Neutral Citation Number: [2018] EWCA Civ 1808

Case No: C1/2017/3339

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE SUPPERSTONE
[2017] EWHC 2865 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2018

Before:

Lord Justice Davis
Lord Justice Lindblom
and
Lord Justice Hickinbottom

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Between:

Hallam Land Management Ltd. — **Appellant**

- and -

(1) Secretary of State for Communities and Local Government
(2) Eastleigh Borough Council — **Respondents**

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Mr Thomas Hill Q.C. and Ms Philippa Jackson (instructed by **Irwin Mitchell LLP**)
for the **Appellant**
Mr Zack Simons (instructed by **the Government Legal Department**)
for the **First Respondent**
Mr Paul Stinchcombe Q.C. and Mr Ned Helme (instructed by **Eastleigh Borough Council**)
for the **Second Respondent**

Hearing date: 3 May 2018

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Judgment Approved by the court or handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

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

2. With permission granted by Lewison L.J. on 6 March 2018, the appellant, Hallam Land Management Ltd., appeals against the order of Supperstone J., dated 16 November 2017, dismissing its application under section 288 of the Town and Country Planning Act 1990 by which it had challenged the decision of the first respondent, the Secretary of State for Communities and Local Government, in a decision letter dated 9 November 2016, dismissing an appeal under section 78 of the 1990 Act. The section 78 appeal was against the refusal by the second respondent, Eastleigh Borough Council, of outline planning permission for a development of up to 225 dwellings, a 60-bed care home and 40 care units, the provision of public open space and woodland, and improvements to Hamble Station, on land to the west of Hamble Lane, in Hamble.

3. The site of the proposed development is about 23 hectares of pasture, on the Hamble Peninsula, between the Hamble River and Southampton Water. It is not within any settlement, nor allocated for development in the Eastleigh Borough Local Plan Review (2001-2011), adopted in 2006. The settlements of Bursledon, Netley and Hamble lie, respectively, to the north, the west and the south. Because it is in the "countryside", the site is protected by policy 1.CO of the local plan. And because it lies within the Bursledon, Hamble, Netley Abbey Local Gap, it also has the protection of policy 3.CO.

4. An inquiry into the section 78 appeal was held by an inspector appointed by the Secretary of State on four days in June 2015. On 24 June 2015, the second day of the inquiry, the appeal was recovered by the Secretary of State, because it involved a proposal for "residential development of over 150 units … , which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities". In his report, dated 26 August 2015, the inspector recommended that the appeal be dismissed. The Secretary of State subsequently received a large number of further representations, some of them in response to letters he sent to the parties on 15 April 2016 and 29 June 2016. In those representations the Secretary of State received the parties' comments on two decisions of inspectors on appeals in which the supply of housing land in the council's area had been assessed – first, an appeal relating to a proposed development of up to 335 dwellings on land at Bubb Lane, Hedge End, which was dismissed on 24 May 2016, and secondly, an appeal relating to a proposed development of up to 100 dwellings on land at Botley Road, West End, which was allowed on 7 October 2016. In his decision letter on Hallam Land's appeal the Secretary of State largely agreed with the inspector's conclusions and accepted his recommendation.

5. The challenge to the Secretary of State's decision was made on four grounds. The first and second grounds went to his failure – unlawfully, it was said – to ascertain the extent of the shortfall against the five-year housing land supply in the council's area, and to provide adequate reasons for his relevant conclusions. The third and fourth grounds asserted that his decision was inconsistent with the conclusions on housing land supply and the weight to be given to policy 3.CO in an inspector's report, dated 25 August 2016, in an appeal relating to a proposed development of up to 680 dwellings on land at Winchester Road, Boorley Green. Supperstone J. rejected all four grounds.

The issues in the appeal

6. The appeal before us raises two main issues:

   (1) given that the council could not demonstrate the requisite five-year supply of housing land under government policy in the first National Planning Policy Framework ("NPPF"), published in March 2012, whether the Secretary of State established the shortfall with sufficient precision, and whether his relevant reasons were adequate; and
   (2) whether the Secretary of State erred in law in deciding Hallam Land's appeal without having regard to the inspector's report on the Boorley Green appeal.

7. These issues raise no question of law that has not already been amply dealt with in a series of cases on the meaning of relevant policies in the NPPF, and on the importance of consistency in planning decision-making.

NPPF policy

8. We are not concerned in this appeal with the policies in the revised NPPF, which was published on 24 July 2018. I shall refer only to the policies in the first NPPF, as if they were still extant.

9. Paragraph 47 of the NPPF states:

> "To boost significantly the supply of housing, local planning authorities should:
> …
> • identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements …
> …".

Paragraph 49 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."

Paragraph 14 contains the Government's policy for the "presumption in favour of sustainable development". It explains that:

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

The inspector's report

10. In his report the inspector noted, under the heading "The Case for the Council", that the council "acknowledge that they are not currently able to demonstrate a 5 year housing supply, as required by NPPF para 47" (paragraph 22). It was the council's case, however, that "the proposal is contrary to development plan policies which are not out of date, and is not the sustainable form of development for which there is a presumption in favour", and that "[even] if the presumption in NPPF para 14 was engaged, the negative aspects of the scheme, including the landscape impact and the loss of openness, would significantly and demonstrably outweigh the benefits" (paragraph 41).

11. Summarizing the case for Hallam Land, under the heading "The Case for the Appellants", he referred (in paragraph 62) to the uncontested evidence of its planning witness, Mr Usher:

> "62. The need for housing is demonstrated in Mr Usher's proof … , which has not been challenged by the Council, and which reflects the conclusions of the Local Plan Examination that the draft is unsound for failing to make adequate provision. The Council accept that they cannot demonstrate a five year supply, the level being shown by the appellants to be 2.92 years, or 1.78 years if the need for affordable housing is included."

Because the council would "not be able to meet its housing land requirements without the loss of significant areas of countryside…", it was "inevitable that there will be a change to the open and undeveloped character of such land". This was "not, of itself, an adequate ground to resist the development when there is no 5 year land supply, nor an up to date development plan" (paragraph 65).

12. In his conclusions the inspector identified the "main issues" as being "i) the effect of the development on the character and appearance of the countryside and its role in separating settlements, and ii) whether any harm would be outweighed by the potential benefits of the development, including a supply of market and affordable housing, and the improvement of station facilities" (paragraph 88).

13. He said that "[the] proposal would not fall within any of the specified uses in Local Plan policy 1.CO …". He concluded that there was "no doubt that a development of this scale would diminish the Local Gap both physically and, to some degree, visually, contrary to policy 3.CO …", and that "[in] these respects it would not comply with the development plan" (paragraph 90). He went on to find that "there are grounds to conclude that policy 1.CO may be regarded as out of date, but that there is not justification for giving any substantial reduction to the weight applied to policy 3.CO" (paragraph 96).

