

IN THE HIGH COURT OF JUSTICE

Claim No.: CO/ _____ /2017

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

PLANNING COURT

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR
JUDICIAL REVIEW

BETWEEN

- (1) RICHBOROUGH ESTATES LIMITED
- (2) REDROW HOMES LIMITED
- (3) LINDEN LIMITED
- (4) WAINHOMES LIMITED
- (5) WILLIAM DAVIS LIMITED
- (6) MARTIN GRANT HOMES LIMITED
- (7) ACORN PROPERTY GROUP
- (8) HOPKINS HOMES LIMITED
- (9) CROUDACE LIMITED
- (10) NORTH OAK HOMES LIMITED
- (11) BARGATE HOMES LIMITED
- (12) LARKFLEET LIMITED
- (13) WEALDEN HOMES
- (14) DBA HOMES LIMITED
- (15) F W JOHNSONS LIMITED
- (16) ROBERT HITCHINS LIMITED
- (17) CATESBY ESTATES LIMITED
- (18) WELBECK STRATEGIC LAND II LIMITED
- (19) SOUTH WEST STRATEGIC DEVELOPMENT LIMITED
- (20) TEM LIMITED
- (21) HIMOR GROUP LIMITED
- (22) MAXIMUS LIMITED
- (23) GREVAYNE PROPERTIES LIMITED
- (24) BEEHCROFT LIMITED
- (25) ALLASTON DEVELOPMENTS LIMITED

Claimants

and

SECRETARY OF STATE
FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

**STATEMENT OF FACT AND GROUNDS
ON BEHALF OF THE CLAIMANT**

INTRODUCTION

1. By this claim for Judicial Review, the Claimant seeks the quashing of the Written Ministerial Statement issued on 12 December 2017 on behalf of the Defendant by the Minister of State for Housing and Planning and Minister for London, the Right Honourable Gavin Barwell, MP (“**the Minister**”).
2. The Defendant is the Secretary of State for Communities and Local Government (2 Marsham St, Westminster, London SW1P 4DF) (“**the Defendant**”).
3. There are 25 Claimants. Collectively, they represent the wide variety of interests working in the house building industry in this country. Each is concerned, and directly prejudiced, by the Written Ministerial Statement issued by the Defendant on 12 December 2016 (“**the WMS**”). They are as follows and are collectively (“**the Claimants**”):
4. The First Claimant is Richborough Estates Limited, a land promotion company based in Birmingham. It operates across England and has secured planning permission for over 4,000 houses in the last decade through development plan allocations, planning applications and appeals. It secures planning permission either from a local planning authority at the application stage or from the Planning Inspectorate or Secretary of State on appeal. It was also the successful Appellant in the Court of Appeal in Richborough Estates v Cheshire East Council [2016] EWCA Civ 168 and a Respondent in the forthcoming appeal hearing in the Supreme Court on the meaning of Paragraph 49 of the National Planning Policy Framework (“**NPPF**”).

5. The Second and Third Claimants are National House Builders. The Second Claimant is Redrow Homes Limited. The Third Claimant is Linden Limited. Both are national house building companies who build houses across the United Kingdom and together delivered over 6,000 houses in the last 12 months.
6. The Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Claimants are medium sized or regional house building companies. The Fourth Claimant is Wainhomes which builds homes in the North West and South West of England. The Fifth Claimant is William Davis Limited which builds homes in the East and West Midlands. The Sixth Claimant is Martin Grant Homes Limited, which builds homes in London, the South East of England and the East Midlands. The Seventh Claimant is Acorn Property Group which builds houses across southern England. The Eighth Claimant is Hopkins Homes which builds homes predominantly in East Anglia. The Ninth Claimant is Croudace Homes which builds homes across the South East of England. Collectively they build over 2,500 houses a year.
7. The Tenth, Eleventh, Twelfth and Thirteenth Claimants are county or sub-regional house building companies. The Tenth Claimant is North Oak Homes Limited which builds homes predominantly in Herefordshire and Worcestershire. The Eleventh Claimant is Bargate Homes Limited which builds homes predominantly in Hampshire. The Twelfth Claimant is Larkfleet Limited which builds homes predominantly in Lincolnshire and other parts of the East Midlands. The Thirteenth Claimant is Wealden Homes which builds homes predominantly in Kent.
8. The Fourteenth Claimant is DBA Homes which is a new, small local house building firm in Shropshire.
9. The Fifteenth Claimant is F. W. Johnsons Limited. Johnsons is a small long - established local house building firm in the town of Lydney in the Forest of Dean in Gloucestershire

