Neutral Citation Number: [2016] EWHC 267 (Admin)

Case No: CO/3830/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 February 2016

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

WEST BERKSHIRE DISTRICT COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
(2) HDD BURGHFIELD COMMON LTD	

- -
- -

William Upton (instructed by **Legal Services West Berks DC**) for the **Claimant**
David Blundell (instructed by **Government Legal Dept**) for the **First Defendant**
Christopher Young and James Corbet Burcher
(instructed by **Gateleys plc**) for the **Second Defendant**

Hearing date: 3 February 2016

- -

Approved Judgment

Mr Justice Supperstone :

Introduction

1. By this claim, made pursuant to section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") the Claimant ("the Council") seeks to challenge the decision of the First Defendant (given by his Inspector) dated 6 July 2015 ("the Decision") allowing the appeal of the Second Defendant ("HDD") against the Council's refusal of planning permission for development on land at Firlands Farm, Hollybush Lane, Burghfield Common, Reading, Berkshire ("the Site").

Factual Background

2. The application for planning permission was dated 27 June 2014, and was refused by notice dated 22 October 2014. The development proposed was the "erection of up to 129 dwellings with vehicular access onto Hollybush Lane and associated public open space, landscaping and drainage work". Following the submission of revised plans during the appeal process, showing a reduced number of dwellings, planning permission was granted for the erection of up to 90 dwellings.

3. The Decision Letter ("DL") records that:

> "12. Burghfield Common is identified as a Rural Service Centre in Policy ADPP1 of the West Berkshire Core Strategy (the Core Strategy). Policy ADPP6 of the Core Strategy states that within the East Kennet Valley area it is intended to be the focus for development along with the other Rural Service Centre of Mortimer. …
>
> 13. Although it is intended that the majority of development will take place on previously developed land and development in the open countryside will be strictly controlled, the Core Strategy does not preclude development on greenfield sites and Policy ADPP6 recognises that development may take the form of small extensions to Burghfield Common, Mortimer and the service village of Woolhampton. Policy ADPP1 allows for development within or adjacent to settlements in the settlement hierarchy (which includes Burghfield Common).
>
> 14. Policy CS1 of the Core Strategy emphasizes that new homes will be located in accordance with the settlement hierarchy. Whilst it states that they will primarily be developed on land within settlement boundaries, strategic sites and broad locations in the Core Strategy and land allocated in subsequent development plan documents, Policy CS1 does not in itself specifically preclude development beyond existing settlement boundaries.
>
> …

> 16. Policy HSG.1 of the West Berkshire District Local Plan (the Local Plan) was saved and continues to form part of the adopted development plan. It allows for new housing development within identified settlement boundaries. The appeal site is adjacent to but outside of the settlement boundary for Burghfield Common. The principle of housing development on the appeal site is contrary to Policy HSG.1 therefore. The appellant accepts that this is the case."

4. The West Berkshire Council July 2014 Housing Site Allocations DPD Preferred Options notes:

> "4.3 The Core Strategy sets out a housing number of approximately 800 new homes for the East Kennet Valley between 2006 and 2026. At March 2013, approximately 270 remained to be identified and this number has been reduced further by permissions since then and by the inclusion of a modest windfall allowance. An element of flexibility is necessary however, in case houses cannot be delivered as planned elsewhere, specifically the Eastern area of the District.
>
> 4.4 The Core Strategy defines Burghfield Common and Mortimer as Rural Service Centres in this area, with Woolhampton and Aldermaston as Service Villages. There are not proposed to be any allocations in Aldermaston due to its proximity to AWE Aldermaston. Development is proposed in Burghfield Common, Mortimer and Woolhampton in the form of small extensions to these villages."

5. The Core Strategy was adopted on 16 July 2012. The planning application was submitted on 27 June 2014 and refused by notice dated 22 October 2014. The inquiry into the appeal was held on 2-10 June 2015. The decision letter is dated 6 July 2015.

Legal and policy framework

Appeal to the High Court under the 1990 Act, s.288

6. Section 288 of the 1990 Act provides for an appeal to the High Court against the decision of an inspector. The general principles of judicial review are applicable to a challenge under s.288. In *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) Lindblom J, as he then was, summarised at para 19 the relevant legal principles:

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

v Secretary of State for the Environment [1981] 42 P&CR 26 at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and anr v Porter (No. 2)* [2004] 1 WLR 1953 at p.1964 B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into *Wednesbury* irrationality' to give material considerations 'whatever weight [it] thinks fit or no weight at all' (see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at p.780 F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J, as he then was, in *Newsmith v Secretary of State for the Environment, Transport and Regions* [2001] EWHC 74 Admin, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17-22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann LJ, as he

> then was, in *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P&CR 80, at p.83 E-H).
>
> (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J in *Sea Land Power and Energy Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).
>
> (7) Consistency in decision making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill LJ. *Fox Strategic Land and Property Ltd v Secretary of State for Communities and Local Government* [2013] 1 P&CR 6, at paragraphs 12-14, citing the judgment of Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P&CR 137, at p.145)."

Development plan and material considerations

7. Section 70(2) of the 1990 Act provides that, in dealing with an application for planning permission, the local planning authority:

> "… shall have regard to—
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."

8. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") provides that:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Policy Framework

National Planning Policy Framework

9. Paragraph 14 of the National Planning Policy Framework ("NPPF") provides that:

> "At the heart of the National Planning Policy Framework 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 **decision-taking** this means:
>
> - approving development proposals that accord with the development plan without delay; and
>
> - where the development plan is absent, silent or relevant polices are out of date, granting permission unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted."

10. Paragraph 47 of the NPPF provides that:

> "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 planned 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% (move forward from later in the planned period) to ensure choice and competition in the market for land. Where there has been a record of persistent under-delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
>
> - identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;

- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and

- set out their own approach to housing density to reflect local circumstances."

11. Paragraph 49 of the NPPF provides that:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up to date if the local planning authority cannot demonstrate a five year supply of deliverable housing sites."

12. Paragraph 159 of the NPPF provides that:

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

13. Paragraph 196 of the NPPF states that:

> "The planning system is plan-led. Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. This Framework is a material consideration in planning decisions."

14. Paragraph 216 of the NPPF provides:

> "From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:
>
> - the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
>
> - the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
>
> - the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

15. In *City and District Council of St Albans v Hunston Properties Ltd* [2014] JPL 599, Sir David Keene at paragraph 25 said this:

> "The words in para 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."

16. In *Solihull MBC v Gallagher Estates Ltd* [2014] EWCA Civ 1610 Laws LJ commented at paragraph 16:

> "The NPPF indeed effected a radical change. It consisted in the two-step approach which paragraph 47 enjoined. The previous policy's methodology was essentially the striking of a balance. By contrast paragraph 47 required the OAN to be made first, and to be given effect in the Local Plan save only to the extent that that would be inconsistent with other NPPF policies."

17. In *Stratford on Avon DC v Secretary of State for Communities and Local Government* [2013] EWHC 2074 (Admin) Hickinbottom J at paragraph 12 observed, in relation to paragraphs 47-49 of the NPPF, that:

> "This guidance… informs the relevant housing requirement to be used for both the strategic plan-making function of a local planning authority when (e.g.) preparing a Local Plan Review, and the function of decision-making in respect of a particular planning application when it informs the approach of the decision-maker. In the latter case, it is particularly relevant in the absence of a demonstration of a particular level of supply of deliverable housing sites. If the authority cannot demonstrate a five year plus buffer supply of housing land at the time of a planning application for housing development, then that weighs in favour of a grant of permission. In particular, in those circumstances, (i) relevant housing policies are to be regarded as out of date, and hence of potentially restricted weight; and (ii) there is a presumption of granting permission unless the adverse impacts of granting permission significantly and demonstrably outweigh the benefits, or other NPPF policies indicate that development should be restricted in any event. That presumption is, again, not irrebuttable: it may be rebutted by other material considerations."

18. In *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) Lindblom J, as he then was, said at paragraph 71:

> "… neither paragraph 49 of the NPPF nor paragraph 14 prescribes the weight to be given to policies in a plan which are out of date. Neither of those paragraphs of the NPPF says that a development plan whose policies for the supply of housing are out of date should be given no weight, or minimal weight, or, indeed, any specific amount of weight. One can of course infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out of date policies 'for the supply of housing' will normally be less, often considerably less, than the weight due to policies which provide fully for the requisite supply. As I have said, Mr Hill points, for example, to an expression used by Males J in paragraph 20 of his judgment in *Tewksbury Borough Council* – 'little weight' – when referring to 'relevant policies' that are 'out of date'. In *Grand Union Investments Ltd* (at paragraph 78) I endorsed a concession made by counsel for the defendant local planning authority that the weight to be given to the 'policies for housing

> development' in its core strategy would, in the circumstances of that case, be 'greatly reduced' by the absence of a five year supply of housing land. However, the weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, or could it be, fixed in the case law of the Planning Court. It will vary according to the circumstances, including, for example, the extent to which the policies actually fall short of providing for the required five year supply, and the prospect of development soon coming forward to make up the shortfall."

Planning Practice Guidance

19. The Planning Practice Guidance ("PPG") provides, so far as is relevant, at para 03-030 that:

> "**What is the starting point for the five year housing supply?**
>
> The National Planning Policy Framework sets out that local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements. Therefore local planning authorities should have an identified five year housing supply at all points during the plan period. Housing requirement figures in up to date adopted Local Plans should be used as the starting point for calculating the five year supply. Considerable weight should be given to the housing requirement figures in adopted Local Plans, which have successfully passed through the examination process, unless significant new evidence comes to light. It should be borne in mind that evidence which dates back several years, such as that drawn from revoked regional strategies, may not adequately reflect current needs.
>
> Where evidence in Local Plans has become outdated and policies in emerging plans are yet capable of carrying sufficient weight, information provided in the latest full assessment of housing needs should be considered. But the weight given to these assessments should take account of the fact that they have not been tested or moderated against relevant constraints. Where there is no robust recent assessment of full housing needs, the household projections published by the Department for Communities and Local Government should be used as the starting point, but the weight given to these should take account of the fact that they have not been tested (which could evidence a different housing requirement to the projection, for example because past events that affect the projection are unlikely to occur again or because of market signals) or moderated against relevant constraints (for example environmental or infrastructure)."