14. Under the heading "The Benefits of the Proposal" he noted that Hallam Land had particularly emphasized "the supply of market and affordable housing to meet an acknowledged need, and the provision of facilities for Hamble Station" (paragraph 107). He continued (in paragraph 108):

> "108. The Council acknowledge that they are not able to demonstrate more than a four and a half years supply of deliverable housing land, and it is the appellants' view that the actual level is significantly less. It is not necessary for this report to carry out a detailed analysis of the housing land supply position, which is better left to the Local Plan

> examination, where all the evidence is available to the inspector. However, it can be said that there is a material shortfall against the five year supply required by NPPF para 47, and that there is evidence of an existing need for affordable housing. In these circumstances, the provision of up to 225 homes, 35% of which would be affordable, would be a significant advantage arising out of the scheme. It is also the case that the new dwellings would meet sustainable construction and accommodation standards, and be of a mix to satisfy a wide range of housing needs. In these respects, the development would help meet the NPPF objectives of boosting significantly the supply of housing, and delivering a wide choice of high quality homes. …".

He accepted that "[the] choice of accommodation would also be boosted by the provision of 100 care and extra care spaces", and that "such accommodation would be likely to release a supply of existing, under-used homes to meet the general housing demand" (paragraph 109).

15. Bringing his conclusions together under the heading "Sustainability and Overall Conclusions", the inspector said (in paragraph 116):

> "116. When assessed against the criteria in para 7 of the NPPF, the supply of market and affordable housing, along with care facilities, would make a significant contribution to meeting the social role of sustainability, complemented by the provision of public open space, although, in the latter case, at the expense of the loss of the rural character of the public footpath crossing the site. The additional population and employment opportunities would assist the economic life of the area, as would the supply of homes in an area with an acknowledged shortfall. There would be the environmental and community benefits arising out of the station improvements (but having regard to the Council's alternative scheme), any spin-off advantages for traffic and pollution levels, from the off-site highway works, and the environmental and ecological aspects of the landscaping proposals."

He accepted that "[on] balance, this is a reasonably sustainable location in terms of accessibility" (paragraph 117). His final conclusion, however, went against the proposal. He found that "the loss of the gap between the surrounding settlements, involving the physical intrusion into an area of countryside, and contributing to the coalescence of those settlements, and loss of independent identity" would be contrary to policy 3.CO of the local plan and corresponding policies in the NPPF; that "[the] countervailing benefits of the scheme, as well as compliance with other development plan policies … would not outweigh the harm that this loss of separation would cause"; and that "[taken] as a whole, the proposal does not amount to the form of sustainable development for which there is a presumption in favour" (paragraph 118).

The decision in the Bubb Lane appeal

16. The inspector in the Bubb Lane appeal concluded (in paragraph 45 of his decision letter):

> "45. The evidence before me does not support EBC's view that it is 'a whisker' away from demonstrating a five year supply of deliverable housing land. Notwithstanding EBC's considerable efforts to improve housing provision, something in the order of a four year supply at the time of this Inquiry indicates that EBC has a considerable way to go to demonstrating a five year supply of deliverable sites. There is no convincing evidence that measures currently taken have been effective in increasing the rate of housing

delivery. The scale of the shortfall is a significant material consideration in determining this appeal. The contribution that the appeal scheme would make to the housing supply, and particularly to affordable housing provision in the area in accordance with EBLP Policy 74.H, would be a significant benefit of allowing the appeal."

Under the heading "Planning balance", the inspector concluded that "some weight can be given to the conflict with EBLP Policy 2.CO, arising from the harm that would result from the proposal to the separation of settlements …", but that "this weight is limited because of the significant shortfall in housing supply, and the lack of convincing evidence that EBC's efforts to address this are proving effective" (paragraph 52). He went on to say that, "[given] the current scale of the housing shortfall, the provision of additional market and affordable housing would be a significant benefit of the proposal" (paragraph 55). But he concluded, finally that "[in] my judgement, the adverse impacts of the proposal would significantly and demonstrably outweigh the benefits, when assessed against the policies in the *Framework* taken as a whole" (paragraph 57).

The decision in the Botley Road appeal

17. In the decision letter on the Botley Road appeal, the inspector stated these conclusions on "Housing land supply" (in paragraphs 18 and 19 of his decision letter):

"18. In conclusion, the final calculation taking a requirement figure of 1,120dpa, or 5,602 dwellings over the 5 year period, there is a 4.25 years' supply of housing land. Even on the Council's most favourable calculations, taking the Council's approach to the buffer and with its suggested contributions from all the disputed sites, the supply would still only be 4.71 years, but the evidence indicates that this is unlikely to be achievable.

19. There is therefore a significant shortfall in the amount of deliverable housing land, amounting to some 833 dwellings. The Leader of the Council gave evidence of the impressive efforts the Council had made to underpin housebuilding confidence following the recession, but this does not seem to have been translated into the provision of enough housing land. Net completions for the two years 2014/15 and 2015/16 amounted to less than one year's requirement. Referring to recent outline approvals, the Council said that it was making progress towards improving housing supply; recent permissions might enable it to exceed the OAN to a degree this year. Even if that happens, it is still well short of the requirement for the year. There is a significant shortfall to be made up, and the evidence that the gap might be closing quickly enough is far from convincing. The Council is not, as it claims, on the cusp of achieving a 5 year supply of deliverable housing land."

Under the heading "Effect on the countryside and the strategic gap", he noted (in paragraph 27) that "planning permission has been granted for a number of sites which have included dwellings in the strategic gaps", and went on to say:

"27. … But the Council's argument that present needs can be met substantially within the land outside the gaps is wholly unconvincing; even with the permissions on gap land, there is still no 5 year housing land supply and without them, even on the Council's unduly optimistic housing land supply calculations, there would only be 3.4 years' supply of housing land. On the contrary, the evidence is that the gaps are a factor in limiting the choice of sites available for the provision of housing, and that breaches of

> the strategic gap policy have proved necessary and will prove necessary to cater to meet current housing needs."

In his "Conclusion" the inspector said (in paragraph 52):

> "52. There is a significant shortfall in the supply of deliverable housing land for the next 5 years and no convincing evidence that the gap is diminishing to the extent that it will be made up within a reasonable time by identified deliverable sites. There is also severe under-delivery of affordable housing. The scheme would deliver up to 100 dwellings including up to 35% affordable homes and, although it is in the countryside and in a defined strategic gap, would cause little practical harm. In a situation where there is a pressing need for housing and affordable housing, and where both saved Policies 1.CO and 2.CO are out of date, the adverse impacts of the scheme to the landscape, the countryside and the strategic gap, and the other impacts of the scheme discussed above, would be slight and would not significantly and demonstrably outweigh the benefits. Indeed, even if saved Policy 2.CO were not accepted as being a policy relevant to the supply of housing, and not out-of-date, the considerable benefits of the scheme, weighed against the limited harm, would indicate a decision other than in accordance with that policy."

The post-inquiry representations

18. The further representations made by Hallam Land and by the council after the inquiry largely concerned the status of policies 1.CO and 3.CO of the local plan for the purposes of NPPF policy, in the light of this court's decision in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2016] EWCA Civ 168, which was handed down on 17 March 2016, and the weight to be given to those policies in the absence of a five-year supply of housing land.