9. The Sixteenth Claimant is Robert Hitchins Limited which has built 17,000 homes mostly in the Midlands and South West of England, but is now restricted to land promotion.
10. The Seventeenth Claimant is Catesby Estates Limited, a land promotion company operating nationally across England.
11. The Eighteenth Claimant is Welbeck Strategic Land II Limited which is a strategic land and development company involved in the promotion of land for housing and retirement villages, across southern England.
12. The Nineteenth Claimant is South West Developments Limited which promotes land for housing across the South West of England.
13. The Twentieth Claimant is TEM Limited which promotes land for housing in Cheshire.
14. The Twenty-First Claimant is Himor Group Limited which promotes land for housing and mixed use in the Midlands and North West of England.
15. The Twenty- Second Claimant is Maximus Limited which promotes land for housing in in the Midlands.
16. The Twenty- Third Claimant is Grevayne Properties Limited which promotes land in Warwickshire.
17. The Twenty- Fourth Claimant is Beechcroft Limited which builds retirements villages and homes across southern England.
18. The Twenty-Fifth Claimant is Allaston Developments Limited, a company which provides serviced plots for self-build and custom build housing, and land for local housebuilder and registered social landlords.

THE FACTS

The Written Ministerial Statement

19. On 12 December 2016, the Minister issued the WMS¹ (with the paragraphs enumerated for navigation):

[1] Neighbourhood planning was introduced by the Localism Act 2011, and is an important part of the Government's manifesto commitment to let local people have more say on local planning. With over 230 neighbourhood plans in force and many more in preparation, they are already a well-established part of the English planning system. Recent analysis suggests that giving people more control over development in their area is helping to boost housing supply – those plans in force that plan for a housing number have on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authority.

[2] The Government confirms that where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted. However, communities who have been proactive and worked hard to bring forward neighbourhood plans are often frustrated that their plan is being undermined because their local planning authority cannot demonstrate a five-year land supply of deliverable housing sites.

[3] This is because Paragraph 49 of the National Planning Policy Framework states that if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites relevant policies for the supply of housing should not be considered up-to-date, and housing applications should be considered in the context of the presumption in favour of sustainable development.

¹ The Statement was also made in the House of Lords: HLWS345

[4] As more communities take up the opportunity to shape their area we need to make sure planning policy is suitable for a system with growing neighbourhood plan coverage. Building on proposals to further strengthen neighbourhood planning through the Neighbourhood Planning Bill, I am today making clear that where communities plan for housing in their area in a neighbourhood plan, those plans should not be deemed to be out-of-date unless there is a significant lack of land supply for housing in the wider local authority area. We are also offering those communities who brought forward their plans in advance of this statement time to review their plans.

[5] This means that relevant policies for the supply of housing in a neighbourhood plan, that is part of the development plan, should not be deemed to be 'out-of-date' under paragraph 49 of the National Planning Policy Framework where all of the following circumstances arise at the time the decision is made:

[5.1] This written ministerial statement is less than 2 years old, or the neighbourhood plan has been part of the development plan for 2 years or less;

[5.2] the neighbourhood plan allocates sites for housing; and

[5.3] the local planning authority can demonstrate a three-year supply of deliverable housing sites.

[6] This statement applies to decisions made on planning applications and appeals from today. This statement should be read in conjunction with the National Planning Policy Framework and is a material consideration in relevant planning decisions.

[7] My Department will be bringing forward a White Paper on Housing in due course. Following consultation, we anticipate the policy for neighbourhood planning set out in this statement will be revised to reflect policy brought forward to ensure new neighbourhood plans meet

their fair share of local housing need and housing is being delivered across the wider local authority area. It is, however, right to take action now to protect communities who have worked hard to produce their neighbourhood plan and find the housing supply policies are deemed to be out-of-date through no fault of their own.

[8] On 7 July 2016, my Rt Hon Friend, the Member for Great Yarmouth (Brandon Lewis), extended for a period of 6 months the criteria for consideration of the recovery of planning appeals to include proposals for residential development over 25 dwellings in areas where a qualifying body has submitted a neighbourhood plan proposal to the local planning authority but the relevant plan has not been made (Hansard HCWS74). In order to allow time for the Neighbourhood Planning Bill to complete its passage through Parliament, and in the light of other potential policy changes currently under consideration, I am now extending that period for a further 6 months from today." (our emphasis)

Neighbourhood Planning Bill

20. On 13 December 2016, the Minister added clarification to the WMS, in a statement made during the consideration of the Neighbourhood Planning Bill at the Report Stage [Column 732]

