

*746 St Modwen Developments Ltd v Secretary of State for Communities and Local Government and another



Positive/Neutral Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

20 October 2017

Report Citation

[2017] EWCA Civ 1643

[2018] P.T.S.R. 746



Practice Note

Court of Appeal

Jackson , McCombe , Lindblom LJJ

2017 June 8; Oct 20

Planning—Statutory review—Principles applicable—Summary— Town and Country Planning Act 1990 (c 8), s 288

Summary of principles to be applied by the court on a challenge under section 288 of the Town and Country Planning Act 1990 ¹ (post, paras 6, 7, 65, 66).

Dicta of Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283 , para 19 approved.

The following cases are referred to in the judgment of Lindblom LJ:

Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283

East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2017] EWCA Civ 893; [2018] PTSR 88 , CA

Eastleigh Borough Council v Secretary of State for Communities and Local Government [2014] EWHC 4225 (Admin)

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2016] EWCA Civ 168; [2016] PTSR 1315; [2017] 1 All ER 1011, CA; [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938 , SC(E)

Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314; [2018] JPL 176 , CA

Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government [2016] EWCA Civ 1040; [2017] JPL 358 , CA

St Albans City Council and District Council v Hunston Properties Ltd [2013] EWCA Civ 1610; [2014] JPL 599 , CA

Solihull Metropolitan Borough Council v Gallagher Estates Ltd [2014] EWCA Civ 1610; [2015] JPL 713 , CA

South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775 , HL(E)

Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government [2013] EWHC 597 (Admin); [2013] JPL 1145

The following additional cases were cited in argument:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063; (1990) 61 P & CR 343, CA *747
Clarke Homes Ltd v Secretary of State for the Environment [2017] PTSR 1081; (1993) 66 P & CR 263, CA
E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351; [2004] LGR 463, CA
Edinburgh Council (City of) v Secretary of State for Scotland [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc)
Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions (Practice Note) [2001] EWHC Admin 74; [2017] PTSR 1126
Seddon Properties Ltd v Secretary of State for the Environment (1978) 42 P & CR 26
South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)
South Somerset District Council v Secretary of State for the Environment (Practice Note) [2017] PTSR 1075; (1992) 66 P & CR 83, CA
Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)
Wind Prospect Developments Ltd v Secretary of State for Communities and Local Government [2014] EWHC 4041 (Admin)

The following additional cases, although not cited, were referred to in the skeleton arguments:

Barker Mill Estates, Trustees of the v Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408
Glover v Secretary of State for the Environment (1980) 44 P & CR 359

APPEAL from Ouseley J

By an appellant's notice, the developer, St Modwen Developments Ltd, appealed the order of Ouseley J [2016] EWHC 968 (Admin), dated 28 April 2016, dismissing its application under section 288 of the Town and Country Planning Act 1990 challenging the decisions of the Secretary of State for Communities and Local Government by a decision letter dated 25 June 2015 to dismiss two appeals under section 78 of the 1990 Act against the refusal of planning permission by the local planning authority, East Riding of Yorkshire Council, for a large development of new housing on land at Brickyard Lane, Melton Park, about 13 kilometres to the west of Hull. Save Our Ferriby Action Group, which had objected to the proposals, was the third respondent in the appeal.

The facts and grounds of appeal are stated in the judgment of Lindblom LJ, post, paras 2–3, 5.

Christopher Young and James Corbet Burcher (instructed by *Irwin Mitchell llp*) for the developer.

Richard Honey (instructed by *Treasury Solicitor*) for the Secretary of State.

Paul Tucker QC and Freddie Humphreys (instructed by *Head of Legal and Democratic Services, East Riding of Yorkshire Council, Kingston upon Hull*) for the local planning authority.

Emma Reid-Chalmers (directly instructed) acting pro bono for the objector.

The court took time for consideration.

20 October 2017. The following judgments were handed down.

LINDBLOM LJ

Introduction

1. The complaint in this appeal is that the Government's planning policy for housing development in the National Planning Policy Framework (“the NPPF”)—in particular, the policy for a five-year supply of housing land in paragraph 47—was *748 misunderstood and misapplied in a decision on a statutory appeal against the refusal of planning permission. The appeal is by no means the first of its kind. It raises no new point of law.

2. The appellant, St Modwen Developments Ltd (“St Modwen”), appeals against the order of Ouseley J, dated 28 April 2016, dismissing its application under section 288 of the Town and Country Planning Act 1990 challenging the decisions of the first respondent, the Secretary of State for Communities and Local Government—in a decision letter dated 25 June 2015—to dismiss two appeals under section 78 of the 1990 Act against the refusal of planning permission by the second respondent, East Riding of Yorkshire Council, for a large development of new housing on land at Brickyard Lane, Melton Park, about 13 kilometres to the west of Hull. The third respondent, Save Our Ferriby Action Group, was an objector to the proposals.

3. The appeal site extends to about 38 hectares, in three parcels, the largest of which is about 35 hectares to the south of Monks Way, straddling Brickyard Lane. Access to it is gained from the A63 trunk road to its north. The village of Melton lies to the north of the A63, the village of North Ferriby to the south, the town of Elloughton-cum-Brough about two kilometres to the west. Much of the site had been allocated for employment development in the development plan—the Beverley Borough Local Plan (1996) and the Joint Structure Plan for Kingston upon Hull and the East Riding of Yorkshire (2005)—and also in the emerging East Riding Local Plan. The first of the two schemes before the Secretary of State, the scheme in “Appeal A”, was for up to 510 dwellings; the second, in “Appeal B”, for up to 390 dwellings, with 7.7 hectares of land for “employment” uses. The council's reasons for refusing planning permission, for both schemes, referred to the loss of employment land, conflict with the settlement hierarchy, and prejudice to the progress of the emerging local plan. Both appeals were recovered for determination by the Secretary of State. They were heard at an inquiry that lasted 20 sitting days in November 2013 and April, May and August 2014, and was eventually closed in September 2014. The inspector submitted her report to the Secretary of State on 2 March 2015, recommending that both appeals be dismissed. In his decision letter the Secretary of State agreed with that recommendation and accordingly dismissed both appeals.

4. The challenge before Ouseley J was pursued on four grounds, all of which he rejected [2016] EWHC 968 (Admin). The appeal before us is more confined. I granted permission to appeal on 11 November 2016. When I did so, I said the argument presented on behalf of St Modwen seemed “more elaborate than it need be”. I accepted, however, there were matters fit for consideration by this court—in particular, the concept of “a supply of specific deliverable sites” in paragraph 47 of the NPPF.

The issues in the appeal

5. There are seven grounds of appeal, corresponding broadly to the first of the four grounds pursued in the court below—described by Ouseley J as “Ground 1: Housing land supply”. At the hearing counsel agreed that those seven grounds present us with three main issues, which relate closely to each other, but in a logical sequence are these. (1) Did the Secretary of State misinterpret or misapply government policy for the supply of housing in paragraph 47 of the NPPF, and, in particular, the concepts of “supply” and “delivery”, and were his relevant reasons clear and adequate (grounds 5 and 6)? (2) Did the Secretary of State misdirect himself, or fail to provide clear and adequate reasons, in his conclusions on the council's housing trajectory (grounds 1 to 4)? (3) Did the Secretary of State err in law in his conclusions on the council's record of housing delivery (ground 7)?

The principles on which the court will act in a section 288 challenge

6. In my judgment at first instance in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283, para 19 I set out the “seven familiar principles” that will guide the court in handling a *749 challenge under section 288. This case, like many others now coming before the planning court and this court too, calls for those principles to be stated again—and reinforced. They are:

“(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to ‘rehearse every argument relating to each matter in every paragraph’: see the judgment of Forbes J in *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26, 28.

