were not the subject of any reasons provided by him. Fourthly, and lastly, it was submitted that the reasons which had been provided to explain why the claimant was a 20 per cent buffer authority, when in 2012 they had been found to be a five per cent authority, were also not legally adequate.

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

21. The law

22. Planning application are determined under section 70 of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004. National planning policy is a material consideration for the purposes of the exercise of this discretion. Interpretation of planning policy, including national policy, is a matter of law (see Tesco Stores v Dundee City Council [2012] UKSC 13). As I have set out above, paragraph 47 of the Framework was the subject of interpretation in the Hunston Properties case, in particular in relation to how determination of the requirement for the five-year housing land supply was to be approached a development control decision. The context of that case was that it was a Green Belt case and the Inspector had concluded that the best available figure for use in the five-year supply calculations was that which was derived from the revoked Regional Strategy. That figure was the most recent independently tested housing

figure which reflected amongst other things the Green Belt policy constraint in the local authority's area. By contrast the developer and appellant argued that a figure representing "full objectively assessed needs" for housing should be used in the absence of any figure derived from any element of the development plan. In giving the leading judgment of the Court of Appeal, Sir David Keene observed as follows:

i. "25. …I am not persuaded that the inspector was entitled to use a housing requirement figure derived from a revoked plan, even as a proxy for what the local plan process may produce eventually. The words in paragraph 47(1), "as far as is consistent with the policies set out in this Framework" remind one that the Framework is to be read as a whole, but their specific role in that sub-paragraph seems to me to be related to the approach to be adopted in producing the Local Plan. If one looks at what is said in that sub-paragraph, it is advising local planning authorities:

ii. "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."

iii. That qualification contained in the last clause quoted is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs. The needs assessment, objectively arrived at, is not affected in advance of the production of the Local Plan, which will then set the requirement figure.

iv. 26. Moreover, I accept Mr Stinchcombe QC's submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present

at or involved in the Section 78 appeal. I appreciate that the inspector here was indeed using the figure from the revoked East of England Plan merely as a proxy, but the government has expressly moved away from a "top-down" approach of the kind which led to the figure of 360 housing units required per annum. I have some sympathy for the inspector, who was seeking to interpret policies which were at best ambiguous when dealing with the situation which existed here, but it seems to me to have been mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.

v. 27. It follows from this that I agree with the judge below that the inspector erred by adopting such a constrained figure for housing need. It led her to find that there was no shortfall in housing land supply in the district. She should have concluded, using the correct policy approach, that there was such a short fall. The supply fell below the objectively assessed five year requirement.

vi. 28. However, that is not the end of the matter. The crucial question for an inspector in such a case is not: is there a shortfall in housing land supply? It is: have very special circumstances been demonstrated to outweigh the Green Belt objection? As Mr Stinchcombe recognised in the course of the hearing, such circumstances are not automatically demonstrated simply because there is a less than five year supply of housing land. The judge in the court below acknowledged as much at paragraph 30 of his judgment. Self-evidently, one of the considerations to be reflected in the decision on "very special circumstances" is likely to be the scale of the shortfall.

vii. 29. But there may be other factors as well. One of those is the planning context in which that shortfall is to be seen. The context may be that the district in question is subject on a considerable scale to policies protecting much or most of the undeveloped land from development except in exceptional or very special circumstances, where because such land is an Area of Outstanding Natural Beauty, National Park or Green Belt. If that is the case, then it may be wholly unsurprising that there is not a five year supply of housing

land when measured simply against the unvarnished figures of household projections. A decision-maker would then be entitled to conclude, if such were the planning judgment, that some degree of shortfall in housing land supply, as measured simply by household formation rates, was inevitable. That may well affect the weight to be attached to the shortfall."

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

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

    i. "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principle important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their

prospects of the obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he is genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

25. In relation to consistency in decision making, the now classic formulation of that principle in a planning context was given in the judgment of Mann LJ in the case of North Wiltshire District Council v the Secretary of State for the Environment and Clover 65 P & C R 137 at page 145 as follows:

i. "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision. To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable, then ordinarily it must be a material consideration.
A practical test for the Inspector is to ask himself whether, if

I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

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

    i. "11. To be considered deliverable, sites should
    ii. be available now, offer a suitable location for development now and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within 5 years, for example they would not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

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

    i. "35. I would accept as a starting point that inclusion of a site in the eWCS or the AMR is some evidence that the site is deliverable, since it should normally be assumed that inclusion in the AMR is the result of the planning authority's responsible attempt to comply with the requirement of [47] of the NPPF to identify sites that are deliverable. However, the points identified in [34] above lead to the conclusion that inclusion in the eWCS or the AMR is only a starting point.

