Neutral Citation Number: [2019] EWHC 128 (Admin)

Case No: CO/2948/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2019

Before :

MR JUSTICE DOVE

- -

Between :

Gladman Development Ltd.	**Claimant**
- and -	
Secretary of State of Housing Communities and Local Government	**Defendant**
Sedgemoor District Council	

- -
- -

Jonathan Easton (instructed by **Addleshaw Goddard**) for the **Claimant**
Jack Smyth (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 5th December 2018

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Approved Judgment

Mr Justice Dove:

Background

1. On the 13th May 2017 the Claimant made an application for planning permission to the Second Defendant for the erection of up to 140 dwellings, demolition of outbuildings, public open space landscaping and sustainable drainage system, together with a vehicular access at a site at Newton Road, North Petherton, in the Second Defendant's administrative area. On the 20th September 2017 that application was refused for four reasons. The Claimant appealed under Section 78 of the Town and Country Planning Act 1990 and the appeal was determined by means of the public inquiry procedure. This application is made pursuant of section 288 of the 1990 Act and is a challenge to the decision which was reached by the First Defendant's duly appointed Inspector dated 18th July 2018 refusing planning permission.

2. By the time the appeal came to be heard at the public inquiry there had been further discussions and a resolution of the reasons for refusal related to archaeology, flooding and highway safety. The only reason for refusal which remained was related to the fact that the appeal site was outside the defined settlement boundary for the settlement and therefore in the countryside, an area to which restrictive policies applied in the development plan. Against that background the Inspector defined the main issue in the case in the following terms:

> "6. With that background there is no signs of specific matters between the main parties and there is one main issue in this case. That is whether the site is suitable for development, in the light of the locational policies in the development plan and other material considerations, including the housing land supplied position."

3. The Inspector reviewed the provisions of the development plan comprised in the Second Defendant's Core Strategy ("CS"). Within the CS the site was not allocated for any purpose and was outside but adjacent to the settlement boundary. The fact that the proposal was contrary to policy S1 in the CS was an agreed position. The Inspector concluded that policy S1 was in conformity with the National Planning Policy Framework ("the Framework") which was then extant. For the avoidance of doubt, all references to the Framework in this judgment are to the March 2012 version of the Framework which was operative at the time of the decision under challenge. The Inspector went on to conclude in paragraph 18 of the decision, having considered various contextual points advanced by the Claimant, that:

> "I do not consider that CS policies S1 and P4 are inconsistent with Framework policy, and I conclude that the conflict with them is a matter of substantial weight."

4. The Inspector noted that there were three bases upon which it was contended by the Claimant that the "tilted planning balance" from paragraph 14 of the Framework should apply. One of those was the Claimant's contention that the council could not demonstrate a five-year supply of deliverable housing land. The Inspector went on to examine the question of the five-year housing land supply and provided the following observations in relation to it, which it is necessary to set out at some length given the centrality of this reasoning to the Claimant's challenge:

> "28.Particularly given the fact that the Examination into the LP was ongoing at the time of the Inquiry, it is clearly not for me to supplant the role of the dLP Inspector, but to come to a view – if possible - of the position in relation to five year housing land supply as part of the

considerations leading to my decision. I should start by saying that, depending what assumptions are made and which approach is taken, the Council's position is that the authority has slightly in excess of 9 years supply of deliverable housing sites, whilst the appellant's position is slightly below 2 years. This is a huge gulf and, despite numerous discussions, the difference between the parties remains

…

31. Dealing firstly with the housing requirement, the Council's position is based on the adopted CS figure. This has the benefit of being a fully tested and adopted requirement, though it must be accepted that the passage of time will inevitably call its currency into question. In addition, as alluded to above, there is a question as to the method by which this was calculated and whether it represents a Full Objectively Assessed Housing Need (FOAN) as it is now defined.

32. More recently the Council has produced a higher annualised requirement in the SHMA. But although this requirement is more up to date, it is as yet untested through the examination process. I was told at the Inquiry that it has been the subject of objections and is still being considered.

…

36. The eLP will identify longer term requirements and the evidence is that this will inevitably require the allocation of greenfield sites outside the existing defined settlements. Such sites are put forward in the eLP, and two of them are close to the appeal site. However, although the appellant sought to persuade me that the eLP should be adopted in full as providing the FOAN, they take an apparently contradictory position in relation to the supply of sites. The Council alleges that the appellants have 'cherry picked' material from the dLP process – in that they have adopted the eLP housing requirement but have discounted all the emerging sites which the authority has put forward to address the new requirement. I have considerable sympathy with that criticism. There are a number of areas of disagreement between the parties over the supply, but the main issue is whether the allocated dLP sites should be included in the supply side.