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

“(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, ‘provided that it does not lapse into *Wednesbury* irrationality’ (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) to give material considerations ‘whatever weight [it] thinks fit or no weight at all’: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780F–H. And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector’s decision: see the judgment of Sullivan J in *Newsmith Stainless Ltd v Secretary of State for Environment, Transport and the Regions (Practice Note)* [2001] EWHC Admin 74 at [6]; [2017] PTSR 1126, para 5 (renumbered)).

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

“(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question: see the judgment of Hoffmann LJ in *South Somerset District Council v Secretary of State for the Environment (Practice Note)* [2017] PTSR 1075, 1076–1077; (1992) 66 P & CR 83, 85.

“(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored: see, for example, the judgment of Lang J in *Sea & Land Power & Energy Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB) at [58].

“(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the *750 operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises: see, for example, the judgment of Pill LJ [in] *Fox Strategic Land and Property Ltd v Secretary of State for Communities and Local Government* [2013] 1 P & CR 6, paras 12–14, citing the judgment of Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137, 145.”

7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasised the limits to the court’s role in construing planning policy: see the judgment of Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, paras 22–26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2018] JPL 176, para 41. More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system—a warning I think we must now repeat in this appeal: see my judgment in *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88, para 50. There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected—whether of decision letters of the Secretary of State and his inspectors or of planning officers’ reports to committee. The conclusions in an inspector’s report or decision letter, or in an officer’s report, should not be laboriously dissected in an effort to find fault: see my judgment in *Mansell’s* case, at paras 41–42, and the judgment of Sir Terence Etherton C, at para 63.

Paragraphs 47 and 49 of the NPPF

8. Paragraph 47 of the NPPF states:

“To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their local plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
- identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
- identify a supply of specific, developable sites or broad locations for growth, for years 6–10 and, where possible, for years 11–15;
- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
- set out their own approach to housing density to reflect local circumstances.”

The word “deliverable” in that paragraph is explained in a footnote—footnote 11—which states:

“To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that ***751** housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans.”

Footnote 12 explains the word “developable”:

“To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged.”

9. The policy in paragraph 47 of the NPPF has on several occasions been considered by the courts: see, for example, the *Hopkins Homes Ltd* case, in particular in the judgment of Lord Gill at paras 76–79; *St Albans City Council and District Council v Hunston Properties Ltd* [2014] JPL 599, in particular the judgment of Sir David Keene at paras 23 and 30; and *Solihull Metropolitan Borough Council v Gallagher Estates Ltd* [2015] JPL 713, in particular the judgment of Laws LJ, at para 16.

10. Paragraph 49 of the NPPF is concerned with development control decision-making. It states:

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

The consequences for a local planning authority of its failing or succeeding in this fundamental requirement of national planning policy need no further explanation by the court: see the *Hopkins Homes Ltd case* [2017] PTSR 623, in particular the judgment of Lord Carnwath JSC at para 59, and the judgment of Lord Gill at paras 80–85; and the *East Staffordshire Borough Council case* [2018] PTSR 88, in particular my judgment at para 22.

11. The Planning Practice Guidance (“the PPG”), first published by the Government in March 2014, in the section dealing with “Housing and economic land availability assessment”, para 3-029-20140306, under the heading “How is deliverability (1–5 years) and developability (6–15 years) determined in relation to housing supply?”, says that “Assessing the suitability, availability and achievability (including the economic viability of a site) will provide the information as to whether a site can be considered deliverable, developable or not currently developable for housing”. Para 3-031-20140306, under the heading “What constitutes a ‘deliverable site’ in the context of housing policy?”, states:

“Deliverable sites for housing could include those that are allocated for housing in the development plan and sites with planning permission (outline or full that have not been implemented) unless there is clear evidence that schemes will not be implemented within five years.

“However, planning permission or allocation in a development plan is not a prerequisite for a site being deliverable in terms of the five-year supply. Local planning authorities will need to provide robust, up to date evidence to support the deliverability of sites, ensuring that their judgements on deliverability are clearly and transparently set out. If there are no significant constraints ... to overcome[,] such as infrastructure[,] sites not allocated within a development plan or without planning permission can be considered capable of being delivered within a five-year timeframe.”

Para 3-033-20150327, under the heading “Updating evidence on the supply of specific deliverable sites sufficient to provide five years’ worth of housing against *752 housing requirements”, was published on 27 March 2015, and was thus extant at the time of the Secretary of State's decision in this case. It states:

“[The NPPF] requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide five years’ worth of housing. As part of this, local planning authorities should consider both the delivery of sites against the forecast trajectory and also the deliverability of all the sites in the five-year supply.

“Local planning authorities should ensure that they carry out their annual assessment in a robust and timely fashion, based on up-to-date and sound evidence, taking into account the anticipated trajectory of housing delivery, and consideration of associated risks, and an assessment of the local delivery record. Such assessment, including the evidence used, should be realistic and made publicly available in an accessible format.”

The previous version of that paragraph of the PPG, published on 6 March 2014, stated:

“[The NPPF] requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide five years’ worth of housing. As part of this, the local planning authority should consider both the delivery of sites against the forecast trajectory and also the deliverability of all the sites in the five-year supply ... By taking a thorough approach on an annual basis, local planning authorities will be in a strong position to demonstrate a robust five-year supply of sites.”

The inspector's report and the Secretary of State's decision letter

12. The inspector's report runs to 171 pages. It contains a comprehensive consideration of St Modwen's section 78 appeals on their planning merits, recording the parties’ cases on the principal issues to which those appeals gave rise, and reaching conclusions on each.

13. The five “main planning issues”, identified by the inspector in para 13.5 of her report, included these:

“(i) the relationship of the proposals to the current and emerging development plan and to national planning policy; (ii) the adequacy of the provision for housing in the East Riding of Yorkshire, including for affordable housing, and the contribution which either proposal could make to that supply; (iii) the particular contribution made by the appeal site to the supply of employment land and to wider economic development objectives, including the potential of the Humber to become established as a centre for renewable energy ...”

14. On the first of those three issues—“the development plan and national planning policy”—the inspector said, in para 13.7, that there was “no dispute that the proposals conflict with the adopted development plan and the emerging local plan”. But she was prepared to give them the benefit of “the presumption in favour of sustainable development” in the NPPF—observing in para 13.10 that that presumption “could ... be engaged by virtue of the fact that some of the relevant policies are out of date”.

15. On the second issue—the “provision of housing in the East Riding of Yorkshire [ERYC]”—the inspector's conclusions, in paras 13.63–13.65, were these:

“13.63. With regard to the five-year housing requirement, I consider that the council's figure of just over 10,000 for the housing market area [‘HMS’] is to be preferred, on the basis that it accords most closely with the relevant national policy and offers a reasonably robust, full, objective assessment of need. Use of an HMA-based figure should be understood as part of the first stage of formulating the requirement according to national policy rather than the second stage of applying a constraint on the basis of local policy making. The Secretary of State *753 may conclude that the requirement should be based on the ERYC administrative area, in which case the council's figure of just under 14,000 is to be preferred over the appellant's figure of 15,300.

“13.64. The appellant's approach to the assessment of housing land supply is fundamentally flawed so that the council's assessment of supply, at almost 15,000, is also to be preferred. Thus, whether the analysis is based on the HMA or the ERYC area, I consider that the council has demonstrated the existence of a five-year housing land supply. Even if the appellant's five-year housing requirement of 15,300 is taken, the shortfall of 300 would be modest in the context of the overall requirement, making it debatable whether any adverse effect on housing delivery due to supply constraints would be identifiable in practice.

“13.65. Since it has not been shown that there is any pressing need for additional sites to come forward to sustain the local supply of housing, I consider that the appeal proposals would not deliver additional benefits by virtue of their contribution to that supply. The contribution of the proposals to the supply of affordable housing is a different matter. Here, significant need has been demonstrated and it seems likely that such need will persist. For that reason, substantial weight should attach to the proposals, in proportion to the extra contribution they would make to the supply of affordable housing.”

