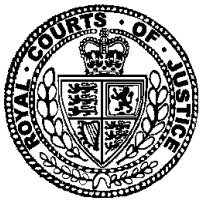

Neutral Citation Number: [2019] EWHC 1524 (Admin)

Case No: CO/200/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2019

Before :

MR JUSTICE DOVE

- -

Between :

Wavendon Properties Limited	**Claimant**
- and -	
Secretary of State of Housing Communities and Local Government	**1st Defendant**
- and -	**2nd Defendant**
Milton Keynes Council	

- - - - - - -

- -

Peter Goatley and James Corbet Burcher (instructed by **Clyde & Co**) for the **Claimant**
Richard Honey (instructed by **Government Legal Department**) for the **1st Defendant**
Daniel Stedman Jones (instructed by **Milton Keynes Legal Department**) for the **2nd Defendant**

Hearing dates: 7th & 9th May 2019

- -

Approved Judgment

Mr Justice Dove :

The Facts

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

> "1. The Committee resolved to refuse planning permission on the basis that any such development of this site would result in the loss of future development and infrastructure options, causing significant and demonstrable harm and is therefore not sustainable development in accordance with Resolution 24/187 of the United Nations General Assembly definition of sustainable development and the National Planning Policy Framework (NPPF) in respect of future generations. The development would also therefore be contrary to paragraphs 14 and 19 of the National Planning Policy Framework, Saved Policy D1 of the adopted Milton Keynes Local Plan 2001-2011 (adopted 2005) and policy WS5 of the Woburn Sands Neighbourhood Plan 2014-2026 (adopted 2014). This does not constitute sustainable development in terms of paragraph 14 of the National Planning Policy Framework.
>
> 2. Furthermore the low density of this proposed development would not be considered sustainable given the current objectives of central government and this Council to both optimise use of land and to build both quickly and strategically."

Subsequently, by way of the Second Defendant's Statement of Case the first reason for refusal was effectively amended to read:

> "1. The development would be contrary to policy WS5 of the Woburn Sands Neighbourhood Plan 2014-2016 ([sic] adopted 2014). This does not constitute sustainable development in terms of paragraph 14 of the National Planning Policy Framework."

2. The Claimant appealed and a public inquiry was held in July 2017. Following the close of the inquiry requests were made to the First Defendant that the appeal should be recovered for his own determination in August 2017 which were declined. Subsequently further representations were made in September 2017 by the local Member of Parliament following which, on the 31st October 2017, the First Defendant recovered the appeal for his own determination.

3. The Inspector's Report to the First Defendant in relation to the appeal was produced on the 2nd February 2018. It remained confidential until it was published alongside the First Defendant's decision on the 5th December 2018. In between the receipt of the Inspector's Report and the First Defendant's decision there were a number of further representations submitted to the First Defendant.

4. Firstly, on the 6th April 2018, the Claimant's planning consultant wrote to the First Defendant pointing out that in two recent appeal decisions within the Second Defendant's administrative area the conclusion had been reached that the Second Defendant could not demonstrate a five year housing land supply. On the 23rd July, the Claimant's solicitors wrote to the First Defendant expressing their concern at the amount of time that had passed since the close of the inquiry, and including a recent briefing note which had been issued by the Second Defendant's Chief Planning Officer to its relevant cabinet member confirming that the council could not demonstrate a five year housing land supply, whether applying the (then current) Liverpool or the Sedgefield method of addressing undersupply in previous years. The briefing note confirmed that if the Liverpool method was used (which was the Second Defendant's preferred position) a land supply of 4.66 years arose, and if the Sedgefield method was deployed the land supply was 4.16 years. In the papers before the court a copy of a

	Liverpool Method Total	Sedgefield Method total
Overall requirement 2016-2021	13,096	14,653
Overall supply of deliverable sites	12,920	12,920
Overall supply with 10% discount to applicable sites	12,195	12,195
Overall supply compared to requirement	-901	-2458
Overall years supply	4.66 years	4.16 years

document produced by the Second Defendant in July 2018 which underpinned the observations in the briefing note has been produced in which the following table sets out the figures leading to these overall calculations as follows:

5. As part of this document (albeit not before the First Defendant) a housing supply trajectory was produced setting out in the form of a schedule each of the sites relied upon by the Second Defendant as forming part of the supply taken into account for the coming five years. In response to the Claimant's letter of the 29th April 2018 the First Defendant wrote to the Second Defendant seeking observations upon the letter referring to other appeal decisions. In response the Second Defendant sent in a briefing note detailing five recent appeal decisions, and in the four which had been decided it was concluded that the Second Defendant did not have a five year housing land supply, albeit that in two cases the appeals were dismissed.

6. On the 26th July 2018 the First Defendant wrote to the Claimant and the Second Defendant seeking observations in relation to the newly published revised National Planning Policy Framework ("the Framework", which unless it appears otherwise, is the version published in July 2018), and the emergence of the Milton Keynes Site Allocations Plan. The Second Defendant responded on the 1st August 2018 noting that the Milton Keynes Site Allocation Plan had been adopted to address any shortfall in five year housing land supply and that the site concerned in the appeal had not been allocated. The objections to the appeal were maintained. The Claimant's solicitors responded by contending that there was nothing in the new Framework which was adverse to the Claimant's case put at the inquiry, and that there remained a shortfall in the Second Defendant's five year housing land supply.

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

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

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

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

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

alternative calculations of five year housing land supply incorporating the adjustments to the supply from the Second Defendant's figure to reflect the SPRU Report's analysis of whether or not that supply was deliverable, coupled with the alternative requirements of the local housing needs requirement calculated using the standard methodology and a calculation using the housing requirement from the emerging local plan. All of this analysis demonstrated that, in addition to the Second Defendant's most recent published analysis showing there was no five year land supply there was, equally, a failure to demonstrate the existence of a five year housing land supply on the basis of the SPRU Report's analysis.

11. The Second Defendant did not provide any response either to the correspondence from the First Defendant or the SPRU Report and its analysis. All of this material, alongside the Inspector's report and the documentation accompanying the inquiry, was before the First Defendant for the purposes of reaching a decision. It should be noted that the appeal was supported by an obligation under section 106 of the Town and Country Planning Act 1990 providing covenants as follows:

> "The Owners covenant as follows:
>
> 1. That, subject to paragraph 2 below, the Owners will use Reasonable Endeavours to build out the Development with 5 (five) years of the Council approving the last Reserved Matters application.
>
> 2. In the event that, prior to the Development being built out, there are more than 4 (four) successive quarters of negative growth in GDP paragraph 1 shall not apply and the Owners will issue a revised date to the Council by reference to the date that the Council approves the last Reserved Matters application and use Reasonable Endeavours to build out the Development by that date."

Planning Policy

12. There were a number of development plan and national policies which were considered in the decision-taking process. Starting with the development plan, policies from the Milton Keynes Core Strategy (the "Core Strategy") adopted in July 2013 which particularly featured in the decision were policies S10 and H8. Policy S10 provided as follows:

> "The open countryside is defined as all land outside the development boundaries defined on the Proposals Map. In the open countryside, planning permission will only be given for development that is essential for agriculture, forestry, countryside recreation or other development which is wholly appropriate to a rural area and cannot be located within a settlement."

13. Policy H8 and relevant parts of its explanatory text provided as follows:

> "Housing density

Objectives of policy:

- To encourage high densities in locations well served by pubic transport

- To ensure land for housing is used efficiently

…

9.53 PPG3 advocates that low density development (at less than 30 dwellings per hectare) should be avoided and puts forward minimum densities of 30-50 dwellings per hectare. However, while aiming to secure higher densities in future, Policy H8 recognises the unique character of the Borough- particularly its diverse character- and seeks realistic increases in density in the appropriate locations. Well designed development can facilitate higher densities and will be crucial in ensuring the new development is successfully integrated into the Borough.