37. The emerging sites account for just over 1,000 of the disputed dwellings, which is obviously a very significant amount. None of them are allocated in the CS or have the benefit of planning permission, and I was told that there are outstanding objections to the draft allocations. All are apparently outside the existing settlement boundaries.

38. I appreciate that, in order 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. I do not have sufficient evidence to consider the

individual position of each of the disputed sites. However, in the light of the Council's overall delivery evidence, I consider it a reasonable assumption that at least a significant number of these sites have a realistic prospect of delivery within the time period.

39. Conversely the appellant, having omitted all the emerging sites from the supply side, states that the appeal proposal – which has no adopted or emerging policy support, no planning permission and is outside the settlement boundary – is deliverable within the five year period. There is an inherent inconsistency in that general approach. On that basis, I consider the Council's position on the supply of deliverable sites to be generally more persuasive.

40. The purpose of a 5% buffer (moved forward from later in the plan period) is to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, the buffer increases to 20% to provide a realistic prospect of achieving the planned supply and to ensure choice and competition. This is not intended to be a sanction but a means by which the authority stands a better chance of meeting its housing targets.

41. In this case the authority argues that, until the production of a new draft requirement in 2016, it considered that it was meeting its housing targets as set out in the adopted CS. Therefore a 5% buffer was appropriate, especially as there was no suggestion that the Council was aware of the issue before the SHMA was published. However, if the SHMA figure is used, a 20% buffer could be argued to be brought about by under-delivery.

42. Again, this is very much a matter which will doubtless be considered as part of the dLP examination, with a wider range of evidence and participants. However, on the basis of what is before me, it seems that there is insufficient evidence to support a record of persistent under delivery against known housing targets, and that a 5% buffer is appropriate.

…

44. The most commonly used method, in the light of the need to boost significantly the supply of housing, is to address the deficit as soon as possible using the Sedgefield method. However the Inspector examining the eLP will doubtless consider detailed evidence as to whether this is appropriate in the case of this authority. It is not a matter on which I can or should conclude in the light of the evidence before me.

Five year housing land supply – conclusion

45. In the context of this appeal it is not for me to undertake some sort of shadow housing land supply assessment, especially as the dLP Inspector is actively considering the position, doubtless on the basis of more comprehensive evidence than that before me. The Council's approach of using the 'current year' method as the appropriate base date is also clearly being considered by dLP Inspector.

46. In terms of the housing requirement I have some sympathy with the suggestion that the untested 2016 figure should be regarded as the current requirement, but it cannot replace the CS figure at this stage. To address the supply there is clearly a range of potential sites and policies being considered as part of the eLP examination and, on the basis of what is before me, the Council's position is more persuasive. As to the buffer, I consider that a 5% buffer is more appropriate on the basis of what I have seen. I have not been able to reach a conclusion on the appropriateness of the Liverpool/Sedgefield methods.

47. These conclusions must be set in the context of the very wide gap - a gap wider than any I have experienced in similar cases - between the parties on the extent of the housing land supply. It is clearly desirable that, if reasonably possible, I should reach a conclusion on the housing land supply position. However in this case that is not a realistic option, for the reasons set out above, and it is not possible to reach a firm conclusion on the gap between the parties.

48. However this is less significant than might otherwise be the case for two reasons. Firstly it is clear that national policy seeks to boost significantly the supply of housing and this remains an important material consideration. Even if the authority were able to demonstrate that it has a five year supply, this does not act as a cap on development. Secondly, as set out above, CS policy P6 is inconsistent with national policy. This is a relevant policy which is out of date and the so-called 'tilted balance' in Framework paragraph 14 is engaged in any event for that reason."

5. The Inspector went on to express his view in relation to the planning balance and his overall conclusion in the following terms:

"56. In terms of social issues, the provision of both market and affordable housing is to be welcomed. Even if I had concluded that there is a five year supply of housing land, the proposal would be a benefit as a contribution to a rolling supply. The provision of affordable housing in line with adopted policy, and in excess of the emerging dLP figure, is a significant benefit. The provision of open space would be a benefit to new and existing residents, and would improve links to the main part of the settlement.

…

58. As set out above, I have carefully considered the evidence in relation to housing land supply and other matters in the context of paragraph 14 of the Framework. I have concluded that CS policy P6, dealing with development in the countryside, does not fully comply with current national policy and I have accordingly reduced the weight which can be accorded to it. This policy is clearly relevant to this case and is out of date. The 'tilted balance' therefore comes into play for that reason alone.

59. National policy in that case is that, where relevant policies are out of date – as in this case in relation to CS policy P6 - permission should be granted unless any adverse impacts of doing so would significantly

> and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.
>
> 60. Based on my considerations above, the benefits of the proposal (especially the provision of market and affordable housing), are significantly and demonstrably outweighed by the adverse impact of the proposal – namely the conflict with the adopted development plan locational policies."