20. The PPG at para 21b-014 considers in what circumstances it might be justifiable to refuse planning permission on the grounds of prematurity, and states that:

> "in the context of the Framework and in particular the presumption in favour of sustainable development… arguments that an application is premature are unlikely to justify a refusal of planning permission other than where it is clear that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, taking the policies in the Framework and any other material considerations into account."

Such circumstances are likely to be limited to situations where both (1) the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan making process by determining decisions about the scale, location or phasing of new development that are central to an emerging Local Plan, and (2) the emerging plan is at an advanced stage but is not yet formally part of the development plan for the area.

The Council's Core Strategy

21. Policy CS1 in the Council's Core Strategy provides, so far as is possible, that:

> "Provision will be made for the delivery of at least 10,500 net additional dwellings and associated infrastructure over the period 2006-2026. Delivery will be phased and managed in order to meet at least an annual average net additional dwelling requirement of 525 dwellings per annum and to maintain a rolling five year supply of housing land.
>
> An update of the Strategic Housing Market Assessment (SHMA) (so that it accords with the requirements of National Planning Policy Framework, paragraph 159) will be undertaken within three years of the adoption of the Core Strategy. This will be carried out in co-operation with neighbouring authorities within the Housing Market Area. If the updated SHMA indicates that housing provision within the District needs to be greater than currently planned, a review of the scale or housing provision in the Core Strategy will be undertaken. …"

The Inspector's decision letter ("DL")

22. In DL11 the Inspector identified the main issues in the appeal as:

> "(a) Whether housing development on the appeal site is appropriate in principle in terms of adopted development plan policies;
>
> (b) Whether there is a five year supply of deliverable housing sites and in the light of this and other factors whether relevant

> policies for the supply of housing should be considered up to date;
>
> (c) The weight to be given to relevant policies in the emerging Housing Site Allocations Development Plan Document (the HSADPD) and whether the appeal proposal would undermine the plan-making process;
>
> (d) The effect on the character and appearance of the area;
>
> (e) In relation to the presumption in favour of sustainable development, if relevant policies are out of date would any adverse impacts of granting permission significantly and demonstrably outweigh the benefits, when assessed against the policies of the National Planning Policy Framework (NPPF) as a whole, and
>
> (f) The effects of the appeal proposal on highway safety and infrastructure provision and whether these would be adequately addressed."

23. In DL17-42 the Inspector considered the "*five year supply of deliverable housing sites and relevant policies for the supply of housing*". First, he considered whether the housing requirement in the Core Strategy provided an appropriate basis for the calculation of a five-year supply (DL17-26). The findings of the Inspector are as follows:

> "17. The report of the Inspector examining the Core Strategy (the Core Strategy Inspector) was published in July 2012. The Core Strategy was adopted in the same month. It seeks to provide for at least 10,500 net additional dwellings in the District between 2006 and 2026, an annual average of 525. The Council argues that this is the basis for calculating a five year housing requirement.
>
> 18. However, it is clear that the Core Strategy Inspector considered that the planned provision of 10,500 dwellings was not justified by an assessment which met the requirements of the NPPF. There was no Strategic Housing Market Assessment (SHMA) which properly assessed overall housing needs in the Housing Market Area (HMA). The figure of 10,500 dwellings was taken from the South East Plan (SEP). This was approved in 2009 and given its evidence base, the Core Strategy Inspector considered that its assessment of housing needs and demand was not up to date.
>
> 19. It is clear that the planned housing provision in the Core Strategy was not based on an objectively assessed need for housing (OAN). The Council accepts that this is the case.

20. The Core Strategy Inspector took account of the particular circumstances which existed at the time. … Weighing up the situation the Core Strategy Inspector considered that on balance, the Government's planning aims would be best achieved in the short term by adopting the Core Strategy. He recommended modifications which made it clear that the figure of 10,500 dwellings was a minimum, there was a need to review housing needs and demands and that a NPPF compliant SHMA should be completed within three years. Policy CS1 of the Core Strategy encompasses these points.

21. Almost three years has passed since the Core Strategy was adopted. There is still no up to date SHMA which properly assesses housing needs for the District or the wider HMA. Although work is underway on a joint SHMA in partnership with the other Berkshire authorities and the Thames Valley Berkshire Local Enterprise Partnership (LEP), no report has been published to date. It was confirmed at the inquiry that work on the SHMA was only commissioned in January 2015. There is no clear timetable set out for the relevant authorities to consider the findings of the SHMA and agree a distribution of housing provision. The Council will take account of the SHMA in preparing a new Local Plan. The Local Development Scheme does not envisage adopting the new Local Plan until September 2019.

…

24. In this case, as set out above, the housing requirement figure in the Core Strategy was taken from the now revoked SEP which itself was based on evidence from a number of years earlier. Given the further passage of time and the clear findings of the Core Strategy Inspector that even in 2012 the figure did not represent a robust and up to date assessment of housing needs, I consider that the Core Strategy is not up to date in respect of housing requirements. Significant new evidence in terms of population and household projections along with jobs growth forecasts is now available.

25. Whilst I appreciate the difficulties in progressing joint working on a SHMA with other authorities, the Council has had almost three years to address the situation. It may be that the report from the SHMA will be published in the near future but none of the findings in relation to OAN have been made available yet. In any case it will clearly be some time before housing requirements can be properly established taking account of interrelationships between authorities and potential constraints.