19. In its further representations dated 15 April 2016, in response to the Secretary of State's letter of the same date, the council asserted that it was now "able to demonstrate a 4.93 year supply" of housing land (paragraph 2.7.2(1)), and that "the action which has been taken to address the shortfall has been both considerable and effective" (paragraph 2.7.2(2)). In further representations dated 5 May 2016, Hallam Land rejected the council's suggestion that it now had a housing land supply of 4.93 years (paragraph 5). On 11 May 2016 the council submitted additional representations, referring to the planning permissions it had granted for housing development since the inquiry (paragraph 2.8 and Appendix 5), and contending that Hallam Land had failed to recognize "the wide range of measures being taken by the Council to boost housing supply" (paragraph 2.9). Hallam Land responded to those representations with further representations of its own, dated 24 May 2016, and took issue again with the council's argument that there was now a housing land supply of 4.93 years. That figure was "not based upon an up to date SHMA", was "not tested", and was "not reflective of unmet need in adjacent areas" (paragraph 8). Its case, it said, "had always been that there remains a substantial shortfall" and it "[continued] to rely upon its evidence and submissions as submitted to the inquiry" (paragraph 10). The council was "still unable to demonstrate a 5YHLS, even against its own target (which is not accepted to be correct)". Also on 24 May 2016, the council sent the inspector's decision letter in the Bubb Lane appeal to the Secretary of State, drawing his attention to it as a relevant decision.

20. On 17 June 2016 the council made yet further representations, "in order that the decision can be taken upon the best and most up-to-date information …" (paragraph 1.1). It now resiled

from its previous concession that policy 3.CO was a policy "for the supply of housing", and, in the absence of a five-year supply of housing land, "out of date" (paragraphs 2.4 and 3.1 to 3.5). It said it would shortly provide "an updated position in respect of its housing land supply reflecting further (recent) changes of circumstance, including its agreement for the purposes of another inquiry [in the Botley Road appeal] (and in the light of the conclusions of the Bubb Lane Inspector) that the full objectively assessed needs for Eastleigh should be taken to be 630 dwellings per annum" (paragraph 4.1). The council provided its promised "Update on Housing Land Supply" on 23 June 2016. This referred to the conclusion of the inspector in the Bubb Lane appeal that "the OAN for Eastleigh was 630dpa", which had now been reflected in the statement of common ground for the imminent inquiry into the Botley Road appeal (paragraphs 2.1 and 2.2). The council's evidence for that inquiry explained that "on its preferred approach [it] is able to demonstrate a 4.86 year supply" (paragraph 2.3). Its position therefore remained that although it could not demonstrate a five-year supply of deliverable housing sites, it was "very close to being able to do so" (paragraph 2.4).

21. In representations dated 19 July 2016, in response to the Secretary of State's letter of 29 June 2016, Hallam Land attacked the council's "volte face" on the status of policy 3.CO (paragraphs 4 to 12). It also made clear that it did not accept the council's "latest attempt to revise its case on the extent of its 5YHLS …", and that it maintained the position it had taken in the representations it had submitted in May 2016 (paragraph 13).

22. In a letter dated 13 October 2016 to Mr Barber, the Secretary of State's decision officer, Barton Willmore, on behalf of Hallam Land, asked him to draw to the Secretary of State's attention the inspector's decision in the Botley Road appeal, "in order that he is fully appraised of the recent approach of one of his senior Planning Inspectors … in relation to a series of identical issues which he will now be considering when making a decision …" in this case. Barton Willmore pointed out that the inspector had rejected "the proposition that [the council] can meet its housing land requirements without impinging upon land which is designated as gap", and had concluded that policy 2.CO "is a relevant policy for the supply of housing". They argued that an "identical conclusion" must follow for policy 3.CO in this case. They referred to "the principle often expounded by the Courts that it is desirable that there be consistency in planning decision-making". It was therefore "highly important", they said, that the Botley Road decision, "relating to a virtually identical issue", was "formally before the Secretary of State" in this appeal. They also emphasized the fact that the inspector's decision letter dealt directly with the issue of housing land supply, "exposing a significant shortfall in deliverable housing land, amounting to some 833 dwellings". They quoted paragraph 27 of the decision letter in full, and also the inspector's conclusion in paragraph 52 that "there is a significant shortfall in the supply of deliverable housing land for the next 5 years and no convincing evidence that the gap is diminishing to the extent that it will be made up within a reasonable time by identified deliverable sites".

23. The council did not respond to those representations, but in an e-mail to the Secretary of State dated 3 November 2016, drew his attention to the inspector's decision in an appeal relating to proposed housing development on a site at Hamble Lane – the Botley Road appeal – and, in particular, what he had said about policy 2.CO, "which also applies to Saved Policy 3.CO". But it said it did not intend to provide further submissions on this point, and was drawing the inspector's decision to the attention of the Secretary of State "in the interests of full disclosure".

The Secretary of State's decision letter

24. In his decision letter the Secretary of State said that he agreed with the inspector's conclusions, "except where stated", and his recommendation (paragraph 3).

25. He referred to the representations he had received after the inquiry, including those made in response to his letters of 15 April 2016 and 29 June 2016, in the light of the judgment of this court in *Hopkins Homes Ltd.*. He confirmed that those representations had been circulated to the parties (paragraphs 5 and 6). He then referred (in paragraph 7) to the further representations he had received in October and November 2016:

> "7. The Secretary of State has also received representations from Barton Willmore dated 13 October 2016, and from Eastleigh Borough Council dated 3 November to which he has given careful consideration. The Secretary of State has also received other representations, set out at Annex A, to which he has given careful consideration. He is satisfied that the issues raised do not affect his decision, and no other new issues were raised to warrant further investigation or necessitate additional referrals back to the parties."

He said that, "[in] reaching his decision", he had "taken account of all the representations and responses referred to in paragraphs 5-7" (paragraph 8).

26. When he came to "The Policy Context" he concluded that policies 1.CO and 3.CO of the local plan were both "out-of-date" (paragraphs 14 to 16). But he went on to qualify this conclusion (in paragraph 17):

> "17. The Secretary of State has considered carefully the Inspector's analysis at IR93-100 on the matter of whether Policy 3.CO would be out of date through no longer meeting the development needs of the Borough, and whether there is justification for reducing the weight applied to that policy. The Secretary of State acknowledges that its weight should be reduced because he has found it to be out-of-date, but taking into account its consistency with the Framework, its role in protecting the Local Gap and the limited shortfall in housing land supply, he concludes that he should still afford significant weight to Policy 3.CO."

27. As for "The Benefits of the Proposal", he said this (in paragraph 19):

> "19. The Secretary of State notes the Inspector's comment (IR108) that at the time of inquiry the Council were not able to demonstrate more than a four and a half years supply of deliverable housing land, and that there is evidence of an existing need for affordable housing. Whilst the Secretary of State notes that the Council are now of the view that they are able to demonstrate a 4.86 year supply, he agrees with the Inspector that the provision of up to 225 homes, 35% of which would be affordable, would be a significant advantage arising out of the scheme, and it would help meet the objectives of the Framework by boosting significantly the supply of housing and delivering a wide choice of high quality homes. The Secretary of State notes too that the choice of accommodation would also be boosted by the provision of 100 care and extra care spaces (IR109)."