"In the written ministerial statement, I made it clear that from yesterday, where communities plan for housing in their area in a neighbourhood plan, those plans should not be deemed out of date unless there is a significant lack of land supply – that is, under three years. That applies to all plans for the next two years, and for the first two years of any plan that is put into place. That will give a degree of protection that has not been available. The message needs to go out clearly from this House that local authorities must get up-to-date plans in place to provide that protection for neighbourhood plans. I hope that that reassures people. As I said, I have written both to the

Planning Inspectorate and to local councils on that issue.” (our emphasis)

Requirement of a Five Year Supply of Housing Land: the Bedrock of Policy

21. These Statements (“WMS”) have far reaching implications for the building of houses and the promotion of land for housing across the entire country.
22. As is clear on its face, the Defendant decided that the WMS should take immediate effect.
23. The WMS removes a long established policy which has been in existence in one form or another for the last 40 year (since at least 1980)², namely the requirement that local planning authorities (“LPA”) should be able to demonstrate a five year supply of housing land in their local authority area. The policy is of pivotal importance to the delivery of new homes in England. It is part of the bedrock of national planning policy for housing. It is also one of the cornerstones of housing supply and the lynchpin of effective housing delivery: please see the witness statement of Mark Sitch for the First Claimant under the heading “Ground 2”.
24. The requirement to demonstrate a five year supply of housing land is presently contained in the National Planning Policy Framework (“NPPF”) in paragraph 47: see also St Albans City and District Council v SSCLG and Hunston Properties Ltd v SSCLG [2013] EWCA Civ 1610, as per Keene LJ at 23/24.
25. The purpose and effect of the policy is to ensure that at all times, local planning authorities have a five year supply of housing land. This is seen as an essential pre-requisite to ensuring a ready and continuous supply of land for the delivery of new homes: please see the witness statement of Mark Sitch for the First Claimant under the heading “Ground 2” and the sub-heading “Why does

² Circular 9/80 (1980)

the Policy Exist?"

26. The significance of the LPA not been able to demonstrate a five year supply of housing land is that the policy in paragraph 49 of the NPPF ("NPPF/49") is engaged. The second sentence of paragraph 49 reads: *"Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable sites."*
27. The important significance of the policy for a five year supply of housing land, paragraph 49 of the NPPF, and the implications of not being able to demonstrate a five year supply of housing land is revealed in the fact that the meaning of NPPF/49 is to be considered by the Supreme Court next month in the case of *Richborough Estates v Cheshire East and SSCLG; Suffolk Coastal v Hopkins Homes and SSCLG*.
28. With Instant effect, on 12 December 2016, the WMS removed the requirement for a local authority to have to demonstrate a five year supply in any area with a neighbourhood development plan ("NDP"). For the WMS to be engaged, the NDP must be made (i.e. statutorily adopted) and make housing allocations (albeit the size and quantity is undefined). There are presently around 250 NDPs in England. But there are 2,000 NDP areas designated, covering a population of 10 million people.³ NDPs typically take 18 - 24 month to come be made. The implications of this policy will be felt all across the country in a very short space of time.

No Attempt Made at any Consultation Prior to Implementing the Policy

29. The WMS was made without any prior notice and without the Defendant or his department having carried out any consultation with the house building

³ : The Parliamentary Under-Secretary of State, Department for Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) "Since its inception, more than 2,000 communities have started the process of neighbourhood planning, in areas that include nearly 10 million people."

industry, the development industry, land promoters, nor any of the members of the Royal Town Planning Institute (“RTPI”) and the Royal Institute of Chartered Surveyors (“RICS”) who represent them; nor any of England’s 363 local planning authorities; nor the Home Builders Federation, nor the National Housing Federation. Neither were the RTPI or the RICS whose members represent many of the aforementioned house builders, land promoters and local authorities.

30. For as far back as the Claimants have been able to establish, which is 28 years (October 1989) the Defendant (and each of his predecessors in title) have consulted upon proposed changes to national planning policy for housing.⁴ The duration and nature of consultation may have varied; the time in which the Defendant took time to consider the consultation responses may have varied; as to the time it took to effect a change in national planning policy for housing. But there has always been consultation on changes to national planning policy for housing. The full details are set out in the witness statement of mark Sitch, under the hearing “Ground 1”. Consultation has certainly always taken place for any significant change in national planning policy for housing.

31. Such consultation takes places for obvious reasons: such changes can have a dramatic impact on the housebuilding industry and the supply of land for new housing. Changes in national housing policy affect investment decisions which can involve huge sums of money for the house building and development industry.