More importantly, in the absence of site specific evidence, it cannot be either assumed or guaranteed that sites so included are deliverable when they do not have planning permission and are known to be subject to objections. To the contrary, in the absence of sites specific evidence, the only safe assumption is that not all such sites are deliverable. Whether they are or are not in fact deliverable within the meaning of [47]is fact sensitive in each case; and it seems unlikely that evidence available to an inspector will enable him to arrive at an exact determination of the number of sites included in a draft plan but are as a matter of fact deliverable or not. Although inclusion by the planning authority is some evidence that they are deliverable, the weight to be attached to that inclusion can only be determined by reference to the quality of the evidence base, the stage of process that the draft document has reached and knowledge of the number and nature of objections that may be outstanding. What cannot be assumed simply on the basis of inclusion by the authority in a draft plan is that all such sites are deliverable. Subject to that, the weight to be attached to the quality of the authority's evidence base is a matter of planning judgment for the inspector, and should be afforded all proper respect by the Court."

28. Ground 3 relates to the role of the Inspector at a hearing. The leading case in relation to this issue is the case of Dyason v Secretary of State 75 P&CR 506. In giving the leading judgment of the Court of Appeal Pill LJ stated at page 512 as follows:

    i. "It is clear that at a hearing there is to be no formal cross-examination and that a hearing is the suitable procedure where "there is no likelihood that formal cross-examination will be needed to test the opposing cases". The intention is to make the procedure "less daunting for unrepresented parties." It is intended "eliminate or reduce the formalities of the traditional local inquiry."

    ii. Planning permission having been refused, conflicting propositions and evidence will often be placed before an inspector on appeal. Whatever procedure is followed, the strength of the case can be determined only upon

> an understanding of that case and by testing it with reference to propositions in the opposing case. At a public local enquiry the Inspector, in performing that task, usually has the benefit of cross-examination on behalf of the other party. If cross-examination disappears, the need to examine propositions in that way does not disappear with it. Further, the statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but assessed for its own worth and in relation to opposing contentions. There is a danger, upon the procedure now followed by the Secretary of State for observing the right to be heard by holding a "hearing", that the need for such consideration is forgotten. The danger is that the "more relaxed" atmosphere could lead not to a "full and fair" hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector."

29. Conclusions

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

31. So what is the nature of a policy which may in a forward-planning context lead to the adjustment of the housing needs assessment figure? Whilst Sir David Keene referred to a "constrained figure for housing need" for example in paragraph 27 of Hunston, when a housing figure passes through the lens of policy it may increase

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

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

    i. "159 Local planning authorities should have a clear understanding of housing needs in their area. They should:

- prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The Strategic Housing Market Assessment should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the planned period which:

- meets household and population projections, taking account of

migration and demographic change;

- addresses the needs for all types of housing, including affordable housing and the needs of different groups in the community (such as but not limited to, families with children, older people, people with disabilities, service families and people wishing to build their only homes); and

- caters for housing demand on the scale of housing supply necessary to meet this demand."

33. This is clearly not a comprehensive description and further guidance is provided by the first defendant in the Planning Practice Guidance, and in particular in this respect, in paragraphs with reference ID 2a-001-20140306 to 2a-029-20140306.
34. In terms of the first element of the assessment in the first of the sub-bullet points in paragraph 159, namely meeting household and population projections taking account of migration and demographic change, the PPG illustrates that this is a statistical exercise involving a range of relevant data for which there is no one set methodology, but which will involve elements of judgment about trends and the interpretation and application of the empirical material available. These judgments will arise for instance in relation to whether, for example, adjustments for local demography or household formation rates are required (see paragraph ID 2a-014-20140306), and the extent and nature of adjustments for market signals (see paragraph ID 2aa-018-20140306). Judgment will further be involved in taking account of economic projections in undertaking this exercise.
35. At the second stage described by the second sub-bullet point in paragraph 159, the needs for types and tenures of housing should be addressed. That includes the assessment of the need for affordable housing as well as different forms of housing required to meet the needs of all parts of the community. Again, the PPG