The Grounds

6. Mr Jonathan Easton, who appeared on behalf of the Claimant, advances two grounds of challenge to the Inspector's decision. Ground 1 is that the Inspector misinterpreted and misapplied national planning policy in failing to make any final finding as to the Second Defendant's five-year housing land supply position. It is contended by Mr Easton that following a number of cases which are set out below, and applying the policy from paragraphs 47 and 49 of the Framework, it was necessary in the circumstances of the present case for the Inspector to reach some sort of conclusion as to the five year housing land supply situation. The Inspector's failure to do so was a material error of law and was not cured by his application of the tilted balance in reaching his conclusions.

7. Ground 2 of the Claimant's case is that the Inspector erred in his interpretation of paragraph 47 of the Framework and misapplied the Framework's policy in reaching his conclusions in respect of whether or not a 5% or a 20% buffer was required in the circumstances of the case. In essence, Mr Easton's submission is that when the Inspector referred to there being insufficient evidence to support a record of persistent under delivery "against known housing targets" that was a misinterpretation of the relevant policy, because pursuant to the decision of this court in Cotswold District Council v SSCLG [2013] EWHC 3719 (Admin) a purposive approach needs to be taken to the identification of whether or not there has been persistent under delivery. The Inspector's approach of simply examining performance against the known housing target of the CS was an unlawful misapplication of the relevant policy which required regard to be had to a wider spectrum of potential housing requirements from emerging as well as adopted policy.

8. I propose to deal, firstly, with the relevant legal principles and policy pertaining to Ground 1 and resolve the issues which arise under it since, as Mr Easton correctly observed, if the Claimant succeeds under Ground 1 there is no need for Ground 2 to be considered. What follows therefore is solely directed to the merits of Ground 1. Once I have reached a conclusion in connection with the Ground 1 I will then determine whether or not it is necessary to proceed to consider Ground 2.

Ground 1: The Law

9. In terms of the basis upon which challenges under section 288 of the 1990 Act proceed this case raises no novel propositions of law. Firstly, the challenge must be brought on the basis of an error of law, and the jurisdiction under section 288 of the 1990 Act does not extend to a reconsideration of the planning merits of the proposal (see Newsmith Stainless v Secretary of State [2001] EWHC (Admin) 74). The decision will be scrutinised against the traditional grounds of public law error. The potential types of error of law which are relevant to the present case are whether or not the decision maker has had regard to all material considerations or alternatively has left out of account considerations which were material to the decision. In particular, in connection with material considerations, the provisions of planning policies in the development plan, of the emerging development plan and the

Framework will all be material considerations and, pursuant to the decision of the Supreme Court in Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 the correct interpretation of those planning policies is a matter of law for the court.

10. In the context of a decision under section 78 of the 1990 Act it is incumbent upon the Inspector to provide legally adequate reasons for the decision which he or she has reached. In examining the reasons given by the Inspector in respect of the legal adequacy of its reasoning it is important to read the document and assess it as an exercise in practical decision-taking; it must be read in good faith and not subject to overly forensic scrutiny or illegitimate nit-picking (see for instance South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80; 66 P&CR 83). It is not a contract or a statute, and should not be approached as if it were when reading it to consider whether the reasons provided are legally adequate.

11. Stepping away from the generality of these legal principles, and moving towards the specific and central issues in respect of Ground 1, the starting point for consideration of Mr Easton's submissions must be the provisions of the Framework pertaining to the requirement for a local authority to have a five-year housing land supply, and the approach taken in the policies of the Framework when such a supply does not exist. The requirement for a five-year housing land supply is to be found in paragraph 47 of the Framework and set out in the following terms:

> "47. To boost significantly the supply of housing, 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 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."

If a five-year housing land supply cannot be demonstrated then paragraph 49 provides for the following consequences:

> "49. 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. The relevance of policies for the supply of housing not being considered up to date is then reflected in paragraph 14 of the Framework which provides for the use of a tilted planning balance favouring the grant of permission in cases where relevant polices are out of date. The relevant terms of paragraph 14 of the Framework are as follows:

> "14. 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 policies 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."

