# PLANNING ADVISORY SERVICE

# PLAN-MAKING CASE LAW UPDATE

## MAIN ISSUE 1: HOUSING NUMBERS

**November 2014**

## About this document

This document forms part of a series of 4 documents providing updates on case law in the plan-making sphere, accompanied by the relevant Official Transcripts. The documents are summaries only and are no substitute for seeking qualified internal or external advice, in what remains a highly complex, fast-moving and litigious area.

In summarising the cases, we do not rehearse the facts at any length. These are complex in every case and there is no better description than the text of the judgments. However we have provide lengthy citations from the ratio of the decisions to encourage consideration of the particular way in which the High Court and the Court of Appeal interprets policy. All references to the National Planning Policy Framework (NPPF) are in the format, NPPF x (with x being the paragraph number).

This paper was prepared by No 5 Chambers on behalf of PAS.

Italics and emphasis are our own.

## Introduction

1. The question of housing numbers give rise to two principal issues at local plan examination:

   Q1: Has the Local Planning Authority correctly objectively assessed its need, in accordance with the requirements of national planning policy?

   Q2: Has the Local Planning Authority correctly identified a five year supply of housing?

2. To both of these one might add: have the Local Planning Authority's (LPA) actions or omissions amounted to an error of law?

3. In the National Planning Policy Framework (NPPF) era, there have been five principal High Court cases (plus one Court of Appeal appeal) that have provided guidance on the correct parameters, with a particular focus on the correct interpretation of NPPF 47:

   (a) *R (Hunston Properties Ltd) v SSCLG and St Albans City and District Council* [2013] EWHC 2678 (5 September 2013) [2013] EWCA Civ 1610 (12 December 2013)

   (b) *Zurich Assurance Ltd v Winchester City Council* [2014] 578 (Admin) (18 March 2014)

(c) *Gallagher Estates Ltd v Solihull MBC* [2014] EWHC 1283 (Admin) (30 April 2014)

(d) *Grand Union Investments Ltd v Dacorum BC* [2014] EWHC 1894 (Admin) (12 June 2014)

(e) *Gladman Development Ltd v Wokingham BC* [2014] EWHC 2320 (Admin) (11 July 2014)

## Legislative and Policy Framework

*Independent Examination and Soundness*

4. Before considering the cases, it is helpful to examine the statutory framework for examination of development plan documents under the Planning and Compulsory Purchase Act ("PCPA") 2004.[1]

*Having Regard to National Policy and Guidance*

5. The first half of section 20 PCPA provides (so far as relevant):

> "*(1) The local planning authority must submit every development plan document to the Secretary of State for **independent examination**.*
> *...*
> *(5) **The purpose of an independent examination is to determine in respect of the development plan document**–*
>
> > *(a) **whether it satisfies the requirements of sections 19** and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;*
> > *(b) **whether it is sound**; and*
> > *(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.*"

6. Section 19(2) PCPA provides (so far as relevant):

> "*(2) In preparing a development plan document or any other local development document the local planning authority **must have regard to**–*
> > *(a) **national policies** and **advice contained in guidance** issued by the Secretary of State;*

[1] "Development plan document" is a broad term defined in section 38 PCPA. The theoretical extent of the terms is highly complex, but in practice, there will be little doubt that a Local Plan Part 1 or Core Strategy (and other terms) are a DPD

*…*

7. Simply put, section 20(5) therefore requires the Plan Inspector to undertake a three-fold test, examining compliance with

    (a) the National Planning Policy Framework, the Planning Practice Guidance (sections 19) and procedural requirement (section 24(a));
    (b) soundness (a term which is further defined in national policy); and
    (c) (c) the duty to co-operate (which is again further defined in national policy)[2]

8. Paragraph 182 of the NPPF is the primary focus of s. 19(2)(a) and provides the core national policy definition of "soundness":

> "*The Local Plan will be examined by an independent inspector whose role is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and* ***whether it is sound****. A local planning authority should submit a plan for examination which it considers is "****sound****" – namely that it is:*
>
> • ***Positively prepared*** *– the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;*
>
> • ***Justified*** *– the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;*
>
> • ***Effective*** *– the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities; and*
>
> • ***Consistent with national policy*** *– the plan should enable the delivery of sustainable development in accordance with the policies in the Framework*."

9. Aspects of those four requirements are further clarified throughout the rest of the NPPF. Of particular relevance are:

[2] This is covered in Paper 2 on the Duty to Co-operate within this series

- NPPF 14: "Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change";
- NPPF 156: "Local planning authorities should set out the strategic priorities for the area in the Local Plan. This should include strategic policies to deliver: ●● the homes and jobs needed in the area",
- NPPF 157: "Crucially, Local Plans should: ●● plan positively for the development and infrastructure required in the area to meet the objectives, principles and policies of this Framework;"
- NPPF 158: "Each local planning authority should ensure that the Local Plan is based on adequate, up-to-date and relevant evidence about the economic, social and environmental characteristics and prospects of the area;
- NPPF 159: "Local planning authorities should have a clear understanding of housing needs in their area."

10. Critically, NPPF 47 provides:

> "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;"

11. The Planning Practice Guidance (PPG) is also a material consideration under section 19(2) and section 20(5), notably Housing and economic development needs assessments, Housing and economic land availability assessment and Local Plans.

12. There is a long history to challenges to development plan documents and their precursors, and this established a series of principles even before the NPPF era, which remain applicable today.

13. A challenge to a decision to adopt a development plan document is under section 113 PCPA which "brings into play the normal principles of administrative law" (*Blyth Valley Borough Council v Persimmon Homes (North East) Limited* [2008] EWCA Civ 861, [8]). Any error of law in the underlying Inspector's decision will thus vitiate the authority's resolution to adopt (subject to the court's discretion as to remedy: i.e. whether to make a declaration or to quash in whole or in part).

14. However the assessment of soundness is a matter of planning judgment, challengeable only on *Wednesbury* grounds: see *Barratt Developments Plc v City of Wakefield Metropolitan Borough Council* [2010] EWCA Civ 897:

> "*11. I would emphasise that this guidance, useful though it may be, is advisory only. Generally it appears to indicate the Department's view of what is required to make a strategy 'sound', as required by the statute. Authorities and inspectors must have regard to it, but it is not prescriptive. Ultimately it is they, not the Department, who are the judges of 'soundness'. Provided that they reach a conclusion which is not 'irrational' (meaning 'perverse'), their decision cannot be questioned in the courts. The mere fact that they may not have followed the policy guidance in every respect does not make the conclusion unlawful.*
>
> *….*
>
> *33. … As I have said, 'soundness' was a matter to be judged by the inspector and the Council, and raises no issue of law, unless their decision is shown to have been 'irrational', or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law.*"

*Modifications*

15. The latter half of section 20 PCPA sets out the scope for modifications to make the plan sound:

> "*(7) Where the person appointed to carry out the examination—*
> *(a) has carried it out, and*
> *(b) considers that, in all the circumstances, it would be reasonable to conclude—*
> *(i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and*
> *(ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,*
>
> *the person must recommend that the document is adopted and give reasons for the recommendation.*
>
> *(7A) Where the person appointed to carry out the examination—*
> *(a) has carried it out, and*
> *(b) is not required by subsection (7) to recommend that the document is adopted,*

*the person must recommend non-adoption of the document and give reasons for the recommendation.*

*(7B) Subsection (7C) applies where the person appointed to carry out the examination—*

*(a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but*

*(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.*

*(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—*

*(a) satisfies the requirements mentioned in subsection (5)(a), and*

*(b) is sound.*

*(8) The local planning authority must publish the recommendations and the reasons.*"

16. The Inspector's reasons must be adequate and intelligible, consistent with the test set out by Lord Brown in *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953, [36] (as applied (successfully) in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin), [76]):

"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 "principal 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 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 has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision*."

*Adoption*

17. Finally, sections 23(2A) to (5) set out what a LPA is required to do following receipt of the Inspector's report:

> *"(2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—*
> *(a) recommends non-adoption, and*
> *(b) under section 20(7C) recommends modifications ("the main modifications").*
>
> *(3) The authority may adopt the document—*
>
> *(a) with the main modifications, or*
>
> *(b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.*
>
> *(4) The authority must not adopt a development plan document unless they do so in accordance with subsection (2) or (3).*
>
> *(5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority*."

18. In short, the LPA must carefully examine the proposed modifications by the Inspector, before proceeding to adoption.

*Interpretation of Planning Policy*

19. It is now firmly established that the correct interpretation of planning policy is a matter for the courts: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. The Supreme Court nonetheless made clear that there was extensive scope for the application of planning judgement provided that the decision-maker correctly informed themselves in respect of the policy, see [17]-[23]).

20. In *Hunston*, the Court of Appeal confirmed at [4] that *Tesco v Dundee* principles apply to the interpretation of the NPPF. It is also now clear that the same principle also apply to Planning Practice Guidance: see

for example *Lark Energy Ltd v SSCLG* [2014] EWHC 2006 (Admin), [70].

*Practical Realities*

21. The correct identification of objectively assessed need and 5 year housing supply are invariably the principal controversial issue at plan examination, and remain the central issue to which Local Planning Authorities must pay close regard, by informed reference to the relevant national policy wording. Ultimately, the majority of statutory challenges have been brought by those promoting land for residential development.

## ***R (Hunston Properties Ltd) v SSCLG and St Albans City and District Council* [2013] EWHC 2678 (5 September 2013) [2013] EWCA Civ 1610 (12 December 2013)**

22. *Hunston* was a challenge in the decision-making, ss. 78 and 288 TCPA context. However, it is the formal starting point for the interpretation of NPPF 47: truly a watershed decision in the interpretation on NPPF.

