are the ingredients that are involved in making the FOAN? In the context of this case, do they include vacancies and second homes? Those are the questions which arise in Ground 1.

[22] In respect of Ground 2, a number of essentially uncontroversial legal propositions are in play. The first is the content of the duty to give reasons which is well-known and set out in the *South Bucks v Porter* no 2 [2004] UKHL 33, [2004] 4 All ER 775, [2004] 1 WLR 1953 in the speech of Lord Brown at para 36 in which he observed as follows.

> "36 The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principle important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of the obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he is genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[23] In relation to consistency in decision making, the now classic formulation of that principle in a planning context was given in the judgment of Mann LJ in the case of *North Wiltshire District Council v the Secretary of State for the Environment and Clover* (1992) 65 P & CR 137 at p 145, [1992] 3 PLR 113, [1992] EGCS 65 as follows:

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision. To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable, then ordinarily it must be a material consideration. A practical test for the Inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

[24] Consideration was given to the materiality of emerging allocations in a consultative version of a local plan by Stewart-Smith J in the case of *Wainhomes (South West) Holdings Ltd v Secretary of State* [2013] EWHC 597 (Admin). The framework provides an understanding of the definition "deliverable" in footnote 11 as follows:

> "11 To be considered deliverable, sites should be available now, offer a suitable location for development now and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission

> expires, unless there is clear evidence that schemes will not be implemented within five years, for example they would not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

[25] Having set out some parameters for the interpretation of the question of whether a site was deliverable, Stewart-Smith J went on to set out his conclusions in respect of emerging allocations as follows:

> "35 I would accept as a starting point that inclusion of a site in the eWCS or the AMR is some evidence that the site is deliverable, since it should normally be assumed that inclusion in the AMR is the result of the planning authority's responsible attempt to comply with the requirement of 47 of the NPPF to identify sites that are deliverable. However, the points identified in 34 above lead to the conclusion that inclusion in the eWCS or the AMR is only a starting point. More importantly, in the absence of site specific evidence, it cannot be either assumed or guaranteed that sites so included are deliverable when they do not have planning permission and are known to be subject to objections. To the contrary, in the absence of sites specific evidence, the only safe assumption is that not all such sites are deliverable. Whether they are or are not in fact deliverable within the meaning of 47 is fact sensitive in each case; and it seems unlikely that evidence available to an inspector will enable him to arrive at an exact determination of the number of sites included in a draft plan but are as a matter of fact deliverable or not. Although inclusion by the planning authority is some evidence that they are deliverable, the weight to be attached to that inclusion can only be determined by reference to the quality of the evidence base, the stage of process that the draft document has reached and knowledge of the number and nature of objections that may be outstanding. What cannot be assumed simply on the basis of inclusion by the authority in a draft plan is that all such sites are deliverable. Subject to that, the weight to be attached to the quality of the authority's evidence base is a matter of planning judgment for the inspector, and should be afforded all proper respect by the court."

[26] Ground 3 relates to the role of the Inspector at a hearing. The leading case in relation to this issue is the case of *Dyason v Secretary of State* (1998) 75 P & CR 506, [1998] JPL 778. In giving the leading judgment of the Court of Appeal Pill LJ stated at p 512 as follows:

> "i. It is clear that at a hearing there is to be no formal cross-examination and that a hearing is the suitable procedure where 'there is no likelihood that formal cross-examination will be needed to test the opposing cases'. The intention is to make the procedure 'less daunting for unrepresented parties'. It is intended 'eliminate or reduce the formalities of the traditional local inquiry'.
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> ii. Planning permission having been refused, conflicting propositions and evidence will often be placed before an inspector on appeal. Whatever procedure is followed, the strength of the case can be determined only upon an understanding of that case and by testing it with reference to propositions in the opposing case. At a public local enquiry the Inspector, in performing that task, usually has the benefit of cross-examination on behalf of the other party. If cross-examination disappears, the need to examine propositions in that way does not disappear with it. Further, the statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but assessed for its own worth and in relation to opposing contentions. There is a danger, upon the procedure now followed by the Secretary of State for observing the right to be heard by holding a 'hearing', that the need for such consideration is forgotten. The danger is that the 'more relaxed' atmosphere could lead not to a 'full and fair' hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector."