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

HOUSING DENSITY

POLICY H8

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

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

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

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

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

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

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

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

> "Development Boundary
>
> 6.5 The attractiveness of the wider Woburn Sands area depends to a very significant extent upon the preservation of the existing countryside both within the Woburn Sands parish and neighbouring parishes. It is essential for the health and wellbeing of the population that the current network of public footpaths and links through the wider area be maintained and this would not be possible if development encroaches on the countryside around Woburn Sands. This is the unanimous view of all the Parish Councils and residents in the area.
>
> …
>
> 6.14 There is therefore no support for the extension of the current development boundary. However it is recognised that the future work on the preparation of the Core Strategy Review (PlanMK) may propose that the boundaries be amended in the future.
>
> Policy WS5 The preservation of the countryside setting, existing woodland and footpath links into the countryside is key to the future of Woburn Sands. Accordingly no extension to the current Woburn Sands Development Boundary will be permitted other than in the following exceptional circumstances:
>
> - Plan MK identified a specific need for an amendment to the Development Boundary, and
>
> - Any proposed amendment is brought forward following full consultation with, and agreement by, Woburn Sands Town Council and
>
> - The implications of any revised Development Boundary has been assessed in terms of the need to protect and maintain the character of the countryside setting of Woburn Sands."

15. A feature of both the superceded 2012 and 2018 editions of the Framework is the presumption in favour of sustainable development. As articulated in the 2012 edition of the Framework the presumption was set out in paragraph 14 in relation to decision taking 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:

  i) 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;

ii) specific policies in this Framework indicate development should be restricted"

16. The revised text of the presumption in favour of sustainable development contained in the 2018 Framework provided as follows in decision taking:

> "11. Plans and decisions should apply a presumption in favour of sustainable development.
>
> …
>
> For **decision-taking** this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date7, granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed6; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole. "

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

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

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

> "73. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of:
>
> a) 5% to ensure choice and competition in the market for land; or 10% where the local planning authority wishes to demonstrate a five year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or
>
> b) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply"

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

> "212. The policies in this Framework are material considerations which should be taken into account in dealing with applications from the day of its publication. Plans may also need to be revised to reflect policy changes which this replacement Framework has made. This should be progressed as quickly as possible, either through a partial revision or by preparing a new plan.
>
> 213. However, existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

20. The 2018 Framework contains a glossary identifying the definition of various terms which are used during the course of its text. In particular so far as is pertinent to the

present case it contains a definition of the term "deliverable" which is used in the context of paragraph 73. The definition provides as follows:

> "Deliverable: To be considered deliverable, sites for housing 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. Sites that are not major development, and sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (e.g. they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans). Sites with outline planning permission, permission in principle, allocated in the development plan or identified on a brownfield register should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years."

21. The Claimant notes that further assistance is provided in relation to the concept of a deliverable site, and the evidence required in relation to it, in the following material from paragraph 3-063-20180913 of the Planning Practice Guidance (the "PPG") and paragraph 3-047-20180913 in relation to the annual review of the five year land supply:

> "What constitutes as a deliverable site in the context of housing policy?
>
> Annex 2 of the National Planning Policy Framework defines a deliverable site in terms of an assessment of the timescale for delivery and the planning status of the site. For sites with outline planning permission, permission in principle, allocated in a development plan or identified on a brownfield register, where clear evidence is required to demonstrate that housing completions will begin on site within 5 years, this evidence may include:
>
> - Any progress being made towards the submission of an application;
>
> - Any progress with site assessment work; and
>
> - Any relevant information about site viability, ownership constraints or infrastructure provision
>
> For example:
>
> - A statement of common ground between the local planning authority and that site developer(s) which confirms the developers' delivery intentions and anticipated start and build-out rates.

- A hybrid planning permission for large sites which links to a planning performance agreement that sets out the timetable for conclusion of reserved matters applications and discharge of conditions."

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

> "122. Planning policies and decisions should support development that makes efficient use of land, taking into account:
>
> a) the identified need for different types of housing and other forms of development, and the availability of land suitable for accommodating it;
>
> b) local market conditions and viability;
>
> c) the availability and capacity of infrastructure and services both existing and proposed as well as their potential for further improvement and the scope to promote sustainable travel modes that limit future car use;
>
> d) the desirability of maintaining an area's prevailing character and setting (including residential gardens), or of promoting regeneration and change; and
>
> e) the importance of securing well-designed, attractive and healthy places.
>
> 123. Where there is an existing or anticipated shortage of land for meeting identified housing needs, it is especially important that planning policies and decisions avoid homes being built at low densities, and ensure that developments make optimal use of the potential of each site. In these circumstances:
>
> a) plans should contain policies to optimise the use of land in their area and meet as much of the identified need for housing as possible. This will be tested robustly at examination, and should include the use of minimum density standards for city and town centres and other locations that are well served by public transport. These standards should seek a significant uplift in the average density of residential development within these areas, unless it can be shown that there are strong reasons why this would be inappropriate;
>
> b) the use of minimum density standards should also be considered for other parts of the plan area. It may be appropriate to set out a range of densities that reflect the accessibility and potential of different areas, rather than one broad density range;

and

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

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

The decision

24. The essential backdrop to the decision reached by the First Defendant was the report provided to him by the Inspector following the public inquiry into the appeal. At the public inquiry the Second Defendant had contended that it was able to demonstrate an almost 5.2 year supply of deliverable housing sites. The Claimant's case was that in truth the supply was barely 3 years. One of the key issues which the Inspector had to resolve, therefore, was the question of whether or not the Second Defendant was able to demonstrate a five year supply of housing. In his conclusions the Inspector identified a number of key issues governing the difference between the alternative analyses of the five year housing land supply position. He set out these key distinctions and disagreements as follows:

> "9.5 So, how do the Council now convince themselves that a 5-year supply of housing land can be demonstrated? First, the shortfall is distributed over the rest of the Plan period rather than just over the next 5 years (the Liverpool rather than the Sedgefield approach); using the latter in place of the former would be enough to reduce the provision to well below 5 years. Second, an odd optimism is imputed to the delivery of dwellings so that everything forecast to be built within the first 4 years is deemed to materialise and a 10% non-implementation allowance only applied to dwellings expected to materialise later; numerically this amounts to a 5% reduction (roughly) to reflect the uncertainties inherent in forecasts of housing delivery which, even if it captures the effects of non-implementation may not allow for 'slippage'. This contrasts with a 10% reduction (quite common elsewhere) that would be sufficient on its own to reduce the provision available to below 5 years in any of the methods outlined in table 2. Third, the imputed cumulative rate of delivery and the delivery implied on some sites, appears to become unrealistically high. For example, the current trajectory (in the 2017 monitoring report) anticipates a rate of delivery increasing to over 3,500 dwellings per annum, a figure not even

> achieved within the last decade of the Development Corporation, about twice the average annualised requirement of the Core Strategy and close to 3 times the level recently achieved. Doubts about this inform the scale of adjustments applied to the estimates of provision; a reduction of about 670-700 dwellings for the Council and a reduction of nearly 5,000 units for the appellants (see table 2). I examine each of those disagreements below."