23. In *Hunston*, the High Court quashed the decision of an Inspector in a section 78 appeal against refusal of permission for a mixed residential housing site (116 dwellings, 72 bed care home), following the Inspector's failure properly to assess housing provision in St Alban's. That decision was upheld by the Court of Appeal on appeal.

24. Given the publicity accorded to the decision across the sector, and its ubiquity in the appeal context, the facts may well be well-known to LPAs. The Council had no up-to-date or emerging plan, and determined by a resolution of Cabinet on 17 January 2013, that it would meet the 'policy vacuum', by agreeing in terms: "the use of the East of England Plan housing target of 360 dwellings per annum from 2001 to 2021 as the most appropriate interim housing target/requirement to use for housing land supply purposes". (*Hunston* (HC), [13]). The LPA's administrative area contained substantial Green Belt land which was considered to be a constraint on provision.

25. At the appeal, the Inspector was presented by the Appellant with DCLG's 2008 household projections, which indicated a substantial

additional requirement: 688 new households per year (Hunston, [19]). There was therefore a substantial gap to be made up.

26. Nevertheless, the Inspector preferred the Regional Spatial Strategy (RSS) figure, as agreed by the Council's resolution, (a) as the only figure that had been scrutinised through the independent examination process; (b) by reference to localism, (c) in the absence of an identified need that took account of any constraints to development, specifically Green Belt; (d) whilst acknowledging the age of the RSS data (Hunston, [20]).

27. The High Court determined that this approach was unlawful.

> *"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. It is common ground that the EEP figure that the Inspector adopted was not such a figure for the reasons that I have explained in Paragraph 10 of this Judgment. As the Inspector entirely accurately observed of the EEP figure that she concluded it was appropriate to adopt: "In reaching the housing requirement, the supporting text made it clear that full provision is not made for all needs irrespective of constraint." 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. Whilst the decisions of planning inspectors in relation to other planning appeals are not in any sense binding on planning inspectors in other cases, I consider the reasoning of the inspector in Planning Appeal X1165/A/11/2165846 to be entirely convincing. As the inspector in that appeal said in Paragraph 47 of that Decision "… constraints do not bear upon the actual need for dwellings … the stage at which growth constraints should be taken into account is when assessing how the identified need can be*

*addressed …they cannot reasonably be used … simply to reduce the number of dwellings calculated as necessary to meet housing need". In reality this is precisely the course adopted by the Inspector in this case. It was only this approach that enabled her to conclude as she does at Paragraph 67 of the DL that "… the supply of additional housing on a greenfield Green Belt site is not afforded weight".*

*29. It was argued by the Defendants and principally on behalf of the Council that this approach did not give effect to the whole of the wording contained in Paragraph 47 of the NPPF. The essence of this submission was that the approach HPL advocated ignored the words "… in so far as is consistent with the policies set out in this Framework …". I accept that proper construction of the NPPF requires the document to be read as a whole. However, I do not accept that the construction for which HPL contends fails to give effect to the words relied on by the Council and that in consequence the appropriate course was to adopt the housing needs figure identified in the EEP. First, given that it is necessary to take account of all the words used, that means that it is necessary to take account of the opening words of the paragraph – "To boost significantly the supply of housing …". It is difficult to see how construing the whole of the first bullet point in the paragraph as meaning that the needs figure referred to is or could be a figure that expressly does not and does not purport to identify actual need could be said to give effect to those words. Secondly, had it been intended that this approach should be adopted, the Policy could have encouraged the use of needs figures derived from the relevant RSS pending the adoption of a strategic local plan prepared in accordance with the NPPF. Not merely is there no such provision, but Paragraph 1 makes clear that the NPPF represents a new start with a large number of planning policies being revoked and replaced. PPS3 was expressly revoked by the NPPF and as I have explained the RSS was revoked on 3 January 2013. Thirdly, I do not see how a constraints adjusted figure arrived at having regard to the policy requirements as they applied at the time when the EEP took effect can be said to lead to the same conclusion applying the first bullet point in Paragraph 47 when that paragraph is read as a whole. The wording of the first bullet point emphasises what is emphasised elsewhere in the NPPF, namely that the NPPF creates a*

*presumption in favour of sustainable development. Finally 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. The Green Belt policy as I have explained is not an outright prohibition on development in the Green Belt. Rather it is a prohibition on inappropriate development in the absence of very special circumstances. 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.*

*30. For those short reasons, I consider that the approach adopted by the Inspector in this case was wrong in law. The proper course involved assessing need, then identifying the unfulfilled need having regard to the supply of specific deliverable sites over the relevant period. Once that had been done it was necessary next to decide whether fulfilling the need in fact demonstrated (in common with the other factors relied on in support of the development) together clearly outweighed the identified harm to the Green Belt that would be caused by the proposed development. Those of course are matters of planning judgment and are for an inspector not me. The contrary is not suggested by HPL.*"

28. The first stage of identification of need had not been properly conducted at all, what followed thereafter incorporated and compounded the error, and the decision therefore had to be quashed.

29. In the Court of Appeal, Sir David Keene upheld the judgment of the High Court:

> "*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 para.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 CC [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 [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 para.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:*J.P.L. 602*

> *•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 L.J.*

*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, s.9, is devoted to that topic, a section which begins by saying "The Government attaches great importance to Green Belts": para.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."*

30. The Court of Appeal continued:

"*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: para.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 para.47 of the Framework (which I will number para.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 para.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 para.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 para.47(1). The policies in the Framework provide guidance, as [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 para.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 s.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 s.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 [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 para.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 para.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 para.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."*

31. Although Hunston was a decision under s. 288, in relation to a s. 78 challenge, the judgment is highly relevant to the examination context. At the core of the judgment is the straightforward principle that in making objective assessments as to housing need one must have regard to the most up-to-date evidence. The RS was established under a very different legislative and policy regime and cannot provide that. In accordance with *Tesco v Dundee*, the court interpreted the meaning of NPPF, paragraph 47, arriving at a construction which is of general application wherever the provision is engaged. The implications of *Hunston* are therefore of fundamental importance to the question of "soundness".

32. This was the submission made by *Gallagher Estates* during the examination which eventually resulted in the findings in the *Gallagher*

*Estates v Solihull* judgment, and we therefore consider this judgment next.

**Gallagher Estates Ltd v Solihull MBC [2014] EWHC 1283 (Admin) (30 April 2014)**

33. The facts of *Gallagher* are also likely well-known. In essence, Solihull MBC has the twin political and practical plan-making challenges of first, being adjacent to Birmingham (which is acknowledged to have major constraints of available land) and second, significant Green Belt areas. In assessing the overall housing need, the Inspector accepted submissions from the Council that he was entitled to have regard to the existing figures in the West Midlands Regional Strategy Phase 2 Revisions.

34. The Claimant argued that the Council had adopted a plan that was not supported by a figure for objectively assessed housing need, contrary to the requirements to (i) have regard to national policies issued by the Secretary of State (section 19(2)(a) of the 2004 Act), and (ii) adopt a sound plan (sections 20 and 23 of the 2004 Act).

35. The High Court (Mr Justice Hickinbottom) held:

> "*76 Mr Dove's submissions were, as ever, coherent, forceful and enticing. However, I am unpersuaded by them: in my firm view, with regard to his approach to the housing provision, the Inspector did err in law. Mr Lockhart-Mummery put the matter in a variety of ways, including that the Inspector failed to have regard to the key requirements of the NPPF, particularly the requirement to base housing provision targets on an objective assessment of full housing needs as identified through a SHMA; he misdirected himself as to the requirements of the NPPF; he misunderstood documents such as the 2009 SHMA; and he failed to give adequate reasons for the housing provision he approved as compliant with the statutory requirements. Each of those reflects, to some extent, the substantive error which was, in my judgment, made by the Inspector, namely a failure to grapple with the issue of full objectively assessed housing need, with which the NPPF required him, in some way, to deal.*
>
> *77 In coming to that conclusion, I have had particular regard to the following.*

*78 There was no doubt that the full objectively assessed housing need was in issue: the parties to the examination made voluminous representations to the Inspector on that issue, including submissions in relation to how projections informed that issue. The technical issue to which I have referred (paragraphs 46-49 above) was simply one aspect of those submissions.*

*79 Although the NPPF is mere policy – and a plan-maker, including an inspector, may therefore depart from it, if there is good reason to do so – the Inspector in this case purportedly dealt with the issue of housing provision by applying the policies of the NPPF, not going outside them.*

*80 As Barratt emphasises, whether a plan is "sound" is essentially a matter of planning judgement for the Inspector (see paragraph 34 above). However, "soundness" requires a plan to be "positively prepared" (i.e. based on a strategy which seeks to meet objectively assessed development requirements) and consistent with national policy (paragraph 182 of the NPPF, quoted at paragraph 33 above). Relevant national policy here includes paragraphs 14 and 47 of the NPPF. For a plan to be sound, it therefore needs to address and seek to meet full, objectively assessed housing needs for market and affordable housing in the housing market area, unless (and only to the extent that) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole.*

*81 Although in paragraph 51 of his report (quoted at paragraph 65 above), the Inspector adequately summarised those requirements of paragraph 14 and 47 – more or less in the terms I have set out – looking at the report as a whole, and following similar confusion which appeared at times in the Council's submissions to him (see paragraphs 50-61 above), the Inspector appears to have confused policy off "housing needs" with policy on housing requirement targets. I make that comment well aware of the need to avoid exegetical analysis of Inspector's reports, and the requirement to consider such reports fairly and as a whole.*