> 26. Taking all of this into account I consider that the housing requirement in the Core Strategy no longer provides an appropriate basis for the calculation of a five year supply."

24. Having reached that conclusion the Inspector at DL27-43 considered the question that therefore arises as to what is an appropriate figure (DL27). He considered the evidence of the appellant that had been given by Mr Bateman in this regard (DL28-32). He noted that the assessment submitted by the appellant only relates to West Berkshire and does not consider the OAN for the HMA as a whole (DL28). However, the assessment had been produced specifically in relation to this appeal and under the circumstances he considered this to be a reasonable approach (DL29). He looked at the appellant's analysis of migration trends and average employment growth (DL30), agreeing with the Council's view that forecasts as to employment growth need to be treated with caution (DL31). He appreciated that the appellant's analysis related to a different time period than that covered in the Core Strategy and the new SHMA, but was of the view that "the scenario based on 0.6% employment growth (833 dwellings per annum) is … the most credible and provides a good indication at least of housing needs in the District in the absence of any alternative detailed evidence" (DL32). The Inspector considered:

> "33. On the basis of evidence before me and taking account of all of the above I therefore consider that a figure of 833 dwellings per annum is an appropriate starting point in calculating a five year housing requirement for the purposes of this appeal. I must stress that this is not intended to pre-judge the outcome of work on the new SHMA for the HMA as a whole or indeed the preparation of a new Local Plan."

25. In DL39-42 the Inspector concluded as follows:

> "39. Whilst the appellant makes a number of detailed criticisms of the Council's calculation of supply and raises doubts over the contribution from individual sites, it is clear that even on the basis of the Council's own position there is not a five year supply of deliverable housing sites when compared with a requirement based on an annual figure of 833 dwellings. In fact the supply falls short of the requirement by a very considerable margin. Under the circumstances I do not consider it necessary to set out a detailed analysis of the Council's calculations on housing supply. I find that there is not a five year supply of deliverable housing sites.
>
> 40. I consider that Policies ADPP1, ADPP6 and CS1 of the Core Strategy are relevant policies for the supply of housing; …
>
> 41. Given Paragraph 49 of the NPPF and my finding that there is not a five year supply of deliverable housing sites, these policies should not be considered up to date. As set out above however, I do not find any conflict with Policies ADPP1, ADPP6 and CS1 of the Core Strategy in any case.

> 42. Whilst policy HSG.1 is a saved policy which remains part of the adopted development plan, the associated settlement boundaries, including that for Burghfield Common, were defined some considerable time ago. The Local Plan was adopted in 2002 and was intended to cover the period 1991 to 2006. The settlement boundaries were defined well before the Core Strategy was adopted and it is clear that the Council recognises the need to review them to accommodate even the level of housing provision set out in the Core Strategy. The Council is intending to review the settlement boundary and allocate additional housing sites at Burghfield Common through the HSADPD in order to contribute towards the provision of housing set out in the Core Strategy. This reinforces my view that Policy HSG.1 should not be considered up to date."

26. In DL43-48 the Inspector considers "*The Housing Site Allocations Development Plan Document (HSADPD)*". The findings of the Inspector include:

> "43. The preferred options document for the HSADPD was published in July 2014. The publication of the proposed submission document is scheduled for September 2015 and submission is scheduled for February 2016. I consider that it has not yet reached an advanced stage of preparation. There are a substantial number of unresolved objections (in the order of 8,000) to the DPD as a whole and significant numbers of objections to the two sites at Burghfield Common included as preferred options. Notwithstanding the issue of overall housing provision, I consider that the approach and policies of the HSADPD are otherwise broadly consistent with the policies in the NPPF. However taking Paragraph 216 of the NPPF as a whole I find that at this point in time it should only be given limited weight."

27. The Inspector considers the preferred options for the HSADPD and concludes that "The appeal proposal is consistent with the scale and distribution of development envisaged in the HSADPD" (DL45). He adds that within this context he does not consider that "the appeal proposal is so substantial or its cumulative effect would be so significant that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new development that are central to the emerging HSADPD" (DL46). He concludes that "in the light of Paragraph 216 of the NPPF and guidance within the PPG, … the appeal proposal would not undermine the plan making process in relation to the HSAPDP" (DL46).

28. The Inspector notes that his conclusion on this issue differs from that of the inspector who dealt with the appeal at Mans Hill. He says:

> "47. … It is important to bear in mind that in that case the proposal was for a noticeably larger scheme, up to 210 dwellings (although a reduced number of 183 dwellings appears to have been considered during the inquiry). As set out

> above, in the context of the amount of additional housing to be planned for and the strategy to accommodate it, I do not consider that the scale of the particular proposal before me would undermine the plan making process.
>
> 48. However, I take a different view as to the weight to be given to the emerging HSADPD because I consider that it has not yet reached an advanced stage of preparation and evidence before me confirms that there are substantial numbers of unresolved objections."