28. On the proposal's "Sustainability" he said (in paragraph 25):

"25. In terms of sustainability, the Secretary of State agrees with the Inspector's conclusion (IR116) that, when assessed against the policies in the … Framework taken as a whole, the supply of market and affordable housing, along with care facilities, would make a significant contribution to meeting the social role of sustainability, complemented by the provision of public open space (although he acknowledges that the latter is at the expense of the loss of the rural character of the public footpath crossing the site). Furthermore, he agrees that the additional population and employment opportunities would assist the economic life of the area, as would the supply of homes in an area with an acknowledged shortfall. In addition, he recognises, like the Inspector, the environmental and community benefits arising out of the station improvements identified at paragraphs 20-21 above. For the reasons given by the Inspector at IR117, the Secretary of State concludes that, on balance, this is a reasonably sustainable location in terms of accessibility."

29. Under the heading "Planning balance and overall conclusion" the Secretary of State said (in paragraphs 29 to 36):

"29. For the reasons given above, the Secretary of State concludes that the proposal is not in accordance with the development plan policies 1.CO and 3.CO and is not in accordance with the development plan as a whole. He has gone on to consider whether material considerations indicate that the proposal should be determined other than in accordance with the development plan.

30. The Secretary of State notes that in their letter of 23 June 2016, the Council updated their position on the supply of deliverable housing land, now claiming to be able to demonstrate a 4.86 year supply. In the absence of a 5-year housing land supply, and having concluded that policies 1.CO and 3.CO are relevant policies for the supply of housing, the presumption in favour of sustainable development is engaged, meaning that permission should be granted unless any adverse impacts of doing so significantly and demonstrably outweigh the benefits.

31. He considers that the provision of market and affordable housing in an area with an acknowledged shortfall, along with care facilities in this case carries substantial weight in favour of the development. The additional population and employment opportunities would assist the economic life of the area, as would the supply of homes in an area with an acknowledged shortfall, to which he gives moderate weight. The environmental and community benefits arising out of the station improvements carry moderate weight in favour of the proposal.

32. Set against the identified positive aspects is the environmental and social damage which would arise out of the loss of the gap between the surrounding settlements, involving the physical intrusion into an area of countryside, and contributing to the coalescence of those settlements, and loss of independent identity. The Secretary of State considers that this would be contrary to those policies of the Framework which apply the principle of recognising the different roles and character of different areas, and this carries significant weight against the proposal. He further considers that the loss of "best and most versatile" agricultural land carries moderate weight against the proposal.

33. The Secretary of State also considers that the appeal site performs a function which is specific to its location and which would be permanently undermined by the development.

34. The Secretary of State considers overall that the adverse impacts of the proposal would significantly and demonstrably outweigh its benefits.

35. The Secretary of State has taken into account the wide range of judgments and appeal decisions referred to in the inquiry and the post-inquiry representations but, having considered all the matters raised, he concludes that none is of such weight as to alter the balance of his conclusions.

36. Overall he concludes that there are no material considerations which indicate that he should determine the case other than in accordance with the development plan. The Secretary of State therefore concludes that your client's appeal should be dismissed."

He therefore agreed with the inspector's recommendation and dismissed the appeal (paragraph 37).

The Boorley Green appeal decision

30. In a decision letter dated 30 November 2016, about three weeks after he had issued his decision on Hallam Land's appeal, the Secretary of State allowed the Boorley Green appeal. The inquiry into that appeal had taken place in May 2016. The inspector's report, though dated 25 August 2016, was released only with the Secretary of State's decision letter, in the normal way. Like the site in Hallam Land's appeal, the Boorley Green site is in the "countryside", protected by policy 1.CO of the local plan, and also within an area protected under policy 3.CO, the Botley-Boorley Green Local Gap.

31. The inspector in the Boorley Green appeal concluded that the supply of housing land in the council's area was "very close to 4 years", observing that this was consistent with the conclusion reached on this question by the inspector in the Bubb Lane appeal – that there was "something in the order of a four year supply" (paragraph 12.16 of the Boorley Green inspector's report). He found that "the HLS is around 4 years". He said that, at this level, it "falls well short of that required and has done for many years …" (paragraph 12.45). He concluded that "the benefits of housing and AH, particularly where the supply is significantly below 5 years and the history of delivery is poor, warrant considerable weight …" (paragraph 12.47). He described the shortfalls in land for housing and affordable housing as "substantial" (paragraph 12.55).

32. In his decision letter, under the heading "Housing supply", the Secretary of State said (in paragraph 17):

"17. The Secretary of State has given very careful consideration to the Inspector's analysis of the 5 year housing land supply position at IR12.10-12.20. He notes that it is common ground that the Council cannot demonstrate the 5 year housing land supply expected at paragraph 47 of the Framework (IR12.10); and agrees with the Inspector's conclusions at IR12.21 that, on the basis of the information presented at the Inquiry and assuming that this decision is issued within the statutory timetable set, the housing land supply should be regarded as standing at around 4 years. The Secretary of State

> also agrees with the Inspector's conclusion at IR12.22 that considerable weight should be attributed to the benefits to which the scheme would bring through delivering affordable housing."

33. Under the heading "Planning balance and overall conclusion", the Secretary of State concluded that "[the] proposal would make a significant contribution in terms of helping to make up the deficit against the 5 year housing land supply and the need for affordable housing" (paragraph 24). Agreeing with the inspector's recommendation, he allowed the appeal.

Did the Secretary of State establish the extent of the shortfall against the five-year supply of housing land with sufficient precision, and were his reasons adequate?

34. Before Supperstone J., and again before us, Mr Thomas Hill Q.C., for Hallam Land, argued that, in any case where there is a dispute as to the five-year supply of housing land, the Secretary of State, or his inspector, is obliged to establish the level of supply and the extent of any shortfall. This, Mr Hill submitted, was because the local planning authority's failure to demonstrate a five-year supply of housing land will bring into play the balancing exercise provided for in paragraph 14 of the NPPF, and the extent of the shortfall, if there is one, will influence the weight given by the decision-maker to the benefits of the proposed development, and to its conflict with the relevant restrictive policies of the development plan. He sought to strengthen this submission with observations made by judges at first instance – in particular, *Phides Estates (Overseas) Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 827 (Admin) (at paragraph 60), *Shropshire Council v Secretary of State for Communities and Local Government* [2016] EWHC 2733 (Admin) (at paragraph 28), and *Jelson Ltd. v Secretary of State for Communities and Local Government* [2016] EWHC 2979 (Admin) (at paragraph 13).