25. In respect of the first of the issues the Inspector concluded that there was no reason why the Sedgefield approach should not be applied in the present case. He then went on to deal with the issues in relation to uncertainty slippage and failure in forecasts of housing delivery and reached the following conclusion at paragraph 9.9 of his report:

> "9.9 An odd optimism inflates the forecasts of housing delivery. One expression of this is that past forecasts of housing delivery over successive 5-year periods from 2007/8 to 2012/13 have (apart from one year in the era of the Milton Keynes Partnership Committee) always over-estimated the delivery anticipated. That is in spite of the forecasts being based on surveys of builders and developers, thereby asking those directly involved in the industry how they anticipate development proceeding. On average, the delivery achieved has been about 25% below the delivery forecast, though the 'failure' varies from roughly 20% to 37%. It may be that these flawed forecasts have served to provide a false sense of security masking the real need to take appropriate action. But, whether or not that is so, the result is that the Core Strategy trajectory has simply not been met and subsequent monitoring has not galvanised effective measures to get the trajectory 'back on track', a good reason not to adhere to it now. Moreover, these results demonstrate that the current effective 5% reduction to reflect uncertainty is well wide of the mark. Indeed, even a reduction of 10% (common elsewhere) might not be sufficient, albeit that it would reduce the estimated supply closer to 4 years rather than 5. And, although I think that the 'windfall' allowance estimated by the Council is legitimate, the difference between the parties (less than 0.3% of the 5-year housing requirement) is too small to make any material difference. In my view, therefore, the current method of factoring in uncertainty, slippage or failure in the forecasts of housing delivery fails to adequately reflect reality; reasonable adjustments would clearly reduce the result to less than 5 years."

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

> "9.11 It is hard to see what special circumstance might occur because, although delivery on some sites in Milton Keynes has been spectacular in the past, the current forecasts entail even greater feats in the future. As an example, the 'eastern expansion

> area' (consisting of sites at Broughton Gate and Brooklands) achieved the second highest average delivery rate in the country recorded in the NLP research into the delivery of dwellings on 'large' sites; an average of 268 dwellings were delivered annually over the 5 year period between 2008/9 to 2013/14. That was achieved because serviced parcels of land were delivered to the market, allowing several builders to commence building houses almost immediately; and, it partly occurred before the MK Partnership Committee was disbanded in 2011. But the current forecasts for the remaining sites at Brooklands are about 16% higher, entailing an average of about 310 dwellings per annum over the 5 years from 2017/18 to 2021/22 with peaks of around 400 dwellings delivered within 2 of those years. Moreover, the forecast delivery on 4 of the 'outlets' on the parcels that make up this site are substantially higher than might be expected from much of the research undertaken, including that by Savills, the HBF and NLP. Similar findings apply to several, though not all, of the other strategic sites. The implication is clear. The delivery rates implied by the forecasts used to demonstrate a 5-year provision of housing land seem unlikely to be achievable.
>
> …
>
> 9.13 There is some agreement that not all the dwellings on sites identified in the Site Allocations Plan are likely to materialise, due to outstanding objections to the Plan and other reasons outlined by the parties. However, all the doubtful sites identified by the appellants would accommodate only some 236 dwellings (about 3% of the 5- year requirement), so that the contribution from these sites would be insufficient to affect the existence, or otherwise, of the 5-year housing land supply."

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

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

> consideration (as espoused in the Framework) derived from the absence of a 5-year supply of housing."

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

> "9.43 'Saved' policy H8 seeks an average net density of 35dph here, over twice the 16dph actually proposed, and it insists that projects achieving less than 30dph should be prevented. But the guidance advocating such minimum densities has long since been revoked and the Framework now advises that Local Planning Authorities should devise their own approach to density in order to reflect local circumstances, taking account of neighbouring buildings and the local area. The Core Strategy is consistent with that approach for, although it does not contain a specific density policy, it does require that a scheme should be of an 'appropriate density for the area in which it is located', a theme echoed in the Residential Design Guide SPD and policy WS1 in the Neighbourhood Plan requiring all new development to 'respect the existing distinct vernacular character of the settlement'. The proposal is intended to be a direct response to the constraints of the site and to reflect the characteristics of the surrounding housing. It also responds to comments received at the public consultation event, at which local people repeatedly referred to a recent scheme as incorporating too high a density. Indeed, as the Framework indicates, a measure of good design (a key aspect of achieving sustainable development) entails responding 'to local character and history, and reflecting the identity of local surroundings and materials, while not preventing or discouraging appropriate innovation'. The low density of the appeal proposal is commensurate with the low density of the nearby housing.
>
> …
>
> 9.46 In order to explore the consequences of building a scheme at a higher density, a subsequent planning application for up to 303 dwellings, at a net density of 26dph, was submitted to the Council. This entailed the loss of several pieces of public open space, more development towards the settlement edge and closer to the boundaries, providing smaller back-to-back distances and smaller gardens, reducing the landscape and planting and increasing the number of flats and car parking courts. This is not a scheme that the appellants wish to pursue and it would not reflect the character and appearance of the rural surroundings or nearby dwellings to the same extent as the appeal scheme.
>
> 9.47 For all those reasons, although the proposed development would be a relatively low density scheme, I do not consider that

> it would be unsustainable nor contrary to the tests advocated in Government guidance or operative planning policy."

29. The ultimate conclusions leading the Inspector to recommend to the First Defendant that planning permission should be granted were set out in the following paragraphs in which the Inspector struck the planning balance:

> "9.48 A 5-year supply of housing land cannot be demonstrated and, worse still, the mechanisms intended to boost the supply of housing significantly here are not in place. In those circumstances it is necessary to set the statutory requirements of the Development Plan against the important material consideration that a 5-year supply of housing land does not exist. The Development Plan pulls both ways. The scheme would be contrary to 'saved' policy S10 and policy WS5, although both would undermine the aim to boost significantly the supply of housing and frustrate the provision of further housing land to address the shortfall identified. However, the scheme would accord with the aims and some specific policies of the Core Strategy and, given the characteristics and explicit designation of Woburn Sands as a 'key settlement', be in a sustainable location.
>
> 9.49 Are there material considerations that would constitute serious impediments to the grant of planning permission? The proposal would radically alter the character and appearance of the site and one or two adjoining fields. But, the significant visual and landscape effects would be largely confined to that area alone. Beyond those immediate surroundings, the effects would be very limited, the scheme being contained behind existing housing and topography to the west and south and filtered through existing and proposed vegetation to the north and east. The new homes would marginally affect the setting of the Listed farmhouse, but the minimal harm identified would not warrant preventing a scheme to provide much needed market and affordable housing. The scheme would provide safe and convenient highway arrangements and offer a benefit in reducing the potential use of an awkward junction. It would not interfere with the eventual construction of the east-west expressway nor, in the absence of evidence to the contrary, unacceptably increase the competition for parking spaces in the town. Provision would also be made for any additional educational and medical facilities required. Although the proposal would entail building at a relatively low density, it would reflect the character of the surroundings and safeguard the amenities of those nearby; the density could not be regarded as unsustainable, as it would reflect the tests advocated in Government guidance and operative planning policy. Adequate measures would be in place to appropriately attenuate surface water run-off from the site and although the development would affect the local flora and fauna,

mitigation measures would prevent damage and, potentially, contribute to some enhancement.