CONCLUSIONS

[27] As set out above, the allegation in Ground 1 is that the Inspector should not have included an allowance for vacancies and second homes in the setting the FOAN. This involves considering what material is relevant to establishing a FOAN. Firstly, to follow the interpretation of para 47 of the Framework set out above, a FOAN is not the figure for a housing requirement following the application of the policies in the Framework. It is a figure for the assessment of housing needs prior to the application of policy.

[28] So what is the nature of a policy which may in a forward-planning context lead to the adjustment of the housing needs assessment figure? Whilst Sir David Keene referred to a "constrained figure for housing

need" for example in para 27 of *Hunston*, when a housing figure passes through the lens of policy it may increase as well as decrease. It may decrease as a result of the application of policies of constraint such as Green Belt or as a consequence of environmental designations such as an Area of Outstanding Natural Beauty or designated European habitats; see for example footnote 9 to the framework. Housing figures may also increase, for example, as a result of factors such as the desire to foster regeneration led by residential development, or the intention to establish a growth area (as has occurred over the years in some parts of the country). All these policies are environmental or socio-economic in their nature and they are policies which are not associated with the calculation of the FOAN. They influence the figure for the housing requirement to be determined in the forward planning process and thereby create a figure "consistent with the policies set out in this Framework".

[29] How then is the FOAN to be arrived at? It is important to read the Framework's para 47 requiring the local plan to meet "the full objectively assessed needs for market and affordable housing in the housing market area" alongside para 159 of the Framework which describes the means of identifying the FOAN, namely the SHMA. It is appropriate, therefore, at this stage to note the terms of para 159 which goes hand in hand with para 47. It provides as follows:

> "159 Local planning authorities should have a clear understanding of housing needs in their area. They should:
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> - prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The Strategic Housing Market Assessment should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the planned period which:
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> - meets household and population projections, taking account of migration and demographic change;
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> - addresses the needs 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 only homes); and
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> - caters for housing demand on the scale of housing supply necessary to meet this demand."

[30] This is clearly not a comprehensive description and further guidance is provided by the First Defendant in the Planning Practice Guidance, and in particular in this respect, in paragraphs with reference ID 2a-001-20140306 to 2a-029-20140306.

[31] In terms of the first element of the assessment in the first of the sub-bullet points in para 159, namely meeting household and population projections taking account of migration and demographic change, the PPG illustrates that this is a statistical exercise involving a range of relevant data for which there is no one set methodology, but which will involve elements of judgment about trends and the interpretation and application of the empirical material available. These judgments will arise for instance in relation to whether, for example, adjustments for local demography or household formation rates are required (see para ID 2a-014-20140306), and the extent and nature of adjustments for market signals (see para ID 2aa-018-20140306). Judgment will further be involved in taking account of economic projections in undertaking this exercise.

[32] At the second stage described by the second sub-bullet point in para 159, the needs for types and tenures of housing should be addressed. That includes the assessment of the need for affordable housing as well as different forms of housing required to meet the needs of all parts of the community. Again, the PPG provides guidance as to how this stage of the assessment should be conducted, including in some detail how the gross unmet need for affordable housing should be calculated. The Framework makes clear these needs

should be addressed in determining the FOAN, but neither the Framework nor the PPG suggest that they have to be met in full when determining that FOAN. This is no doubt because in practice very often the calculation of unmet affordable housing need will produce a figure which the planning authority has little or no prospect of delivering in practice. That is because the vast majority of delivery will occur as a proportion of open-market schemes and is therefore dependent for its delivery upon market housing being developed. It is no doubt for this reason that the PPG observes at para ID 2a-208-20140306 as follows:

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

[33] This consideration of an increase to help deliver the required number of affordable homes, rather than an instruction that the requirement be met in total, is consistent with the policy in para 159 of the Framework requiring that the SHMA "addresses" these needs in determining the FOAN. They should have an important influence increasing the derived FOAN since they are significant factors in providing for housing needs within an area.