*82 However, for example, the Inspector says (in paragraph 62):*

> *"[The Council] maintains that the SLP is fully meeting the identified housing needs of the Borough, but has considered higher levels of housing at the option stage."*

*That can only be explained by "housing needs" being used in a policy on sense. Leaving aside any obligation to meet unmet need from an adjacent authority (not in play here, because the Inspector throughout worked on the basis that there was no such need), the Council of course need not – and would not – consider meeting levels of housing higher than the full objectively assessed need.*

*83 Further, the Inspector found that 11,000 new dwellings over the period of the plan (i.e. 500 dpa) "represents an effective, justified and soundly based figure which would meet the current identified housing needs of the district over the plan period…" (paragraph 64 of his report, quoted at paragraph 67 above). Mr Dove submitted that "the current identified housing needs" was a tacit reference to the interim 2011-based projection of 533 dpa; but, reading the report as a whole (as I must), I cannot accept that proposition, because (i) the interim 2011-based projection of 533 dpa was only for the period to 2021, not for the plan period (to 2028); (ii) the Inspector (rightly) made clear that a single household projection does not represent objectively assessed need for housing (paragraph 55); and (iii) as Mr Dove properly conceded, nowhere in either the Inspector's Report or the WM RSS Phase 2 Revision Panel Report, by reference to the interim 2011-based projection or otherwise, is any full, objectively assessed need for housing in Solihull "identified". The reference in paragraph 53 of the report to "the annual need may only be slightly above that planned for in the submitted SLP" cannot be stretched to amount to an identification of housing need of 11,700 in aggregate or 533 dpa. Again, the Inspector appears to use the term "housing need" here to mean a policy on figure for housing requirement.*

*84 In any event, whether or not the Inspector confused policy off housing need with policy on housing requirement, nowhere*

*in the report does he objectively assess full housing need, a matter to which I shall shortly return.*

*85 The importance of the difference between full objectively assessed housing need and any policy on figure was recently emphasised in City and District Council of St Albans v Hunston Properties Limited and the Secretary of State for Communities and Local Government [2013] EWCA Civ 1610 (" Hunston "), upon which Mr Lockhart-Mummery relied for his proposition that, in plan-making, an authority must, as a first step, fully and objectively assess housing need.*

*86 The case itself concerned, not the preparation of a development plan, but a development control application for planning permission for housing within the Metropolitan Green Belt, in circumstances in which no local plan existed so that there was a "policy vacuum" in terms of the housing delivery target. Planning permission was refused by the local planning authority, and by an inspector on appeal. However, this court (His Honour Judge Pelling QC) quashed that decision ([2013] EWHC 2678 (Admin)), a determination upheld by Sir David Keene giving the only substantive judgment in the Court of Appeal ([2013] EWCA Civ 1610).*

*87 An issue in the case was the proper interpretation of paragraph 47 of the NPPF: indeed, in granting permission to appeal, Sullivan LJ considered that the local authority did not have a real prospect of success of overturning Judge Pelling, but in his view there was a compelling reason for the appeal to be heard namely to enable the Court of Appeal to give a "definitive answer to the proper interpretation of paragraph 47" and, in particular the interrelationship between the first and second bullet points in that paragraph, quoted at paragraph 27 above (see Hunston at [3]).*

*88 I respectfully agree with Sir David Keene (at [4] of Hunston): the drafting of paragraph 47 is less than clear to me, and the interpretative task is therefore far from easy. However, a number of points are now, following Hunston , clear. Two relate to development control decision-taking.*

*i) Although the first bullet point of paragraph 47 directly concerns plan-making, it is implicit that a local planning authority must ensure that it meets the full, objectively assessed needs for market and affordable housing in the housing market, as far as consistent with the policies set out in the NPPF, even when considering development control decisions.*

*ii) Where there is no Local Plan, then the housing requirement for a local authority for the purposes of paragraph 47 is the full, objectively assessed need.*

*89 As I have said, those matters – the ratio of the decision of the Court of Appeal – go to development control decision-taking. To that extent, Mr Dove was correct in pointing out that both Judge Pelling (at [11]) and Sir David Keene (at [21]) emphasised that the case before them did not concern plan-making, but decision-taking where there was no plan.*

*90 However, reflecting comments made by Judge Pelling at first instance, Sir David Keene also made some important observations about the construction of paragraph 47 in the context of plan-making. Consequently, the Inspector's Report in this case (published on 14 November 2013, between the judgments of Judge Pelling and the Court of Appeal in Hunston) was not in the event entirely correct when it said (at paragraph 55) that Hunston was not relevant to his inquiry because "this case relates to the process of determining planning applications rather than plan-making"; nor was the submission of Mr Dove that "[Hunston] is solely concerned with the development control process where there is a policy vacuum in relation to housing requirement" (skeleton argument, footnote 10).*

*91 Sir David Keene, at [25]-[26], drew the very clear distinction between the full objectively assessed needs figure; and the policy on, housing requirement figure fixed by the Local Plan. In considering the first bullet point in paragraph 47 of the NPPF, which of course expressly concerns plan-making, he said:*

*"… The words in [the first bullet point of paragraph 47], 'as far as consistent with the policies set out in the 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."*

*That makes clear that, in the context of the first bullet point in paragraph 47, policy matters and other constraining factors qualify, not the full objectively assessed housing needs, but rather the extent to which the authority should meet those needs on the basis of other NPPF policies that may, significantly and demonstrably, outweigh the benefits of such housing provision. It confirms that, in plan-making, full objectively assessed housing needs are not only a material consideration, but a consideration of particular standing with a particular role to play.*

*92 I was also referred to the recent case of South Northamptonshire Council v Secretary of State for Communities and Local Government [2014] EWHC 573 (Admin), in which Hunston was considered . Mr Dove particularly relied upon the emphasis Ouseley J gave in that case to the fact that Hunston "did not decide that [a] revoked RSS was expunged". However, that case was very different from this. It was a section 288 challenge to two refusals of planning permission for housing development, on the basis that the approach the planning*

*authority adopted to the calculation of the 5 year housing supply was unlawful in the light of the NPPF. In addition to the revoked regional strategy, there was a new core strategy, but that had not been adopted and was still subject to examination. There was no issue as to the housing requirement over the relevant plan period (see [8]), the issue being how the shortfall of 626 homes by 2012 was to be dealt with for the purposes of assessing whether there was a 5 year supply. The case is of little consequence to this application because, it appears, the regional strategy figure for housing provision was (unlike in the case of Hunston and here) not constrained (see [29]), nor inflated over objectively assessed need because of a regional growth strategy for the area (see [36]). The regional strategy figures were very similar to the figures from the emerging core strategy. In those circumstances, Ouseley J held, unsurprisingly, that, in considering how the shortfall should be made up (i.e. whether the future supply should be front- or end-loaded), it was relevant to see how supply had fared against the regional strategy requirement when it was in force, as the inspector in that case had done (see [37]). Importantly, the judge emphasised the need for caution in using figures from revoked regional strategies: he considered that, by treating the regional strategy figure as relevant, "there [was] potential for an error of law", but he was satisfied that there was no error in that case on its specific facts. This case does not give Mr Dove any assistance. Indeed, in my view, it gives Mr Lockhart-Mummery some support.*

*93 As I have said, neither the SLP nor the Inspector made any objective assessment of full housing need, in terms of numbers of dwellings. Mr Lockhart-Mummery submitted that, if the plan-makers have to assess whether the full objectively assessed housing need is outweighed by other policy factors and cooperate with adjacent authorities with regard to any shortfall between full objectively assessed housing need and any constrained housing requirement target (as they do), they must, first, determine a figure for the full objectively assessed need by preparing a SHMA in accordance with paragraph 159 of the NPPF. Paragraph 159 requires local planning authorities to have a clear understanding of housing needs in their area*

*and, specifically, to prepare a SHMA to assess their full housing needs.*

*94 Those submissions have considerable force. Whilst I do not need to endorse Mr Lockhart-Mummery's precise propositions for the determination of this application – for example, I see that, in practice, full housing needs might be objectively assessed using data other than a SHMA – it is clear that paragraph 47 of the NPPF requires full housing needs to be assessed in some way. It is insufficient, for NPPF purposes, for all material considerations (including need, demand and other relevant policies) simply to be weighed together. Nor is it sufficient simply to determine the maximum housing supply available, and constrain housing provision targets to that figure. Paragraph 47 requires full housing needs to be objectively assessed, and then a distinct assessment made as to whether (and, if so, to what extent) other policies dictate or justify constraint. Here, numbers matter; because the larger the need, the more pressure will or might be applied to infringe on other inconsistent policies. The balancing exercise required by paragraph 47 cannot be performed without being informed by the actual full housing need.*

*95 Nor can an assessment of whether a planning authority has complied with its duty to cooperate under section 33A of the 2004 Act, which may be triggered by an unmet housing need in one area resulting from a shortfall between full housing need and a housing target based on policy on requirements.*

*96 Mr Dove submitted that paragraph 218 of the NPPF encouraged – or at least allowed – the use of regional strategy policies and evidence that informed the preparation of regional strategy in the preparation of Local Plans. It was therefore open to the Inspector to take the policy on figure derived from the WM RSS Phase 2 Revision process, into which relevant demographic and other housing need evidence had gone, together with the relevant policy considerations, and which had been tested at an examination in public; and then see whether any more recent housing need evidence (e.g. later projections and SHMAs), or change in policy, undermined the Panel's figure. That there had been no material alteration in circumstances was a matter for the planning judgment of the*

*Inspector. The conclusion he reached had a clear evidential foundation, and was unimpeachable in law.*