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

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

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

37. Insofar as Hickinbottom J in the case of Oadby and Wigston Borough Council v Secretary of State [2015] EWHC 1879 might be taken in paragraph 34(ii) of his

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

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

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

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

41. The PPG does not provide any specific guidance on this point related to vacancies and second homes. That is to my mind unsurprising, as it could not begin to address every conceivable point which might arise in this exercise. However, I have no doubt that the inclusion of vacancies and second homes is an adjustment based on statistical data of a kind similar to those which are contemplated in the PPG. The absence of this issue from the PPG does not therefore dissuade me from the view which I have reached.
42. As I have indicated above, my attention was drawn to the fact that the PPG in paragraphs reference ID3-012-20140306 and 3-039-20140306 does address the question of vacancies but in the context of them forming an element of potential supply. It permits an allowance for bringing homes back into use if that is supported by robust evidence from the planning authority. The existence of that guidance does not however assist in answering the question which arises in this case. Simply because a reduction in vacant homes has the potential to provide an element of supply does not render it illegitimate or inadmissible to account for the existing trend of vacant or second homes as a factor influencing the statistical exercise of determining the FOAN before supply questions arise.
43. As I have indicated, the elements of the PPG which address the question of the calculation of the FOAN support the interpretation that finding the FOAN requires an analysis of the relevant statistical and econometric data and trends. Against that background, there is no difficulty in concluding that census data about vacancies and second homes are a species of the data to be taken into account in the calculation. Ground 1 therefore fails.
44. That has implications for the remainder of the case. At the hearing of the appeal,

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

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

46. True it is that the Inspector did not directly address the conclusion of his colleague in 2012 but the point appears in her decision, as will be seen from the quotation I have provided above, uncontentiously and without explanation. As is clear from the North Wiltshire case, the Inspector was not bound by it. In paragraph 9 of his decision letter, the Inspector sets out fully the reasons for his judgment that the claimant has been responsible for persistent under delivery. That is in the form of

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

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

48. To some extent the same analysis can be deployed in relation to the question of small windfalls. There were two competing figures and in concluding that the supply was 1.91 years, the Inspector accepted the second defendant's figure. In

paragraph 11 of the decision letter he explains he is unpersuaded that large site windfalls should be allowed for on the basis that the allocation process should identify most of that type of site. He does not however, discount small site windfalls, and he includes the lower figure adopted by the second defendant. As the hearing note discloses, the 268 figure was derived from a five to ten year average of small site windfalls and the derivation of the figure was therefore known.

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

50. Finally in respect of Ground 2, the question arises as to the emerging site allocations. Here again, in my view, the claimant has legitimate cause for concern since the Inspector's conclusions inferentially reject their inclusion by his acceptance of the second defendant's calculation, but the reasons are entirely silent as to why that is the case. The hearing note from the second defendant's consultant records that there was discussion at the hearing about this element of housing supply, but there does not appear any conclusion at all in the Inspector's decision as to why they where excluded. Perhaps in the light of Wainhomes case, and given the very embryonic nature of the allocations in a plan which had yet to

be consulted upon and about which objections were unknown, it is possible to hazard a guess as to why the Inspector would have afforded them no weight and excluded them. But that would be speculation and in my view it was a matter which required some, albeit brief, explanation. Again this was a failing in the reasoning but again it did not cause any genuine or substantial prejudice to the claimant as in the light of earlier matters even including this source of housing would not have affected the important and determinative question of whether or not the claimant had provided for a five-year housing land supply. In those circumstances ground 2 must fail.

51. Turning to Ground 3, it is important to separate off what Ground 3 is not about at the outset. At one point before the hearing and in the written arguments it appeared to be suggested that this ground might be about whether the claimant, and in particular Mr Jermany, should have asked for an adjournment. It is not about that issue and in my view no possible criticism could be raised in relation to Mr Jermany's approach to the hearing. Indeed it is fair to recall that Mr Simons, who appeared on behalf of the first defendant, endorsed that approach and was rightly keen during the course of his submissions to point out that there was no criticism of Mr Jermany's conduct or participation at the hearing.