29. The Inspector returned to this issue when considering "Other Matters", and added:

> "70. I have given careful consideration to the decision of the Inspector who dealt with the appeal at Mans Hill. It is worth emphasising that in that case the Inspector was considering a noticeably larger proposal adjoining a different part of the village. Whilst I have approached the issue of housing land requirements and supply from a different perspective, I reach the same conclusion that Policy HSG.1 of the Local Plan should not be considered up to date and the proposal should be assessed in the light of paragraph 14 of the NPPF.
>
> 71. As explained above I take a different view as to the weight to be given to the emerging HSADPD and do not consider that the particular proposal before me would undermine the plan making process. I have also taken a different view of the weight to be attached to social and economic benefits as I consider that the proposal should be assessed in its own right in terms of sustainable development. Notwithstanding this, it is clear that the Inspector in the Mans Hill case had significant concerns regarding the adverse effect on the character and appearance of the area. I do not share such concerns in relation the proposal before me."

30. In DL55-61 the Inspector deals with the presumption in favour of sustainable development. He states that "In this case there are no specific policies in the NPPF which indicate development should be restricted" (DL55); on balance he considered that the proposal would have a neutral effect in terms of the environmental role of sustainable development (DL59); and on the basis of his assessment he considered that the proposal would constitute sustainable development. In his view whilst there would be some adverse environmental impacts, these would be limited and would not outweigh the benefits of the proposal (DL60). He concluded that in the light of this and the presumption in favour of sustainable development, permission should be granted (DL61).

Grounds of challenge

31. Mr William Upton, for the Claimant, advances four grounds of challenge to the Inspector's decision:

i) The Inspector was wrong to treat the strategy and policies for housing set out in the Core Strategy as out of date. He was in effect questioning the three years given in the development plan for the Claimant to review its housing needs;

ii) He was wrong to identify the housing need figure as 833 dwellings per year, and to treat that figure as an absolute consideration rather than one that is a relative matter of weight;

iii) He was wrong to apply no weight to the housing land supply policies and little weight to the emerging DPD. In the circumstances, he failed to apply the correct planning tests, including how the overall planning balance applied;

iv) In the alternative, he has failed to give adequate reasons for this decision. This causes considerable prejudice to the Claimant, given that this decision is relevant to all planning applications for housing development in the district.

Mr Upton submits that the Inspector reached the wrong conclusions on the housing land supply requirements, and then (having ventured to identify a housing land supply requirement) he failed to consider what weight should be applied to it, or to the related development plan policies (skeleton argument, para 1). The Claimant takes issue with the Inspector's decision, in particular, on the first three of his main issues, and the fifth (see para 22 above).

The Parties' Submissions and Discussion

Ground 1: The Inspector was wrong to treat the strategy and policies for housing in the Core Strategy as out of date

32. Mr Upton submits that the Inspector was not required to identify an OAN figure, given the terms of the Core Strategy. The Core Strategy required the update to the SHMA to be completed within three years, that is by 16 July 2015. It was then for the Claimant to decide how to proceed to review the development plan. It follows that as at 10 June 2015 when the inquiry concluded or 6 July 2015, the date of the Inspector's decision, he was wrong to conclude that he had to consider what the OAN might be, and to judge the five year housing land supply situation as against that OAN figure rather than the interim Core Strategy figure.

33. Despite the terms of paragraphs 47-49 of the NPPF which would require an immediate OAN assessment, Mr Upton suggests that the CS Inspector recommended a specific solution tailored to the needs of the District. The target for the plan period (2006-2026) is at least 10,500 dwellings, at an annual average of 525 dwellings. There is a need to update the SHMA in the light of the OAN within three years of the adoption of the plan, which was on 16 July 2012. During this interim three year period the adopted development plan provides a sound basis for the five year HLSA required by the NPPF. The needs analysis using the SHMA was to be completed within the three year period, and any alteration to the development plan would occur thereafter.

34. The Core Strategy was adopted after the NPPF was published and, Mr Upton submits, took it into account. The Inspector acknowledged the unusual circumstances of the

Core Strategy's process (DL17-20) but he was then wrong, Mr Upton submits, when he decided not to follow the approach set out in the Core Strategy (DL21-26). It follows that the Inspector failed to determine this part of his decision in accordance with the development plan process.

35. Mr David Blundell, who appears for the Defendant, makes the point that contrary to the suggestion made by the Claimant, the Inspector did not find the housing policies in the Development Plan were out of date. Rather, he found that (1) the principle of housing development on the appeal site did not conflict with Policies ADPP1, ADPP6 and CS1 of the Core Strategy (DL15); (2) the development proposals were not in accordance with Policy HSG.1 of the Local Plan (DL16); (3) the planned housing provision in the Core Strategy was not based on an OAN (DL19); (4) there was still no up to date SHMA at the time of the inquiry (DL21); (5) the figure for housing provision in Policy CS1 was not a robust or up to date assessment of housing needs (DL24); and (6) the housing requirement in Policy CS1 no longer provided an appropriate basis for the calculation of a five year supply (DL26).

36. Mr Blundell observes that points (1), (2) and (4) are not disputed by the Claimant; point (3) was conceded by the Claimant (DL19); point (5) was the case even at the time of the adoption of the Core Strategy (see paras 30, 35 and 41 of the Core Strategy Inspector's report at paras 39-40 below). Mr Blundell submits that against that background point (6) cannot realistically be disputed.