16. Behind those conclusions lay a much more detailed assessment, some of which I shall need to mention in dealing with the issues before us.

17. As for the third issue—“employment land supply and wider economic development objectives”—the inspector said, in para 13.87, that “[the] appeal site comprises a substantial proportion of the Melton site, one of only four key employment sites in the East Riding and one of only two identified for general industrial uses”, and that

“[if] the appeal site was developed for housing, whether along the lines of Appeal A or Appeal B, the status of Melton as a key employment site would be much diminished so that it would have a significant, detrimental effect on the portfolio of employment land”.

18. The inspector set out her “Overall Conclusions” in section 14 of her report. She confirmed that in her view both of the appeal schemes were in conflict with the relevant provisions of the development plan, concluding, in para 14.2, that

“[the] proposals run counter to local planning policies in three respects: the use of employment land for housing; the strategy of maintaining a portfolio of employment land; and the location and distribution of residential development”,

and that they were “contrary to the existing and the emerging development plan”. She went on to say, in para 14.4, that it was “necessary ... to consider the proposals within the terms of the presumption in favour of sustainable development”. Under the heading “The benefits of the proposals”, in para 14.5, she referred to the two contentions on which St Modwen had relied in asserting an urgent need for housing development: first, “that a significant shortfall exists in the availability of land for housing”; and second “that there is an acute need for affordable housing”. She rejected the first of those two contentions (in para 14.6), but accepted the second (in para 14.7). As to the first, she said, in para 14.6:

“The first ... has not been demonstrated. The council's assessment of the position as to the housing requirement and the housing land supply has been shown to be reasonably robust when tested at this inquiry. This would be the case whether the housing requirement was taken as that for the housing market area or the ERYC administrative area. In either case, a five-year supply of sites exists. Since the identified supply already satisfies the test of boosting significantly the supply of deliverable sites, the proposals would not deliver any additional benefit in this respect.”

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On the likely “adverse impacts” of the proposed development, she concluded, in para 14.10, that “[the] proposals would have a significant, detrimental effect on the portfolio of employment land”, and “would also undermine wider economic development objectives”, and, in para 14.16, that “a grant of planning permission for either proposal would strike at the heart of key strategic decisions in the emerging ERYC Local Plan, thus undermining the plan-making process”, and therefore that “the harm by way of prematurity should carry considerable weight”. As to “[whether] the proposal would represent a sustainable form of development”, she concluded, in para 14.17, that it would not.

19. Finally, in striking “[the] overall planning balance”, the inspector concluded in para 14.20 that “[the] proposals are contrary to the development plan”, that “[when] considered in the context of the presumption in favour of sustainable development contained in NPPF, these adverse effects would significantly and demonstrably outweigh the benefits of each proposal”, and that “[the] material considerations are not sufficient to warrant a decision contrary to the development plan”. Explaining her “Recommendation” in the light of those conclusions, she said in para 14.21 that “[at] the heart of [the] inquiry was the question of whether the best use for the appeal site at this time would be to continue to hold it in reserve for employment development or to bring it forward now for housing”, and that “[on] the evidence provided”, she considered that “the planning case for housing has not been made so that neither appeal should succeed”. In para 14.22 she recommended that both appeals be dismissed.

20. In his decision letter the Secretary of State adopted the inspector's formulation of the “main issues” in the appeals, and agreed with her principal conclusions upon them. As to “[the] development plan and national planning policy”, he noted in para 10 that there was “no dispute that the proposals conflict with the adopted development plan and the emerging local plan” and he agreed with the inspector “with regard to the weight that this conflict should be given”. He also agreed with the inspector's conclusion in para 13.10 that,

“in accordance with paragraph 49 of the [NPPF], so long as the appeal proposals can be accepted as a sustainable form of development, the planning balance to be applied would be that permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits”.

On “[the] provision for housing in the East Riding of Yorkshire”, he concluded in para 11:

“The Secretary of State has carefully considered the inspector's reasoning on housing provision at [paras] 13.11–13.62 and, for the reasons given at [paras] 13.63–13.65, he agrees with her conclusions that the council's figures of a requirement for just over 10,000 dwellings for the housing market and just under 14,000 for the council's administrative area are to be preferred over those put forward on behalf of your client, as is the council's assessment of overall supply, at almost 15,000. Overall, therefore, the Secretary of State agrees with the inspector that, whether the analysis is based on the Housing Market Area or the council's area, it has not been shown that there is any pressing need for additional sites to come forward to sustain the local supply of housing. However, he also agrees with the inspector's conclusion that substantial weight should attach to the proposals in proportion to the contribution they would make to the supply of affordable housing.”

And on “[the] employment land supply and wider economic objectives”, he said in para 12 that he agreed with the inspector's conclusion in para 13.87 of her report that,

“as the appeal site comprises a substantial proportion of the highly accessible Melton site, it represents a logical choice in relation to the spatial strategy of the *755 emerging local plan with regard to employment land which would be much diminished if the appeal site were to be developed for housing—thereby having a significant detrimental effect on the portfolio of employment land”.

He therefore also agreed with the inspector that, “although there is potential for other land to come forward, this would have to be on an ad hoc basis rather than as part of a plan-led approach, potentially causing harm to economic development objectives”. In his “Overall Conclusions”, he said in para 18 that

“[although] the provision of new homes, including affordable housing, would be an important social and economic benefit ... granting permission for either of the appeal schemes would be contrary to the development plan, so that it is necessary to consider whether there are material considerations sufficient to warrant a decision contrary to that”.

In para 19 he concluded that

“[with] regard to Appeal A ... the benefits of the scheme are significantly and demonstrably outweighed by the adverse impacts including that on the council's overall spatial strategy for housing, their economic objectives and the portfolio of employment land, and the urbanising impact on North Ferriby”,

and

“[in] the case of Appeal B ... these disbenefits would be compounded by the reduced quantum of housing while the funding for a bridge across the railway line would not be a proportionate or reasonable response to any harm to the supply of employment land”.

In para 20 he said he agreed with the inspector's recommendations, and therefore dismissed both appeals.

Ouseley J's judgment

21. In a typically careful judgment, Ouseley J considered the “Housing land supply” issue in St Modwen's challenge under five headings, two of which—“Issue (c): the approach to ‘deliverable’ sites” and “Issues (d) and (e): housing record and trajectory”—largely embrace the issues now raised in this appeal.

22. Before getting to those two issues, the judge had come to these conclusions, at para 46:

“[The inspector] addressed the issue of whether ERYC had demonstrated that the sites in its five-year housing land supply figures were deliverable within the requirements of paragraph 47 NPPF and footnote 11. Her approach reflects the requirements of paragraph 49 [of the] NPPF and of the PPG. She had evidence on deliverability sufficient to enable her to reach a reasonable planning judgment ...”

There is no criticism of those conclusions in this appeal.

23. On “Issue (c): the approach to ‘deliverable’ sites”, Ouseley J said, at paras 49–52:

“49. Mr [Christopher] Young contended that the inspector had misinterpreted what ‘deliverable’ meant in paragraph 47 of the NPPF. This was more an issue about the language she had used in two paragraphs, [13.53 and 13.56], rather than whether any substantive conclusions showed a misinterpretation of the concept.”

“50. [Mr Young] submitted that the inspector had erred in drawing a distinction between the supply of housing and the delivery of housing on it. Delivery was at the heart of the NPPF. The inspector had focused on ‘supply’ and not on ‘deliverable supply’. She needed to find that specific sites were deliverable. *756 The argument itself veered somewhat uncertainly between the concepts of ‘delivery’, and ‘deliverability’.