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

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

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

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

> beyond the Borough and commute for work. Provision would also be made for any additional educational and medical facilities required.
>
> 9.54 Environmentally, the proposal would result in the loss of greenfield land. But, the visual effects would be confined and the landscape, although pleasant, is not protected or obviously 'special'. Sufficient space could be made available to mitigate the impact of the new homes on the Listed farmhouse. The new road through the site could reduce the potential use of an awkward junction. The low density would reflect the character of the surroundings and safeguard the amenities of those nearby. Adequate measures would be in place to appropriately attenuate surface water run-off and overcome some inadequacies in existing drainage arrangements. And, although the development would affect the local flora and fauna, mitigation measures would prevent damage and, potentially, contribute to some enhancement.
>
> 9.55 Taking all those matters into account, I consider that the planning balance in this case is firmly in favour of the scheme. The benefits of this sustainable housing proposal would significantly and demonstrably outweigh the adverse impacts elicited."

30. The decision reached by the First Defendant was to disagree with the Inspector's recommendation. The First Defendant commenced by addressing the contents of the development plan, which he noted were as follows:

> "10. In this case the development plan consists of the saved policies of the Milton Keynes Local Plan (LP) 2001-2011 (adopted in 2005), the Core Strategy (CS) 2010-2026 (adopted in 2013), the Milton Keynes Site Allocations Plan (SAP) (adopted on 18 July 2018) and the Woburn Sands Neighbourhood Plan (NP) 2014-2026 (made in 2014). The Secretary of State considers that the development plan policies of most relevance to this case are those set out at IR4.2-4.9. The appeal site is not allocated as one of the non- strategic sites in the SAP."

The policies quoted in paragraph 4.2-4.9 of the Inspector's report were policies CS1 and CS9 of the Core Strategy; policies S10 and D1 of the Local Plan and policy WS5 of the Neighbourhood plan.

31. The First Defendant's conclusions in relation to the five year housing land supply, the relationship between the proposals and policies S10 and WS5, and the issues associated with housing density were addressed in the following paragraphs of the decision letter:

> "15. The Secretary of State has considered the Inspector's assessment of housing land supply at IR9.4-9.18, and has also

taken into account the revised Framework, and material put forward by parties as part of the reference back processes.

16. As the Core Strategy was adopted in July 2013, the adopted housing requirement figure is more than 5 years old. Paragraph 73 of the Framework indicates that in that scenario, unless these strategic policies have been reviewed and found not to require updating, local housing need should be applied. The Secretary of State has therefore calculated the local housing need figure, using the standard method. He considers that local housing need is 1,604. The agent in their representation of 5 October 2018 has considered the question of the buffer to be added at paragraph 4.12-4.15. The Secretary of State considers that their proposed approach is appropriate, and agrees that for the purposes of this decision, a 5% buffer should be added. This gives a figure of 1,684.

17. The Secretary of State has also considered the deliverable supply and has taken into account both the Inspector's analysis and the material put forward by the agent in their representation of 5 October 2018 which deals with local market evidence on past delivery, and potential delivery rates. For the reasons given at IR9.9 he agrees with the Inspector that the current method of factoring in uncertainty, slippage or failure in the forecasts of housing delivery fails to adequately reflect reality. For the reasons given in IR9.10-9.13, he further agrees with the Inspector that the delivery rates implied by the forecasts used by the Council to demonstrate a 5-year provision of housing land seem unlikely to be achievable (IR9.11).

18. The Secretary of State has further taken into account the change to the definition of 'deliverable' in the revised Framework, the Council's position put forward in their Updated Housing Land Supply Position 2018-19 (referred to in paragraph 7.2 of the agent's representation of 5 October), and the evidence on progress which is set out in the summary of site assessments put forward by the agent in that representation. Taking all these factors into consideration, he considers that on the basis of the evidence put forward at this inquiry, estimated deliverable supply is roughly in the region of 10,000– 10,500. The Secretary of State therefore considers that the housing land supply is approximately 5.9–6.2 years. He notes that on this basis, even if the emerging plan figure of 1,766 were used (1,854 with a 5% buffer added), as the agent proposes, there would still be an estimated deliverable housing land supply of over 5 years.

Location of site

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

…

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

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

Housing density

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

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

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

32. In contrast to the approach of the Inspector, the First Defendant did not consider that the section 106 obligation pertaining to the building out of the site within five years could properly amount to a material consideration. His conclusion in respect of the materiality of the obligation was as follows:

> "33. … The Obligation sets out that 'the owners will use reasonable endeavours to build out the development within 5 years of the Council approving the last reserved matters application'. The Secretary of State considers that in the circumstances of the case there has not been an adequate demonstration of the planning harm which this Obligation addresses, and there has not been an adequate demonstration that the Obligation is necessary to make the development acceptable in planning terms. It therefore does not pass the tests set out in the Framework and the CIL Regulations and the Secretary of State has not taken it into account in reaching his conclusion on this case."

33. The planning balance and overall conclusion of the First Defendant was articulated as follows:

> "34. For the reasons given above, the Secretary of State considers that the appeal scheme conflicts with development plan policies relating to development outside settlement boundaries and density. He further considers that it is in conflict with the development plan as a whole. The Secretary of State has gone on to consider whether there are material considerations which indicate that the proposal should be determined other in accordance with the development plan.
>
> 35. The Secretary of State considers that the housing benefits of the scheme carry significant weight and the economic benefits carry moderate weight in favour of the proposal.
>
> 36. The Secretary of State considers that the low density of the appeal proposal carries significant weight against the proposal, while the location in unallocated open countryside outside the development boundary of Woburn Sands carries moderate weight, and the impact on the character of the area carries limited

> weight. He further considers that the minimal harm to the listed building carries little weight and that the public benefits of the scheme outbalance this 'less than substantial' harm. The heritage test under paragraph 196 of the Framework is therefore favourable to the proposal.
>
> 37. The Secretary of State considers that there are no material considerations which indicate the proposal should be determined other than in accordance with the development plan. He therefore concludes that the appeal should be dismissed, and planning permission should be refused."

34. As a consequence of these conclusions the First Defendant dismissed the Claimant's appeal and thereafter the Claimant brought this challenge pursuant to section 288 of the 1990 Act.

The Grounds

35. The Claimant pursues this application on the basis of five grounds for which permission was granted on the 18th February 2019. The sixth ground was refused permission and permission to apply was renewed at the substantive hearing.

36. Ground 1 of the claim is that the First Defendant failed to recognise that the presumption in favour of sustainable development applied to the appeal by virtue of the conclusion which he had reached at paragraph 19 of the decision letter that policy S10 of the Local Plan and policy WS5 of the Neighbourhood Plan were out-of-date. Having reached that conclusion in respect of the policies which were the "most important for determining the application", paragraph 11(d) of the Framework and the tilted balance for decision taking ought to have been applied to reach the decision in this case. On behalf of the Claimant, Mr Peter Goatley submitted that the proper interpretation of the Framework required that once a policy which was important for determining the application had been found to be out-of-date then the tilted balance under paragraph 11(d)(ii) was engaged. It followed that the First Defendant had erred in law in interpreting his own policy in failing to apply the tilted balance when reaching his overall conclusions in respect of the merits of the appeal. Alternatively, there was a failure to provide any reasons in relation to why paragraph 11(d)(ii) did not apply, in circumstances where the conclusion had been reached in paragraph 19 of the decision letter that two of the policies bearing upon the determination of the appeal were out-of-date.

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

38. The Claimant contends that the First Defendant failed to properly interpret this policy material in that he failed to identify any findings on deliverability in relation to the specific sites review in the analysis of the SPRU Report (which had not been gainsaid by anything submitted by the Second Defendant). Given the requirement in the policy material for clear evidence on deliverability, the First Defendant had signally failed to

correctly interpret the policy and identify any findings in respect of deliverability. Alternatively, the Claimant contends that the finding in relation to housing land supply standing at 10,000-10,500 dwellings is entirely unexplained and no reasons are provided as to why, bearing in mind the acceptance of the Inspector's conclusions in respect of the factors over which there was disagreement at the inquiry, and the appearance that the First Defendant had taken account of the evidence on progress put forward in the SPRU report, his figure for supply had been arrived at.