37. The NPPF has created a two-stage process (see *Hunston*, per Sir David Keene at paras 6, 18 and 24-27, as confirmed by Laws LJ in *Solihull* at para 16). At the first stage it requires the identification of the OAN in setting the housing requirement for a district. The second stage is one in which the housing requirement can be reduced below the OAN if the council can persuade a core strategy or local plan inspector that there are constraints which justify a lower figure, such as Green Belt. However an inspector at a s.78 appeal is not able to conduct the second stage. In *Hunston* at para 26 Sir David Keene said that:

> "… it is not for an inspector on a s.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."

It does not follow that a s.78 inspector is prevented from calculating the OAN for the district from which one can then identify the annual housing requirement for the district and thereupon calculate the housing land supply. In *Stratford-on-Avon* this is precisely the approach that was adopted by Hickinbottom J at paras 34-46.

38. In *Stratford-on-Avon* Hickinbottom J rejected the submission that "the Inspector effectively usurped the role of the Council by determining the housing requirement for the relevant period" (para 34). He stated as follows:

> "37. Of course, an assessment of future housing requirements is essential for the purposes of the development plan. But,

> equally, the housing requirement position must be considered when a planning application is made for housing development. First, such consideration is required by NPPF paragraph 47-49, because, if the supply is less than five years plus buffer, then that favours grant for the reasons given above (see paragraphs 11-12): there is a presumption in favour of granting permission. …
>
> 39. … In coming to [a] necessary assessment in the context of a specific planning application/appeal, the Inspector was of course not binding the Council as to the relevant housing requirement so far as the development plan (now, in the form of the Council's Core Strategy) was concerned. Indeed, the Inspector made it clear that he understood the Council's role in considering housing supply in the context of the Core Strategy, and was not seeking to assume that role. …
>
> 42. … In deciding on the housing requirement for the district on the evidence before him and for the purposes of the particular planning application he was considering, the Inspector was not seeking to (and did not in fact) bind the Council, or another inspector or the Secretary of State, as to the housing requirement figure in other applications or appeals. The relevant housing requirement figure in another case would depend upon a separate exercise of judgment on the basis of the evidence available in that other case, at the time of the relevant decision, including relevant policy documents such as the local Core Strategy at whatever stage that process had reached."

39. Mr Christopher Young, who appears for HDD, supported by Mr Blundell, submits that the Inspector applied the Core Strategy in accordance with s.38(6). In so doing he concluded that one aspect of one policy was no longer up to date. The figures in Policy CS1 were taken from a Regional Strategy adopted in May 2009, based on earlier information and which was revoked in February 2013. The fact that 525 dwellings per year was an inappropriate figure for the annual housing requirement had been recognised by the Core Strategy Inspector. He had concluded in his report at para 30 that:

> "Given all the above, the Core Strategy's planned provision of 10,500 is not justified by an assessment which meets the requirements of the NPPF. The available evidence indicates that need and demand within the District are materially greater than planned provision and that there may be needs in the wider area that are not being met because the SEP [South East Plan] was unable to fully address them. However in the absence of an up to date, comprehensive SHMA based on the Housing Market Area and agreed between the relevant local authorities covering that HMA, there is insufficient evidence to identify what are the objectively assessed needs and demands."

The Inspector continued at para 35:

> "The lack of justification for housing provision which complies fully with the requirements of the NPPF is a significant shortcoming and there is no specific main modification which I would make now to overcome this problem. What is required is a new SHMA which complies with NPPF paragraph 159, the apportionment of identified needs and demands between local authorities within the HMA, coupled with an explicit balancing of meeting those needs against environmental impacts…"

40. The Inspector's overall conclusion was set out at paragraph 41 in his report:

> "On balance, I consider that the Government's planning aims, as set out in the NPPF, are best achieved in the short term in West Berkshire by the adoption of this Core Strategy (subject to the main modifications necessary for soundness), but amended to make clear that the 10,500 housing figure is a minimum and not a ceiling and requiring a review of housing provision. This review would be in 2 stages. Firstly, a review of needs and demands for housing to inform the appropriate scale of housing to be met in the District. This would be done through an update of the SHMA which complies with NPPF. This review is a stand-alone piece of work and a prerequisite of any review of the Core Strategy itself. This SHMA should be completed within 3 years. Secondly, if the updated SHMA indicates that housing provision within the District needs to be greater than currently planned, a review of the scale of housing provision in the Core Strategy will be undertaken. It is not possible at present to set a realistic timetable for that to be completed. I have deleted from the changes proposed by the Council much of the supporting text which seeks to justify 10,500 dwellings as an appropriate scale of provision, since my conclusion suggests that it is not a justified long term basis for planning in West Berkshire. …"

41. Para 03-030 of the PPG (see para 19 above) advises that evidence drawn from revoked regional strategies may not be up to date and that significant weight should be given to local plan figures unless "significant new evidence comes to light". The Inspector directed himself in those terms (DL24) and found that such evidence was now available. Thus he declined to follow the development plan on the basis of material considerations, namely the fact the figures were not up to date and also that there was "significant new evidence" available which was of assistance. On this appeal the Appellants offered a figure for the OAN for the District upon which the available housing land supply could be calculated. As the Inspector explained, "significant new evidence in terms of population and household projections along with jobs growth forecasts is now available" (DL24).