“51. In my judgment, the inspector made no error of interpretation of the NPPF at all. The NPPF and the assessment of housing land supply are concerned with ‘deliverability’, which is an assessment of the likelihood that housing will be delivered in the five-year period on that site. The assessment of housing land supply does not require certainty that the housing sites will actually be developed within that period. The planning process cannot deal in such certainties. The problem of uncertainty is managed by assessing ‘deliverability’ over a five-year period, re-assessed as the five-year period

rolls forward. The inspector was simply recognising that there is that difference, and her focus had to be on deliverability, which was not disproved by showing that there were uncertainties. All this was very much a matter of degree for her.

“52. There are many reasons why the difference may exist: the assumed production rates off large sites may be too high for the market, though that does not seem to have been an issue here; the building industry's infrastructure, skilled labour, finance, and materials, may not be geared up to the assumed rate; and the market may not wish to build or buy houses at the assumed rate of delivery; mortgage funds may not be available for those who would wish to buy. As Mr [Paul] Tucker [QC] pointed out, the local planning authority can only do so much, that is to maintain a five-year supply of deliverable housing land. The market, comprising house builders, finance and purchasers, has to do the rest. I reject this aspect of ground 1; the inspector made no error of law.”

24. On “Issues (d) and (e): housing record and trajectory”, in paras 53–59, the judge said:

“53. These can be taken together: (d) relates to the way in which the inspector approached ERYC's [the council's] past delivery of housing, and (e) relates to the trajectory it placed before the inspector, and prepared for the local plan examination. They are also bound up with the other contention, featuring *passim* in Mr Young's argument, that the decision of the inspector was not merely overly generous to ERYC, but was irrational.

“54. The essence of (d) was that the supply figures, of 15,000, over five years or 3,000 a year was far beyond what ERYC had achieved in the past, which was of the order of 650 a year, and of (e) was that it was far ahead of what ERYC was putting forward as its expected production over the five years. ERYC's April 2014 housing implementation strategy for submission to the local plan examination, in evidence before the inspector, showed fewer than 1,000 dwellings built in 2013–14, and 1,500 or fewer in each succeeding year until that figure of 1,500 was just exceeded in 2017–18, making a total for the five relevant years of no more than 7,000 dwellings.

“55. Mr Young described ERYC as in effect saying that there was a realistic prospect that 3,000 houses a year would be produced, but that it did not regard that as the likely outcome, the outcome that more probably than not would occur. No legally adequate reasons had been given as to how its five-year housing supply figures could be reconciled with its past and probable future delivery.”

“57. NPPF paragraph 47, fourth bullet point, states that local planning authorities should illustrate ‘the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy ... describing how they will maintain delivery of a five-year supply of housing land to meet their housing target’.

“58. Mr Young's point was not that market factors, such as a spread of locations, and locations where people actually wanted to live, or the delivery rate of large sites had been unlawfully ignored in the assessment of the sites warranting ERYC's supply figures. Both aspects of this ground went to an argument deployed before the inspector to the effect that the housing land supply figures put forward by ERYC were not credible, and the inspector well understood the way the point *757 was being deployed, as her account of St Modwen's case and Mr Young's closing submissions to her showed. His was a simple point, but not a principal important issue, on the credibility of ERYC's judgment; he made it to the inspector, which she rejected, as she was entitled to do in her planning judgment. This point is cousin to issue (c). It is necessary to be cautious lest a point on a section 288 challenge takes a very different shape and emphasis from that which it had before the inspector.

“59. The process for allocating sites in the emerging plan and the sites, albeit in brief, were considered by the inspector and judged to be deliverable. She took account of these issues in reaching that judgment, but she concluded that they did not persuade her that the supply sites were not deliverable. That was a planning judgment for her. The past shortcomings in the supply of land were addressed in the manner required by the NPPF through the 20% buffer, though of course that can only address a shortfall caused by failings in the supply of deliverable housing land. The future difference between what was ‘deliverable’ and what would probably be ‘delivered’, discussed above, lies at the heart of the difference between the housing supply figures and the housing trajectory. This difference did not reflect, on the inspector's conclusions, a contradiction between her assessment of what was ‘deliverable’ and what ERYC thought was ‘deliverable’, nor did it mean that ERYC was saying one thing to one inspector and something completely different to another. She accepted that ERYC was intending to give great weight to the fact of allocation in the plan when it came to reach its decisions on planning applications for housing on such sites. So far as ‘deliverability’ was concerned, which it was her task to consider, that was

the second principal point. Thereafter it would be market factors which would lead to delivery. If sites are deliverable, and the problem in delivery is not within the control of the planning authority, for example the cost of housing or the availability of finance, the solution to a problem of delivery is not an increase in the supply of sites which are capable of delivery. The issue raised was not ignored; it was dealt with briefly but sufficiently.”

Issue (1)— Did the Secretary of State misinterpret or misapply government policy for the supply of housing in paragraph 47 of the NPPF?

25. It is necessary at this stage to look more closely at the inspector's conclusions on the supply of housing land. In the section of her report where she dealt with “Planning Policy”, she referred in para 4.11 to the policies in paragraphs 47 and 49 of the NPPF, and summarised them, reminding herself of the requirement in paragraph 47 that local planning authorities “should identify a supply of specific, deliverable sites sufficient to provide five years’ worth of housing against their housing requirements”. She came back to that requirement in para 13.11, where she introduced her conclusions on “Issue 2: provision for housing in the East Riding of Yorkshire”. As she said in that paragraph, “[where] the existence or otherwise of a shortage of land for housing is relevant to an appeal, it is necessary to have regard to NPPF paragraph 47”, which she then paraphrased, and that “[as] part of this process, the LPA must identify sufficient sites to provide five years’ worth of housing against their housing requirements”.

26. The inspector set out “the respective positions of the parties by the end of the inquiry” in a table in para 13.14 of her report. As she said in a footnote (footnote 146), both the council and St Modwen had followed the policy in paragraph 47 of the NPPF “where there has been a persistent record of under delivery” and had therefore “adopted a common approach of including the 20% buffer as part of the calculation of the housing land requirement”. The council's position was that the five-year requirement, for its own area, was 13,957, and for the housing market area, 10,053; St Modwen's, that it was 15,312. The parties’ “final positions” on “housing land supply” were set out in a table in para 13.41: the council's position being that there was a “[total] five-year supply” figure of 14,971; St Modwen's, that the figure was *758 4,734. The “principal area of disagreement”, as the inspector said in para 13.42, “related to allocations in the emerging local plan”, though “[to] a lesser extent, there was also disagreement as to allocations in the existing local plan and to larger sites with planning permission”.

27. She went on, in paras 13.43–13.55, to deal with those issues. In paras 13.43–13.50, under the heading “The approach to allocations in the emerging local plan”, she said:

“13.43. Footnote 11 of NPPF paragraph 47 states that deliverable sites should be available, in a suitable location, achievable and have a realistic prospect of being developed ... Both the appellant and the council draw attention to [the judgment of Stuart-Smith J in *Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government* [2013] JPL 1145]. From this, it appears there are two key points to note with regard to the interpretation of NPPF paragraph 47: firstly, that whether or not a site is deliverable is fact sensitive; and secondly, that inclusion of a site in an emerging local plan is some evidence of deliverability, since it should normally be assumed that [a local planning authority] will make a responsible attempt to comply with national planning policy. None the less, there are other relevant factors including the plan's evidence base, the stage the draft plan has reached and the nature of any objections.