52. The point is this. At the hearing the Inspector is in charge, and the purpose of the hearing is for the Inspector to test and explore the evidence with the assistance of the parties and by means of a structured discussion of the issues. This is the substance of his inquisitorial role identified in the case of Dyason. It is of course open to the parties if they feel disadvantaged, or that an event has occurred in the procedure which renders it unfair, to ask for an adjournment or for some other

suitable relief from the Inspector. But at all times it is for the Inspector to be on top of matters and ultimately if he cannot discharge his inquisitorial duty because of late material, then he must adjourn or regulate the procedure accordingly. There is a sense in which that analysis of the approach and involvement of the Inspector at the hearing is an answer to the claimant's complaint. They may well feel (and others might agree) that it would have been prudent for the Inspector to take a little time to read the material which he had only just received and to give consideration to whether or not the agenda or the questions he wish to explore needed to be adjusted, but ultimately that was a matter for his judgment. He clearly considered that he could explore the issues and get what he needed from the debate without doing so.

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

54. For reasons which I have set out above, each of the three grounds on which this

claim has been advanced by the claimant must be dismissed.

Appendix 3

England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2013] EWCA Civ 1610
Case No: C1/2013/2734

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
HIS HONOUR JUDGE PELLING QC (Sitting as a Judge of the High Court)
CO 4686 2013

Royal Courts of Justice
Strand, London, WC2A 2LL
12/12/2013

Before:

LORD JUSTICE MAURICE KAY
LORD JUSTICE RYDER
and
SIR DAVID KEENE

Between:

City and District Council of St Albans	**Appellant**
- and -	
The Queen (on the application of) Hunston Properties Limited	**1st Respondent**
Secretary of State for Communities and Local Government and anr	**2nd Respondent**

Matthew Reed (instructed by the Appellant's Head of Legal Services) for the Appellant
Paul Stinchcombe QC and Ned Helme (instructed by Photiades Solicitors) for the First Respondent and (Treasury Solicitors for the Second Respondent).
The Second Respondent did not appear.

Hearing date: 20 November 2013

HTML VERSION OF JUDGMENT

Sir David Keene :

Introduction

1. This appeal concerns the interpretation of the relatively recent (March 2012) National Planning Policy Framework ("the Framework") and in particular of the policies contained therein in respect of residential development proposals. The issue is one which arises in the situation where, as in the present case and in a number of other planning authority areas, there is not as yet a local plan produced after and in accordance with the Framework.

2. **Hunston** Properties Limited ("**Hunston**") applied for outline planning permission for the construction of 116 dwellings, a care home and some associated facilities on five hectares of agricultural land within the district of **St Albans**. Permission was refused by the District Council, now the appellant, principally on the ground that the site was almost entirely within the Metropolitan Green Belt. **Hunston** appealed under Section 78 of the Town and Country Planning Act 1990 ("the 1990 Act") and, simplifying the history of the matter, the appeal was dismissed on 12 March 2013 by an inspector appointed by the Secretary of State. **Hunston** then challenged that decision in the Administrative Court under Section 288 of the 1990 Act. H.H. Judge Pelling QC, sitting as a judge of the High Court, quashed the inspector's decision, and the Council now appeals with permission granted by Sullivan LJ. The Secretary of State appeared by counsel in the Administrative Court to resist the Section 288 challenge but seeks to play no part in these appeal proceedings.

3. I note the basis on which Sullivan LJ gave permission to appeal. He said that he was not persuaded that the appeal had a real prospect of success, but he found there to be a compelling reason for the appeal to be heard so that there could be a "definitive answer to the proper interpretation of paragraph 47" of the Framework, and in particular the interrelationship between the first and second bullet points in that paragraph.

Policy Context

4. The Framework was published by the Government in order to set out its planning policies for England, so as to give guidance to local planning authorities and other decisions-makers in the planning system. It was seen by the Minister for Planning as simplifying national planning guidance "by replacing over a thousand pages of national policy with around fifty, written simply and clearly." Unhappily, as this case demonstrates, the process of simplification has in certain instances led to a diminution in clarity. It will be necessary to set out the wording of paragraph 47 of the Framework very soon in this judgment. I have to say that I have not found arriving at "a definitive answer" to the interpretative problem an easy task, because of ambiguity in the drafting. In such a situation, where one is concerned with non-statutory policy guidance issued by the Secretary of State, it would seem sensible for the Secretary of State to review and to clarify what his policy is intended to mean. Nonetheless, the Supreme Court in *Tesco Stores Ltd -v- Dundee City Council* [2012] UKSC 13 has emphasised that policy statements are to be interpreted objectively by the court in accordance with the language used and in its proper context, so that the meaning of the policy is for the courts, even if the application of the policy is for planning authorities and other planning decision-makers: see paragraphs 18 and 19. That case was concerned with policy in a statutory development plan, but it would seem difficult to distinguish between such a policy statement and one contained in non-statutory national policy guidance. I accept, therefore, as do the parties to this appeal, that it is for this court to seek to arrive at the appropriate meaning of paragraph 47 of the Framework.