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

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

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

The Law

42. When determining an application for planning permission the decision-taker is required by section 70(2) of the 1990 Act to have regard to the provisions of the development plan so far as the material to that application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that a determination "must be in accordance with the plan unless material considerations indicate otherwise". The Framework (which was current at the time of the present decision and which has been subsequently superseded by a 2019 version of the Framework) is a material consideration to which regard must be had within the statutory decision-taking regime.

43. The jurisdiction of the court in relation to a statutory challenge under section 288 of the 1990 Act is an error of law jurisdiction. Since the decision in Tesco Stores Limited v Dundee City Council [2012] UKSC 13; [2012] PTSR 983 the question of the textual interpretation of planning policy is a question of law for the court to determine. As I observed in the case of Canterbury City Council v SSCLG and Gladman Developments Limited [2018] EWHC 1611 (Admin) questions of interpretations of planning policy are to be resolved applying the following principles which emerge from the authorities:

> "i) The question of the interpretation of the planning policy is a question of law for the court, and it is solely a question of interpretation of the terms of the policy. Questions of the value or weight which is to be attached to that policy for instance in resolving the question of whether or not development is in accordance with the Development Plan for the purposes of section 38(6) of the 2004 Act are matters of judgment for the decision-maker.
>
> ii) The task of interpretation of the meaning of the planning policy should not be undertaken as if the planning policy were a statute or a contract. The approach has to recognise that planning policies will contain broad statements of policy which may, superficially, conflict and require to be balanced in ultimately reaching a decision (see Tesco Stores at paragraph 19 and Hopkins Homes at paragraph 25). Planning policies are designed to shape practical decision-taking, and should be interpreted with that practical purpose clearly in mind. It should also be taken into account in that connection that they have to be applied and understood by planning professionals and the public for whose benefit they exist, and that they are primarily addressed to that audience.
>
> iii) For the purposes of interpreting the meaning of the policy it is necessary for the policy to be read in context: (see Tesco Stores at paragraphs 18 and 21). The context of the policy will include its subject matter and also the planning objectives which it seeks to achieve and serve. The context will also be comprised by the wider policy framework within which the policy sits and to which it relates. This framework will include, for instance, the overarching strategy within which the policy sits.
>
> iv) As set out above, policies will very often call for the exercise of judgment in considering how they apply in the particular factual circumstances of the decision to be taken (see Tesco Stores at paragraphs 19 and 21). It is of vital importance to distinguish between the interpretation of policy (which requires judicial analysis of the meaning of the words comprised in the policy) and the application of the policy which requires an exercise of judgment within the factual context of the decision by the decision-taker (see Hopkins Homes at paragraph 26)."

44. The decision in relation to the determination of appeals or applications which are called in for the First Defendant's determination are governed by the Town and County Planning (Inquiries Procedure) (England) Rules 2000. Rule 17 has the following relevant provisions for the purposes of the present case:

> "17. Procedure after inquiry
>
> (1) After the close of an inquiry, the inspector shall make a report in writing to the Secretary of State which shall include his conclusions and his recommendations or his reasons for not making any recommendations.
>
> (5) If, after the close of an inquiry, the Secretary of State-
>
> (a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or
>
> (b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),
>
> and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with the recommendation without first notifying in writing the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or matter or fact, not being a matter of government policy) of asking for the reopening of the inquiry."

45. In addition, rule 18 provides as follows:

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

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

EWCA Civ 1643 summarised 7 principles to be applied in considering such cases, at paragraph 19 of his judgment as follows:

> "19. The relevant law is not controversial. It comprises seven familiar principles:
>
> 1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parities who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph"
>
> 2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principle important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issue in the dispute, not to every material consideration.
>
> 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"
>
> 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 to properly 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.
>
> 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.

> 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.
>
> 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. "

47. So far as the test for the adequacy for reasons is concerned it is an agreed proposition that the principles are set out (albeit not necessarily exhaustively) in the speech of Lord Brown in South Bucks v Porter (No.2) [2004] 1 WLR 1953 at paragraph 36 (which cross refers to the second principle from St Modwen) in which he provided as follows:

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

48. The question of the meaning of "out-of-date" in the context of paragraph 14 of the 2012 Framework was considered by Lindblom J (as he then was) in the case of Bloor Homes Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283 at paragraph 45 of the judgment as follows:

> "45 These ["absence", "silence" and "out-of-date"] are three distinct concepts. A development plan will be "absent" if none has been adopted for the relevant area and the relevant period. If there is such a plan, it may be "silent" because it lacks policy

> relevant to the project under consideration. And if the plan does have relevant policies these may have been overtaken by things that have happened since it was adopted, either on the ground or in some change in national policy, or for some other reason, so that they are now "out-of-date". Absence will be a matter of fact. Silence will be either a matter of fact or a matter of construction, or both. And the question of whether relevant policies are no longer up-to-date will be either a matter of fact or perhaps a matter of both fact and judgment."

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

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

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

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

> "50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in paragraphs 47 and 49 of the NPPF and the corresponding guidance in the Planning Practice Guidance ("the PPG"). The Government has chosen to express its policy in the way that it has – sometimes broadly, sometimes with more elaboration, sometimes with the aid of definitions or footnotes, sometimes not (see *Oadby and Wigston Borough Council v*

Secretary of State for Communities and Local Government [2016] EWCA Civ 1040, at paragraph 33; *Jelson Ltd.*, at paragraphs 24 and 25; and *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at paragraphs 36 and 37). It is not the role of the court to add to or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.

51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-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.
>
> 53. With those three points in mind, I do not think that in this case the Secretary of State could fairly be criticized, in principle, for not having expressed a conclusion on the shortfall in the supply of housing land with great arithmetical precision. He was entitled to confine himself to an approximate figure or range – if that is what he did. Government policy in the NPPF did not require him to do more than that. There was nothing in the circumstances of this case that made it unreasonable for him in the "Wednesbury" sense, or otherwise unlawful, not to establish a mathematically exact figure for the shortfall. It would not have been an error of law or inappropriate for him to do so, but if, as a matter of planning judgment, he chose not to do it there was nothing legally wrong with that."