*97 However, that fails to acknowledge the major policy changes in relation to housing supply brought into play by the NPPF. As I have emphasised, in terms of housing strategy, unlike its predecessor (which required a balancing exercise involving all material considerations, including need, demand and relevant policy factors), the NPPF requires plan-makers to focus on full objectively assessed need for housing, and to meet that need unless (and only to the extent that) other policy factors within the NPPF dictate otherwise. That, too, requires a balancing exercise – to see whether other policy factors significantly and demonstrably outweigh the benefits of such housing provision – but that is a very different exercise from that required pre-NPPF. The change of emphasis in the NPPF clearly intended that paragraph 47 should, on occasions, yield different results from earlier policy scheme; and it is clear that it may do so.*

*98 Where housing data survive from an earlier regional strategy exercise, they can of course be used in the exercise of making a local plan now – paragraph 218 of the NPPF makes that clear – but where, as in this case, the plan-maker uses a policy on figure from an earlier regional strategy, even as a starting point, he can only do so with extreme caution – because of the radical policy change in respect of housing provision effected by the NPPF. In this case, I accept that it was open to the Inspector to decide that the urban renaissance policy continued to be potent, and even (possibly) that the evidence of housing need had not significantly changed since the WM RSS Phase 2 Revision Draft target was set – those were matters of planning judgment, for him. However, in my judgment, in his approach, he failed to acknowledge the new, NPPF world, with its greater policy emphasis on housing provision; and its approach to start with full objectively assessed housing need and then proceed to determine whether other NPPF policies require that, in a particular area, less than the housing needed be provided. The WM RSS Phase 2 Revision Panel did not, of course, adopt that approach. Nor did the guidance provided by the Secretary of State on the revocation of regional strategies in 2010 (see paragraph 71*

*above) take the new policy into account. Both were pre-March 2012, when the NPPF was published.*

*99 The Inspector did not acknowledge, or take into account, that change. I accept that the Inspector might have taken that change into account in a number of ways. However, in one way or another, he was required to assess, fully and objectively, the housing need in the area. In the event, he made no attempt to do so. Mr Dove conceded – as he had to do – that neither the SLP nor the Inspector provided any full and objective assessment of housing need. Nor is there any evidence that the WM RSS Phase 2 Revision Panel made such an assessment, either: they had evidence of need before them, but there is no evidence that, as required by the NPPF, they assessed the full and objective housing need before considering constraints on meeting that need. Indeed, the evidence is that they went straight to policy on figures for the region in a conventional planning balancing exercise, with all material factors in play – as they were entitled to do under the pre-NPPF regime – and then proceeded to carve up that policy on requirement between the various areas within the region. Even as a surrogate, that did not comply with the NPPF requirements, properly construed. The further projections and 2009 SHMA did nothing to assist in this regard.*

*100 This is not a reasons case, because the approach adopted by the Inspector is in my view clear from his report: indeed, the fact that the Inspector unfortunately failed to grapple with this important issue of housing need is, in my view, betrayed in the report. When the report is read as a whole, far from full objectively assessed housing need being a driver in terms of the housing requirement target – as the NPPF requires – it is at best a back-seat passenger. Nowhere is the full housing need in fact objectively assessed. As I have said, the reference to the work done by the WM RSS Phase 2 Revision Panel does not assist, because there is no evidence that they assessed such need either. In any event, the Inspector appears to accept that the WM RSS Phase 2 Revision Panel target did not fully meet all housing needs (paragraph 53). Further, in paragraph 10 (quoted at paragraph 64 above), he says:*

*"There is insufficient evidence to demonstrate that Solihull does not intend to full meet its objectively assessed housing requirements …".*

*All of this makes clear, in my view, that the Inspector erred in his approach to this issue: he failed to have proper regard to the policy requirements of the NPPF.*

*101 For those reasons, I do not consider that the Inspector's approach to the policy requirements of the NPPF in relation to housing provision was correct or lawful. As a result, he failed to comply with the relevant procedural requirements; and the SLP with modifications, which he endorsed and the Council adopted, is not sound because it is not based on a strategy which seeks to meet objectively assessed development requirements nor is it consistent with the NPPF.*

*102 Therefore, on this ground, the Claimants succeed."*

36. Gallagher is currently at appeal, and this note will updated following the decision.

**Zurich Assurance Ltd v Winchester City Council [2014] 578 (Admin) (18 March 2014)**

37. Zurich v Winchester can be dealt with more briefly. The Claimant identified a historic shortfall in delivery against the South East Plan:

"*38 The Housing Technical Paper noted the figures in the South East Plan, and produced a graph showing that the actual completions of housing developments achieved between 2006 and 2011 showed a shortfall as against the average figures indicated for those years in the South East Plan, assuming a straight line allocation of new housing supply throughout the 2006–2026 period covered by the Plan at 612 new homes per year. Making that assumption, for the five year period ending 31 March 2011, the South East Plan requirement was 3,060 as against net completions of new homes in that period of 2,206, a difference of 854.*

*39 Mr Cahill QC for Zurich described that difference between those figures as a "shortfall" against the requirements of the South East Plan. Under Ground One, it is this shortfall which Mr Cahill says the Inspector failed properly to take into account in reaching his conclusion that the Core Strategy was sound, in general conformity with the South East Plan and could properly be adopted.*

*40 As a preliminary point, however, it should be noted that the alleged shortfall is an artefact of making the assumption referred to. That assumption was not itself a requirement of the South East Plan. As set out above, the requirement in the South East Plan was for provision of 12,240 new homes in WCC's area by 2026, and the annual rate of 612 new homes was simply stated as the "annual average." It was not itself a required target for WCC year by year. (I observe in passing that this point is unaffected by an argument by Mr Cahill based on sub-paragraph (viii) in policy H2 in the South East Plan, for reasons given by Mr Bedford for WCC in answer to it and also because the wording of policy H2 does not affect the clear statement in policy H1 that the 612 rate was only an "annual average"). Accordingly, there would be no breach of the South East Plan requirements in relation to WCC if a period of completions in the early phase of the 2006–2026 period below the 612 p.a. average figure were made up by a later phase of completions in that period above the 612 p.a. figure, provided that on average 612 new homes per year were completed throughout the period. It is inaccurate and inappropriate in the present context to describe the 854 figure relied upon by Mr Cahill as a "shortfall" against the South East Plan requirements.*"

38. The High Court (Mr Justice Sales, as he then was) held:

"*93 The Core Strategy needed to include a figure for new homes to be provided in the period 2011–2031. WCC proposed such a figure based on up-to-date evidence and modelling of population growth for the period 2011–2031 which post-dated the evidence base and modelling for the South East Plan estimated figure for the period 2006–2026. The Inspector took account of that evidence and of evidence from others,*

*including Barton Willmore and Open House, similarly based on up-to-date evidence and modelling.*

*94 Contrary to Zurich's case, there was no methodological error in the way these competing estimates for the period 2011–2031 were drawn up by reason of the notional "shortfall" in housing delivery between 2006 and 2011 by comparison with the average annual figure for additional housing indicated in the South East Plan. Contrary to Mr Cahill's argument, there was no reason whatever for a person in 2011 seeking to draw up a current estimate of population growth and housing requirements looking into the future from that date to 2031 and using up-to-date evidence to do so, to add on to the estimated figures any shortfall against what had been estimated to be needed in the first phase of the previously modelled period included in the South East Plan.*

*95 According to Mr Cahill's suggestion, the modellers in 2011 should have begun by saying that there was a shortfall of 854 homes against a previous estimate and then should have added that on to their own modelled estimates for new homes for 2011–2031 to produce the relevant total figure. In fact, none of them proceeded in that way, and rightly so. In my view, they would clearly have been wrong if they had tried to do so. Their own modelling for 2011–2031 is self-contained, with its own evidence base, and would have been badly distorted by trying to add in a figure derived from a different estimate using a different evidence base. That would have involved mixing apples and oranges in an unjustifiable way.*

*96 Since this is not a proper criticism of the approach adopted by the modellers who provided evidence to the Inspector (including those who compiled Barton Willmore's own Open House model, relied on by Zurich), still less is it a valid criticism of the Inspector. He was entitled to rely on the evidence as presented to him by expert modellers on each side, which did not include the arbitrary add-on of 854 homes proposed by Mr Cahill. Indeed, I think there would have been strong grounds for saying that the Inspector would have been open to attack on rationality grounds had he ventured to depart from the methodology they had employed and done what Mr Cahill suggested he should have done.*

*97 In my judgment, the Inspector proceeded in a perfectly rational and lawful way in making his assessment of the evidence in relation to the new housing requirement for 2011–2031, as set out above. In fact, as explained in his Report, he did take the South East Plan forecasts and evidence base properly into account, as material bearing on his assessment of the modelled forecasts for 2011–2031 presented by WCC and objectors. He was not obliged by any methodological logic to go further and make the arithmetical addition proposed by Mr Cahill.*

*98 The Inspector was entitled to find that the housing requirement figure in the Core Strategy was sound. He examined whether it was deliverable and in conformity with NPPF guidance and satisfied himself, on a rational and lawful basis, that it was. He was also entitled to find that it was in general conformity with the South East Plan, since the housing completions trajectory figures which he accepted ( Appendix D) allowed for delivery of new housing at a rate that would have fulfilled the requirement for 2006–2026 stated in the South East Plan.*

*…*

*103 The Inspector found in terms that the Core Strategy was in general conformity with the South East Plan. He clearly had the housing requirement figure in the South East Plan well in mind, because he referred to it in the context of his discussion about the housing requirement figure to be included in the Core Strategy. The Inspector's Report also makes clear that the Inspector understood that the annual figures which he was comparing in the South East Plan and the draft Core Strategy were averages, not in themselves binding annual requirements (see, in particular, paras. 49, 53 and 56 of the Report, set out above). The housing supply trajectory figures he discussed and accepted as valid had the effect that the Core Strategy would be carried into effect in a way which fully met the housing requirement figure for 2006–2026 in the South East Plan. In these circumstances, the Inspector was plainly entitled to make the finding of general conformity which he did and his Report, read as a whole, explains to the informed reader the basis for*

*that finding in respect of the housing requirement figures. Again, I accept Mr Bedford's submission that this met the standard for giving reasons set out in Porter (No. 2)."*

39. *Zurich* was not subject to appeal. The decision upheld the particular approach taken by that Inspector to the long-term trajectories of housing delivery and that on the specific facts there was no requirement to have regard to the historic shortfall against the RS target. Now that some distance has been travelled from the RS era, it is likely that such issues will arise with less frequency.