[34] Insofar as Hickinbottom J in the case of *Oadby and Wigston Borough Council v Secretary of State* [2015] EWHC 1879 (Admin) might be taken in para 34(ii) of his judgment to be suggesting that in determining the FOAN, the total need for affordable housing must be met in full by its inclusion in the FOAN I would respectfully disagree. Such a suggestion is not warranted by the Framework or the PPG for the reasons which I have just set out. As Hickinbottom J found at para 42 of that judgment, what the Inspector did in that case was to exercise his planning judgment, firstly, to conclude that the FOAN was higher than the council's figure and secondly, (again deploying planning judgment) to arrive pragmatically at a figure for the FOAN in order for it to be used to assess the five-year housing land supply. The council's figure was regarded by the Inspector in that case as being short because it failed to properly take account of factors which should have been included in the FOAN, including considering affordable housing need. Understood in this way, references to "policy on" and "policy off" become a red herring. The appropriate figure was for the Inspector's judgment to determine taking account of all the matters involved in finding the FOAN.

[35] Thus, when para 47 of the Framework requires the local plan to meet "the full objectively assessed needs for market and affordable housing", that is the figure determined by the SHMA required by the para 159 of the Framework for the purpose of identifying the FOAN. That process, guided by the PPG, seeks to meet household and population projections (taking account of migration and demographic change), and to address the need for types of housing including affordable housing. When a planning authority has undertaken or commissioned a SHMA, that will obviously be an important piece of evidence, but it is not in and of itself conclusive. It will be debated and tested at the local plan examination or (as in the present case) in appeals within the development control process.

[36] This is all background to answering the question of whether or not the Inspector was correct to include second homes and vacancies in his assessment of the FOAN in this case. I am satisfied that he was. These elements were empirically based from the 2011 census and indicated a trend whereby a certain portion of the housing in the district was not in fact being used by the indigenous population, and therefore was not available to meet housing need. He was therefore entitled to form the view as a matter of judgment based on the empirical material that an allowance should be made for the prospect of that trend continuing. It is true that this involves a judgment about applying the census-based figure as a trend, but that in my view is precisely the kind of statistical judgment which is involved in determining the FOAN and the Inspector was right to countenance it.

[37] Mr Leader contended that it was in reality the application of a policy, namely the perpetuation of the existing quantum of existing homes and vacancies in the housing stock, and therefore as the implementation

of a policy it was not a legitimate exercise pursuant to para 47. That argument is ingenious but in my view clearly puts the matter the wrong way round. In the two-stage process envisaged by para 47, (that is to say in summary, firstly, determining the FOAN and secondly applying policy to it), it will be entirely open to the Claimant to impose a policy in the second stage to arrest or reverse the number of vacancies or affordable homes in their planned housing stock and that could potentially lead to a reduction in housing requirements. But taking account of the existing extent of vacancy and second homes and projecting it forwards is clearly part of the statistical assessment of housing needs and part and parcel of the FOAN equation at the first stage.

[38] The PPG does not provide any specific guidance on this point related to vacancies and second homes. That is to my mind unsurprising, as it could not begin to address every conceivable point which might arise in this exercise. However, I have no doubt that the inclusion of vacancies and second homes is an adjustment based on statistical data of a kind similar to those which are contemplated in the PPG. The absence of this issue from the PPG does not therefore dissuade me from the view which I have reached.