13. In recent times courts have had to consider these paragraphs of the Framework. The authorities were reviewed by Lang J in Shropshire Council v Secretary of State of Communities and Local Government and Others [2016] EWHC 2733 (Admin) at paragraphs 22-26 of her judgment in that case. Her review of the authorities led her to the following conclusions;

> "27. In my judgment, these passages in Dartford confirm the other judgments cited to the effect that Inspectors generally will be required to make judgments about housing needs and supply. However, these will not involve the kind of detailed analysis which would be appropriate at a Development Plan inquiry. The Inspector at a planning appeal is only making judgments based on the material before him in the particular case, which may well be imperfect. He is not making an authoritative assessment which binds the local planning authority in other cases.
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> …
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> 30. I do not accept that this was an exceptional case (of the type referred to by Gilbart J. in Dartford at [43]) where the evidence before the Inspector was so lacking that it was impossible for him to perform this task. In fact, in this appeal there was a substantial amount of material relating to housing needs and supply in Shropshire, much of it recent in origin, upon which the Inspector could have made his judgments. The developer's expert report identified a range of figures in respect of housing supply. I acknowledge that the Inspector's task would have been easier if the developer's expert had volunteered some alternative figures for the FOAN or housing requirements, but the absence of such evidence did not absolve the Inspector from making his own judgment on the material before him, as best he could, despite its imperfections. If he was not able to identify a specific figure, he could have identified a bracket, or an approximate uplift on the Claimant's figures and the departmental projections. As I have already explained, he was not required to undertake the kind of detailed analysis which would be appropriate at a Development Plan inquiry and he was not making an authoritative assessment which would bind the local planning authority in other cases.
>
> 31. I also accept the Claimant's alternative submission that, if the Inspector was genuinely unable to make the required judgments as to the FOAN,

> housing requirements, and housing supply, he ought to have given adequate reasons to explain why he could not do so."

14. This case, amongst others, was considered when a similar point arose in the case of Hallam Land Management v Secretary of State for Communities and Local Government [2018] EWCA (Civ) 1808. In that case it was contended in essence that the Secretary of State in reaching a decision on a section 78 appeal failed to reach any conclusion as to the extent of a shortfall against the five-year housing land supply requirement in the local planning authority's area. Having examined the authorities on this particular point Lindblom LJ identified three points emerging from the authorities:

> "50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in paragraphs 47 and 49 of the NPPF and the corresponding guidance in the Planning Practice Guidance ("the PPG"). The Government has chosen to express its policy in the way that it has – sometimes broadly, sometimes with more elaboration, sometimes with the aid of definitions or footnotes, sometimes not (see *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government [2016] EWCA Civ 1040* , at paragraph 33; *Jelson Ltd.* , at paragraphs 24 and 25; and *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643* , at paragraphs 36 and 37). It is not the role of the court to add to or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.
> 51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet.
> 52. Thirdly, the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker. It will not be the same in every case. The parties will sometimes be able to agree whether or not there is a five-year supply, and if there is a shortfall, what that shortfall actually is. Often there will be disagreement, which the decision-maker will have to resolve with as much certainty as the decision requires. In some cases the parties will not be able to agree whether there is a shortfall. And in others it will be agreed that a shortfall exists, but its extent will be in dispute. Typically, however, the question for the decision-maker will not be simply whether or not a five-year supply of housing land has been demonstrated. If there is a shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule applies. But it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a

> shortfall in the five-year supply and to any conflict with relevant "non-housing policies" in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in *Hopkins Homes Ltd.* . It is for this reason that he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land."

15. Having identified these points Lindblom LJ concluded that in that particular case the Defendant could not be criticised for not having expressed a conclusion on the shortfall in the five-year supply of housing land with great arithmetical procession when considering the case under challenge in isolation. However, after the inquiry in relation to the decision under challenge had concluded, two further decisions on appeals in the local planning authority's administrative area had been reached, in which alternative conclusions were reached in respect of the extent of the supply of housing land. Lindblom LJ was satisfied that the Secretary of State had fallen into error in failing to engage with the separate conclusions on housing land supply which had been reached in those appeals. Delivering a concurring judgement, and providing further observations in relation to the issue of whether or not it was necessary for the extent of any short fall in the five-year housing land supplied to be identified, Davis LJ provided the following observations in paragraphs 81-86 of his judgment as follows:

> "81. Clearly a determination of whether or not there is a shortfall in the 5 year housing supply in any particular case is a key issue. For if there is then the "tilted balance" for the purposes of paragraph 14 of the NPPF comes into play.
> 82. Here, it was common ground that there was such a shortfall. That being so, I have the greatest difficulty in seeing how an overall planning judgment thereafter could properly be made without having at least some appreciation of the extent of the shortfall. That is not to say that the extent of the shortfall will itself be a key consideration. It may or not be: that is itself a planning judgment, to be assessed in the light of the various policies and other relevant considerations. But it ordinarily will be a relevant and material consideration, requiring to be evaluated.
> 83. The reason is obvious and involves no excessive legalism at all. The extent (be it relatively large or relatively small) of any such shortfall will bear directly on the weight to be given to the benefits or disbenefits of the proposed development. That is borne out by the observations of Lindblom LJ in the Court of Appeal in paragraph 47 of *Hopkins Homes* . I agree also with the observations of Lang J in paragraphs 27 and 28 of her judgment in the *Shropshire Council* case and in particular with her statements that "…Inspectors generally will be required to make judgments about housing need and supply. However these will not involve the kind of detailed analysis which would be appropriate at a "Development Plan inquiry" and that "the extent of any shortfall may well be relevant to the balancing exercise required under NPPF 14." I do not regard the decisions of Gilbart J, cited above, when properly analysed, as contrary to this approach.
> 84. Thus exact quantification of the shortfall, even if that were feasible at that stage, as though some local plan process was involved, is not necessarily called for: nor did Mr Hill QC so argue. An evaluation of some "broad magnitude" (in the phrase of Lindblom LJ in his judgment) may for this purpose be legitimate. But, as I see it, at least some assessment of the extent of the shortfall should ordinarily be made; for without it the overall weighing process will be undermined. And even if some exception may in some cases be admitted (as connoted by the use by Lang J in *Shropshire*