52. Lindblom LJ went on to conclude that whilst it was lawful for the Secretary of State to have concluded that the level of housing land supply fell "within a clearly identified range below the requisite five years" there was a fatal defect in the decision in the First Defendant's failure to deal with the recent decision at Bubb Lane and Botley Road. He expressed his conclusions in this connection as follows:

> "61. At least by the time the parties in this appeal were given the opportunity to make further representations, an important issue between them, and arguably the focal issue, was the extent of the shortfall in housing land supply. This was, or at least had now become, a "principal controversial issue" in the sense to which Lord Brown of Eaton-under-Heywood referred in *South Bucks District Council v Porter* (at paragraph 36 of his speech). A related issue was the weight to be given to restrictive policies in the local plan – in particular, policy 3.CO. These were, in my view, clearly issues that required to be properly dealt with in the Secretary of State's decision letter, in the light of the representations the parties had made about them, so as to leave no room for doubt that the substance of those representations had been understood and properly dealt with. This being so, it was in my view incumbent on the Secretary of State to provide intelligible and adequate reasons to explain the conclusions he had reached on those issues, having regard to the parties' representations.
>
> 62. There is no explicit consideration of the inspectors' decisions in the Bubb Lane and Botley Road appeals in the Secretary of State's decision letter, nor any reference to them at all, despite the fact that they had been brought to his attention and their implications addressed in the further representations made to him after the inquiry. The inspectors' conclusions on housing land supply in those two decisions, and the consequences of those conclusions for the weight to be given to local plan

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

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

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

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

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

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

Submissions and conclusions

54. As set out above, in respect of ground 1 Mr Goatley submits that in the light of the First Defendant's conclusions in paragraph 10 and 19 of the decision letter the First Defendant misinterpreted paragraph 11(d) of the 2018 Framework in that he failed to recognise that the consequence of these findings was that the tilted balance should apply. It has to be recognised, as Mr Goatley did, that this ground depends upon the

examination of the correct interpretation of paragraph 11(d) of the Framework. Mr Goatley drew attention to the change in the wording of paragraph 11(d) when compared with the 2012 Framework. The 2012 Framework at paragraph 14 simply referred to "relevant policies are out-of-date" as a trigger to the application of the tilted balance. By contrast, the 2018 version of the Framework uses the language "or the policies which are most important for determining the application are out-of-date". Mr Goatley submitted that it was significant that the drafting did not say that "all" the most important policies must be out-of-date before the tilted balance would arise, and since there may be only one policy which might be the most important for determining the application the policy ought to be approached as if both the plural included the singular and, furthermore, that once one of the most important policies for determining the application had been concluded to be out-of-date the tilted balance would apply. On the basis of this interpretation the First Defendant's conclusions that policy S10 and WS5 were out-of-date and, as listed in the Inspector's report at paragraph 4.2 and 4.9 of "most relevance" (and therefore uncontroversially of most importance) to the decision, the tilted balance ought to have applied.

55. By contrast Mr Richard Honey on behalf of the First Defendant, supported by Mr Daniel Stedman Jones on behalf of the Second Defendant, submitted that the correct interpretation of paragraph 11(d) had been applied by the First Defendant. Mr Honey submitted that the correct interpretation is that the exercise required by paragraph 11(d) in relation to the assessment of the question as to whether or not the policies which were of most importance for determining the application were out-of-date is as follows. Akin with Mr Goatley, he contended that the first step was to identify which were the policies which were most important for determining the application. Having done so, it is then necessary for the decision-taker to examine each of those policies, applying the Framework and the approach in the Bloor case, to see whether they are out-of-date. Having done so, the next step required by paragraph 11(d) is an assessment of all the basket of policies most important to the decision in the round to reach a conclusion as to whether, taken overall, they could be concluded to be out-of-date or not for the purposes of the decision. If they were out-of-date then the presumption would be triggered.

56. Mr Honey contended that there was no warrant for the interpretation that once one of the most important policies for determining the application had been found out-of-date the tilted balance would apply. He observed that the policy specifically does not say that the tilted balance would apply when "one of" or "any of" the important policies for determining the application has been found to be out-of-date. To answer the question posed by paragraph 11(d) it is necessary, having identified those policies which are most important for the determination of the application, to examine them individually and then consider whether taken in the round, bearing in mind some may be consistent and some in-consistent with the Framework, and some may have been overtaken by events and others not, whether the overall assessment is that the basket of policies is rightly to be considered out-of-date. That will, of course, be a planning judgment dependent upon the evaluation of the policies for consistency with the Framework (see paragraph 212 and 213) taken together with the relevant facts of the particular decision at the time it is being examined.

57. Mr Honey submitted that the First Defendant's decision was consistent with that approach. He drew attention to the fact that the policies referred to in paragraph 10 of

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

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

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

60. Mr Honey submitted that there was no need for the First Defendant to provide particular reasons for his conclusion in relation to the application of paragraph 11(d) on the basis of the most important policies for the decision being out-of-date in circumstances where it was not a principal or main controversial issue in the decision which he was reaching. Neither before the Inspector, nor in their submissions to the First Defendant, had the

Claimant contended that there was any alternative justification for the application of the tilted balance apart from the shortfall in housing land supply. The contentions made in the context of this challenge have been made solely as part of the grounds of the challenge itself. As is clear on the authorities, and in particular the South Buckinghamshire case (as applied in Hallam Land), it is incumbent upon the decision-taker to provide reasons in relation to the principal or main controversial issues, but not every dimension of the basis upon which the decision has been reached. In that this alternative argument for the application of the tilted balance was not a matter which had ever been relied upon by the Claimant prior to this challenge there was in my view no necessity for the First Defendant to provide reasons in relation to his conclusions on paragraph 11(d), and whether or not the most important policies for determining the application were out-of-date, when it had not been raised as a basis for applying the tilted balance by the Claimant during the decision-taking process. For all of these reasons I am not satisfied that there is substance in the Claimant's ground 1.

61. As set out above grounds 2 and 3 fall to be considered together. They relate to the conclusion reached in paragraphs 15-18 of the decision letter that the "estimated deliverable supply" of housing is roughly in the region of 10,000-10,500 homes. It will be recalled that these grounds proceed upon two bases. The first is that the First Defendant must have misinterpreted his policy, since the requirements of the policy in relation to whether or not a site is to be counted as deliverable, and therefore within the available supply of housing, requires (in terms of the definition in the Framework's glossary) in relation to sites with outline planning permission or allocated in a development plan, that there should be "clear evidence that housing completions will begin on site within five years". This requirement for specific evidence is, it is submitted, reinforced by the further guidance contained in the PPG, which reiterates this language and provides potential sources or kinds of evidence which might support this conclusion. Evidence of this nature was contained in the SPRU Report and the tables which it contained. Mr Goatley submits that the simple assertion that there was a supply of 10,000-10,500 units was one which must have been based upon a misinterpretation of the policy since no evidence, let alone clear evidence, was anywhere identified in the decision letter to support the First Defendant's conclusions.

62. In the alternative Mr Goatley contends that the reasons provided by the First Defendant were inadequate and failed the South Buckinghamshire test. The question of what was the deliverable housing land supply was one of the main controversial issues and it is entirely unclear, he submits, how the First Defendant arrived at the figure of 10,000-10,500 units. There is no means of understanding how this issue was resolved by the First Defendant and why the Claimant's figures as advanced in the material in the SPRU Report had been rejected. Furthermore, the absence of reasons for the conclusion about the housing land supply left the parties in the dark as to how to approach future consideration of the issue.

63. In response to these submissions Mr Honey relied upon the Hallam Land case and contended that the conclusions of that case supported the approach of the First Defendant, in the sense that it was observed in the Hallam Land case that a definitive conclusion as to the housing land supply would not be required in every case, and it was not necessary for the First Defendant to set out all of the workings or details of his analysis of the housing land supply for his reasons to be adequate. He further submitted that there was no evidence that the Framework had been misinterpreted. The decision

letter at paragraph 18 specifically referred to the change in the definition of "deliverable" in the revised Framework and there was no evidence that the First Defendant failed to properly apply it. He submitted that there was no basis for the contention that the First Defendant had to provide specific findings in relation to each of the sites concerned.

64. Mr Honey responded to the Claimant's contention that the figure of 10,000-10,500 was simply inexplicable by observing in his submissions that firstly, the figure of 10,000-10,500 fell in the range between the Council's figure for supply of 12,920 and the SPRU Report's figure for supply of 7,108. He further observed that, for instance, in relation to Table 11 there were three different types of comment in relation to sites which had outline planning consent only, namely sites where conditions were discharged, sites where reserved matters were pending and one site where an alternative application had been approved. He submitted that each of these characterisations was a form of evidence on progress of the type referred to in the PPG. He further submitted that it was open to the First Defendant to have taken into account some of these sites depending on their characteristics, and that there were permutations of that exercise which would explain how the First Defendant had come to the conclusion that the housing supply was in the range of 10,000-10,500. Thus, the First Defendant's figure was explicable on the evidence before him and there was no need for him to provide further reasons on this aspect of his decision.