5. That paragraph begins the section of the Framework entitled "Delivering a wide choice of high quality homes." Insofar as material for present purposes, it reads as follows:

> "47. 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."

These are the two bullet points referred to by Sullivan LJ.

6. There is no doubt, that in proceeding their local plans, local planning authorities are required to ensure that the "full objectively assessed needs" for housing are to be met, "as far as is consistent with the policies set out in this Framework". Those policies include the protection of Green Belt land. Indeed, a whole section of the Framework, Section 9, is devoted to that topic, a section which begins by saying "The Government attaches great importance to Green Belts": Paragraph 79. The Framework seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that "the general extent of Green Belts across the country is already established." It seems clear, and is not in dispute in this appeal, that such a Local Plan could properly fall short of meeting the "full objectively assessed needs" for housing in its area because of the conflict which would otherwise arise with policies on the Green Belt or indeed on other designations hostile to development, such as those on Areas of Outstanding Natural Beauty or National Parks. What is likely to be significant in the preparation of this Local Plan for the district of **St Albans** is that virtually all the undeveloped land in the district outside the built up areas forms part of the Metropolitan Green Belt.

7. However, no such new Local Plan for this district currently exists. There remains the old-style Local Plan, the **St. Albans** City and District Local Plan Review, dating from 1994, but it is not suggested that its contents insofar as they deal with housing land requirements are of any relevance today. The most recent policy document containing a quantified assessment of such requirements in the district was the East of England Plan, which contained a figure of 360 dwelling units per annum, but that Plan was revoked on the 3 January 2013, in accordance with the Government's move away from strategically based figures. Thus, as the inspector in the present case put it:

> "there is a policy vacuum in terms of the housing delivery target." [paragraph 23]

8. The appellant Council resolved on 17 January 2013 that the target of 360 dwellings per annum from 2001 to 2021 remained the most appropriate interim housing target for housing land supply purposes.

9. There are a number of other policies in the Framework which are of relevance. At paragraph 13 it states that the Framework:

> "constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications."

Paragraph 14 begins by saying that:

> "At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking."

It goes on in that same paragraph to spell out what that means for plan-making and for decision-taking. In respect of the latter, it sets out two bullet points. The first deals with cases where there is a development plan. The second is relevant to the present appeal:

> "where the development plan is absent, silent or relevant policies are out-of-date, [it means] granting permission unless:
>
> > any adverse impacts of doing so would significantly and demonstrably

> outweigh the benefits, when assessed against the policies in this Framework taken as a whole;
>
> or
>
> specific policies in this Framework indicate development should be restricted."

A footnote, no.9, gives examples of such policies as are meant by that last sentence, including policies relating to land designated as Green Belt.

10. As I have already said, the Framework includes specific policies to protect Green Belt land. Paragraphs 87 and 88 are of particular relevance. They state:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

The Framework does not seek to define further what "other considerations" might outweigh the damage to the Green Belt, but in principle there seems no reason why in certain circumstances a shortfall in housing land supply might not do so.

The Planning Appeal and the Inspector's Decision

11. It was agreed at the planning inquiry that the proposed development on this site would constitute inappropriate development in the Green Belt. The inspector noted that, by virtue of paragraph 87 of the Framework, it should not be permitted except in very special circumstances. That led her to the topic of housing land supply.

12. The inspector referred to paragraph 47 of the Framework and then considered the development plan position. She observed that there was "no definitive housing delivery requirement" in any relevant plan (paragraph 24 of decision letter). She described the Department for Communities and Local Government ("DCLG") 2008 projections of new households as providing the most up-to-date figures. They gave a projection of 688 new households per annum in this district. **Hunston** contended for various upwards adjustments of that annual figure, but even without those it can be seen that arithmetically the projection produced a five year requirement of 3,440 dwelling units. **Hunston**'s figure was 3,600 units.