> *Council* of the word "generally") that will, by definition, connote some degree of exceptionality: and there is no exceptionality in the present case.
> 85. In this case (and in striking contrast to the Bubb Lane and Botley Road cases) a sufficient evaluation of the extent of the shortfall did not happen. Instead, the Secretary of State, having "noted" the council's updated figure of 4.86 year supply and without any express reference to the Bubb Lane and Botley Road cases, simply announced a bald conclusion that there was a "limited" shortfall in the housing land supply. Broad statements elsewhere in the decision letter to the effect that "the Secretary of State has taken into account" the post-inquiry representations do not overcome the defect of a demonstrable lack of engagement with the actual extent of the shortfall: thereby resulting in an absence of a reasoned conclusion on this material issue. Moreover, such a conclusion departs – again, for no stated reason – from the inspector's statement in paragraph 108 of his report that "it can be said that there is a material shortfall against the five year supply…".
> 86. Although it was submitted on behalf of the council that the result would still inevitably have been the same, even had the extent of the shortfall been properly addressed, I cannot accept that that is necessarily so. So the matter must be the subject of further consideration."

16. Against this background, reference was made by the Claimant in support of its submissions to the March 2017 edition of the Inspector Training Manual issued by the Planning Inspectorate and the guidance which it provides to inspectors in relation to the need to reach a firm conclusion on the five-year housing land supply question when it arises in an appeal in respect of residential development. The Training Manual provides the following guidance:

> "8. When reaching a decision on the appeal, consider whether you need to reach a firm conclusion on the existence or otherwise of a five-year supply Consider:
>
> -If you [are] allowing the appeal because the proposal is in accordance with the development plan it will not usually be necessary to reach a firm conclusion on housing land supply.
>
> -If you are concluding that the proposal would cause harm, consider (In the context of paragraph 14 of the Framework) whether the adverse impacts would significantly outweigh the benefits, even if there were a shortfall in 5 year supply to the extent argued by the appellant. If you consider this to be the case, you would not need to reach a firm conclusion about 5 year supply. Instead your conclusions could be expressed along the following lines: "Even if I were to conclude there is a shortfall in 5 year supply of the scale suggested by the appellant and that relevant policies for the supply of the scale suggested by the appellant and that relevant policies for the supply of housing should not be considered up-to-date, he adverse impacts of granting permission would significantly and demonstrably outright the benefits…" Provided that your planning balance is made on this basis there would be no contact with the *Phides Estates* case (see below), because your decision will be based on the maximum possible shortfall in five year supply that has been put to you and, therefore, on the maximum weight that could be attached to any benefit through increasing the supply of housing.

> -In other circumstances the existence or otherwise of a five year supply will be critical to determine whether paragraph 14 applies and understanding the degree of any shortfall will be necessary to carry out the paragraph 14 planning balance correctly. For example, the degree of shortfall in five year supply could affect your conclusion on whether any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits. Understanding the degree of shortfall is also important to determine the appropriate weight to accord "out of date" policies (see paragraphs 16 & 17 below on the *Phides Estates and Crane* cases). The case of *Shropshire Council v SSCLG and BDW trading Ltd [2016] EWHC 2733 (Admin)* confirms that Inspectors will generally need to make judgements on housing need and supply. The Court considered that the Inspector could not properly apply paragraph 49 and paragraph 14 of the NPPF without first reaching a judgement on housing need and housing supply on the evidence before him. The Court confirmed that this does not require the kind of detailed analysis that takes place at a Development Plan Inquiry, nor is it always necessary to identify a specific figure, a bracket or range or approximate uplift on DCLG household projections is acceptable, but a judgement needs to be made on the evidence available despite its imperfections."