“13.44. Pointing to the strong emphasis in NPPF on delivery, the appellant has taken the position that supply will largely consist of sites with planning permission, putting forward a figure of just over 4,700 as the realistic supply. However, if the exercise is to be fact-sensitive as indicated in the *Wainhomes* judgment, it follows that sites should not be discounted simply on the basis of a general characteristic such as their planning status. Moreover, there is a fundamental lack of credibility in a figure for a period looking five years ahead which fails to acknowledge the likelihood that the council will grant at least some planning permissions during that period. In this respect, it should be noted that the appellant's own supply figure has had to be revised upwards by a substantial margin ... in order to reflect this very fact. The appellant's approach to deliverability does not achieve the intended aim of providing certainty over the projected five-year period.

“13.45. On the question of the status of sites without planning permission, the appellant draws attention to various appeal decisions, particularly High Peak and Ottery St Mary ... In contrast, for the two appeals currently under consideration, the council's case is based on all the sites identified in a submission draft allocations document rather than a small number of strategic sites. The relevant local plan is in the process of being examined and provides a much clearer picture as to technical or viability issues and the nature of any objections. The circumstances are not comparable and a different approach is warranted here, due to the different characteristics of the evidence base and the availability of public responses

to the emerging plan. In addition, it seems to me there is a fundamental flaw in an approach to the assessment of housing land supply which fails to entertain the possibility that a local planning authority with an identified need of at least 1,400 dwellings a year and an emerging local plan which provides for 23,800 dwellings may grant at least some planning permissions for residential development over a five-year period.

“13.46. On its own, the absence of a planning permission is not sufficient reason for a site to be categorised as undeliverable. On that basis, I consider that very little weight can be attached to the appellant's figures for supply from the existing and emerging local plans [paras 7.107; 9.147–8].

“13.47. The second point raised from the *Wainhomes* case is that, in a plan-led system, regard needs to be had to the evidence base of the emerging plan, albeit this depends on context. In this instance, the emerging ERYC local plan makes detailed provision for development over the plan period. Whilst the appellant protests that the detailed evidence base for those allocations was not put to the *759 inquiry, it seems to me that the proper arena to test such detail is indeed the local plan examination. For the purposes of this inquiry, it is sufficient to establish the extent to which reliance may be placed on the emerging local plan.

“13.48. The emerging local plan makes provision for 23,800 additional dwellings over the plan period. The council contends that some 11,000 should be considered deliverable over the next five years. The council's evidence to this inquiry on this point comprises the PSAD dated January 2014, the SHLAA [strategic housing land availability assessment], which sets out the position at November 2013 and the evidence of Mr Hunt [the council's planning policy manager], particularly appendices L and M (as updated by ERYC 14 and ERYC 25).

“13.49. Sites in the PSAD have been subjected to a four-stage assessment which includes deliverability. An example of this can be seen in the discussion of potential sites at Melton at Chapter 3 of Mr Hunt's PoE. However, although this methodology may support inclusion of a site within the emerging local plan, it does not demonstrate the likelihood of its delivery in the next five years, as indicated by the council's own acceptance that some sites should be discounted.

“13.50. Turning to the SHLAA, two key assumptions underpin its reliance on emerging local plan allocations in the five-year housing land supply figures: that, since few sites require infrastructure to be provided prior to commencement of development, most of the allocations in the emerging local plan can be regarded as being free from significant constraints; and that the council is committed to affording weight to the emerging local plan when determining planning applications.”

28. On the “Supply from the emerging local plan” she noted, in para 13.52, that “the number of sites with planning permission or expected to obtain such permission has risen significantly (by almost 1,100 in three months) and the trend for those under consideration is also upward”. And in para 13.53 she said:

“Clearly, given the number of sites involved, it may well turn out that not all allocations currently identified as deliverable will in fact be delivered. However I consider that, overall, the appellant has not shown that this part of the evidence base is lacking in robustness. As a result, the council's figure of 11,156 dwellings on sites identified in the emerging local plan should carry substantial weight [paras 7.104–107; 9.147–151]” (Emphasis added.)

In para 7.107, one of the paragraphs in her summary of the council's case on housing land supply, she had said that “the big issue between the parties is the extent to which the draft allocations are included within the figures”.

29. As for “Sites in the existing local plan”, the inspector found in para 13.54 that the council's “assessment that 612 dwellings could be delivered on these sites is reasonable”. And under the heading “Lead-in times” she accepted, in para 13.55, that the council's “figure of 1886 dwellings to be delivered on larger sites ... appears to be reasonable”.

30. In para 13.56 the inspector turned to “The credibility of the supply figure”, and said:

“Whilst the council's supply figure has fluctuated over the period of the inquiry, a fair reading of Mr Hunt's first proof shows that the discussion of a 12-year supply took place in the context of the weight which could be attached to sites in the emerging local plan (StM16). In a situation where a local plan is under preparation, it is not surprising that data will be subject to revision. As such, the fluctuations of themselves should not be seen as indicative of a lack of reliability. It

is also suggested that the 15,000 figure should be seen as absurd in comparison with the housing trajectory. *However, the assessment of supply is distinct from that for delivery* [paras 7.101–103; 9.142–144].” (My emphasis.)

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31. Before us, Mr Young repeated the argument on the inspector's alleged misinterpretation and misapplication of national policy in paragraph 47 of the NPPF rejected by Ouseley J. The argument was largely based on what the inspector said in the two sentences I have emphasised in paras 13.53 and 13.56 of her report. Mr Young submitted that the judge was wrong to uphold the inspector's distinction—which the Secretary of State plainly accepted—between “supply” and “delivery”, by interpreting the concept of “a supply of specific deliverable sites sufficient to provide five years’ worth of housing” (in the second bullet point of paragraph 47 of the NPPF) as not involving, inevitably, an assessment of “what would probably be ‘delivered’”: para 59 of Ouseley J's judgment. Ouseley J's judgment, said Mr Young, is inconsistent. Although he had recognised (in para 51) that the policy in paragraph 47 of the NPPF is concerned with “an assessment of the likelihood that housing will be delivered in the five-year period” on the site in question, he had gone on (in para 59) to conclude, in effect, that there is no need for an assessment of “what would probably be ‘delivered’”. This distinction between deliverability and the probability of delivery was false, and betrayed a misinterpretation of policy in paragraph 47. Properly understood, submitted Mr Young, the policy requires an assessment of what would probably be delivered. It had not been St Modwen's case at the inquiry, nor was it now, that there had to be certainty of delivery. And, Mr Young confirmed, it was no longer their position that, to be included in the assessment, a site had to have planning permission for housing development.

32. I cannot accept those submissions. In my view it would have been most surprising if the Secretary of State had gone astray in his understanding and application of these fundamental components of national planning policy for the supply of housing, contained as they are in the Government's primary policy document for the planning system in England, which had been published some three years before he came to make his decisions in this case. Nor is it likely that an experienced inspector would err in that way: see the judgment of Lord Carnwath JSC in the *Hopkins Homes Ltd case* [2017] PTSR 623, para 25. I think the court should approach arguments like this with great hesitation. Here I am in no doubt that the argument is bad; that neither the inspector nor the Secretary of State misinterpreted or misapplied the relevant concepts and requirements in NPPF policy, or failed to express their conclusions with completeness and clarity; and that the judge was therefore right, essentially for the reasons he gave.