35. In this case, Mr Hill submitted, the Secretary of State had failed to make the planning judgments he needed to make. He noted, in paragraph 19 of his decision letter, that the council was "now of the view that [it was] able to demonstrate a 4.86 year supply". But he did not say whether he accepted that this figure was accurate. Nor did he deal with the material before him, including the decision letters in the Bubb Lane and Botley Road appeals, showing that the council was now able to demonstrate only a supply of 4.25 years or even less than that. This could not sensibly be described as a "limited shortfall" – the expression the Secretary of State used in paragraph 17. In fact, Mr Hill submitted, the Secretary of State had failed to reach any conclusion on this question. His decision was vitiated by that failure.

36. Supperstone J. rejected those submissions. He did not accept that one can find in the authorities relied upon by Mr Hill the principle that the decision-maker is required "to determine a workable [five-year housing land supply] or range" in every case. He accepted the argument of Mr Zack Simons, for the Secretary of State, and Mr Paul Stinchcombe Q.C., for the council, that in a case such as this, where there was "inadequate housing supply on either [side's] figures", the Secretary of State was "not required to fix a figure for the extent of that inadequacy" (paragraph 22). He went on to say that "[in] making judgments on the issues of housing requirements and housing supply the decision maker was not required to fix a figure for the precise extent of the Council's housing shortfall". In his view the "key question" was "whether the housing supply is above or below five years". This was what Lord Carnwath had called the "important question" in paragraph 59 of his judgment in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865 (paragraph

23). The tenor of relevant decisions at first instance was to the same effect – for example, the observation of Gilbart J. in *South Oxfordshire District Council v Secretary of State for Communities and Local Government* [2016] EWHC 1173 (Admin), at paragraph 102, that it is "not necessary to conduct a full analysis of requirements and supply in every case", and "[whether] one has to do so depends on the circumstances".

37. On the basis of the inspector's conclusion in paragraph 108 of his report, having regard to "the updated material before him from the Bubb Lane [decision letter] and the Botley Road [decision letter]", and Hallam Land having provided "no further evidence" on housing land supply since the inquiry, the Secretary of State was, said Supperstone J., "entitled to note the agreed shortfall, describe it as "limited" (DL17), and agree with his Inspector that the scheme's contribution to the Council's housing shortage would be "significant" (DL19)". Nothing more was required (paragraph 29).

38. In his submissions to us, Mr Hill argued that the authorities on which Supperstone J. had based his conclusions did not deny the need for a decision-maker to establish the extent of a shortfall against the five-year supply of housing land when conducting the balancing exercise under paragraph 14 of the NPPF. Relevant parts of the judgment of the Court of Appeal in *Hopkins Homes Ltd.* – particularly paragraph 47 – which were effectively endorsed by Lord Carnwath in the Supreme Court, indicate that there is such a requirement. Detailed analysis may not always be necessary. A range or an approximate figure may be enough. But, submitted Mr Hill, the judge's view that the crucial question is simply whether the supply of housing land exceeds or falls below five years was unduly simplistic. In this case there were several factors that made it imperative for the Secretary of State to define the shortfall: in particular, the size of the development – more than 150 dwellings – which had led to the appeal being recovered by the Secretary of State; the significance of the shortfall for the weighting of policies in the development plan that went against the proposal, which could be decisive, especially policy 3.CO of the local plan; and the fact that there were other relevant and recent appeal decisions in which the scale of the shortfall had been considered, and on which the parties had made representations. In the circumstances, Mr Hill submitted, it was not enough for the Secretary of State merely to describe the shortfall as "limited", without resolving what it actually was by the time he made his decision.

39. Mr Hill also submitted that, in any event, the Secretary of State had failed to explain how and why he had reached a markedly different conclusion on housing land supply from the conclusions recently reached by the inspectors in the Bubb Lane and Botley Road appeals – in spite of the further representations he had received from Hallam Land in the light of them. Those two decisions were clearly relevant in this case. Yet the Secretary of State did not even refer to them in his decision letter. He said he had given "careful consideration" to the representations made after the inquiry, but in this important respect it is not clear that he had in fact done so. In both cases the decision-maker had identified a considerable shortfall against the required five-year supply materially greater than the council had conceded here. In the Bubb Lane appeal the inspector had found "something in the order of a four year supply" (paragraph 45) and had described the shortfall as "significant" (paragraph 52). In the Botley Road appeal the supply was found to be 4.25 years. And the inspector there had also described the shortfall – which amounted to "some 833 dwellings" – as "significant" (paragraphs 18, 19 and 52).

40. Those conclusions, and those descriptions of the shortfall, Mr Hill submitted, simply cannot be reconciled with the figure of 4.86 years' supply put forward by the council in its "Update on Housing Land Supply" of 23 June 2016. An explanation of some kind was clearly called for in

the Secretary of State's decision letter. None was provided. Even if he did not have to resolve the precise level of the shortfall, the Secretary of State had fallen short of his duty to provide intelligible and adequate reasons for his conclusion on an issue crucial to the outcome of the appeal (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] 1 W.L.R. 1953, at paragraph 36). In the circumstances it was not enough for him simply to refer to the shortfall as "limited", without more.

41. Mr Simons and Mr Stinchcombe supported the judge's analysis. They submitted that it is not always, or generally, a decision-maker's task to determine the precise level of housing land supply. The critical question will always be whether or not a five-year supply of housing land has been demonstrated. Under NPPF policy, the degree of detail required in ascertaining housing need and supply is left largely to the decision-maker's planning judgment in the circumstances of the case before him – as Gilbart J. emphasized in *Dartford Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 649 (Admin) (at paragraphs 43 to 45), and in *South Oxfordshire District Council* (at paragraph 102). Mr Stinchcombe pointed to the recent decision of this court in *Jelson Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 24 as lending support to this submission (see, in particular, paragraph 25). Mr Simons recalled Sir David Keene's warning in *City and District Council of St Albans v Hunston Properties Ltd.* [2013] EWCA Civ 1610 (at paragraph 26) about section 78 appeals descending into the kind of exercise appropriate only for the process of plan preparation.

42. In this case, Mr Simons and Mr Stinchcombe submitted, by the time the Secretary of State came to make his decision in November 2016, the evidence given by Hallam Land at the inquiry in June 2015 in contending for a housing land supply of between 1.78 and 2.92 years was stale. The Secretary of State did not have to go beyond his conclusions that the shortfall was now "limited", and that the provision of market and affordable housing in an area with an "acknowledged" shortfall merited "substantial weight". These conclusions were, in themselves, fully justified. The existence of a shortfall in housing land supply was not a "principal controversial issue" in this appeal, even if it was in the Bubb Lane and Botley Road appeals. The parties had drawn the Secretary of State's attention to the inspectors' decisions in those appeals. But that did not make it necessary for him to deal with those decisions in the reasons he gave for concluding as he did on the evidence in this case. The reasons he gave were sufficient to explain the decision he made.