13. However, the inspector regarded such figures as failing to take account of the constraints on development within the district, particularly the Green Belt. She noted that the old East of England (regional) Plan had reflected such constraints and had come up with its figure of 360 units per annum:

> "26... striking a balance of the social, economic and environmental objectives with the aim of achieving sustainable development. The balance was evidence based, consulted upon, subject to a sustainability appraisal, justified and publically examined."

The inspector added that there was no evidence to suggest that the constraints would be any less applicable now, and at paragraph 29 she said that the figure in the East of England Plan (the RSS):

> "29. ... provided housing requirements for the period to 2021 and took account of the severe constraints in the District. It provides the only figure that has been scrutinised through the independent examination process. Government policy aims for localism rather than top down set targets but there was nothing to indicate that the constraints identified in the RSS process are reduced because the RSS is no longer extant."

14. Consequently, the inspector concluded as follows on housing need:

> "At this time and in the absence of an identified need that takes account of any constraints to development and acknowledging the age of the RSS data, and the fact that the RSS has now been revoked, I consider it is reasonable that the annual housing target should have regard to constraints in the district and be that which takes them into account. As resolved by the Council on 17 January 2013, provision should be made for a minimum of 360 residential units per annum on specific deliverable sites." (Paragraph 30)

15. On the supply side of the exercise, the District Council put forward a figure of 2183 dwelling unit sites available within five years. On analysis, the inspector found that that was too high by about 100 units, but nonetheless it meant that there was a supply of housing land in excess of the five year requirement if that was put at 360 dwellings per annum. As a five year total, she appears to have put the total five year housing land supply at about 2080 units. Thus the inspector at paragraph 67 concluded:

> "67. Additional delivery of housing would be of value as would the proposed affordable housing provision whether at 35% or 53%. Nevertheless, the five year housing land supply has been found to be robust even if the delivery may not be as high as the Council advises on some sites. A 5% buffer over and above the five year supply has been found to be appropriate and there is a realistic prospect that adequate provision has been made for the delivery of five years plus 5% supply of housing land. Therefore the supply of additional housing on a greenfield Green Belt site is not afforded weight."

16. The inspector in her overall conclusion on the residential development gave weight to certain factors, but said:

> "However, in the absence of an identified need for the release of a greenfield Green Belt site, the substantial harm to the Green Belt and significant harm to the character and appearance of the countryside are not clearly outweighed by the other material considerations either individually or as a whole. Therefore the very special circumstances necessary to justify the inappropriate residential development in the Green Belt do not exist." (Paragraph 71)

She added that the development would be contrary to Local Plan policies and to Government policy in the Framework, and consequently she dismissed the appeal.

The High Court Decision

17. In the Section 288 proceedings it was argued by **Hunston** that the inspector had erred by failing to identify the "full objectively assessed needs" for housing in the area, as required by the first bullet point in paragraph 47 of the Framework, and had failed, in this situation where there was no new Local Plan containing housing requirements, to recognise the shortfall between those needs and the supply of housing sites. Had she adopted the correct policy approach, she might have found that very special circumstances, sufficient to outweigh the contribution of the appeal site to the Metropolitan Green Belt, existed. Thus she erred in law.

18. The deputy judge accepted this argument. In his judgment at paragraph 28 he said:

> "28. Where it is being contended that very special circumstances exist because of a shortfall caused by the difference between the full objectively assessed needs for market and affordable housing and that which can be provided from the supply of specific deliverable sites identified by the relevant planning authority, I do not see how it can be open to a LPA or Inspector to reach a conclusion as to whether that very special circumstance had been made out by reference to a figure that does not even purport to reflect the full objectively assessed needs for market and affordable housing applicable at the time the figure was arrived at."

He went on to add:

> "A figure that takes account of constraints should not have any role to play in assessing an assertion by an applicant in the position of HPL that an actual housing requirement has not been met."

He observed that the Framework did not encourage the use of need figures derived from such earlier

regional plans as the East of England Plan, as it could have done if it had been intended by the government that such should be the approach where a new Local Plan prepared in accordance with the Framework had not been adopted.