33. It is important to keep in mind—as Ouseley J said in the second sentence of para 49 of his judgment—that Mr Young's argument here is really directed at the language used by the inspector in paras 13.53 and 13.56 of her report. It does not attack her substantive conclusions on the deliverability of housing sites. Nor does it cast doubt on her conclusions, fully adopted by the Secretary of State, on the adequacy of the relevant housing supply when measured against the five-year housing requirement—specifically, that “the council's figure of just over 10,000 for the housing market area is to be preferred, on the basis that it accords most closely with the relevant national policy and offers a reasonably robust, full, objective assessment of need” (para 13.63 of the inspector's report); that if the Secretary of State were to conclude that the housing requirement should be based not on the housing market area, but on the council's administrative area, “the council's figure of just under 14,000 is to be preferred over the appellant's figure of 15,300” (para 13.63); that St Modwen's “approach to the assessment of housing land supply is fundamentally flawed so that the council's assessment of supply, at almost 15,000, is also to be preferred” (para 13.64); that, whether the analysis was based on the housing market area or on the council's administrative area, “the council has demonstrated the existence of a five-year housing land supply” (para 13.64); that “[even] if [St Modwen's] five-year housing requirement of 15,300 is taken, the shortfall of 300 would be modest in the context of the overall requirement” (para 13.64); and that it had “not been shown that there [was] any pressing need for additional sites to come forward to sustain the local supply of housing” (para 13.65). *761

34. Those conclusions were as firm an endorsement of the council's case on housing land supply, and as firm a rejection of St Modwen's, as one could imagine. All of them, together with the assessment on which they were based, were expressly supported by the Secretary of State in para 11 of his decision letter. They are not in themselves said to be unlawful. Nor could they be. They are, all of them, perfectly secure as matters of planning judgment, and not in any way vulnerable in proceedings such as these. I therefore agree with the judge's conclusions in paragraph 46 of his judgment, which were crucial, and—as I have said—are not the subject of any criticism before us.

35. That is the context in which this issue in the appeal has to be considered. It lends an air of inconsequence, even unreality, to the argument put forward. But in any case, as was submitted both by Mr Richard Honey for the Secretary of State and by Mr Tucker for the council, the argument itself is mistaken. Its fatal defect lies in its misreading of the policy in paragraph 47 of the NPPF. It misses the essential distinction between the concept of deliverability, in the sense in which it is used in the policy, and

the concept of an “expected rate of delivery”. These two concepts are not synonymous, or incompatible. Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessarily will be. For various financial and commercial reasons, the landowner or housebuilder may choose to hold the site back. Local planning authorities do not control the housing market. NPPF policy recognises that.

36. Where the policies in paragraphs 47 and 49 of the NPPF are concerned with the composition of the five-year supply of housing land, they are consistently worded to refer to a supply of housing sites that can be regarded as “deliverable”, not sites that are regarded as certain to be delivered. Thus, in the second bullet point of paragraph 47 the local planning authority's task is to “identify and update annually a supply of specific *deliverable* sites sufficient to provide five years’ worth of housing against their housing requirements” (my emphasis)—with the appropriate buffer (whether 5% or 20%), whereas in the third bullet point, the requirement for subsequent years (“years 6–10 and, where possible ... years 11–15”) is for the identification of specific sites that are “developable”, or “broad locations for growth”. And in the policy in paragraph 49 the implicit requirement is the same, namely that the authority must be able to “demonstrate a five-year supply of *deliverable* housing sites” (my emphasis). By contrast, the policy for the “housing trajectory” in the fourth bullet point of paragraph 47 is not expressed in terms either of “deliverable” or of “developable” sites as such, but in terms of illustrating “the expected rate of housing *delivery*” (my emphasis).

37. That those who drafted the policies in paragraph 47 and 49 of the NPPF intended to refer to “deliverable sites” and “deliverable housing sites” where they did, with a meaning distinct both from that of the expression “developable sites” and also from the idea of an “expected rate of housing delivery”, is confirmed by their having taken the trouble to define the word “deliverable” so precisely in footnote 11, and the word “developable” in footnote 12. Had the Government's intention been to frame the policy for the five-year supply of housing land in terms of a test more demanding than deliverability, this would have been done.

38. The first part of the definition in footnote 11—amplified in paras 3–029, 3–031 and 3–033 of the PPG—contains four elements: first, that the sites in question should be “*available* now”; second, that they should “offer a *suitable* location for development now”; third, that they should be “*achievable* with a realistic prospect that housing will be delivered on the site within five years”; and fourth, that “development of the site is *viable*” (my emphasis). Each of these considerations goes to a site's capability of being delivered within five years: not to the certainty, or—as Mr Young submitted—the probability, that it actually will be. The second part of the definition refers to “[sites] with planning permission”. This clearly implies that, to be considered deliverable and included within the five-year supply, a site does not necessarily have to have planning permission already granted for housing development on it. The use of the words “realistic prospect” in the footnote 11 *762 definition mirrors the use of the same words in the second bullet point in paragraph 47 in connection with the requirement for a 20% buffer to be added where there has been “a record of persistent under delivery of housing”. Sites may be included in the five-year supply if the likelihood of housing being delivered on them within the five-year period is no greater than a “*realistic prospect*”—the third element of the definition in footnote 11 (my emphasis). This does not mean that for a site properly to be regarded as “deliverable” it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years. As Lord Gill said in the *Hopkins Homes Ltd case [2017] PTSR 623*, para 78 when referring to the policies in paragraph 47 of the NPPF, the insistence on the provision of “deliverable” sites sufficient to provide five years’ worth of housing reflects the futility of local planning authorities relying on sites with “no realistic prospect of being developed within the five-year period”.

39. One must keep in mind here the different considerations that apply to development control decision-making on the one hand and plan-making and monitoring on the other. The production of the “housing trajectory” referred to in the fourth bullet point of paragraph 47 is an exercise required in the course of the preparation of a local plan, and will assist the local planning authority in monitoring the delivery of housing against the plan strategy; it is described as “a housing trajectory *for the plan period*” (my emphasis). Likewise, the “housing implementation strategy” referred to in the same bullet point, whose purpose is to describe how the local planning authority “will maintain delivery of a five-year supply of housing land to meet their housing target” is a strategy that will inform the preparation of a plan. The policy in paragraph 49 is a development control policy. It guides the decision-maker in the handling of local plan policies when determining an application for planning permission, warning of the potential consequences under paragraph 14 of the NPPF if relevant policies of the development plan are out of date. And it does so against the requirement that the local planning authority must be able to “demonstrate a five-year supply of deliverable housing sites”, not against the requirement that the authority must “illustrate the expected rate of housing delivery through a housing trajectory for the plan period”.

40. We are concerned with the alleged unlawfulness of a development control decision. In the light of a proper understanding of the policies in paragraphs 47 and 49 of the NPPF, in particular those pertaining directly to development control decision-making, was the judge's approach to that allegation misguided? In my view it plainly was not.

41. When the two sentences on which Mr Young concentrated in paras 13.53 and 13.56 of the inspector's report are read fairly in their full context, they do not, in my view, reveal any misunderstanding of NPPF policy. The inspector was clearly alive to the distinction between deliverability and actual delivery, and had well in mind that deliverability entailed a "realistic prospect" of the site being delivered. She was entitled to conclude, as a matter of planning judgment, that "given the number of sites involved, it may well turn out that not all allocations currently identified as deliverable will in fact be delivered" (para 13.53), and, again as a matter of planning judgment, that the council's housing supply figure of 15,000 dwellings was not undermined by its housing trajectory, given that "the assessment of supply is distinct from that for delivery" (para 13.56). Indeed, those conclusions were as much statements of common sense as they were of planning judgment. In coming to them, the inspector did not dilute the test of deliverability provided for in paragraph 47 of the NPPF. It is plain—for example, in paras 13.11 and 13.43 of her report—that she had a sound understanding of the policy in paragraph 47, and that this lay behind her conclusions in paras 13.43 to 13.56, and, in particular, the distinction she drew in paras 13.53 and 13.56 between deliverability and the actuality of delivery. And the reasons she gave for those conclusions, and more generally in her treatment of the housing land supply issue, were adequate and clear.