43. Mr Hill's argument was persuasively presented, but I accept it only in part.

44. The Secretary of State's decision here was taken in the light of the judgment of this court in *Hopkins Homes Ltd.*, but before the Supreme Court had dismissed the subsequent appeals – though on the basis of a narrower reading of the policy in paragraph 49 of the NPPF. As this case shows, however, nothing turns on the difference between the so-called "wider" interpretation of paragraph 49, in which the phrase "policies for the supply of housing" embraces local plan policies that create and constrain the supply, and the "narrow" interpretation, which excludes policies that operate to constrain the supply but does not prevent the decision-maker from giving such policies reduced weight under the policy in paragraph 14 of the NPPF when five years' supply is not demonstrated. Either way, the consequences will, in the end, be the same. The weight given to a policy ultimately depends not on its status but on its effect – whether it enables the requisite five-year supply to be realized or acts contrary to that objective. Policies in a local plan are liable to carry less weight in the making of a decision on a proposal for housing development if – and because – their effect is to prevent a five-year supply of housing land (see the judgment of Lord Carnwath in *Hopkins Homes Ltd.*, at

paragraphs 59 and 61, followed in this court in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 22).

45. None of that is controversial here, nor should it be. As Lord Carnwath said in *Hopkins Homes Ltd.* (at paragraph 54), "the primary purpose of paragraph 49 [of the NPPF] is simply to act as a trigger to the operation of the "tilted balance" under paragraph 14". And he went on to say (in paragraph 59) that the "important question" is "not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47". If the local planning authority fails to demonstrate that supply, "it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies". In such a case "[the] shortfall is enough to trigger the operation of the second part of paragraph 14". As Lord Carnwath emphasized (in paragraph 61), a restrictive policy may not itself be "out of date" under paragraph 49, "but the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles".

46. As this court said in *Hopkins Homes Ltd.* (in paragraph 47), the policies in paragraphs 14 and 49 of the NPPF do not prescribe how much weight is to be given to relevant policies of the development plan in the determination of a planning application or appeal. Weight is always a matter for the decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H) (paragraph 46). It will "vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements". The decision-maker must judge "how much weight should be given to conflict with policies for the supply of housing that are out-of-date". This is "not a matter of law; it is a matter of planning judgment" (see the first instance judgments in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) (at paragraphs 70 to 75), *Phides* (at paragraphs 71 and 74), and *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government and Mid-Sussex District Council* [2015] EWHC 1173 (Admin) (at paragraphs 87, 105, 108 and 115)).

47. The NPPF does not state that the decision-maker must reduce the weight to be given to restrictive policies according to some notional scale derived from the extent of the shortfall against the five-year supply of housing land. The policy in paragraph 14 of the NPPF requires the appropriate balance to be struck, and a balance can only be struck if the considerations on either side of it are given due weight. But in a case where the local planning authority is unable to demonstrate five years' supply of housing land, the policy leaves to the decision-maker's planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth.

48. Relevant authority in this court, and at first instance, does not support the proposition that, for the purposes of the appropriate balancing exercise under the policy in paragraph 14 of the NPPF, the decision-maker's weighting of restrictive local plan policies, or of the proposal's conflict with such policies, will always require an exact quantification of the shortfall in the supply of housing land. This is not surprising. If the court had ever said there was such a

requirement, it would have been reading into the NPPF more than the Government has chosen to put there, and more than is necessarily implied in the policies it contains.

49. Several decisions at first instance were cited in argument before Supperstone J., including those in *Jelson Ltd.* (at paragraphs 2 and 13) – upheld on appeal, *Shropshire Council* (at paragraph 28), *South Oxfordshire District Council* (at paragraph 102), *Dartford Borough Council* (at paragraphs 44 and 45), *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2015] EWHC 1879 (Admin) (at paragraphs 42(ii) and 48) – upheld on appeal, and *Phides* (at paragraph 60). Mr Simons also referred to *Eastleigh Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin) (at paragraphs 17 and 18). It is not necessary to explore the facts of these cases, or to set out the relevant observations of the judges who decided them. In summary, however, three main points emerge.

50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in paragraphs 47 and 49 of the NPPF and the corresponding guidance in the Planning Practice Guidance ("the PPG"). The Government has chosen to express its policy in the way that it has – sometimes broadly, sometimes with more elaboration, sometimes with the aid of definitions or footnotes, sometimes not (see *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040, at paragraph 33; *Jelson Ltd.*, at paragraphs 24 and 25; and *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at paragraphs 36 and 37). It is not the role of the court to add to or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.

51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet.

52. Thirdly, the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker. It will not be the same in every case. The parties will sometimes be able to agree whether or not there is a five-year supply, and if there is a shortfall, what that shortfall actually is. Often there will be disagreement, which the decision-maker will have to resolve with as much certainty as the decision requires. In some cases the parties will not be able to agree whether there is a shortfall. And in others it will be agreed that a shortfall exists, but its extent will be in dispute. Typically, however, the question for the decision-maker will not be simply whether or not a five-year supply of housing land has been demonstrated. If there is a shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule applies. But it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant "non-housing

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

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

54. But what was his conclusion on housing land supply? He obviously accepted, as the council had acknowledged, that the requisite five-year supply had not been demonstrated. In paragraph 30 of his decision letter he referred to the "absence of a 5-year housing land supply". And in the same paragraph he made it plain that he was applying "the presumption in favour of sustainable development", which, as he said, meant "that permission should be granted unless any adverse impacts of doing so significantly and demonstrably outweigh the benefits". He went on, in the following paragraphs, to apply that presumption, in accordance with the policy in paragraph 14 of the NPPF. In the course of that balancing exercise, he referred, in paragraph 31, to the "acknowledged shortfall", which went into the balance on the positive side. All of this is clear.

55. Not so clear, however, is whether the Secretary of State reached any concluded view on the scale of the "acknowledged shortfall". His reference in paragraph 17 to "the limited shortfall in housing land supply" suggests he had not found it possible to accept Hallam Land's case at the inquiry, as recorded by the inspector in paragraph 62 of his report, that the supply of housing land was as low as "2.92 years, or 1.78 years if the need for affordable housing is included", or even the "material shortfall" to which the inspector had referred in paragraph 108, in the light of the council's concession that it was "not able to demonstrate more than a four and a half years supply of deliverable housing land". A "limited shortfall" could hardly be equated to a "material shortfall". It would have been a more apt description of the shortfall the council had now acknowledged in conceding, or contending, that it was able to demonstrate a supply of 4.86 years – the figure to which the Secretary of State referred in paragraphs 19 and 30 of his decision letter.

56. On a fair reading of the decision letter as a whole, I do not think one can be sure that the Secretary of State did fix upon a precise figure for the housing land supply. It may be that, in truth, he went no further than to conclude that the supply remained below five years. He certainly did not adopt the figures put forward by Hallam Land at the inquiry, nor did he even mention those figures. And he neither adopted nor rejected the council's position at the inquiry. Instead, he took care to say, in paragraph 19 of his decision letter, that he "notes" the inspector's comment that at the time of the inquiry the council was not able to demonstrate more than four and a half years' supply. He was equally careful not to adopt or reject the figure that was now put forward by the council – a supply of 4.86 years. In paragraph 19, again, he said merely that he "notes" the council was now of the view that it was "able to demonstrate a 4.86 year supply". In paragraph 30, once again, he used the word "notes" when referring to the position the council had taken in its letter of 23 June 2016 – "now claiming to

be able to demonstrate a 4.86 year supply". He was not, I think, unequivocally endorsing that figure, but rather was relying on it as proof of "the absence of a 5-year housing land supply".