***Grand Union Investments Ltd v Dacorum BC [2014] EWHC 1894 (Admin) (12 June 2014)***

*40.* In *Grand Union Investments v Dacorum*, the Inspector had concluded in his Report that there was insufficient substantive evidence to enable him to conclude that the original housing provision figure proposed in the submission draft represented full objectively assessed need, and that these needs could not be met by increased provision, including through Green Belt review. However, the Inspector further recommended the Council to commit to an early partial review of the core strategy by way of a Main Modification, in order to investigate ways of assessing and meeting housing need. This, in his view, would make the document sound and enable him to recommend it be adopted. The thrust of the challenge to the Inspector's decision was that a commitment to an early partial review could not rationally make an unsound plan sound.

41. The Inspector made clear that his recommendation was based on the specific features of Dacorum and the Core Strategy itself: notably the short to medium term trajectory, with over-supply in the first three years, the scale of the shortfall over the whole plan period (circa 15%), and the steps undertaken towards a rigorous and comprehensive Green Belt review. The Inspector observed that such issues as arose could "best be addressed by the preparation of an early review because in the short to medium term the Core Strategy will provide a sound basis on which planning decisions can be taken". The Council accepted that recommendation and have already commenced work, with the intention to adopt the further modification by 2017/2018, alongside site allocations.

42. The Claimant brought a section 113 challenge in the High Court to the adoption of the Core Strategy on two core grounds: failure to have regard to NPPF and a breach of the SEA Directive, albeit both were, as they had to be, characterised as irrationality challenges, facing the usual exceptional threshold: "an unusually bad error of judgment".

43. On the first ground, the High Court (Mr Justice Lindblom) identified the crucial question as, "whether in its final form, incorporating the Main Modification, the Core Strategy could properly be regarded as having become sound so that it was, by then, a plan capable of being lawfully adopted" (not whether the core strategy was sound when considered in its originally submitted form at the examination). The Main Modification was, in the inspector's judgment, a solution which was proportionate to the problem before him, notably the absence of any imminent shortfall in the provision of housing in the borough, a means of ensuring that any shortfall would be made good before it had any practical effect. As an exercise of judgment, it was free from error:

> "*52 The competing arguments on this issue present starkly different views of the approach adopted by the inspector and the Council.*
>
> *53 The thrust of the submissions made by Mr Christopher Katkowski Q.C. for Grand Union was that Main Modification 28 did not address the basic shortcomings in the core strategy identified by the inspector in his preliminary findings and in his report. The inspector could only recommend Main Modification 28 if, in the first place, he had found the submitted core strategy unsound. He did find it unsound, and he was right to do so. But he did not explain why he thought a modification committing the Council to a review of the core strategy could remedy the substantial flaws in it. That commitment did not put right the errors the Council had made in preparing the core strategy, which went to several of the fundamentals in plan preparation. It did not change the inaccurate assessment of housing need. It did not establish the full objectively assessed need for housing in the Council's area, for the whole plan period, as paragraph 47 of the NPPF requires. The outcome of the review is wholly unclear. In these circumstances the inspector could not reasonably conclude that the review would*

*render an unsound plan sound. And his reasons for thinking it would are obscure.*

*54 For the Council Mr Martin Kingston Q.C. submitted that there was nothing irrational in the inspector's analysis and recommendation. The inspector clearly had regard to and understood government policy for plan-making in the NPPF. He referred to it both in his preliminary findings and in his report. With that policy in mind he took a pragmatic view. As he could see, although the Council had not shown that it had established the full objectively assessed need for housing in its area, any shortfall in its allocation of land for residential development was not going to cause problems until later in the plan period. By then – if the allocations turned out to be inadequate – the review to which the Council had committed itself would have been completed and the Council would have been able to amend its strategy if it had to. The Council had to bear in mind the need to have its core strategy in place as soon as it reasonably could. In taking up the inspector's suggestion that it should promote Main Modification 28, it acted entirely reasonably. There is a strong incentive for it to get on with its review of the core strategy. If it does not do so it will find it more and more difficult to rely on its adopted policies for meeting housing need when making decisions on applications for planning permission.*

*55 I cannot accept Mr Katkowski's argument. I think Mr Kingston's submissions are essentially correct. In my view the Council lawfully adopted the core strategy, in accordance with the relevant statutory provisions governing the preparation of development plan documents.*

*56 Testing the soundness of a plan is not a task for the court. It is a task that lies within the realm of planning judgment exercised under the relevant statutory scheme in the light of relevant policy and guidance. The court's jurisdiction under section 113 of the 2004 Act is limited to review on traditional public law grounds (see the judgment of Keene L.J. in Blyth Valley Borough Council v Persimmon Homes (North East) Limited [2008] EWCA Civ 861 , at paragraph 8). The question in this case, as the parties agree, is whether the Council's adoption of the plan on the inspector's recommendation was*

*irrational. As has been said many times, a claimant who seeks to persuade the court that a planning decision-maker has lapsed into irrationality will have to demonstrate an unusually bad error of judgment. He must show that the decision falls outside the range of judgment open to a reasonable decision-maker (see, for example, the judgment of Lord Bingham C.J., as he then was, in R. v Secretary of State for the Home Department, ex parte Hindley [1998] QB 751 , at p. 777A).*

*57 The concept of the soundness of a development plan document is not defined in the 2004 Act. But the Government has supplied four criteria of soundness in paragraph 182 of the NPPF. The first of those four criteria, that the plan has been positively prepared, will be satisfied if the plan has been based on a strategy that "seeks to meet" the local planning authority's "objectively assessed" requirements for development and infrastructure. This echoes the reference in paragraph 47 of the NPPF to plans meeting the "full, objectively assessed needs …" for housing.*

*58 In R. (on the application of Hunston Properties Limited) v Secretary of State for Communities and Local Government [2013] EWCA Civ 1610 , where an inspector's decision on an appeal against the refusal of planning permission for housing development in the Green Belt was quashed because she had based it on a constrained figure for housing need, Sir David Keene said (in paragraph 6 of his judgment) that there is "no doubt" that in producing their local plans local planning authorities are required to ensure that the "full objectively assessed needs for housing are to be met", subject to this being consistent with the policies of the NPPF. The words "as far as is consistent with the policies set out in this Framework" in paragraph 47 of the NPPF do not qualify the housing needs themselves. They qualify the extent to which the plan should go in meeting those needs.*

*59 But the guidance as to "soundness" in the NPPF is policy, not law, and it should not be treated as law. As Carnwath L.J., as he then was, said in Barratt Developments Plc v The City of Wakefield Metropolitan District Council [2010] EWCA Civ 897 (in paragraph 11 of his judgment), so long as the inspector and the local planning authority reach a conclusion on soundness*

*which is not "irrational (meaning perverse)", their decision cannot be questioned in the courts, and the mere fact that they have not followed relevant guidance in national policy in every respect does not make their conclusion unlawful. Soundness, he said (at paragraph 33) was "a matter to be judged by the inspector and the local planning authority, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law".*

*60 In this case Main Modification 28 could not have been prompted by the inspector's preliminary findings, formulated by the Council, put before the inspector for his consideration, and ultimately recommended by him to the Council, if the submitted core strategy had been sound. As the inspector said in paragraph 30 of his report, the alternative to changing the core strategy by introducing Main Modification 28 into it would be to find it was not sound. The Council had not tried to dissuade him from that view once he had made it known in his preliminary findings. It decided to promote Main Modification 28 to enable him to recommend adoption, as he had indicated he could in his preliminary findings.*

*61 The crucial question here, therefore, is not whether the core strategy was sound when considered in its originally submitted form at the examination, but whether in its final form, incorporating Main Modification 28, it could properly be regarded as having become sound so that it was, by then, a plan capable of being lawfully adopted.*

*62 To answer that question it is necessary to consider the reasons for the inspector's conclusion that the submitted core strategy was not sound, and his reasons for concluding that that unsoundness could be overcome by Main Modification 28.*

*63 The inspector found two flaws in the approach the Council had taken in preparing the document. The first flaw was that the Council had failed to undertake a proper assessment of the housing needs of its area, in accordance with government policy in paragraph 47 of the NPPF. It had not identified those needs in the light of the most recent household and population*