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

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

assessments set out in the SPRU Report in arriving at his figures for supply, figures which are clearly inconsistent with his overall assessment.

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

68. Having failed to disclose how the First Defendant arrived at the range which he did, the Claimant is entitled to contend that it is left without any understanding of the treatment of the evidence (including the SPRU Report) so as to arrive at the range stated, and unable to evaluate, therefore, how the relevant policy on deliverability was applied and how the conclusion was reached. I accept the Claimant's submission that the need for the range to be in some way explained is not requiring reasons for reasons, it is simply requiring reasons for a conclusion which was pivotal in relation to the application of the tilted balance in this case, and which derived from figures which had not been canvassed as an answer to the question of what the Second Defendant's housing land supply was anywhere in any of the material before the First Defendant prior to the decision letter. In terms of the South Buckinghamshire test, it also left both the Claimant and the Second Defendant unable to assess how future evaluation of housing deliverability should be undertaken. Indeed, in the Second Defendant's five year housing land supply position statement published in January 2019, after the decision, they noted, having observed that the First Defendant felt the Second Defendant could demonstrate a supply of between 10,000-10,500 dwellings, that "no detailed explanation has however been provided by the SoS as to how this figure has been calculated."

69. Turning to Mr Honey's reliance upon Hallam Land, in my view the issue which arises in the present case differs from the question which was being evaluated in that case. Firstly, the question in the present case was not how far the First Defendant had to go in calculating the extent of any shortfall in the five year housing land supply. In fact, the First Defendant provided an answer as to what was considered to be the five year supply of land. The issue here is whether or not having arrived at wholly new figures for the housing land supply, and taken account of various conclusions both the Inspector and the SPRU Report, the First Defendant was required to give some reasons for having

arrived at the figures he did, those figures for the first time suggesting that the Second Defendant could demonstrate a five year housing land supply. I am in no doubt that the First Defendant was required to provide some reasoning to explain how he had treated the material before him so as to arrive at his conclusion as to the range of the supply of deliverable land available to the Second Defendant. Further, I am satisfied that the Claimant has been prejudiced by the absence of those reasons since without them the Claimant is unable to understand why the conclusions of the SPRU Report have not been accepted, and what was done in relation to either the Inspector's conclusions or the material in that report so as to arrive at the conclusion which had the significant effect upon their case of depriving them of the tilted balance when the decision came to be forged. In my view the Claimant's case in relation to grounds 2 and 3 is made out.

70. I turn to ground 4 which, it will be recalled, relates to policy H8 and the objections to the Claimant's proposals based upon their low density. The Claimant contends that the First Defendant has illegitimately prioritised the numerical assessment of density without having proper regard for the need for density to relate to the character and appearance of the surrounding area, and the Inspector's conclusions that the lower density proposed properly reflected the surrounding area. In response Mr Honey on behalf of the First Defendant contends that paragraphs 24-26 of the decision letter properly explained, firstly, the conclusion of the First Defendant that policy H8 was consistent with the 2018 Framework which contained a more specific policy in paragraph 122-123 than the treatment which density had received in the 2012 Framework used by the Inspector, where density was treated as part of design, and a local planning authority had a broader discretion to set its own approach to density. Mr Honey further submits that it is clear that the First Defendant had regard to the points in relation to the character of the area but concluded in paragraph 26 that the scale of departure from policy H8 which had been found to be consistent with the 2018 Framework could not be justified.

71. Having considered Mr Goatley's submissions I am satisfied that the decision which the First Defendant reached was one which was, in the circumstances, lawful. Firstly, it is clear that the content of national policy had changed between the policy which the Inspector needed to apply to that which fell to be applied by the First Defendant. The question of whether or not policy H8 was consistent with the 2018 Framework was a matter of planning judgment for the First Defendant to evaluate. I can see no error of law in the judgment reached that policy H8 was consistent with the revised Framework both in relation to the reference to density being well related to the character and appearance of the surrounding area, and also the use of a range of average net densities. Having reached that conclusion, the reasoning in paragraphs 25 and 28 demonstrates that the First Defendant was alive to, and took account of, the Inspector's conclusions in relation to the relationship of the density of the proposal to its surroundings. Nevertheless, the First Defendant was entitled to reach the conclusion which he did that the scale of the departure from the policy requirement of H8 was a matter which amounted to a conflict with policy H8 to which significant weight should be ascribed. I am unable to read these paragraphs as founding in Mr Goatley's contention that the First Defendant had illegitimately overemphasised the numerical requirements as compared to the analysis of the proposals suitability by reference to the surrounding area. All of these factors are clearly taken into account in the assessment undertaken in paragraphs 24-26 of the decision and the First Defendant's view is clear and properly reasoned. In my view there is no substance in the Claimant's ground 4.

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

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

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

Conclusions

75. I am satisfied that the Claimant must succeed under grounds 2 and 3, in particular in relation to the inadequacy of the First Defendant's reasons and that permission must be refused for ground 6 and substantive relief declined in respects of grounds 1, 4 and 5. Given the conclusions which I have reached there is no need to determine the Claimant's application for specific disclosure which was made at the hearing: such disclosure was at the very least not required to enable the court to determine the matters arising in this case. I am satisfied that for the reasons set out above the First Defendant's decision must be quashed.

Appendix:

Annex 1

Table 10 Sites which are extant housing allocations

Site Address	Status	MKC Supply (2018-2023)	SPRU Supply (2018-2023)	Difference	SPRU Comments
Campbell Park Remainder (Northside)	Allocated in 2005 Local Plan	300	0	-300	No planning application submitted or approved.
Land off Hampstead Gate (SAP7)	SAP Allocation	16	0	-16	No planning application submitted or approved.
Land off Harrowden (SAP8)	SAP Allocation	25	0	-25	No planning application submitted or approved.
Reserve Site off Hendrix Drive	Reserve Site in 2005 Local Plan	10	0	-10	No planning application submitted or approved.
Land off Singleton Drive (SAP1)	SAP Allocation	22	0	-22	No planning application submitted or approved.
Land north of Vernier Crescent (SAP3)	SAP Allocation	14	0	-14	No planning application submitted or approved.
Site 4 Vernier Crescent	Reserve site in the 2005 Local Plan	10	0	-10	No planning application submitted or approved.
Manifold Lane (SAP10)	SAP Allocation	18	0	-18	No planning application submitted or approved.
Land at Daubeney Gate (SAP6)	SAP Allocation	60	0	-60	No planning application submitted or approved.