32. As noted above, the WMS removes the requirement for LPAs to demonstrate a five year supply of housing land. It sets a wholly new (previously unseen and unheard of) policy for LPAs, such that they now need only demonstrate a three year supply of housing land. This is a profound change.

33. It removes the policy requirement for an LPA to have a five year supply of

⁴ Consultation on the draft version of the first PPG3, which was finally issued in March 1992

housing land and the implications of NPPF/49 for all qualifying NDP areas.

34. The fact that there has always been consultation is explained in the witness statement of Mark Sitch under the heading "Ground 1". But by way of illustration,

- i. The NPPF itself was subject to consultation prior to its introduction in March 2012. A draft version of the NPPF was published on 25 July 2011. It was subject to a three-month consultation period which ended on 17 October 2011. 16,000 responses were received to the consultation. The draft version was subject to an Impact Assessment (dated July 2011)
- ii. Prior to this, national planning for housing was contained in the aforementioned PPS3, which was issued in November 2006. This was the policy which re-introduced the requirement for a continuous five year supply of housing land. This was itself the subject of consultation. A draft version of PPS3 was published in December 2005, and was subject of a three-month consultation period ending on 27 February 2006. This consultation was also the subject of a Regulatory Impact Assessment.
- iii. Prior to this, national planning for housing was contained in Planning Policy Guidance Note 3 ("**PPG3**"). This was published in March 2000. It was the subject of detailed consultation conducted in March 1999.

35. It is not just the publication of wholly new planning policy documents upon which change to national policy for housing has been the subject of consultation:

- i. There was consultation on targeted changes to the NPPF in December 2015, which led to the Written Ministerial Statement on "*Support for Small Scale Developers, Custom and Self*

Builders” by the (then) Minister for Housing and Planning (the Right Honourable Brandon Lewis MP) on 28 November 2014. This was the subject of litigation in SSCLG and West Berkshire DC and Reading BC [2016] EWCA Civ 441. That WMS made specific and repeated reference to the fact the Government had engaged in consultation on the proposed changes to national policy. That WMS, in fact cited the fact the Defendant had received 300 consultation responses “*many which contained detailed submission and local data.*”⁵

- ii. There was consultation on targeted changes to the aforementioned PPG3: Housing in July 2003, when the Government previously proposed changes to affordable housing policy and the use of employment and commercial land for housing.

36. In its response to the pre-action letter, the Defendant refers to other areas of planning policy, such a fracking. This is not relevant. This claim is not based on consultation in any other areas of planning policy. The housing industry is a £19.2 billion UK industry which invests £12.5 billion in land and buildings.⁶

37. In it response, the Defendant also says “*In the specific area of housing policy there have been previous WMSs where no consultation has taken place, including the WMS on previously developed land of 9 June 2010 and on economic growth following the coalition government taking office in 2011.*”

38. This is wrong, there was a huge consultation exercise which DCLG conducted with every LPA in the country before that 2010 WMS was issued. The DCLG allowed two months for consultation and received 127 detailed responses, followed up by detailed surveys and interviews. These were all about the extent

⁵ The WMS cited support for the Government’s position in the consultation from small and medium sized developers, a category of house builder who form many of the litigants in the present action.

⁶ The Economic Footprint of UK Housebuilding (March 2015) Witness Statement of Mark Sitch: Exhibit MS1

of garden land development and assessing the likely impact of the proposed change. This was consolidated in a 100 page research document by the University of Kingston entitled “**Garden developments: understanding the issues**” (Witness Statement of Mark Sitch, Exhibit MS15).

39. The resultant change was to text in the Annex at the back of the policy and its limited impact on the development industry is addressed in the Witness Statement of Mark Sitch under the heading “Ground 1”.

40. The 2011 WMS on Economic Development was about economic development. Housing is not economic development, as is made very clear from the definition of economic development in the NPPF (in the glossary):

“**Economic Development:** Development, including those within the B Use Classes public and community uses and main town centre uses (but excluding housing development)”.

41. The 2011 WMS makes just a fleeting reference to housing and nothing more. The 2010 WMS also refers to forthcoming policy in the NPPF upon which there was consultation.

“The Recent Analysis” Supporting the New Policy

42. The WMS refers to and relies upon on evidence (“*recent analysis*”) which claims that NDPs plan for more homes than local plans, prepared by LPAs. It is expressed in this way in para 1 of the WMS:

“Recent analysis suggests that giving people more control over development in their area is helping to boost housing supply – those plans in force that plan for a housing number have on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authority.” (our underlining)

43. The WMS does not identify this “recent analysis”. But the Claimants believe it is based on an informal internal DCLG research paper published in October

2015, entitled *“Neighbourhood Planning; progress on housing delivery”*.