Submissions and conclusions

17. Against the backdrop of the judgments in Shropshire and Hallam Land Mr Easton contended that in this case the Inspector had misinterpreted and misapplied the policy of the Framework in relation to the five-year housing land supply, and that it had been incumbent upon him to reach a conclusion both as to whether or not a housing land supply existed and also as to the extent of any short fall. The reasons for Mr Easton submitting that that was necessary in the present case were as follows.

18. Firstly, the Inspector had himself identified the housing land supply position as a main issue which fell to be determined in the appeal. Thus, to fail to address what was an identified part of the main issue in the appeal before him was a material error of law. Secondly, Mr Easton submitted, uncontroversially, that within the body of evidence furnished to the Inspector by both the Claimant and the Second Defendant there was all of the raw data and analysis required for the Inspector to forge a conclusion on the housing land supply figure and determine whether the five-year requirement was met and if it was not the extent of the short fall. This appeal was not, Mr Easton submitted, one of the exceptional cases in which it was simply not possible to perform the calculation.

19. Mr Easton further submitted that in the absence of undertaking the calculation the Inspector had failed to take account of two important material considerations pertinent to the case. The first matter was the weight which should be ascribed to the benefit of making housing provision: if there is a shortfall greater weight should be given to that benefit and the weight increased based on the extent of the shortfall, as well as vice versa. The second matter was the weight to be attached to the policies with which the development conflicted. This submission was grounded in the observations of Lord Gill in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] 1 WLR 1865 paragraphs 83 and 84 as follows:

> "83 If a planning authority that was in default of the requirement of a five years' supply were to continue to apply its environmental and

> amenity policies with full rigour, the objective of the Framework could be frustrated. The purpose of paragraph 49 is to indicate a way in which the lack of a five years' supply of sites can be put right. It is reasonable for the guidance to suggest that in such cases the development plan policies for the supply of housing, however recent they may be, should not be considered as being up to date.
>
> 84 If the policies for the supply of housing are not to be considered as being up to date, they retain their statutory force, but the focus shifts to other material considerations. This is the point at which the wider view of the development plan policies has to be taken."

In the absence, therefore, of identifying whether a shortfall in the five-year housing land supply existed and, if it did, giving some indication as to its extent, the Inspector left out of account a proper weighting to the issue of the benefit arising from the provision of housing, as well as the policies with which the proposal conflicted.

20. In response to these submissions Mr Jack Smyth, who appeared on behalf of the Defendant, commenced his submissions by observing that whether or not to provide a calculation of the extent of a five-year land supply in any given case was quintessentially a matter of planning judgement and was not therefore susceptible to being impugned as a legal error. Furthermore, whilst he accepted that the Inspector had all of the necessary evidence to calculate the five-year housing land supply and reach a definitive conclusion upon it (and thus accepted that this was not a case where such a calculation was impossible), he nonetheless submitted that impossibility of calculation was not the only circumstance in which it would not be necessary for an Inspector to reach a concluded view on the five-year housing land supply. He drew attention to paragraph 31of the judgement of Lang J in the Shropshire case, and submitted that provided the Inspector gave reasons which were lawful for a departure from making a finding in relation to the five-year land supply issue then that would amount to a perfectly legitimate approach.

21. In the present case the Inspector provided, he submitted, three clear reasons why it was inappropriate to reach a conclusion on the five-year housing land supply issue. The first reason, set out in paragraphs 28 and 47 of the decision letter, were that there was an extremely wide gap, or "huge gulf", between the parties as to the appropriate figure for the five-year housing land supply which precluded him from reaching any further sensible conclusion on the differences between the parties. Secondly, the Inspector had exercised proper restraint in declining to reach a concluded view on the five-year housing land supply issue in the context that this question was a matter fully at large before the local plan Inspector who was presently conducting the examination into the emerging local plan at the time of the enquiry. Mr Smyth conceded in the light of the observations of Hickinbottom J (as he then was) in Stratford-Upon-Avon v SSCLG [2014] JPL 104 at paragraph 42 that this reason would not in and of itself be sufficient to depart from reaching a conclusion on the five-year land supply, but in combination with the other reasons it enabled the conclusion that the Inspector had reached a lawful decision in this respect. Whilst Mr Smyth accepted that had the Inspector reached any conclusion on the five-year supply issue it would have not been in any way binding upon the local plan Inspector, nonetheless for the reasons which he gave it was, he contended, legitimate for the Inspector to decline to reach a conclusion. Thirdly, Mr Smyth relied upon the Inspector's reasoning at paragraph 48 of the decision letter, namely that he had applied the "tilted planning balance" from paragraph 14 of the Framework in any event, as a consequence of one of the policies relevant to the decision having been found to have been out of date.