19. The District Council had relied upon the wording of the first bullet point in paragraph 47 of the Framework and in particular the words about meeting the housing needs "as far as is consistent with the policies set out in this Framework." The Council contended that this justified the inspector's use of figures for housing needs which reflected the very substantial constraints on development within this district. The judge rejected that argument, commenting at paragraph 29:

> "... the suggestion that the words "... *in so far as is consistent with the policies set out in this Framework...*" requires or permits a decision maker to adopt an old RSS figure is unsustainable as a matter of language. That language requires that the decision maker considers each application or appeal on its merits. Having identified the full objectively assessed needs figure the decision maker must then consider the impact of the other policies set out in the NPPF...
>
> ...
>
> ... It is entirely circular to argue that there are no very special circumstances based on objectively assessed but unfulfilled need that can justify development in the Green Belt by reference to a figure that has been arrived at under a revoked policy which was arrived at taking account of the need to avoid development in the Green Belt."

20. He concluded that the inspector's approach had been wrong in law. The proper approach was to assess need, then identify the unfulfilled need having regard to the supply of specific deliverable sites, and then to decide whether fulfilling the need (plus any other factors in favour of permission) clearly outweighed the harm which would be caused to the Green Belt. As he rightly said, that final stage involved planning judgment, which was not for the court. As a result he quashed the inspector's decision.

Discussion

21. In essence, the issue is the approach to be adopted as a matter of policy towards a proposal for housing development on a Green Belt site where the housing requirements for the relevant area have not yet been established by the adoption of a Local Plan produced in accordance with the policies in the Framework. Such development is clearly inappropriate development in the Green Belt and should only be granted planning permission if "very special circumstances" can be demonstrated. That remains government policy: paragraph 87 of the Framework. In principle, a shortage of housing land when compared to the needs of an area is capable of amounting to very special circumstances. None of these propositions is in dispute.

22. Neither party before us sought to take issue with the inspector's findings as to the supply of housing land over the five year period in this district. But, as will be evident from the earlier passages in this judgment, the inspector found that there was no shortfall in the supply because she regarded it as necessary to identify a housing requirement figure which reflected the constraints on built development in the district generally which resulted from the extensive areas of Green Belt there. The best she felt she could do was to adopt the earlier East of England Plan figure which, though in a revoked plan, sought to take account of such constraints. Was she entitled to do so?

23. The appellant Council contends that she was. On its behalf Mr. Reed emphasises the close links between the first two bullet points of paragraph 47 of the Framework (which I will number 47(1) and (2) for the sake of convenience.) Paragraph 47(2) requires there to be five years supply of housing sites, that is to say a supply sufficient to meet a local planning authority's housing requirements for five years. But to discover what is meant by the reference to housing requirements, one has to go to paragraph 47 (1), and while that refers to "the full objectively assessed needs," it also adds the qualification "as far as is consistent with the policies set out in this Framework." That, it is submitted, means that one has to take into account such policies as those on the protection of the Green Belt. The qualification does not relate solely to the process of producing a Local Plan. Paragraph 47(1) has to be read as a whole and, if one goes to it as **Hunston** do for the reference to "full objectively assessed needs" when dealing with a development control decision, one must take on board the qualification as well. One cannot rely on the objectively assessed needs part without having regard to the reference to policy constraints.

24. The Council contends that the inspector used the former East of England plan figure for housing requirements while recognising that it was not ideal. But she was doing her best to arrive at an assessment which reflected the whole of paragraph 47(1) and not just part of it, so as to include the constraints flowing from other policies as well as the household projections. The mere fact that this was a development control situation as opposed to local plan formulation does not, it is said, undermine the need to reflect the whole of paragraph 47(1). The policies in the Framework provide guidance, as paragraph 13 states, both for the drawing up of plans and in the determination of planning applications.

25. I see the force of these arguments, but I am not persuaded that the inspector was entitled to use a housing requirement figure derived from a revoked plan, even as a proxy for what the local plan process may produce eventually. The words in paragraph 47(1), "as far as is consistent with the policies set out in this Framework" remind one that the Framework is to be read as a whole, but their specific role in that sub-paragraph seems to me to be related to the approach to be adopted in producing the Local Plan. If one looks at what is said in that sub-paragraph, it is advising local planning authorities:

> "to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework."

That qualification contained in the last clause quoted is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs. The needs assessment, objectively arrived at, is not affected in advance of the production of the Local Plan, which will then set the requirement figure.