44. The Claimants have obtained a copy of this paper, although as far as the Claimants’ legal advisors are aware, it has now been removed from all Government websites. This paper is Exhibit 42 to Mark Sitch Witness Statement. The Claimants say the following of it:

- a. The claim made for this analysis is extremely questionable.
- b. It is based on work done in the summer of 2015, looking at just 16 NDPs.
- c. The paper is 10 pages in length.
- d. The paper makes the claim that housing delivery in areas where NDPs have allocated sites for new homes is 10% greater than the level of allocations in local plans. Yet, in many instances the comparison is not made with Local Plan allocations at all. This is because for most of the 16 NDPs studied, the relevant Local Plans had not yet been adopted, and in some instances had not yet been examined. Instead, the comparison is made between the number of new houses allocations in the NDP and,
 - i. SHLAA⁷ sites which have no planning status as allocations whatsoever (Tettenhall and Heathfield Park NDPs);
 - ii. Proposed allocations in early consultation draft local plans (Arundel, Bersted, Ferring, Littlehampton, Yapton and Barnham and Eastergate NDPs); and even
 - iii. Allocations in a draft local plan which had already been found unsound by the examining planning inspector (Winslow);
- e. In one of the NDPs for which a greater number of allocations than the local plan was claimed, there were in fact significantly fewer houses

⁷ SHLAA - Strategic Housing Land Availability Assessments

actually allocated (Heathfield Park NDP).

- f. In another, the only addition housing site above the Local Plan requirement was a site not even included as an allocation in the NDP. The document acknowledges it was actually granted planning permission as a windfall (Thame NDP). So the NDP had no relevance to the increase.

45. The Claimant has also obtained a further Report in October 2016, updating the Report of October 2015, and carrying the same title. This was not available on the DCLG website, or any Government website but was eventually located via a not-for-profit charity website. This paper is Exhibit 43 to Mark Sitch Witness Statement. The Claimants observe that

- a. The 2016 document is said to update the October 2015 Report, and carries forward similar methodological deficiencies listed above. It is to be noted that the claim is still made that the data shows 10% more homes "*over and above the local authority provided number*", when as the document (but not the WMS) accepts that the figures are in fact based in many instances on emerging draft Local Plans or SHLAAs.
- b. It is also unclear why only 39 NDPs are relied upon in the analysis, when it is believed that there were well over 100's made which met the criteria of having been in force for 3 months by the time the data was collected in May and June 2016. The analysis therefore looks to be selective.
- c. Many of these early NDPs had "front runner" funding from the Government, directed to the relevant LPAs. Acceptance of such money would have no doubt carried an obligation to provide clearly stated outcomes and data to the DCLG once the NDP had been made.

- d. Added to which, unlike the previous document, only a few of the relevant data sheets are provided and some are repeats of those from the 2015 document. In fact, there are only 3 datasheets which are new.
46. The claim that NDPs have planned for 10% more homes than that allocated in Local Plans by LPAs is not made out from this analysis.
47. This analysis is woefully inadequate in terms of its intended purpose. It is also misleading as to the claims it makes and which are made for it. It lacks any meaningful credibility. Yet this has been relied upon as the basis for changing a 40 year old well established cornerstone of national planning policy for housing.
48. The WMS specifically highlights this erroneous analysis as part of the justification for introducing the new policy of removing the national policy requirement for LPAs to demonstrate a continuous five year supply of housing land. No reliance should be placed on such analysis.
49. In fact, in the WMS, the Minister appears to be mistaken as to the facts. The opening paragraph of the WMS and the 2016 DCLG Report are not dealing with the same dataset. The DCLG research consists of 39 plans out of 230 (17%).
50. In contrast, the WMS says this

“Neighbourhood planning was introduced by the Localism Act 2011, and is an important part of the Government’s manifesto commitment to let local people have more say on local planning. With over 230 neighbourhood plans in force and many more in preparation, they are already a well-established part of the English planning system. Recent analysis suggests that giving people more control over development in their area is helping to boost housing supply – those plans in force that plan for a housing number have on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authority.”