42. Ouseley J was, in my view, undoubtedly right to conclude that the inspector and the Secretary of State did not misinterpret or misapply the NPPF policies in play, *763 and that the relevant questions on "deliverability" and "delivery" were tackled lawfully. His grasp of the distinction between those two concepts is obvious both in para 51 and in para 59 of his judgment. There is no inconsistency of the kind complained of by Mr Young, either in those two paragraphs or elsewhere in the judgment. The judge did not suggest that in assessing deliverability a local planning authority should leave entirely to one side any difficulties beyond their control. But, as he said in para 51, "the assessment of housing land supply" is concerned with "deliverability" and "does not require certainty that the housing sites will actually be developed within [the five-year] period", and that, as the inspector recognised, "deliverability ... was not disproved by showing that there were uncertainties".

43. The judge was not drawn beyond the court's proper role in reviewing a planning decision. What he said in para 59 of his judgment was correct—that the evaluation of housing land supply involved the exercise of "planning judgment", having regard to the allocation of sites for housing development in the emerging local plan; that the "difference between what was 'deliverable' and what would probably be 'delivered' ... lies at the heart of the difference between the housing supply figures and the housing trajectory"; that this difference "did not reflect, on the inspector's conclusions, a contradiction between her assessment of what was 'deliverable' and what [the council] thought was 'deliverable'"; that where "deliverability" was concerned, the inspector had "accepted that [the council] was intending to give great weight to the fact of allocation in the plan when it came to reach its decisions on planning applications for housing on such sites"; that where "delivery" was concerned, she recognised that "market factors", which were not in the council's control, would play their part; and that "the solution to a problem of delivery is not an increase in the supply of sites which are capable of delivery".

44. In my view therefore, the appeal cannot succeed on grounds 5 and 6.

Did the Secretary of State misdirect himself on the council's housing trajectory?

45. Mr Young submitted that the inspector, and in turn the Secretary of State, failed to take into account the council's housing trajectory in figure 1 of its *East Riding Proposed Submission Local Plan—Housing Implementation Strategy (2012–2029)* of April 2014 as compelling evidence of its inability to demonstrate the requisite five-year supply of deliverable housing sites. That evidence had generated an important issue in the appeals, which the inspector should have addressed, in clear and adequate reasons. The judge, at para 58, was wrong to describe it as "not a principal important issue". It was undeniably an important issue in a case such as this. The housing trajectory, said Mr Young, is "the beating heart" of the policies in paragraph 47 of the NPPF. Here, he submitted, it was "the most critical piece of evidence" on housing land supply. Yet the inspector seems to have ignored it, failing to see its true significance and avoiding the "dichotomy of figures" presented to her by the council. The only possibly relevant reasons are in the final sentence of para 13.56 of her report, where she said that "the assessment of supply is distinct from that of delivery". That paragraph seemed to be dealing with a different matter—the fluctuations in the council's housing supply figures, rather than with the housing trajectory itself. Even so, submitted Mr Young, its final sentence revealed a misunderstanding of NPPF policy for the preparation of a housing trajectory; it did not provide the "intelligible and ... adequate" reasons required on a "principal important controversial [issue]" (as Lord Brown of Eaton-under-Heywood put

it in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, 1964D); and the absence of proper reasons indicates a failure to have regard to a material consideration.

46. I am unable to accept that argument. It is, in part, a reprise of the submissions I have already rejected on the previous issue. I am not going to repeat what I have already said, except that in my view the inspector's and Secretary of State's interpretation and application of government policy in paragraphs 47 and 49 of the NPPF, including the policy on the preparation of a "housing trajectory" in the *764 fourth bullet point of paragraph 47, were legally impeccable. But there are four short conclusions to add.

47. First, it is wrong to describe the council's housing trajectory as having been, in itself, a "principal important controversial [issue]". Evidence was given about it at the inquiry, certainly, and submissions were made in closing. But it was only one feature of the case put before the inspector on housing land supply. She had regard to it as a material consideration, which bore on the question of whether the council's figures for housing land supply were credible. Ouseley J's conclusions to this effect in para 58 of his judgment are correct. In these proceedings before the court the importance of the housing trajectory has been elevated to a significance it simply did not have in evidence and submissions at the inquiry. This was not conceded, but it seems quite plain. And I agree with the judge's comment that one must "be cautious lest a point on a [section] 288 challenge takes a very different shape and emphasis from that which it had before the inspector". That is what has happened here.

48. Secondly, the inspector understood what St Modwen were saying about the housing trajectory, which was that it served to demonstrate a lack of credibility in the council's case on housing land supply. Mr Justin Gartland of Nathaniel Lichfield & Partners, who gave planning evidence on behalf of St Modwen at the inquiry, had described the use of the housing trajectory as a "reality check" (as he confirms in para 95 of his witness statement of 14 August 2015). The inspector knew what was being suggested. The relevant submission made by Mr Young at the end of the inquiry appeared in a single paragraph—para 295—of a lengthy closing speech, 377 paragraphs in all. It came shortly after another submission on "credibility", in para 291(vi)—that "the council's supply figure has fluctuated to such an alarming degree that it ... lacks any credibility". It acknowledged the role of the housing trajectory in the council's plan-making process. It was, as Mr Young said, contained in the council's "housing implementation strategy (ERYC 32) published as part of the [local plan] evidence base"—which confirms, in para 2.10, that "[the] housing trajectory in figure 1 ... shows how the council plans to manage the delivery of housing over the plan period".

49. In para 9.144 of her report, when summarising St Modwen's case on housing land supply, the inspector recorded what Mr Young had submitted:

"Another major problem with the credibility of the council's own housing supply figures is the trajectory in the housing implementation strategy, which shows delivery in 2013–2014 at less than 1,000 units (and closer to 800), followed by less than 1,400 for the following two years. The figure is 1,500 for 2016–17 and marginally higher than that in 2017–2018. That is a supply of about 6,500 to 7,000 in the next five years on the basis of its own evidence to the local plan examination."

This was a true reflection of the way in which the point had been put to her, in support of the argument that the council's position on housing land supply lacked credibility and should not be accepted, and with emphasis on the supply figure of a maximum of 7,000. In fact, it was almost an exact quotation of the submission made by Mr Young in para 295 of his closing speech.

50. The inspector went on to record St Modwen's main argument on housing land supply, which included these points: that St Modwen had "examined the council's delivery on the basis of just sites with planning permission and no discounting and projecting forward past delivery" (para 9.146 of her report); that "[the] supply of housing should be assessed on what is available now and that will largely be sites with planning permission" (para 9.147); that "it is inappropriate to include sites without planning permission or even a resolution to grant unless there is very clear evidence supporting the delivery of that site in the next five years" (para 9.148); that "[St Modwen] has elected not to accept any of the sites without planning permission or a resolution to grant" (para 9.149); that "[St Modwen] believes that the council's supply of housing land is around 5,000 dwellings", that this was "woefully inadequate", and that it was "clear that the council has nothing *765 like a five-year supply of housing land" (para 9.154). That was the gist of St Modwen's case on housing land supply, which the inspector—and the Secretary of State—rejected. No complaint is or could be made about the inspector's recording of it, nor can it be said that she failed to understand it or failed to address it.

51. Thirdly, it is not open to St Modwen now to go behind the inspector's conclusions on the credibility and reliability of the parties' respective cases on housing land supply, which she reached in the light of all the relevant evidence, including the council's housing trajectory. Such conclusions are well within the exclusive province of planning judgment: see, for example, my judgment in *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2017] JPL

358, para 33 and the first instance judgments of Stuart-Smith J in *Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government* [2013] JPL 1145, paras 35 and 54, and Dove J in *Eastleigh Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin) at [13] and [15]. For the court to venture there would be to trespass beyond its jurisdiction in the review of planning decisions: see paras 6–7 above.