*projections. What it had done was to decide how much development could satisfactorily be accommodated in its area without breaching other policy constraints, including the Area of Outstanding Natural Beauty and the Green Belt. Its figure of 11,320 dwellings could not therefore be taken as representing the full objectively assessed need (paragraphs 2, 3 and 11 of the inspector's preliminary findings and paragraphs 13 and 14 of his report). The second flaw was that the Council had not done what it should to establish whether and how much of the objectively assessed need for market and affordable housing could be met. It had not conducted a rigorous and comprehensive review of the Green Belt, with a view to the borough's longer term needs (paragraphs 4, 5, 6, 7, 8 and 11 of the preliminary findings and paragraphs 19 to 22 of the report). And it had not gone as far as it should have done in exploring the potential for some of the borough's needs to be met in the areas of neighbouring local planning authorities, in particular St Albans City and District Council (paragraphs 5, 9, 10 and 11 of the preliminary findings and paragraph 27 of the report).*

*64 As the inspector accepted, those two flaws related to the soundness of the core strategy in its submitted form. Unless they were dealt with in a satisfactory way, the core strategy could not be regarded as sound. The inspector told the Council this in his preliminary findings, and the Council acted on his conclusion in one of the ways that he had suggested, by committing itself to carrying out a partial review of the core strategy within five years of its adoption.*

*65 Mr Katkowski's argument relies on the inspector's judgment as to the soundness of the submitted core strategy, yet condemns the solution proposed by the inspector himself as being not merely wrong in terms of planning judgment, but irrational. That is a bold submission. It depends on the proposition that because the flaws identified by the inspector were, in essence, shortcomings in the work the Council had done in preparing the core strategy, the only reasonable way to tackle them was by doing that work in this plan-making process. By putting the work off to the partial review, to be undertaken only after the core strategy had been adopted, the Council was relying on that further process to reveal the full,*

*objectively assessed housing needs of the borough for the period of the core strategy, and whether those needs, whatever they might be, could have been met more fully than the Council had said. Logically, Mr Katkowski argued, the core strategy could not be made sound simply by grafting into it a commitment to doing work that was a prerequisite to its soundness. This was planning to plan, which is not the same thing as actually planning.*

*66 The argument is simple, and it was elegantly presented. But I think it is wrong. The difficulty with it, in my view, is that it implies an unrealistic and wholly unnecessary constraint upon the inspector's judgment on the question of soundness.*

*67 The assessment of soundness was not an abstract exercise. It was essentially a practical one. If the core strategy as submitted was unsound, the inspector had to consider why and to what extent it was unsound, what the consequences of its unsoundness might be, and, in the light of that, whether its unsoundness could be satisfactorily remedied without the whole process having to be aborted and begun again, or at least suspended until further work had been done.*

*68 The inspector did that. The genesis of Main Modification 28 lay in his view that the work done in the preparation of the core strategy was not so defective, and the evidence on which it was based not so incomplete, that it had to be rejected as unsound in any event. If he had seen the potential unsoundness in the core strategy as irremediable, he would not have issued his preliminary findings suggesting, as one option for addressing that problem, the mechanism of an early partial review. By the time he came to write his report the Council's commitment to that review and the agenda for it set out in the additional text in paragraphs 29.7 to 29.10 of the core strategy were, in his view, enough to make the document sound at the point of its adoption. Though he could not be sure that the core strategy in its adopted form would provide to the fullest possible extent for the housing needs of the borough all the way through to the end of the plan period in 2031, he had enough confidence in it to be able to conclude that, as modified, it was sound.*

*69 Main Modification 28 was, in the inspector's judgment, a sufficient solution – a solution proportionate to the problem. I do not think this was an irrational view. On the contrary, it was entirely reasonable. The inspector described Main Modification 28 as "pragmatic, rational and justified". That, in my opinion, would be a fair description of his own conclusions. And the reasons he gave for those conclusions were not only adequate and clear, but make perfectly good sense. Another inspector might have come to a different view. I accept that. But that does not mean that this inspector's conclusion, formed on the evidence and representations which he had heard, was bad as a matter of law. And I do not think that it was.*

*70 The inspector neither neglected nor misunderstood any relevant aspect of government planning policy. He plainly had regard to the principles in national policy bearing on the matters he had to consider. He referred to the relevant parts of the NPPF – including paragraphs 47, 83 and 159 – both in his preliminary findings and in his report. He began his report by acknowledging the four criteria of soundness in paragraph 182. The assessment which led him to suggest the option of a main modification started with his finding that the Council ought to have assessed the full housing needs of its area for the plan period as policy in the NPPF required. The course he suggested, which the Council followed by promoting Main Modification 28, was intended to ensure that the relevant objectives of national policy in the NPPF would be met.*

*71 Mr Katkowski said the inspector's conclusion, in paragraph 28 of his report, that the shortcomings in the submitted document were not of such significance to justify finding the document "as a whole not sound" was inconsistent with his conclusion that it was necessary to modify the submitted plan to make it sound, and that in any event his reasons here were obscure. I disagree. The following sentence in paragraph 28 resolves any genuine doubt. It says that the issues – the "shortcomings in the submitted document" – could best be addressed through the preparation of an early review. That is precisely what the inspector had concluded in his preliminary findings, which were concerned specifically with housing supply and the Green Belt, and not with the submitted core strategy "as a whole".*

*72 Mr Katkowski also submitted that the inspector need not have feared the consequences of finding the core strategy unsound. There would be no policy vacuum and no threat to the level of house building in the borough while the core strategy process was gone through again. In the meantime the presumption in favour of sustainable development would apply, under the policy in paragraphs 14 and 49 of the NPPF. That may be so, but Mr Katkowski's submission ignores the emphasis in government policy on the plan-led system of development control, and on the importance of having an up-to-date plan in place, to which the inspector referred in paragraph 28 of his report.*

*73 At the heart of Mr Katkowski's argument was the submission that, in reality, Main Modification 28 changed nothing. The substance of the policies and allocations in the core strategy remained unchanged. The evidence on which it was based was the same as when the document was submitted to the Secretary of State. And the outcome of the review, if there was to be one, was also unknown.*

*74 There is a straightforward answer to that complaint.*

*75 It is clear that the inspector was well aware of the need for the Council to have a solid and durable plan in place as soon as it reasonably could, and of the need for that plan to be kept up-to-date. The Council was planning in the core strategy for a period of 25 years, ending in 2031, which is a much longer period than the 15 years that paragraph 157 of the NPPF says is preferable. In the course of that 25-year period there will be several cycles of plan-making.*

*76 Making his judgment on soundness in that context, the inspector could not foresee any imminent shortfall in the provision of housing in the borough. The shortfall calculated on the basis of the CLG household projection was not too large to prevent the core strategy being an appropriate basis for the delivery of new housing in the borough and for the making of decisions on applications for planning permission until 2024 or 2025, which was some 18 years after the start of the plan period in 2006, and at least six years after the partial review*

*was due to have been completed, in 2017 or 2018. In the short to medium term, the inspector found, there would not be an over-supply of housing, matching the annual figure of 538 dwellings derived from the CLG projection. The outcome of the early partial review was uncertain. The inspector knew that. Crucially, however, he was satisfied that the review, whatever its outcome, would be able to anticipate any shortfall in housing supply arising towards the end of the plan period, so that the Council's development plan strategy could be adjusted in good time to cope with it. That judgment is not attacked in these proceedings.*

*77 In these circumstances I think the inspector could reasonably conclude that the approach embraced by the Council in Main Modification 28 was compatible with the aim of government policy in the NPPF to secure an increase in the supply of housing, and that in this respect the core strategy as modified would be sound. The review would enable the Council to identify the full objectively assessed needs for market and affordable housing in its area, and would assess how far those needs could be met – with the help of neighbouring authorities if this is necessary. It would also include a full review of the Green Belt boundary. The review itself would be subject to independent examination in the local plan process, and its own soundness would be put to the test. At the point of its adoption, therefore, the core strategy was a satisfactory strategy for the whole of its period, not just for part of that period. The purpose and effect of Main Modification 28 was to include in the document a means of ensuring that any shortfall in the provision of housing would be made good before it had any practical effect, and that the Council's strategy would remain sound at least until 2031. So it cannot be said that the Council was failing to plan for the whole plan period.*

*78 Mr Katkowski was of course right to say that the Council's commitment to reviewing the core strategy is not legally binding. But this does not mean that it was unreasonable for the inspector to rely on the review in his assessment of soundness. As Mr Kingston accepted, the spur to the Council in getting on with the review as fast as it has said it will is the policy in paragraphs 14 and 49 of the NPPF – the policy on which Mr Katkowski relied in his submission that there would*

*have been no policy vacuum if the core strategy had not been adopted when it was. Those two paragraphs of the NPPF give no comfort to local planning authorities who allow their plans to become stale. Paragraph 14 applies the "presumption in favour of sustainable development" when relevant policies of the development plan are out-of date. And paragraph 49 says that relevant policies for the supply of housing should not be considered up-to-date if the authority "cannot demonstrate a five-year supply of deliverable housing sites". Mr Kingston conceded, rightly in my view, that if the Council failed to carry out the review within the timescale given in paragraph 29.9 of the core strategy, that is to say by 2018 at the latest, it would not be able to say that the policies for housing development in the core strategy were up-to-date. The weight which could be given to those policies in a development control decision would then be greatly reduced. It would therefore have been surprising if the inspector had doubted the Council's resolve to complete the early partial review as soon as it can.*

*79 Finally on this issue, I do not think Mr Katkowski's argument gains anything from the decision in D. B. Schenker Rail (U.K.) Limited v Leeds City Council [2013] EWHC 2865 (Admin). That case turned on its own facts, which were very different from the facts of this case. It was held that a policy safeguarding sites for the handling of canal-borne or rail-borne minerals, which had been modified by inserting into it a provision for its review after five years, was unlawful because the inspector who had endorsed the modification had failed to identify any good reason for it. The case is not authority for the wider principle contended for by Mr Katkowski – that a plan which does not provide for the meeting of relevant needs "cannot be cured by the fact that it might be reviewed in the future". The court in Schenker did not dismiss the concept of an authority's commitment to an early partial review of its plan justifying a finding of soundness. If there is a proper rationale for the review, which in this case there patently was, there is no reason in principle why it should not be taken into account as a consideration relevant to the soundness of the plan.*

*80 I therefore reject ground 1 of the application."*

44. The Judgment may be of assistance to local authorities who need to rely on such review provisions, but this is only if they are able to persuade Inspectors of the overall soundness of that approach in the particular local circumstances. Whilst the Judgment rejects the proposition that an early partial review cannot make an unsound plan sound, it is perhaps best understood as a carefully articulated recognition of the high threshold facing challenges to Inspectors' planning judgments in the plan-making sphere.