42. Mr Young and Mr Blundell submit that the resolution of the issue as to whether relevant policies for the supply of housing should be considered up to date (DL11(b)), and the assessment of future housing requirements, involve a classic exercise of planning judgment by the Inspector (see *Stratford-on-Avon* per Hickinbottom J at para

43(i)). As such it was a matter exclusively for the Inspector, subject to *Wednesbury* rationality.

43. I consider the Inspector was entitled to depart from the figure in the development plan for the reasons he gave in his decision. In my view he was entitled to conclude that the material considerations he identified outweighed the annual housing requirement figure in the Core Strategy. The housing requirement in Policy CS1 no longer provided an appropriate basis for the calculation of a five year supply.

Ground 2: The Inspector was wrong to identify the housing need figure as 833 dwellings per year, and to treat that figure as an absolute consideration rather than the one that is a relative matter of weight.

44. Mr Upton submits (1) the Inspector erred in reaching his conclusion on what the housing requirement figure was, and that this error undermines any conclusion that was then reached on the level of that need; and (2) whatever figure the Inspector did conclude was the housing requirement figure, he erred when he treated that figure as an absolute consideration rather than one that is a relative matter of weight.

45. In relation to the assessment of the housing land supply, Mr Upton accepts that the Inspector was correct to identify that the PPG would advise that the starting point for the housing need figures would be the Sub-National Household Projections 2012 ("SNHP 2012") "although clearly they have not been tested or moderated against constraints" (DL27). However the Inspector did not rely on the SNHP 2012 figures, rather he relied on the evidence of Mr Bateman (DL33). In so doing Mr Upton submits the Inspector erred in three respects. First, there is no support in national policy for using a figure which is not a substitute for a full assessment of housing needs to assess those needs. The Inspector acknowledges that Mr Bateman's evidence is not based on the HMA as a whole (DL28), but he goes on to use it for a full assessment of housing needs. Second, he does not explain why it is acceptable to use a different timeframe than the one used in the development plan. The figure of 833, says Mr Upton, is no more than what the maths produces if you divide 16,067 (between 2011 and 2031) by 20 years. Third, he bases his choice of the 833 figure on a misunderstanding of the Council's evidence against migration periods. Mr Upton suggests that a significant part of the reason the Inspector gives for using "the shorter migration trend" (DL30, 33) is because "The Council maintains that migration trends over five years should be used", however that is not what the Council's case was. Further the figure of 833 is taken from a scenario of Mr Bateman where he applied growth in the labour force which uses its own higher migration figure. Hence there was a misunderstanding of the evidence, and errors of fact which, Mr Upton submits, amount to an error of law.

46. In relation to the second limb of the second ground Mr Upton makes two points: first, that the Inspector failed to consider what weight to attach to the 833 figure which was an untested and unconstrained figure. He used the OAN figure as the figure for housing requirements but closed his eyes to the other factors, and the need to consider what weight to be attached to any housing shortfall figure (see *Hunston* at para 29). Second, he failed to consider the weight to be attached to the development plan policies. Mr Upton suggests that all the Inspector does is disapply the policies he considers are out of date.

47. Further the Inspector was wrong, Mr Upton submits, to treat the figure of 833 dwellings per year as an absolute consideration. The DL is silent about the weight to be attached to the indicative/OAN figure that he derived. It is a reasonable conclusion, Mr Upton submits, that the Inspector made no assessment of the weight to attach to the 833 figure he has identified.

48. In response to Ground 2 Mr Blundell makes five preliminary points (skeleton argument, para 46):

    i) the assessment of the housing requirement position was as important for the purposes of planning decision-taking as it was for plan-making (*Stratford-on-Avon*, per Hickinbottom J at para 37);

    ii) this was a matter of planning judgment for the Inspector and his discretion was wide (*Stratford-on-Avon*, per Hickinbottom J at para 43(i));

    iii) nothing in the NPPF or PPG requires the decision maker to ignore relevant evidence on housing requirements in the situation where the figures in the development plan are out of date, or requires only that regard be had to national household projections, since such an approach would be contrary to s.70(2)(c) of the 1990 Act;

    iv) the Claimant's suggestion that the Inspector should have limited himself to considering the SNHP 2012, and was wrong to consider Mr Bateman's evidence, would amount to a failure to have regard to material considerations, contrary to s.70(2)(c) of the 1990 Act (see para 7 above); and

    v) the Council did not provide any alternative evidence on migration or employment growth trends, or any detailed assessment of housing requirements, to rebut HDD's analysis.