57. The Secretary of State's conclusions on housing land supply are not said to be irrational on their face – nor could they be. If one leaves aside for the moment the decisions in the Bubb Lane and Botley Road appeals and what had been said about those decisions in the parties' further representations, they make sense. To describe the shortfall in housing land supply as "limited", as the Secretary of State did in paragraph 17, seems reasonable if he was assuming – though without positively finding – that the housing land supply now stood at or about 4.86 years. And there is nothing necessarily inconsistent between that conclusion and his later conclusions: in paragraph 19, that the amount of new housing proposed was a "significant advantage"; in paragraph 30, that the "presumption in favour of sustainable development" fell to be applied in this case; and, in paragraph 31, that the provision of housing in an area with an "acknowledged shortfall" carried "substantial weight in favour of the development".

58. All of this is logical, as far as it goes. It may reflect an assumption on the part of the Secretary of State that he could rely on the figure of 4.86 years for the housing land supply, or at least on a range of between four and half and 4.86 years, and that this was sufficient to found his conclusions on the weight to be given to the benefits of the housing development proposed and to its conflict with restrictive policies in the local plan.

59. This reading of the decision letter may be overly generous to the Secretary of State, because it resolves in his favour the doubt as to what figure, or range, he was actually prepared to accept for the present supply of housing land in the council's area. Assuming it to be correct, however, he can be acquitted of any misunderstanding or unlawful misapplication of NPPF policy. If he did adopt, or at least assume, a figure of 4.86 years' supply of housing land, or even a range of between four and half and 4.86 years, his approach could not, I think, be stigmatized as unlawful in either of those two respects. It could not be said, at least in the circumstances of this case, that he erred in law in failing to calculate exactly what the shortfall was. In principle, he was entitled to conclude that no greater precision was required than that the level of housing land supply fell within a clearly identified range below the requisite five years, and that, in the balancing exercise provided for in paragraph 14 of the NPPF, realistic conclusions could therefore be reached on the weight to be given to the benefits of the development and its conflict with relevant policies of the local plan. Such conclusions would not, I think, exceed a reasonable and lawful planning judgment.

60. However, even if that assumption is made in favour of the Secretary of State, there is in my view a fatal defect in his decision in his failure to engage with the conclusions on housing land supply in the recent decisions in the Bubb Lane and Botley Road appeals. Here, it seems to me, Mr Hill's argument is demonstrably well founded.

61. At least by the time the parties in this appeal were given the opportunity to make further representations, an important issue between them, and arguably the focal issue, was the extent of the shortfall in housing land supply. This was, or at least had now become, a "principal controversial issue" in the sense to which Lord Brown of Eaton-under-Heywood referred in *South Bucks District Council v Porter* (at paragraph 36 of his speech). A related issue was the weight to be given to restrictive policies in the local plan – in particular, policy 3.CO. These were, in my view, clearly issues that required to be properly dealt with in the Secretary of State's decision letter, in the light of the representations the parties had made about them, so as to leave no room for doubt that the substance of those representations had been understood and properly dealt with. This being so, it was in my view incumbent on the Secretary of State to

provide intelligible and adequate reasons to explain the conclusions he had reached on those issues, having regard to the parties' representations.

62. There is no explicit consideration of the inspectors' decisions in the Bubb Lane and Botley Road appeals in the Secretary of State's decision letter, nor any reference to them at all, despite the fact that they had been brought to his attention and their implications addressed in the further representations made to him after the inquiry. The inspectors' conclusions on housing land supply in those two decisions, and the consequences of those conclusions for the weight to be given to local plan policies, clearly were material considerations in this appeal. They would, in my view, qualify as material considerations on the basis of the case law relating to consistency in decision-making (see the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P. & C.R. 137, at p.145, most recently followed by this court in *DLA Delivery Ltd. v Baroness Cumberlege of Newick and Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, at paragraphs 29, and 42 to 56). But leaving aside the principle of consistency, they would have been, it seems to me, material considerations if only on the basis that they represented an up to date independent assessment of housing land supply in the council's area, which had been squarely put before the Secretary of State. Yet he said nothing at all about them. Nor is there any explicit reference to the relevant content of the representations the parties had made. It is clear that the reference in paragraph 19 of the decision letter to the council's view that it was now able to demonstrate 4.86 years' supply of housing land was taken from the "Update on Housing Land Supply" that it produced on 23 June 2016. But he did not refer to the very firm and thoroughly reasoned conclusions of the inspector in the Botley Road appeal, which were reached in the light of that evidence.

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

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

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

66. The significance of the parties' dispute over the extent of the shortfall in housing land supply was not confined to that issue alone. It also bore on the question of how much weight should be given to restrictive policies in the local plan – in particular, policy 3.CO – for the purposes of the balancing exercise required by the policy in paragraph 14 of the NPPF. A factor to which the Secretary of State attached some importance in determining that "significant weight" should be given to policy 3.CO was that the shortfall in housing land supply was, as he said in paragraph 17 of the decision letter, only "limited". This was an important issue in itself, and potentially decisive in the planning balance.

67. In the circumstances I am driven to the conclusion that the Secretary of State's reasons were in this respect deficient, when considered in the light of the familiar principle in *South Bucks District Council v Porter*, and that Hallam Land was substantially prejudiced by the failure to provide intelligible and adequate reasons. The parties, and in particular Hallam Land, whose section 78 appeal was being dismissed after a protracted exchange of post-inquiry representations, were entitled to know why the Secretary of State had concluded as he did not only on the question of housing land supply but also on its consequences, in spite of two very fresh appeal decisions in which the question of supply had been decided in a materially different way. This was a matter on which proper reasons were undoubtedly called for, but were not given. In the absence of those reasons, one cannot be sure that the Secretary of State had come to his conclusion lawfully, having regard to all material considerations. It follows, in my view, that in failing to provide such reasons the Secretary of State erred in law and his decision is liable to be quashed for that error. I can see no basis on which the court, in the circumstances, could properly withhold an order to quash his decision. To do so, we would have to speculate as to the outcome of Hallam Land's section 78 appeal on the assumption that the Secretary of State had regard to all material considerations, including the decisions in the Bubb Lane and Botley Road appeals.

68. Having come to that conclusion, I can take the other main issue more shortly.

Should the Secretary of State have had regard to the inspector's report on the Boorley Green appeal?

69. The argument here is that the Secretary of State's conclusion in this case that the shortfall in housing land supply was "limited" is impossible to reconcile with the conclusion in his decision letter in the Boorley Green appeal, issued about three weeks later, that the supply of housing land in the council's area was "around four years". This offended the principle that there is a public interest in planning decisions in like cases being consistent, and that, in cases of inconsistency, the decision-maker should explain that inconsistency (see the judgment of Mann L.J. in *North Wiltshire District Council*). Where relevant matters arose after the close of an inquiry, such as an inspector reporting to him on an appeal raising closely similar planning issues in the same area as the appeal in hand, it was incumbent on the Secretary of State to take reasonable steps to inform himself of those matters, and so avoid inconsistent decisions. The inspector's report in the Boorley Green appeal fell into that category. By the time the Secretary of State eventually came to make his decision on Hallam Land's appeal, he had had that report for almost three months.