[39] As I have indicated above, my attention was drawn to the fact that the PPG in paragraphs reference ID3-012-20140306 and 3-039-20140306 does address the question of vacancies but in the context of them forming an element of potential supply. It permits an allowance for bringing homes back into use if that is supported by robust evidence from the planning authority. The existence of that guidance does not however assist in answering the question which arises in this case. Simply because a reduction in vacant homes has the potential to provide an element of supply does not render it illegitimate or inadmissible to account for the existing trend of vacant or second homes as a factor influencing the statistical exercise of determining the FOAN before supply questions arise.

[40] As I have indicated, the elements of the PPG which address the question of the calculation of the FOAN support the interpretation that finding the FOAN requires an analysis of the relevant statistical and econometric data and trends. Against that background, there is no difficulty in concluding that census data about vacancies and second homes are a species of the data to be taken into account in the calculation. Ground 1 therefore fails.

[41] That has implications for the remainder of the case. At the hearing of the appeal, the Second Defendant produced a table setting out the various figures which were candidates for the five-year supply calculation. The figure including second homes and vacancies for the five-year requirement as found by the Inspector (and upheld under Ground 1) was 5,836 homes with a five per cent buffer and 6,670 homes with a 20% buffer. Even if the Claimant's supply figure was to be preferred in total, the Claimant could only demonstrate a five-year supply if the buffer was five per cent and not 20%. In short, therefore, the Claimant would have to succeed on all other issues before the court in order to succeed in showing they had a five-year supply once it is determined as I have that the Inspector made the correct conclusion as to the appropriate figure for the FOAN.

[42] Turning to Ground 2, it is convenient, therefore, to look first at the complaint which is raised about the Inspector's reasoning in relation to the appropriate buffer. The context of that complaint is the 2012 Inspector's decision. The concern raised is that the decision that the Claimant was a 20% authority is not adequately reasoned or explained in circumstances where the 2012 Inspector found them to be a five per cent authority. How could it be that with such a short intervening period and little by way of additional annual monitoring data that the outcome could be so different?

[43] True it is that the Inspector did not directly address the conclusion of his colleague in 2012 but the point appears in her decision, as will be seen from the quotation I have provided above, uncontentiously and without explanation. As is clear from the *North Wiltshire* case, the Inspector was not bound by it. In para 9 of his decision letter, the Inspector sets out fully the reasons for his judgment that the Claimant has been

responsible for persistent under delivery. That is in the form of the Claimant's failure to achieve the Core Strategy average for the past six years with an overall average which was well below it. The Inspector notes the Claimant's arguments about the long term trend but observes that that long term trend is still behind the target with an accumulated shortfall to date. In my view his reasons are absolutely clear. Since the 2012 Inspector provided no reasons for her conclusions, nothing further was required in my view to explain why the Inspector had decided as he did.

[44] The other reasons arguments within Ground 2 must start from the understanding that in para 13 of the decision letter the Inspector accepted in entirety the calculation of the five-year housing land supply undertaken by the Second Defendant and that there was but a 1.91 year housing land supply. In that this figure was based upon the requirement figure employing the allowance for second homes and vacancies as well as the backlog, there is no substance in the Claimant's complaint that it is not clear what figure the Inspector concluded upon. The derivation of the figures was clearly set out in the evidence and did not in my view require setting out further in the decision letter as they were well-known to the informed reader of the decision. The reasons for the conclusions which the Inspector reached on the FOAN are fully set out in para 7 of the decision letter, where he makes clear that second homes and vacancies should be accounted for as part of the exercise of turning household figures into dwelling numbers. In my view clear and sufficient reasoning was provided for his decision.

[45] To some extent the same analysis can be deployed in relation to the question of small windfalls. There were two competing figures and in concluding that the supply was 1.91 years, the Inspector accepted the Second Defendant's figure. In para 11 of the decision letter he explains he is unpersuaded that large site windfalls should be allowed for on the basis that the allocation process should identify most of that type of site. He does not however, discount small site windfalls, and he includes the lower figure adopted by the Second Defendant. As the hearing note discloses, the 268 figure was derived from a five to ten year average of small site windfalls and the derivation of the figure was therefore known.