22. Mr Smyth also drew attention to the fact that in making closing submissions on behalf of the Claimant at the inquiry Mr Easton had stated at paragraph 64 of his closing that the Claimant did not "invite the Inspector to make an explicit finding as to exact level of housing in the instant case". Thus, Mr Smyth submitted that it hardly lay in the mouth of the Claimant to criticise the Inspector for failing to reach a conclusion on the housing land supply situation. What the Inspector had done in response to those submissions, and in the particular circumstances of the case, was to provide a pragmatic and lawful response to the evidence and the Claimant's submission.

23. Turning to the question of whether or not the Inspector had left out of account an assessment of the weight to be attached to the benefit from the provision of housing by failing to measure the five-year housing land supply, Mr Smyth drew attention to a number of specific references within the Inspector's decision in which he gave credit to the Claimant in the planning balance for the benefit of providing further housing. Those references were at paragraphs 48, 56 and 60 of the decision. Whilst the inspector had not dealt explicitly with the impact upon the weight to be attached to policy harm which might be affected by the calculation of a five-year housing land supply shortfall that, Mr Smyth submitted, did not represent an error of law when as a matter of planning judgement the Inspector had formed clear conclusions as to the weight to be attached to the policies with which there was conflict in the present case.

24. In response to these submissions, and in particular in relation to the reasons provided by the Inspector for not providing a five-year housing land supply calculation, Mr Easton submitted as follows. Firstly, the scale of the gap or gulf between the parties depended upon the choice between a number of key inputs to the assessment which had a significant effect upon the overall calculation. The extent of the gap did not amount to reason or excuse for not performing the calculation. Secondly, the Inspector was undertaking a development control decision at a particular point in time: a conclusion which he reached in respect of the five-year land supply calculation at that time and on the evidence before him could not bind the Local Plan Inspector who would have to form a separate conclusion based upon the evidence which was before the examination. Thirdly, the fact that the Inspector placed the planning considerations into a tilted balance as a consequence of one of the relevant policies being out of date did not detract from the other consequences identified of failing to undertake the housing land supply in respect of the weight to be attached to the benefit of the provision of housing, and the weight to be attached to the conflict with policy which was relied upon by the Second Defendant.

25. Before reaching conclusions in relation to these submissions it is necessary, in my view, to provide some preliminary observations about the question of the extent to which it is necessary for the decision taker, in considering a decision in relation to housing development, to form a conclusion about whether or not there is a shortfall in the planning authority's five-year housing land supply. Having observed that the requirement to identify a five-year housing land supply is a requirement of paragraph 47 of the Framework, which is brought into the context of decision-taking through the application of paragraphs 49 and 14 of the Framework, it is correct to observe that, given it is a "key issue" (per Davis LJ in Hallman Land at para 81), unless there are clear and legitimate reasons adequately expressed for doing so a conclusion as to the extent of the five-year housing land supply will be required. There may be cases where it is simply not possible for the five-year housing land supply to be calculated on the basis that, for instance, there is critical data missing or a conclusion on an aspect of the calculation would be hopelessly speculative. There may be other cases where as a piece of pragmatic or common-sense decision taking it would be otiose to reach a definitive conclusion on the five-year housing land supply. One such scenario is identified in the Training Manual when it contemplates a situation in which a decision maker has concluded that even if the housing land supply was as short as contended by an appellant, and the "tilted

balance" was applied, planning permission would be refused on the basis that the adverse impact of doing so would significantly and demonstrably outweigh the benefits of the development. In those circumstances resolving the competing contentions between the appellant and the local planning authority as to the precise extent of the five year housing land supply would have become moot. These circumstances will almost certainly be the exception rather than the rule, but they have to be acknowledged.

26. Secondly, as Lindblom LJ observed in paragraph 52 of his judgement in Hallam Land, there is no hard and fast rule as to the degree of precision required in reaching a conclusion on the five-year housing land supply. It will be a question of planning judgement to be exercised from case to case as to whether or not it is necessary for a definitive figure to be derived or whether or not a range within which the supply may fall suffices for the purpose of practical decision-taking. That said, as Lindblom LJ observed, in the event of there being a shortfall in the housing land supply, by and large it will be necessary for the decision maker to engage at least in broad terms what the extent of that shortfall is.

27. Thirdly, the importance of undertaking the five-year land supply assessment is, as was identified by Lindblom LJ in paragraph 52 of his judgment and Davis LJ in paragraphs 82-84 of his judgement in Hallam Land, that it will have an impact on the weight to be attached to ingredients or elements to be weighed in the tilted planning balance. An understanding of the extent of any shortfall will influence the weight to be attached to the benefit of the provision of housing in the planning balance: the greater the shortfall the more significant the weight to be attached to housing provision seeking to address it. It will also influence the weight to be attached to any conflict with relevant policies relied upon to resist the development. For all of these reasons there would need to be, as set out above, cogent and clearly justifiable reasons for not reaching any finding in respect of the five-year housing land supply position.