49. In my view it is clear that the Inspector did not treat the figure of 833 dwellings per annum as the equivalent of an OAN figure for the HMA as a whole (DL28-29). HDD had produced evidence on housing need for the purposes of this appeal which the Inspector considered to be material to his decision. That, as I have said, was in the circumstances the correct approach for him to adopt (see paras 37-38 above). Mr Bateman put forward the figure of 833 and two alternative figures for consideration. The Inspector favoured the scenario which adopted 0.6% economic growth rather than 0.8% for the reason given in DL31. He also rejected the scenario based on the 10 year migration trend. The Council offered no up to date assessment of housing needs. The 525 dwellings per annum figure was very much out of date. Mr Bateman's update note to the Inquiry was based on the 2012-based household projections. The Inspector explained in his decision, "Significant new evidence in terms of population and household projections along with job growth forecasts is now available" (DL24). As Mr Young observes, the choice for the Inspector was between the figure in the Core Strategy which was not an OAN figure or Mr Bateman's evidence which did suggest an appropriate OAN figure. In those circumstances he was required by s.70(2)(c) of the 1990 to have regard to Mr Bateman's evidence; and was entitled to find, as he did, that the evidence produced specifically in relation to this appeal was "a reasonable approach" (DL29).

50. The Inspector acknowledged that the period covered by Mr Bateman's evidence was different from the plan period (DL32). He gave two reasons for relying on it: first, the particular circumstances in West Berkshire (which, as Mr Blundell observes, in the context of this decision means the absence of up to date figures in the Core Strategy and the absence of a SHMA); and second, the fact that the Inspector was concerned with an individual planning appeal, rather than the plan-making process. These are both, in my view, sound reasons (see *Hunston*, per Sir David Keene at paras 29-32; and *Stratford-on-Avon,* per Hickinbottom J at paras 36-42).

51. I agree with Mr Blundell that the Claimant's argument in relation to migration trends is an attempt to re-argue the merits of the case. The Defendant accepts that the Inspector's observation about the migration trend in one scenario considered in the evidence is misconceived, but that was irrelevant because the Inspector did not adopt the 0.8% economic growth scenario (skeleton argument, para 47(3) and footnote 1). The Claimant has identified no material error of fact that satisfies the test in *E v Secretary of State for the Home Department* [2004] QB 1044, per Carnwath LJ at para 66.

52. The Inspector was required to identify an annual housing requirement in the District. If he failed to do so he would not have been able to identify whether the Council was able to demonstrate whether it had a five year supply of housing land. Having rejected the Core Strategy figure the Inspector explained why he favoured the figure of 833 dwellings per annum "as an appropriate point in calculating a five year housing requirement for the purposes of this appeal" (DL33).

53. Mr Upton's complaint that the Inspector failed to consider the question of weight that arises with regard to the application of the Development Plan policies appears to be a complaint in relation to Policy HSG.1. The Inspector did not consider the proposal to be in conflict with any of the relevant policies, so the precise weight to be given to the policies was, as Mr Young observes, academic. The weight that he gave policy HSG.1 which was out of date was a matter of planning judgment for the Inspector.

54. For all these reasons Ground 2 fails.

Ground 3: the Inspector failed to apply the correct planning tests

55. Mr Upton submits that contrary to paragraph 216 of the NPPF the Inspector failed to address the scale of prejudice that would be caused by removing one of the preferred allocation sites from the emerging HSADPD; given that the appeal site will now have planning permission he was pre-determining the appropriate scale and location of development. The Inspector's decision is also, Mr Upton submits, inconsistent with the earlier appeal decision letter on Mans Hill. Further, Mr Upton submits the Inspector erred when he came to his conclusion that Policy HSG.1 was out of date and should not be applied. The appeal site forms a strongly defined edge to this part of the settlement and such belts of woodland are a defining feature of the village. Policy HSG.1 was still relevant and should still be accorded weight as part of the development plan, in advance of these boundaries being reconsidered as part of the HSADPD process if a site is allocated for development.

56. Mr Upton submits that having erred in his assessment of the housing land supply, the weight to be attached to it, and the weight to be attached to the development plan and

draft HSADPD, the Inspector's assessment of the overall considerations was also in error.

57. I reject these submissions. It seems to me to be clear that the Inspector dealt with all the matters that paragraph 216 of the NPPF required him to consider (DL43). The Inspector considered that the proposal did not conflict with key policies in the Development Plan. He gave little weight to the emerging allocations DPD (HSADPD) which is the subject of 8,000 objections and had not been the subject of independent examination. As for the suggestion that he failed to give Policy HSG.1 sufficient weight, Policy HSG.1 was adopted 14 years ago and addressed the development needs of West Berkshire for the period 1991 to 2006. The Inspector was entitled, in my view, to give it little weight in terms of a planning decision about development needs in 2015. DL42 read as a whole shows that the Inspector did consider the issue of weight.

58. The development at Mans Hill concerned the same settlement. However the Inspector gave adequate reasons, in my view, for reaching a different conclusion to that of the inspector in the Mans Hill decision (DL47-48 and 70-71). Further, and importantly, at DL17-42 the Inspector explained why he rejected the Core Strategy figure (which the inspector in Mans Hill had accepted).

59. None of these criticisms by the Claimant amounts to an error of law.

Ground 4: the Inspector failed to give adequate reasons for his decision

60. Mr Upton suggests that this ground arises if the court is satisfied that there is a possible answer to the issues raised by the Claimant, but there is substantial doubt as to whether the Inspector was wrong in law.

61. I am satisfied that the reasons provided by the Inspector for the conclusions he reached on the "principal important controversial issues" are clear and adequate (see *South Buckinghamshire DC v Porter (No.2)* [2004] 1 WLR 1953, per Lord Brown at 1964B-G).

Conclusion

62. For the reasons that I have given this claim is dismissed.