52. Fourthly, it is pointless to rehearse the evidence and submissions presented to the inspector on the council's housing trajectory in an attempt to persuade the court that her conclusions on housing land supply, shared by the Secretary of State, are somehow legally flawed. They are not legally flawed. On a fair reading, they are all well within the range of lawful planning judgment. As Ouseley J accepted, the discussion of the parties' evidence and submissions, in paras 13.41–13.56 of the inspector's report, and her conclusions in paras 13.63–13.65, are unassailable. Her conclusions are comprehensive and cogent, and are expressed in clear and adequate reasons. And they are not undone by a failure to take into account, as a material consideration, the council's housing trajectory, or by irrationality in the weight given to it.

53. As to the approach to sites allocated in the emerging local plan—a matter at the heart of the parties' dispute on the existence or not of a five-year supply of housing land—the inspector's conclusions in paras 13.43–13.53 of her report, including her conclusion in para 13.53 that “it may well turn out that not all allocations currently identified as deliverable will in fact be delivered”, are faithful to the relevant policy in paragraph 47 of the NPPF, and, in law, unimpeachable. Her focus on the crucial question of deliverability, and her application of NPPF policy on that question, cannot be faulted.

54. Having set out those conclusions, the inspector went on in para 13.56 to consider the credibility of the housing supply figures presented on either side. She referred at the end of that paragraph to her summary of St Modwen's case in paras 9.142–9.144. As her conclusions show, she did not accept that the council's housing trajectory disproved its case on supply. This was a planning judgment she could properly make on the evidence and submissions before her. In making it, she demonstrably had regard to the housing trajectory as a material consideration; she referred to it directly. And she gave it the weight she judged to be right in view of its status and role.

55. Her relevant reasons, read as a piece, are an ample explanation of her conclusions. Individual sentences in them should not be separated from their full context. In terms that were crystal clear, she disposed of the argument that the council's housing supply figure lacked credibility—or “reliability”. She distinctly preferred the council's case to St Modwen's, finding herself able to conclude, in para 13.64, that the council had “demonstrated the existence of a five-year housing land supply”.

56. That, in the end, was how she resolved the question of credibility, which required her to decide, on all the evidence and submissions she had heard on housing land supply, which side's case she was able to believe. The relevant planning judgment, which the Secretary of State accepted, fell very clearly in favour of the case put forward by the council. It cannot be disturbed in a legal challenge.

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57. I conclude, therefore, that Ouseley J's conclusions on this part of St Modwen's challenge are valid, and that these four grounds of St Modwen's appeal—grounds 1 to 4—must also fail.

Did the Secretary of State err in his conclusions on the council's record of housing delivery?

58. Mr Young's argument on this issue—the issue in ground 7—began with the submission that Ouseley J should not have thought that the inspector's failure to confront the council's “past shortcomings in the supply of land” could be overcome by the application of the 20% buffer. The inspector had not explained how in her view the council's claimed five-year supply of 15,000 dwellings could be squared with its “local delivery record” of 1,000 dwellings a year, and even less than that in the five years preceding the inquiry. Here again there was a failure to have regard to a material consideration. The council's “local delivery record” was, said Mr Young, “absolutely central” in St Modwen's case on housing land supply. But the inspector did not grapple with it. Before us, however, Mr Young concentrated on a different theme, not pursued before Ouseley J—that neither the inspector nor the Secretary of State had dealt with the now current guidance in the PPG under the heading “Updating evidence on the supply of specific deliverable site sufficient to provide five years' worth of housing against housing requirements”. This revised passage in the PPG had been published after the inquiry, and after the inspector submitted her report to the Secretary of State, but before he issued his decision. In the circumstances, Mr Young submitted, the Secretary of State ought to have dealt with it.

59. These arguments I also reject, for reasons similar to those I have given in discussing the previous two issues.

60. Here again one must take a fair-minded approach to the inspector's conclusions. The judge plainly did that in paras 53–59 of his judgment. As he recognised, the evidence on the council's record of housing delivery, like the evidence on its housing trajectory, went to the credibility and reliability of its figures for housing land supply. And, as he found, that question was sufficiently and lawfully addressed by the inspector in paras 13.41–13.56 and 13.63–13.65 of her report, and the reasons she gave were legally good. I agree with him.

61. As Mr Honey submitted, the council's housing trajectory looked forward in time, its housing record back. But the question of the deliverability of housing sites, the essential question for the inspector in considering the parties' cases on the five-year supply of housing land, required her to exercise her planning judgment. This had now to be done in the light of the emerging local plan, with its new policies for housing development and its new allocations of land for such development. In doing it, the inspector did not ignore the council's housing record. She had regard to it, though—correctly—not as a “principal important controversial issue”. Her summary of St Modwen's case—in particular in paras 9.142–9.144 of her report, to which she referred in para 13.56, included these points: that the council's claim to have a five-year housing supply of in excess of 15,000 dwellings was “utterly implausible on the available evidence” (para 9.142), since this represented “a supply of over 3,000 houses a year” and “[the] council's past track record shows it has never delivered houses in that quantity” (para 9.142(i)); that “the available evidence from [Mr Hunt] is that completions up until April 2014 are still below the [regional strategy] requirement of 1,150” (para 9.142(ii)); that against a requirement of 3,500 completions a year, “the council has delivered an average of just 635 a year over the last five years” (para 9.142(iii)); that for the years between 2004 and 2008 there had been “an annual delivery rate of 1,495” (para 9.142(iv)); that the “annual delivery rate” for the period 2004 to 2013 was “1,017” (para 9.142(v)); and that the council “accepts the record of persistent under delivery” (para 9.143). She had these points in mind when she reached her conclusions in para 13.56, and in para 13.64. Plainly, they did not dissuade her from the view that the council had, as she said in para 13.64, **767* “demonstrated the existence of a five-year housing land supply”. This was her ultimate planning judgment on the housing land supply issue. I see no reason for the court to interfere with it.

62. I do not accept that, in para 59 of his judgment, Ouseley J acquitted the inspector of error in dealing with the council's record of housing delivery merely on the basis of the 20% buffer required in cases where there has been “a record of persistent under delivery”. That notion is misconceived. To see why the judge found against St Modwen on this issue one must read the whole of his conclusions in paras 53–59 of his judgment. His reference to the 20% buffer in paragraph 59 was entirely legitimate. What he said was that “[the] past shortcomings in the supply of land were addressed in the manner required by the NPPF through the 20% buffer”. He was right. As Mr Honey submitted, the 20% buffer is “a mechanism to address historic under delivery”, its purpose being “to provide a realistic prospect of achieving the planned supply”. With this in mind, the judge was merely acknowledging, correctly, that the council had accepted the need for a 20% buffer to be applied in this case. This concession is referred to in para 7.103 in the inspector's summary of the council's case on housing land supply—one of the paragraphs mentioned at the end of para 13.56—where she had recorded the council's “acceptance of a 20% buffer”. It is also acknowledged in para 13.14, where she set out the parties' respective positions on the housing land requirement, confirming in a footnote their “common approach of including the 20% buffer”. In my view therefore, Mr Young's submission here does not begin to prove any error of law.

63. Lastly, the argument that the Secretary of State failed to apply the revised guidance in the PPG affords no basis for quashing his decision. The revised guidance refers to a local planning authority's “local delivery record”, but the thrust of it, at least for a development control decision, is not materially different from the previous guidance. And it cannot be said that the inspector's conclusions on the issue of housing land supply, or the Secretary of State's, could conceivably have been different if the new guidance had been explicitly taken into account. Those conclusions, as I have said, were lawfully reached in the light of the council's housing trajectory and “local delivery record”. There is, in my view, nothing in this point at all.

Conclusion

64. For the reasons I have given I would dismiss this appeal.

McCOMBE LJ

65. I agree.

JACKSON LJ

66. I also agree.

Isobel Collins, Barrister *768

Appeal dismissed.

Footnotes

- 1 Town and Country Planning Act 1990, s 288(1) : “If any person— (a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds— (i) that the order is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that order; or (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds — (i) that the action is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section.”

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