28. That brings the analysis to an examination of whether or not the reasons provided by the Inspector in the present case were capable of justifying him declining to reach a conclusion on the five-year land supply position in the present case, notwithstanding the fact that he had identified it as part of the main issue in the appeal. Having considered those reasons I am not satisfied that any of them provided a basis for departing from the approach identified in the Shropshire and Hallam Land cases founded upon the policy requirements of the Framework.

29. Firstly, the fact that there was a large difference between the competing analyses of the Claimant and the second Defendant did not prevent, or make inappropriate, the Inspector using the evidence at his disposal in order to reach a conclusion on this key issue. In just the same way as both the Claimant and the Second Defendant had to make judgements and justify assumptions in presenting their evidence on this issue, so the Inspector was perfectly capable of undertaking the same exercise himself. Indeed, in reading the reasons which he provides in respect of this issue in the decision letter it appears as though he has gone some way to arriving at conclusions in respect of the various contested elements of the analysis: the scale of the difference between the parties in the final analysis is not a coherent basis for not pressing those judgements to a conclusion.

30. Secondly, the fact that the Local Plan Inspector was undertaking an examination and was also looking at the five-year housing land supply position of the second Defendant was not a reason for the Inspector taking the decision on this appeal to fail to reach a conclusion on the five year housing land supply position. Any conclusion which the Inspector reached would necessarily be one taken at a particular point in time on the basis of the evidence then available. It would not be in any way binding on the Local Plan Inspector or prejudicial to that Inspectors' conclusions.

31. Thirdly, the fact that the Inspector was in any event applying the tilted balance does not engage with the further reasons why the calculation of the five-year housing land supply was relevant and provided material to be taken into account in the planning balance as set out above. The fact that the tilted planning balance was being deployed did not render it unnecessary for account to be taken of the extent of any additional weight to be afforded to the benefit of the provision of housing from an examination of the extent of any shortfall in the housing land supply, or diminish the need to assess the extent of the weight to be applied to policy conflict if the Second Defendant could not identify a five-year supply of housing. In short, by deploying this reason, the Inspector clearly overlooked the potential materiality of any shortfall to other elements of the planning balance, as opposed to the formula for that balance which had to be used.

32. Whilst Mr Smyth relied upon references to the benefit of housing provision contained within the decision letter those simple references do not engage with the proper ascription of weight to that consideration which would follow from an examination of whether or not there was a shortfall in the five-year housing land supply and, in particular, the extent of such a shortfall. As had to be conceded there was no reference to the other way in which the identification of a shortfall in the five-year housing land supply might play into the planning balance, namely the weight to be attached to the conflict with planning policy relied upon by the Second Defendant. Thus, it appears inescapable that that dimension of this material consideration was also left out of account.

33. It follows from what I have set out above that it is clear that the Inspector fell into legal error in this case by failing to reach a conclusion in relation to the five-year housing land supply position and undertake some measurement of the five-year housing land supply so as to understand the extent of the influence of any shortfall in relation to the weight to be attached to the benefit of making housing provision and the weight to be attached to policies with which the housing proposal conflicted. It is clear that he reached no conclusion at all as to the five-year housing land supply position, and whether there was a shortfall, let alone examining the nature and extent of any such shortfall if one existed. Bearing in mind the conclusions of this court in the Shropshire case, and the Court of Appeal in the Hallam Land case, that amounted to the failure to take account of a material consideration arising from the proper interpretation of housing policy in the Framework. This was not one of the exceptional cases where such a conclusion either could not be reached or was not required in order to provide a comprehensive answer to the question of whether or not development should be consented.

34. Mr Smyth submitted that as an exercise of discretion, quashing could be withheld in the present case. He relied upon the fact that benefits had been taken into account by the Inspector in terms of the provisions of housing and, further, that there were, as he put it, the glimmers of a decision emerging in the paragraphs which have been quoted above bearing upon the housing land supply issue. Those glimmerings of a decision showed that the conclusions in this case would have been adverse to the Claimant. In those circumstances, Mr Smyth submitted it would be proper to conclude that the decision will be no different were it to be remitted.

35. Those are submissions which I am unable to accept. For the reasons which I have set out above it is clear to me that in this case the Inspector left out of account material considerations by failing to reach a conclusion on part of the main issue namely the housing land supply position. On the basis of the material before me I am unable to conclude that it is inevitable that it would have been concluded that there was an adequate five-year housing land supply identified in the Second Defendant's administrative area, or that the decision would be the same.

36. In my view the appropriate relief to grant in the light of the conclusions which I have reached is for this decision to be quashed and for the matter to be remitted for redetermination. In the light of the conclusions which I have reached on Ground 1 it is unnecessary for me to go on to consider the Claimant's contentions under Ground 2.