**Gladman Development Ltd v Wokingham BC [2014] EWHC 2320 (Admin) (11 July 2014)**

45. In *Gladman v Wokingham* the Claimants identified an even simpler problem: the specific allocations Development Plan Document (DPD) – the MDD – was proceeding on the basis of a Core Strategy that was now out of date. Could the DPD lawfully be adopted if it failed to provide for objectively assessed need.

46. The High Court (Mr Justice Lewis) held as follows:

> "*The Issues*
>
> *43 Against that background, and in the light of the claim form, the skeleton arguments and oral submissions, the following issues arise:*
>
> > *(1) did the inspector consider what the objectively assessed need for housing in Wokingham was, or did he simply consider whether the MDD was sound in so far as it dealt with the allocation of the number of houses proposed in the Core Strategy?*
> >
> > *(2) could the inspector consider the soundness of the MDD without considering what was the objectively assessed need for housing, determined in accordance with paragraph 47, and using the process envisaged by paragraphs 158, 159 and 182, of the Framework?*
> >
> > *(3) if the inspector was purporting to depart from the Framework, did he give proper, adequate and intelligible reasons for doing so?;*

*(4) did the inspector fail to determine whether or not there was a five year supply of housing land available, or, if he did determine that issue, did he give adequate reasons for his conclusion?*

*(5) should the Claimant be given permission to amend the claim to allege that the Defendant's failure to adopt the MDD with the modifications proposed by them in response to the inspector's letter of 20 October 2013?*

*The First Issue – The Inspector's Approach*

*44 In my judgment, the inspector approached the examination on the basis that he was considering that the MDD was dealing with the allocation of sites for the amount of housing proposed in the Core Strategy, that is the figure of at least 13,230 houses over the 20 years of the development plan period. He did not determine that that figure represented the objectively assessed need for housing in Wokingham in the development plan period. In other words, the inspector was considering whether the MDD was sound in the sense of whether the policies for the allocation of sites for the number of dwellings referred to in the Core Strategy were sound. He did not determine whether the number of houses to be provided under the Core Strategy would be sufficient to ensure the objectively assessed need for housing during the relevant period.*

*45 I reach that conclusion for the following reasons. First, the MDD which was before the inspector itself indicates that its purpose was to take forward the Core Strategy and allocate sites in accordance with it, as appears from paragraph 1.10 of the MDD set out at paragraph 28 above. There is nothing to indicate that the intention of the MDD was to review the figure for housing in the Core Strategy.*

*46 Secondly, the inspector's report, read as a whole, confirms that he did not consider that he was, or was in a position, to consider whether the Core Strategy housing figure now represented what was objectively assessed as necessary to meet the housing needs of the Borough. In paragraph 11 of his report, the inspector indicates that his assessment of soundness involved considering whether there was any need to*

*reconsider the spatial vision in the Core Strategy or the principle of locating development in the four strategic development locations. He considered that there was no such need. Those matters all relate to the location of housing – not the different question of what amount of housing is needed. There is nothing in the preamble, therefore, to indicate that the inspector was considering whether the Core Strategy housing figure continued to represent the objectively assessed need for housing.*

*47 Thirdly, paragraphs 13 to 15 of the inspector's report also confirm that he was not seeking to determine that issue. His report is carefully drafted. He indicated that the Defendant was using the Core Strategy figure to determine its housing requirement. He notes criticisms based on the absence of an up-to-date strategic housing market assessment (of the sort envisaged in paragraph 159 of the Framework). He notes the Core Strategy figures, adopted in 2010, were the most recent assessment of housing figures. He then noted that there was no other better or credible basis for calculating the level of housing need. He was aware that housing projections from 2008 suggested that the Core Strategy figure may be a serious under-estimate of the needs for housing (although he was also alive to the risk of relying on a single projection, given the variation that could be seen in the projections over time). The inspector concluded that for "these reasons" – that is, the absence of any better, credible figure, and in this particular local context — "it was appropriate to continue to rely on" the number of dwellings identified in the Core Strategy.*

*48 Fourthly, an objective assessment of housing needs would generally require a strategic housing market assessment. That would address the sort of issues referred to in paragraph 159 of the Framework, including household and population projections and needs for different types of housing. The inspector was aware that there was no up to date assessment of this nature available in relation to the housing needs of the borough. That again, supports the conclusion that the inspector was not purporting to determine that the Core Strategy figure adopted in 2010, and based on figures produced in 2006, were an objective assessment of the current*

*need of the sort contemplated by paragraph 47 of the Framework.*

*49 Furthermore, that interpretation of the inspector's report is reinforced by the exchanges between the inspector and the Defendant. The evidence produced generally appeared to indicate that the figure of 13,230 dwellings over the plan period, or 660 houses per annum, might well not reflect the current need for housing in the borough. The indications are, generally, that that is likely to be an under-estimate of the amount of housing necessary. The inspector noted that he was concerned that there was "no comprehensive evidence in the form of an up to date [strategic housing market assessment] to support the overall housing requirement". He noted that Core Strategy figure for the provision of at least 13,230 dwellings between 2006 and 2026 may be an under-estimate.*

*50 In my judgment, read as a whole, and read in context, it is clear from the inspector's report that he was not intending to endorse the figures in the Core Strategy as the figures for housing that would reflect an objective assessment of the current need for housing in the borough. Rather, the inspector considered that it was appropriate to consider whether the MDD was sound in its allocation policies for the figure of at least 13,230 new dwellings bearing in mind that that might be an underestimate of the housing needs for the borough.*

*The Second and Third Issues – The Inspector's Approach to the Assessment of Soundness*

*51 The next issue, encapsulated in the Claimant's first and second grounds, is whether the inspector could lawfully proceed to assess the MDD without there being an objective assessment of housing needs of the sort envisaged by paragraph 47 of the Framework?*

*52 Mr Tucker Q.C., on behalf of the Claimant, submitted that it was implicit in the Framework that assessing the soundness of a development plan document, such as an MDD, which dealt with the allocation of housing across the district, required consideration of the objectively assessed need for housing. He submitted that that was what the Framework envisaged. The*

*objective recognised in paragraph 47 of the Framework was to boost significantly the supply of housing and that the local planning authority should use their evidence base to ensure that the local plan (that is the development plan documents) did meet the full, objectively assessed need. The means of doing that was set out in paragraphs 158 and 159 which required authorities to have a clear understanding of housing needs in their area, based on adequate, up to-date and relevant information and, to that end, to prepare a strategic housing market assessment.*

*53 Furthermore, Mr Tucker relied upon paragraph 182 of the Framework which is expressly addressed to examination of development plan documents such as the MDD. That set out guidance on what constituted a "sound" local plan. That required that local plans be positively prepared in that they should be based on a strategy which seeks to meet objectively assessed development needs. The local plan should be based on proportionate evidence. Further, the local plan, to be sound, should be consistent with national policy, that is, the local plan should deliver sustainable development in accordance with the policies in the Framework*

*54 All those factors, submitted Mr Tucker, indicated that assessment of the soundness of a development plan document dealing with the allocation of sites for housing necessarily involved forming a view on whether that document would deliver sufficient sites to meet the objectively assessed need for housing. If the MDD were based on a Core Strategy, and that Core Strategy was out of date and did not provide for sufficient housing development, the MDD itself would not therefore be sound.*

*55 Mr Tucker submitted that that approach was consistent with the legislation. Section 19(2) of the 2004 Act required the inspector to have regard to national guidance, such as the Framework, and other development plan documents, such as the Core Strategy. It was permissible for one development plan document, such as an MDD, to supersede an earlier development plan document such as a Core Strategy. That was implicit in section 38(5) of the 2004 Act and regulation 8(5) of the Town and Country Planning (Local Planning) (England)*

*Regulations 2012 which provide that if one development plan document is to supersede an earlier one, it must say so.*

*56 Mr Tucker realistically recognised that as, the Framework was guidance and not a statute, it would be open to an inspector to depart from the guidance but an inspector would need to have, and to articulate, good, adequate and intelligible reasons for doing so. The inspector here, he submitted, failed to have regard to the Framework, rather than deciding consciously to depart from it and failed to give good reasons for doing so.*

*57 Finally, Mr Tucker drew attention to the decision of Hickinbottom J. in Gallagher Homes Limited v Solihull Metropolitan Borough Council [2014] EWHC 1283 (Admin). Hickinbottom J. chartered the changes in relating to housing policy represented by the Framework and explained the significance of having an objective assessment of housing need based upon a strategic housing market assessment, or equivalent data. Hickinbottom J. considered that an inspector conducting an examination into the soundness of a development plan document which determined the housing provision for the area needed to address the issue of what were the objectively assessed needs. Hickinbottom J. held that the inspector had approached the issue unlawfully by failing to do so. Mr Tucker submitted that the same conclusion applied here.*