51. The Ministerial Code says at page 6, paragraph 1.2 (c) *“It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity”*.
52. In the reply to the pre-action letter, the Defendant has already accepted that the statement should have said the analysis was “plainly provisional and of limited weight”. This should have been made clear in the WMS.
53. Added to which, it is the collective experience of the Claimants that many NDPs do not make appropriate allocations for new housing. Some are unrelated to the requirements in Local Plans, as the relevant local plans have not been adopted. Some are what can be characterised as “NIMBY”⁸ plans which seek to impose widespread restrictions on development, such as preventing any new development outside of settlement boundaries or imposing large areas of protected local green space across the parish. Some make nominal allocations or select too few sites, whilst others select sites which are not available, deliverable or viable. Some of these involve environmental or ecological constraints which are difficult to overcome. Some involve sites involving landowners who have no intention of making the land available for housing. On this issue, please see the witness statements of
- a. Mark Sitch for the First Claimant (paragraph);
 - b. Kathryn Ventham for the Second Claimant;
 - c. Gareth Williams for the Third Claimant;
 - d. Stephen Harris for the Fourth and Twenty-First Claimant,
 - e. John Coleman for the Fifth Claimant;
 - f. Jane Gardner for the Sixth Claimant
 - g. Duncan Powell for the Seventh Claimant
 - h. Julia Foster for the Ninth Claimant

⁸ NIMBY the acronym for the phrase “Not In My Back Yard”, which is often used to describe those opposed to new development.

- i. Sian Williams for the Tenth Claimant
- j. Paul Thomas for the Eleventh Claimant
- k. Michael Braithwaite for the Twelfth Claimant
- l. Barry Chamberlain for the Thirteenth Claimant
- m. Paul Fong for the Fifteenth and Twenty-Five Claimant
- n. Tony Bateman for the Sixteenth and Twentieth Claimant
- o. Matthew Jones for the Seventeenth Claimant
- p. Alice Brighton for the Eighteenth Claimant
- q. Matthew Kendrick for the Nineteenth Claimant

A Three Year Supply Policy

54. The stated objective of the WMS is to ensure that, in areas with a NDP, *“those plans should not be deemed to be out-of-date unless there is a significant lack of land supply for housing in the wider local authority area.”* (WMS para 4). This is then elaborated upon further by reference to NPPF/49, with the WMS statement making clear that the requirement for a five year supply of housing does not apply in areas where,

- *“the neighbourhood plan allocates sites for housing; and*
- *the local planning authority can demonstrate a three year-supply of deliverable sites.”* (WMS, para 5)

55. It is therefore the apparent intention of the policy to provide in NDP areas “protection” from the submission of planning applications for housing on sites not allocated in an adopted development plan⁹. Such applications are known as windfall developments, and for larger sites these are often secured by means of a planning appeal under Section 78 of Town and Country Planning Act 1990.

⁹ See the Statement by the Minister in the House of Common on 13 December 2016

56. The WMS only refers to a period of three years. It is therefore a policy based on a housing requirement for three years. No other timeframe is suggested. In the Defendant's reply to the pre-action protocol letter, it is stated that the policy is meant to mean a requirement for a three year supply against the minimum five year requirement (i.e. a significant shortfall on a shortfall target). But the WMS simply does not say that. There is no other term of reference in the WMS to show that it relates to a time period of five years. This issue was raised in the pre-action letter over three weeks ago. There has been no Government Statement or publication to clarify this matter.

57. Therefore, until that happens the means by which this protection is to be achieved is to reduce the number of years of housing land supply that a LPA is required to demonstrate on any given date. Yet in many areas of the country, the way in which this is to be achieved will, ironically, make it harder for LPAs to evade the effect of NPPF/49. The reasons for this are simple:

- i. An LPA will have a housing target in its local plan¹⁰ of typically 15 or 20 years (for example 7,500 houses to be delivered in the next 15 years).
- ii. This housing requirement is always annualised, such that there is an annual target for the number of houses to be built in each City, Borough or District area (e.g. 500 dwellings per year).
- iii. A three year supply of housing land gives rise to a lesser housing requirement of deliverable sites (e.g. 1,500 dwellings as opposed to 2,500). But at the same time, it also gives rise to a lesser period in which to demonstrate the same (just 3 years not 5 years).
- iv. For the reasons explained, even with planning permission, houses in the housing supply cannot be built immediately. With

¹⁰ If there is no adopted Local Plan or Core Strategy then the housing requirement will be the objective assessment of housing need (which the Local Plan should be based upon): *St Albans City and District Council v Hunston Properties Ltd and SCLG* [2013] EWCA Civ 1610

planning conditions and other matters to be addressed before construction can begin there are substantial lead-in times for all housing sites. This is especially the case for sites with outline planning permission, where little if any housing will be built in the first three years. This is because sites with outline permission are subject to the need to submit “reserve matters” applications (which provide the detail on matters such as the layout, siting and appearance of each of the houses). Three years is the normal time allowed for the submission of reserved matters.