70. Supperstone J. rejected this argument, on the simple basis that the Secretary of State's decision in the Boorley Green appeal had not yet been made when the decision in this case was issued, and "accordingly, it cannot have been a material consideration to which the principle of

consistency can apply". Although the inspector's report on the Boorley Green appeal had been submitted to the Secretary of State before he made his decision in this case, "the principle of consistency in decision taking has no application to Inspectors' reports which are not decisions" (paragraph 33 of the judgment). The proposition that the Secretary of State must always have imputed knowledge of an inspector's report in an undetermined appeal was incorrect (paragraph 35). So was the submission that it was irrational, and a breach of the principle recognized by the House of Lords in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] 3 W.L.R. 641 that a decision-maker must take reasonable steps to acquaint himself of relevant matters, for the Secretary of State not to take into account an unpublished inspector's report in another appeal that was yet to be decided on its own, different facts (paragraph 38).

71. The judge also accepted the submission of Mr Simons and Mr Stinchcombe that there was, in fact, no material inconsistency between the two decisions. In both cases the Secretary of State had found that there was less than the requisite five-year supply of housing land, and that the consequences provided for by NPPF policy must follow. In his decision on the Boorley Green appeal the Secretary of State did not adopt the inspector's description of the shortfall as "significant". His conclusion in that case that the housing land supply "should be regarded as standing at around four years" was consistent with his corresponding conclusions in his decision in this case. And in both cases, given the shortfall, he gave significant weight to the provision of housing: "substantial weight" in this case, "considerable weight" in the Boorley Green case (paragraph 39). The Secretary of State's application of policy 3.CO of the local plan in this appeal, the weight he gave to that policy, and his relevant reasons did not betray an inconsistent approach with his inspector's or his own in the Boorley Green appeal (paragraphs 40 to 46).

72. I agree with the judge's approach to this issue, and the conclusions he reached upon it, essentially for the reasons he gave.

73. The principle of consistency in planning decision-making is not a principle of law. It is a principle of good practice, which the courts have traditionally supported and the Court of Appeal has recently confirmed in *DLA Delivery Ltd.*.

74. The principle applies to decisions of planning decision-makers, and is exercised with a view to the public interest in planning decisions in like cases being consistent, or if inconsistency arises, a clear explanation for it being given in the second of the two decisions concerned (see *DLA Delivery Ltd.*, at paragraphs 28 to 30, 46 and 47). It does not apply, in the case of decisions on planning appeals made by the Secretary of State, to inspectors' reports that have been submitted to the Secretary of State but on which his decision is still to be made at the time of the decision subject to challenge in the case before the court. The purpose and status of such a report is, essentially, that of advice given to the Secretary of State by his appointed inspector, which will inform the decision itself, but which the Secretary of State is not bound to follow and is free to reject, so long as he gives adequate reasons for doing so. It is an intermediate stage in the process of decision-making. The assessment and conclusions contained in the report do not constitute the Secretary of State's decision, nor do they form any part of that decision unless and until they are incorporated into it, whether in whole or in part. Usually, as in the Boorley Green appeal, the inspector's report is not published until the Secretary of State has made his decision. On occasions, however, it may be released by the Secretary of State with a view to inviting further representations or evidence from the parties to deal with a particular issue raised in it.

75. It would be a radical and unjustified extension to the principle of consistency to embrace within it unpublished inspectors' reports, whose conclusions and recommendations the Secretary of State may in due course choose to accept or reject. Indeed, this would not be an extension of the principle of consistency but a distortion of it, because the basis for it would not be consistency between one decision and another, but consistency between a decision and a non-decision, a decision yet to be made. That is not a principle the court has ever recognized, nor even, in truth, a meaningful principle at all.

76. In my view, therefore, this part of the appeal is mistaken, and I would reject it.

Conclusion

77. For the reasons I have given, I would allow this appeal on the first issue alone and on the basis I have indicated.

Lord Justice Hickinbottom

78. For the reasons given by Lindblom L.J., with which I entirely agree, I agree that the appeal is allowed on the first issue alone.

Lord Justice Davis

79. I also agree that the appeal should be allowed.

80. I would like to make some observations of my own on the first issue.

81. Clearly a determination of whether or not there is a shortfall in the 5 year housing supply in any particular case is a key issue. For if there is then the "tilted balance" for the purposes of paragraph 14 of the NPPF comes into play.

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

83. The reason is obvious and involves no excessive legalism at all. The extent (be it relatively large or relatively small) of any such shortfall will bear directly on the weight to be given to the benefits or disbenefits of the proposed development. That is borne out by the observations of Lindblom LJ in the Court of Appeal in paragraph 47 of *Hopkins Homes*. I agree also with the observations of Lang J in paragraphs 27 and 28 of her judgment in the *Shropshire Council* case and in particular with her statements that "…Inspectors generally will be required to make judgments about housing need and supply. However these will not involve the kind of detailed analysis which would be appropriate at a "Development Plan inquiry" and that "the extent of any shortfall may well be relevant to the balancing exercise required under NPPF 14." I do not

regard the decisions of Gilbart J, cited above, when properly analysed, as contrary to this approach.

84. Thus exact quantification of the shortfall, even if that were feasible at that stage, as though some local plan process was involved, is not necessarily called for: nor did Mr Hill QC so argue. An evaluation of some "broad magnitude" (in the phrase of Lindblom LJ in his judgment) may for this purpose be legitimate. But, as I see it, at least some assessment of the extent of the shortfall should ordinarily be made; for without it the overall weighing process will be undermined. And even if some exception may in some cases be admitted (as connoted by the use by Lang J in *Shropshire Council* of the word "generally") that will, by definition, connote some degree of exceptionality: and there is no exceptionality in the present case.

85. In this case (and in striking contrast to the Bubb Lane and Botley Road cases) a sufficient evaluation of the extent of the shortfall did not happen. Instead, the Secretary of State, having "noted" the council's updated figure of 4.86 year supply and without any express reference to the Bubb Lane and Botley Road cases, simply announced a bald conclusion that there was a "limited" shortfall in the housing land supply. Broad statements elsewhere in the decision letter to the effect that "the Secretary of State has taken into account" the post-inquiry representations do not overcome the defect of a demonstrable lack of engagement with the actual extent of the shortfall: thereby resulting in an absence of a reasoned conclusion on this material issue. Moreover, such a conclusion departs – again, for no stated reason – from the inspector's statement in paragraph 108 of his report that "it can be said that there is a material shortfall against the five year supply…".

86. Although it was submitted on behalf of the council that the result would still inevitably have been the same, even had the extent of the shortfall been properly addressed, I cannot accept that that is necessarily so. So the matter must be the subject of further consideration.

87. Thus I too would allow the appeal on this basis. I would reject the appellant's arguments on the second issue, for the reasons given by Lindblom LJ.