*Discussion*

*58 In my judgment, the starting point is an analysis of the scope of this particular development plan document, that is the MDD. That deals with policies for the allocation of a certain quantity of housing, i.e. a figure of "at least 13,320" over 20 years. That amount of housing provision will be required, as a minimum, as a contribution to meeting the housing needs for Wokingham. As the inspector recognised, that might well prove to be an under-estimate of the amount of housing that will be required. The MDD will provide a set of policies for allocating sites for the provision of 13,320 dwellings (although more houses, and possibly other sites, may be required).*

*59 On analysis, therefore, the issue is whether the inspector could assess the soundness of a development plan document dealing with the allocation of the provision of at least 13,320 dwellings which would be required without also having an objective assessment of what further additional housing provision might be required in due course.*

*60 In my judgment, an inspector assessing the soundness of a development plan document dealing with the allocation of sites for a quantity of housing which is needed is not required to consider whether an objective assessment of housing need would disclose a need for additional housing. I reach that conclusion for the following reasons.*

*61 First, the statutory framework does not require such an approach. The statutory framework recognises that a development plan may be comprised of a number different development plan documents. Section 19(2)(h) of the 2004 Act provides that a local planning authority preparing a development plan document must have regard to any other local development document (which will include a development plan document). Thus where, as here, the Defendant has an adopted development plan document in the form of a Core Strategy, it must have regard to that in preparing a subsequent development plan document. The inspector, on examination, will need to ensure, amongst other things, that that requirement has been met (see section 20(5)(a) of the 2004 Act).*

*62 The structure of the 2004 Act is, therefore, consistent with a situation where one development plan document is giving effect to another earlier such document. It may be that the earlier development plan document needs up dating, and may need to make further and additional provision for development in the future. There is, however, nothing in the statutory framework to suggest that a development plan document, such as the MDD here, cannot be adopted simply because another development plan document, such as the Core Strategy, may need to be updated to include additional provision, for example additional housing.*

*63 Secondly, the Framework properly interpreted, and read against the statutory background, does not, in my judgment, require the result contended for by the Claimant. The Framework sets out the government's policies on planning in England. It provides guidance. It is written in a way which is intended to be accessible to the reader as is clear from the foreword. The Framework offers guidance on what it describes as local plans. These are, or at least include, the development plan. The development plan is, however, comprised of a series of development plan documents adopted under the 2004 Act as the glossary to the Framework makes clear. One should, therefore, be wary about assuming that the guidance in relation to one particular development plan document necessarily applies to all other development plan documents simply because the Framework refers to "local plans" without differentiating between different development plan documents for these purposes.*

*64 Where a development plan document is intended to deal with the assessment of the need for housing, then, the provisions of the Framework material to housing need will be a material consideration. A local planning authority dealing with the question of the amount of housing needed for its area will need to have regard to paragraph 47 of the Framework. The provisions governing a local plan – that is a development plan document — dealing with the assessment of housing need would have to have regard to paragraphs 158 and 159 of the Framework. Any examination of that local plan, that is that particular development document, would need to have regard in that context to paragraph 182 of the Framework.*

*65 Properly read, however, the Framework does not require a development plan document which is dealing with the allocation of sites for an amount of housing provision agreed to be necessary to address, also, the question of whether further housing provision will need to be made.*

*66 Thirdly, in my judgment, the approach advocated by the Claimant would be likely to run counter to the aims of the Framework and lead to results that were not intended. On the facts of the present case, for example, the position taken by the inspector is that a figure of at least 13,230 dwellings will be*

*required and the MDD, with modifications, would address the allocation of that amount of housing in a sound way. On the Claimant's case, the Defendant cannot prepare, and an inspector cannot consider the soundness of, a development plan document dealing with the allocation of necessary housing until further steps are taken to identify whether additional housing is required. The process of adopting the MDD allocating sites for required housing would have to stop while a strategic housing market assessment is carried out or equivalent data obtained. If additional housing were to be needed, then either the scope of the proposed MDD would have to be enlarged to include the larger figures and have that MDD supersede the Core Strategy figure or a development plan document dealing with changes to the Core Strategy would need to be prepared. It is difficult to see that that interpretation is consistent with the Framework which seeks to encourage the development of development plan documents and to ensure that such documents are in place to guide decisions on development.*

*67 Fourthly, in reality, the approach of the Claimant would involve using the perceived need to comply with the Framework as a way of compelling the Defendant to carry out a full, objective assessment of its housing needs to discover if additional housing provision were required. The Defendant is, however, already under a statutory duty to review matters which may be expected to affect the development of their area (section 13(1) of the 2004 Act). The Defendant is also under a duty to keep the development plan documents under review having regard to the results of any such review (section 17(6) of the 2004 Act). The Defendant in the present case is, as the evidence establishes, in the process of preparing a strategic housing market assessment which may lead to a review of the housing provision identified as necessary. The use of the Framework as a means of compelling the Defendant to carry out of such reviews is not necessary. In those circumstances, the interpretation of the Framework advanced by the Claimant has less force. The Claimant's interpretation is not needed to ensure that the local planning authority performs a review of its housing need but it would prevent them from adopting a development plan document which allocates sites for housing need already established.*

*68 Finally, this conclusion is, in my judgment, consistent with the decision in Gallagher Homes Ltd . There, Hickinbottom J. was dealing with a development plan document which did involve the assessment of housing need and proposed a figure of 11,000 new dwellings in the relevant period as appears from paragraph 35 of the judgment. It was in that context that Hickinbottom J. considered that the inspector erred in his approach to the examination of that development plan document in not addressing fully the issue of what was the objectively assessed need for housing. This case is different. The inspector here was not examining a development plan document assessing housing provision. He was examining a plan which proposed site allocations for housing which, as a minimum, would contribute towards the agreed housing need of the area.*

*69 For those reasons, in my judgment, the inspector in the present case was not required by reason of the Framework to consider an objective assessment of housing need in order to assess whether this development plan document was sound.*

*70 If that conclusion were wrong, Mr Tucker accepts that the Framework is guidance only, and an inspector could depart from it for good reasons. In the present case, the context in which the MDD came to be prepared and examined is one where the Defendant had a figure for housing requirement and this MDD would deal with allocating sites for that amount of housing. The preparation of the MDD was, as the Defendant submitted to the inspector in its comments in May 2013, well advanced before publication of the Framework and the Defendant wanted to ensure that there was an up-to-date development plan document dealing with these matters. The inspector did not, I accept, expressly indicate whether he considered he was not required by the Framework to consider objectively assessed housing needs before he could consider the soundness of the MDD or whether he was departing from that guidance. Reading paragraphs 13 to 15 of his report, however, it is clear, in my judgment, that the inspector was aware of the possibility that the figures in the Core Strategy might underestimate the need for housing but considered that there were no other better or credible basis for calculating an*

*alternative figure for housing requirements. As the inspector made clear in the last sentence of paragraph 15, in those circumstances, and in this particular local context (where at least 13,230 dwellings were needed and the MDD would at least allocate sites for those), he considered it appropriate to rely on the number in the Core Strategy. Read as a whole, that is a sufficient indication of the reasons why he considered it appropriate to proceed. If, contrary to the interpretation that I consider to be correct, the Framework would have required him to have an objective assessment of need, his report gives a sufficiently clear explanation of why the inspector did not consider that one should be required in the present case and would explain the departure from the Framework.*

*71 For those reasons, the inspector did not err in his approach to the examination of the soundness of the plan. He was not obliged to consider whether there was an objective assessment of need for housing before considering the examination of the MDD to determine whether the allocation of sites was sound. Provided that the inspector's approach is lawful and his conclusion is rational, the assessment of soundness is, of course, a matter of planning judgment for the inspector: see Barratt Developments plc v Wakefield Metropolitan District Council [2010] EWCA Civ. 897 at paragraph 33.*

*72 For completeness, I note that even if I had found that the inspector had erred in law, I would not, as a matter of discretion, have quashed the MDD. In the course of submissions, Mr Tucker frankly and realistically accepted that he was not seeking to quash the MDD as he recognised that the Claimant did not object to the allocation of sites made by that MDD. Rather, the Claimant's concerns was that the process of the examination should, as they saw it, be properly carried out as they believed that any objective assessment of need would recognise that additional housing was required.*

*The Fourth Issue – Housing Land Supply*

*73 Mr Tucker submits that one of the principal issues at the examination was whether the proposed allocations would provide a five-year supply of land. He submits that the*

*inspector either did not decide this issue or, if he did, gave no adequate intelligible reasons for his conclusion on that issue.*

*74 In my judgment, reading the report as a whole, and in particular paragraphs 16 to 21 and 84, the inspector did resolve this issue. He concluded that the MDD was sound, having regard to the amount of land allocated generally for housing purposes, and the specific sites allocated in policies SAL01 to SAL03. There was no need for any further allocations of land and none of the other proposed sites were better than those allocated by the MDD. It is clear that the inspector did resolve the issue of housing land supply and gave reasons for his conclusion: the MDD allocated the right amount of land, in the most appropriate sites, for the provision with which it was dealing.*"

47. The key conclusions are therefore expressed with relative clarity. At the site allocations DPD stage, there is no requirement as a matter of statutory interpretation or interpretation of the NPPF or the case law (*Gallagher*) to stop until OAN is identified. The position becomes more complex and arguably unrealistic at the fourth criterion: as a matter of practical plan-making. DPD examination is a critical step, and the allocations stage is left as an incomplete process. The judgment therefore should not be read as removing the requirement at examination stage to recognise and express very clearly in the supporting documentation and the Inspector's report that what is being carried out is only a partial exercise.

**Prepared by No5 Chambers**

**November 2014**