- v. Lead-in times are a key part of the assessment of the housing land supply. The Government’s own planning policy guidance (the NPPG¹¹) requires the use of realistic (local based and market-based) lead in times.
- vi. It is for these reasons, that most LPAs which are able to demonstrate a five year supply of housing land are reliant on a substantial part of their delivery supply coming forward in years 4 and 5 of the five year supply of housing.
- vii. The consequence is that the new policy in the WMS will ironically make it harder for many LPAs to demonstrate the requisite three year supply of housing land, than a five year supply, and thereby opening up more (not less) opportunities for windfall development in areas with a NDP.

58. This is the exact opposite of the intended protection from windfall development which the policy seeks to achieve (as confirmed by the Minister on 13 December in the House of Common).

59. The Defendant’s department appears not to know how its own policy on housing land supply operates in practice. Had it consulted upon the same

¹¹ NPPG, Chapter 3, Paragraph 23: ID: 3-023-20140306

(Ground 1), this could have been pointed out by consultees.

60. The first two grounds are mutually reinforcing, evidencing a fundamental problem with the WMS.

61. The WMS gives rise to utter confusion: please see the Claimants aforementioned witness statements (plural) under the heading Ground 2. Such confusion gives rise to serious uncertainty. Uncertainty is anathema to the delivery of housing growth by the house building industry.

A Policy Contradiction: WMS and NPPF

62. The Government's national planning policy for housing seeks to **"boost significantly the supply of housing"** (NPPF/47). This part of the national policy has not been changed by the WMS. Yet for the reasons outlined above, the clear intention (if not the wording) of WMS is to prevent windfall development from coming forward.

63. Windfall development is a major part of the supply of new homes in England. Most such housing is secured by means of Section 78 planning appeal. Recent research conducted by Indigo Planning indicates that an estimated around 40,000 new dwellings have secured planning permission by appeal in 2016: Exhibit 62 to the Witness Statement of Mark Sitch. This is a major part of the total supply of new homes coming forward.

64. Furthermore, planning permission for many more thousands of new homes have been granted by LPAs on unallocated sites (without the need for an appeal) because of the shortfall in the five year supply of housing land.

65. The Government's policy to boost significantly the supply of housing in the NPPF has been re-enforced by the Defendant himself last year:

"In the last year of full records, we managed to deliver more than

170,000 additional properties across England. It's not a bad number but it is far fewer than we need. We need to do much better. Everyone agrees we need to build more homes. But too many of us object to them being built next to us" - Right Honourable Savid Javid MP, Secretary of State for Communities and Local Government: Speech to the Conservative Party Conference, October 2016 (our emphasis)

66. The WMS seeks to protect those areas with a NDP from such windfall development. In the context of the number of new homes delivered through applications and appeals where there is no five year supply of housing land, the intention (if not the wording of) the WMS is to seriously curtail this important supply of new homes coming forward in the form of windfall development.
67. The WMS is plainly inconsistent with NPPF/49. Yet in assessing the weight to give development plan policies in the determination of planning applications and appeals, the NPPF/215 requires the decision maker to look at how consistent a policy is against the NFFP. Reliance on the WMS instead of NPPF/49 will make the approach adopted to the relevant policy, inconsistent with the NPPF.

Regulatory Impact Assessment

68. The Defendant is proposing a major change in national planning policy for housing. Such changes require a regulatory impact assessment (or similar) to assess the impact on affected enterprises.
69. There is also a legitimate expectation of such an impact assessment (or similar) for a major changed in national planning policy.
70. House building is a major industry in the England. For the reasons set out in the aforementioned witness statements, the effect of this change is significant.

It is a change which should have been assessed.

71. No such regulatory impact assessment was done for the WMS.

The Public Sector Equality Duty ("PSED")

72. The WMS was not accompanied by any Equality Impact Assessment. Such an assessment is required by virtue of Section 149 of the Equality Act 2010.

73. Section 149 of the Equality Act 2010 requires a public authority to have due regard to the matters mentioned in subsection 1(a)-(c) including a consideration of the interests of those sharing relevant protected characteristics such as age, gender, disability and race.

74. Without such an Equality Impact Assessment, it is simply not possible for the Defendant to know if it has complied with the requirements of Section 149. It is considered that the removal of windfall development will impact adversely on those in need of affordable housing which is a requirement of nearly all housing development on sites of more than 10 houses. This may affect certain ethnic groups differently.

75. The Claimants also contend that the policy, which will restrict the supply of windfall development, will very obviously have an adverse impact on young people between the ages of 25 and 34, who face a well-documented difficulty in terms of being able to purchase their own home, as first time buyers. They is a defined category of persons with a protected characteristic, namely age, as defined in the Equality Act 2010.