Lakes Estate Neighbourhood Plan Sites	NP Allocation	130	0	-130	No planning applications submitted or approved on any of the sites in the NP.
Reserve Site Hindhead Knoll	Reserve site in 2005 Local Plan	30	0	-30	No planning application submitted or approved.
Reserve Site Lichfield Down	Reserve site in 2005 Local Plan	50	0	-50	No planning application submitted or approved.
Land at Walton Manor, Groveway/Simpson Road (SAP13)	SAP Allocation	110	0	-110	No planning application submitted or approved.
Reserve Site 3, East of Snehsall Street (SAP11)	SAP Allocation	22	0	-22	No planning application submitted or approved.
Tickford Fields	NP Allocation	325	0	-325	No planning application submitted or approved.
Police Station Houses, High Street	NP Allocation/ 2005 LP Allocation	14	0	-14	No planning application submitted or approved.
Total		**1,156**	**0**	**-1,156**	

Annex 2

Table 11 Sites with Outline Planning Consent only

Site Address	Outline	MKC Supply (2018-2023)	SPRU Supply (2018-2023)	Difference	SPRU Comments
Land at Brooklands 2,501 Units Outline	06/00220/MKPCO	291	0	-291	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 2	06/00856/MKPCO	82	0	-82	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 3	06/00856/MKPCO	120	0	-120	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 4	06/00856/MKPCO	70	0	-70	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
Tattenhoe Park 5	06/00856/MKPCO	20	0	-20	Outline Permission only. No change since publication of Council's data. Various conditions discharged.
WEA AREA 10.1 - 10.3 REMAINDER	05/00291/MKPCO	912	0	-912	Outline Permission only. Only change since publication of data is there is now a RM Pending for 129 dwellings under 18/01724/REM submitted by Bovis Homes.
WEA Area 11 Remainder	06/00123/MKPCO	550	0	-550	Outline permission only. Only change since publication of data is there is now a RM pending for 347 dwellings under reference 18/02142/REM submitted by Barratt/David Wilson Homes.
Ripper Land	17/00303/OUT	120	0	-120	Outline Permission only. No change since publication of Council's data. No conditions discharged. Outline application

					submitted by Minton Wavendon.
Haynes Land	14/02167/OUTEIS	164	0	-164	164 Dwellings in the supply comprises the element of land remaining with outline permission only. RM now pending under 18/02183/REM submitted by Barratt/David Wilson Homes for 174 dwellings on Phase 3, Parcel B3.
Eagle Farm	13/02381/OUTEIS	125	0	-125	125 dwellings comprises element of land remaining with outline permission only. No RM applications have yet been submitted.
Golf Course Land	14/00350/OUTEIS	100	0	-100	Outline Permission only. No change since publication of Council's data. No conditions discharged. Application was submitted by Merton College, University of Oxford and Wavendon Residential Properties LLP.
Church Farm (Connolly Homes)	14/01610/OUT	100	0	-100	Outline Permission only. No change since publication of Council's data. One condition discharged in March 2018. Application was submitted by Connolly Homes.
Newton Leys	02/01337/OUT	62	0	-62	Outline Permission only. No change since publication of Council's data. Various conditions discharged. Conditions are being discharged by Taylor Wimpey.
Eaton Leys	15/01533/OUTEIS	270	0	-270	Outline Permission only. No change since publication of Council's data. Various conditions discharged by Gallagher Estates.
Land at Skew Bridge Cottage, Drayton Road	16/02174/OUT	10	0	-10	Outline Permission only. No change since publication of Council's data. No conditions discharged. Application submitted by the landowner, not a housebuilder.
Broughton Atterbury (SAP14) Self Build Plots	SAP Allocation/ 17/00736/OUT	15	0	-15	Outline application approved in August 2018 and was submitted by Morris Homes for 15 self-build units. No RM or conditions discharged.
76-83 Shearmans	15/00268/OUT	14	0	-14	No reserved matters application submitted, and no conditions discharged. Application was submitted by the landowner not a housebuilder.
Land At Towergate, Groveway (SAP12)	17/03205/OUT	105	0	-105	Outline Permitted September 2018. Submitted by HCA. One Condition discharged.
Railcare Maintenance Depot, Stratford Road	15/02030/OUTEIS	75	0	-75	Outline planning permission only. No reserved matters application or conditions discharged. Application submitted by St Modwen.
SW of BWMC, Duncombe Street	16/01430/OUT	12	0	-12	Outline application is still pending, and therefore does not yet have planning permission. Went to committee in December 2016 recommend for approval. Committee minutes not available online, but presumption is approved subject to S106. Application was

					submitted by the landowner not a housebuilder.
Timbold Drive (SAP9)	17/02616/OUT	130	0	-130	Hybrid application: outline for 148 dwellings, details for 47 bed hospital. No conditions discharged. No change since publication of Council's data. Application was submitted by MKDP and Spire Healthcare, not a housebuilder.
Land east of Tillbrook Farm	16/00762/OUT	36	0	-36	Outline Permission only. No change since publication of Council's data. No conditions discharged. Application was submitted by Paliser Investments Ltd. who are t a housebuilder
Maltings Field	17/01536/OUT	32	0	-32	Outline Permission only. No change since publication of Council's data. No conditions discharged. Application was submitted by The Trustees of Lord Carrington's 1963 Settlement (1 & 2) Funds. who are not a housebuilder
Off Long Street Road	16/02937/OUT	101	0	-101	Outline permission only. RM pending under 18/01608/REM for 141 dwellings submitted by Davidson Developments. Various applications to discharge conditions are pending.
Land off Olney Road, Lavendon	17/00165/OUT	65	0	-65	Outline Permission only. No change since publication of Council's data. No conditions discharged. Application was submitted by Gladman Developments who are a lead developer but not a housebuilder.
Former Employment Allocation Phase 2	14/02060/OUT	33	0	-33	RM Pending for 33 dwellings under reference 18/00799/REM by Lioncourt Homes. No conditions discharged.
Land West of Yardley Road and West of Aspreys Olney	17/00939/OUT	250	0	-250	Only permitted in July 2018. No RM and no conditions discharged. Application submitted by Providence Land who arenot a housebuilder?]
Land south of Lavendon Road Farm	16/00688/OUT	50	0	-50	No RM and no conditions have been discharged. Submitted by Francis Jackson Homes.
Frosts Garden Centre, Wain Close	14/00703/OUT	53	0	-53	Application to vary approved plans was approved in June 2018 by Careys New Homes.
Land North of Wavendon Business Park	15/02337/OUT	134	0	-134	Outline only. No RM. Various conditions have been discharged by Abbey Development.
Total		4,101	0	-4,101	

Annex 3:

Table 12 Adjusted Trajectory of Sites with Detailed Planning Permission

Site	MKC Supply (2018-2023)	SPRU Supply (2018-2023) (RGB Proof)	Adjusted to be 2018 Framework Compliant (Removal of outline and allocation with no clear evidence of delivery)	Adjusted to be 2018 Framework Compliant incl. Build Out Rates for Sites with FUL/RM Consent as per RGB Proof	Difference
WEA	2,820	1,600	1,358	1,358	-1,462

Brooklands	1,307	800	1,016	800	-507
Strategic Reserve	1,888	940	1,279	940	-948
Tattenhoe Park	292	300	0	0	-292
Total	**6,307**	**3,640**	**3,653**	**3,098**	**-3,209**

Annex 4:

Table 13 Five-year Supply Calculation using Standard Methodology

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

Annex 5:

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

	MKC (No Adjustments)	SPRU (with adjustments to be 2018 Framework Compliant)	SPRU (with adjustments to be 2018 Framework Compliant and adjustments to delivery rates on sites with FUL/RM Consent)
Local Plan	**1,766**	**1,766**	**1,766**
5 year supply requirement (1,766x5)	**8,830**	**8,830**	**8,830**
5 year supply requirement (2018-2023) including 5% buffer	**9,272**	**9,272**	**9,272**
Annual supply required	**1,854**	**1,854**	**1,854**
Supply	**12,920**	**7,663**	**7,108**
Difference	**+3,649**	**-1,609**	**-2,164**
5 year housing land supply position	**6.97 years**	**4.13 years**	**3.83 years**