26. Moreover, I accept Mr Stinchcombe QC's submissions for **Hunston** that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal. I appreciate that the inspector here was indeed using the figure from the revoked East of England Plan merely as a proxy, but the government has expressly moved away from a "top-down" approach of the kind which led to the figure of 360 housing units required per annum. I have some sympathy for the inspector, who was seeking to interpret policies which were at best ambiguous when dealing with the situation which existed here, but it seems to me to have been mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.

27. It follows from this that I agree with the judge below that the inspector erred by adopting such a constrained figure for housing need. It led her to find that there was no shortfall in housing land supply in the district. She should have concluded, using the correct policy approach, that there was such a shortfall. The supply fell below the objectively assessed five year requirement.

28. However, that is not the end of the matter. The crucial question for an inspector in such a case is not: is there a shortfall in housing land supply? It is: have very special circumstances been demonstrated to outweigh the Green Belt objection? As Mr Stinchcombe recognised in the course of the hearing, such circumstances are not automatically demonstrated simply because there is a less than a five year supply of housing land. The judge in the court below acknowledged as much at paragraph 30 of his judgment. Self-evidently, one of the considerations to be reflected in the decision on "very special circumstances" is likely to be the scale of the shortfall.

29. But there may be other factors as well. One of those is the planning context in which that shortfall is to be seen. The context may be that the district in question is subject on a considerable scale to policies protecting much or most of the undeveloped land from development except in exceptional or very special circumstances, whether because such land is an Area of Outstanding Natural Beauty, National Park or Green Belt. If that is the case, then it may be wholly unsurprising that there is not a five year supply of housing land when measured simply against the unvarnished figures of household projections. A decision-maker would then be entitled to conclude, if such were the planning judgment, that some degree of shortfall in housing land supply, as measured simply by household formation rates, was inevitable. That may well affect the weight to be attached to the shortfall.

30. I therefore reject Mr Stinchcombe's submission that it is impossible for an inspector to take into account

the fact that such broader, district-wide constraints exist. The Green Belt may come into play both in that broader context and in the site specific context where it is the trigger for the requirement that very special circumstances be shown. This is not circular, nor is it double-counting, but rather a reflection of the fact that in a case like the present it is not only the appeal site which has a Green Belt designation but the great bulk of the undeveloped land in the district outside the built-up areas. This is an approach which takes proper account of the need to read the Framework as a whole and indeed to read paragraph 47 as a whole. It would, in my judgment, be irrational to say that one took account of the constraints embodied in the polices in the Framework, such as Green Belt, when preparing the local plan, as paragraph 47(1) clearly intends, and yet to require a decision-maker to close his or her eyes to the existence of those constraints when making a development control decision. They are clearly relevant planning considerations in both exercises.

31. There seemed to be some suggestion by **Hunston** in the course of argument that a local planning authority, which did not produce a local plan as rapidly as it should, would only have itself to blame if the objectively-assessed housing need figures produced a shortfall and led to permission being granted on protected land, such as Green Belt, when that would not have happened if there had been a new-style local plan in existence. That is not a proper approach. Planning decisions are ones to be arrived at in the public interest, balancing all the relevant factors and are not to be used as some form of sanction on local councils. It is the community which may suffer from a bad decision, not just the local council or its officers.

32. Where this inspector went wrong was to use a quantified figure for the five year housing requirement which departed from the approach in the Framework, especially paragraph 47. On the figures before her, she was obliged (in the absence of a local plan figure) to find that there was a shortfall in housing land supply. However, decision-makers in her position, faced with their difficult task, have to determine whether very special circumstances have been shown which outweigh the contribution of the site in question to the purposes of the Green Belt. The ultimate decision may well turn on a number of factors, as I have indicated, including the scale of the shortfall but also the context in which that shortfall is to be seen, a context which may include the extent of important planning constraints in the district as a whole. There may be nothing special, and certainly nothing "very special" about a shortfall in a district which has very little undeveloped land outside the Green Belt. But ultimately that is a matter of planning judgment for the decision-maker.

Conclusion

33. The inspector did err in law in the approach she adopted to calculating the housing land requirement over the five year period. I would therefore quash her decision. The Section 78 appeal will consequently have to be redetermined in accordance with the guidance in this judgment, if my Lords agree. I would dismiss this appeal.

Lord Justice Ryder:

34. I agree.

Lord Justice Maurice Kay:

35. I also agree.