[46] There is some concern, however, in my view, about what is absent from the reasoning. What is absent is an explanation for the choice between the figures for small site windfalls which in my view could and should have been provided, albeit briefly. That said, however, this was a dispute over but 202 dwellings which would not have affected the overall and critical conclusion as to whether or not a five-year supply actually existed and therefore I am not persuaded that the Claimant suffered any substantial prejudice as a result of the absence of an explanation.

[47] Finally in respect of Ground 2, the question arises as to the emerging site allocations. Here again, in my view, the Claimant has legitimate cause for concern since the Inspector's conclusions inferentially reject their inclusion by his acceptance of the Second Defendant's calculation, but the reasons are entirely silent as to why that is the case. The hearing note from the Second Defendant's consultant records that there was discussion at the hearing about this element of housing supply, but there does not appear any conclusion at all in the Inspector's decision as to why they where excluded. Perhaps in the light of *Wainhomes* case, and given the very embryonic nature of the allocations in a plan which had yet to be consulted upon and about which objections were unknown, it is possible to hazard a guess as to why the Inspector would have afforded them no weight and excluded them. But that would be speculation and in my view it was a matter which required some, albeit brief, explanation. Again this was a failing in the reasoning but again it did not cause any genuine or substantial prejudice to the Claimant as in the light of earlier matters even including this source of housing would not have affected the important and determinative question of whether or not the Claimant had provided for a five-year housing land supply. In those circumstances ground 2 must fail.

[48] Turning to Ground 3, it is important to separate off what Ground 3 is not about at the outset. At one point before the hearing and in the written arguments it appeared to be suggested that this ground might be about whether the Claimant, and in particular Mr Jermany, should have asked for an adjournment. It is not about that issue and in my view no possible criticism could be raised in relation to Mr Jermany's approach to

the hearing. Indeed it is fair to recall that Mr Simons, who appeared on behalf of the First Defendant, endorsed that approach and was rightly keen during the course of his submissions to point out that there was no criticism of Mr Jermany's conduct or participation at the hearing.

[49] The point is this. At the hearing the Inspector is in charge, and the purpose of the hearing is for the Inspector to test and explore the evidence with the assistance of the parties and by means of a structured discussion of the issues. This is the substance of his inquisitorial role identified in the case of *Dyason*. It is of course open to the parties if they feel disadvantaged, or that an event has occurred in the procedure which renders it unfair, to ask for an adjournment or for some other suitable relief from the Inspector. But at all times it is for the Inspector to be on top of matters and ultimately if he cannot discharge his inquisitorial duty because of late material, then he must adjourn or regulate the procedure accordingly. There is a sense in which that analysis of the approach and involvement of the Inspector at the hearing is an answer to the Claimant's complaint. They may well feel (and others might agree) that it would have been prudent for the Inspector to take a little time to read the material which he had only just received and to give consideration to whether or not the agenda or the questions he wish to explore needed to be adjusted, but ultimately that was a matter for his judgment. He clearly considered that he could explore the issues and get what he needed from the debate without doing so.

[50] There is a risk in not taking time to assimilate the material and that risk is obvious. It may be that on mature reflection the material may not have been properly or fully understood which may lead to proceedings needing to be reopened. Worse still, it may lead to erroneous decisions or decisions that are based on a misconception about the evidence. However, those risks did not materialize in this case. I am not prepared to accept that the absence of reasoning which I have set out above is evidence of that failure or evidence of an unfair procedure and a failure to properly discharge the inquisitorial burden. Those failures are rather simply the failure to provide fuller explanation of conclusions in relation to issues which there is no doubt the Inspector fully understood. Thus there was no unfairness in the procedure nor did the Inspector fail to discharge his inquisitorial role in undertaking the hearing adopting the procedure which he did.

[51] For reasons which I have set out above, each of the three grounds on which this claim has been advanced by the Claimant must be dismissed.

Judgment accordingly.