76. There is ample evidence of suppressed household formation in this age group. The Defendant's department has itself encouraged LPAs to look carefully for evidence of suppressed household formation in the official DCLG household

projections¹². The Defendant's department itself recognises that this age group, and possibly extending to those up to the age of 40, are caused grief and hardship by the housing crisis which the Defendant department has acknowledged exists in this country: Statement of the (then) Housing and Planning Minister, Nick Boles MP, in the House of Commons in October 2013.

77. The Government did carry out an Equality Impact Assessment for the changes to the NPPF in 2015. This acknowledged persons under 40 as a defined category of persons with a protective characteristic, namely age.

78. More recently, the Defendant made clear that:

"Far too many young people can't get a foot on the housing ladder. Many are being forced to live back with mum and dad, as rents soar faster than wages... One and a half million households contain at least one adult who says he or she wants to buy or rent their own home but simply cannot afford to do so." - Right Honourable Savid Javid MP, Secretary of State for Communities and Local Government: Speech to the Conservative Party Conference, Oct 2016

GROUNDS OF CHALLENGE

GROUND 1: LEGITIMATE EXPECTATION OF CONSULTATION

79. A legitimate expectation (in this case, of consultation) can be founded upon practice: Council of Civil Service Unions v Minister for Civil Service [1985] AC 374 ("*the GCHQ case*") at 408 G- H. This has been confirmed as one of the four main categories of legitimate expectation by R v (Devon County Council, ex parte Baker) [1995] 1 All ER 73 as per Simon Brown LJ (as he then was) at 26F. It was confirmed in R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 as per Lord Woolf at 57. More recently, the Court of

¹² NPPG, Chapter 2a, paragraph 15: ID: 2a-015-20140306

Appeal has again confirmed the law of legitimate expectation founded on established practice in R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 as per Laws LJ at 29

80. When the practice induces a legitimate expectation of being consulted before a particular decision is taken, the review of the court is not confined to Wednesbury grounds. The court will itself require the opportunity for consultation to be given. That is unless there is an overriding reason to resile from it, in which case the court will itself judge the adequacy of the reason advanced for the policy change, taking into account what fairness requires. In the GCHQ case that reason was national security.

81. No such reason for the failure to consult exists here.

82. Based on the evidence set out in the witness statement of Mark Sitch

- a. Any change to national planning policy for housing should be the subject of consultation with those affected.
- b. In the alternative, any major change to national planning policy for housing (which this is) should be the subject of consultation with those affected.
- c. In the alternative, any major change to the well-established five year housing supply policy in national planning policy for housing should be the subject of consultation with those affected.

GROUND 2: THE WMS IS ILLOGICAL AND IRRATIONAL COMPARED TO ITS STATED INTENTION. IT IS ALSO WEDNESBURY UNREASONABLE

83. The three year housing land supply policy in the WMS is illogical and irrational against its stated intention. Its intention is to offer protection from windfall

development. Yet the three year housing land supply policy (as written) in the WMS will have the opposite effect as explained in the witness statement of the Claimants.

84. The WMS is therefore illogical and irrational against its stated intention.
85. No Ministers properly directed could introduce a policy which has the opposite effect of that intended.

GROUND 3: THE WMS IS BASED AND EVIDENCED ON MISTAKEN FACTS WHICH ARE MISLEADING. IT IS IRRATIONAL AND WEDNESBURY UNREASONABLE TO RELY ON SUCH EVIDENCE TO FORMULATE GOVERNMENT POLICY

86. The WMS specifically relies upon “recent analysis” which claims to show that NDPs have planned for 10% more homes than planned for by the relevant local planning authority.
87. For the reasons set out in the witness statement of Mark Sitch (and others) that conclusion is completely unfounded from this analysis.
88. This analysis is woefully inadequate in terms of its intended purpose. It is also misleading as to the claims it makes and which are made for it. It lacks any meaningful credibility. It is certainly not suitable as a foundation for National Government Policy.
89. There are a whole series of material errors of fact about the research and what it purports to demonstrate.
90. No reliance should be placed on such analysis.
91. It is irrational for the Defendant to have relied upon such evidence to formulate any change in the Government’s national planning policy for housing, let alone one as significant as this.

92. It is also Wednesbury unreasonable, as no Minister or Government department properly directed would look to act in this way, placing reliance upon such woefully inadequate evidence.

93. The Minister appears to have breached the Ministerial Code and it is Wednesbury unreasonable for a Minister to have done so, whether inadvertently or not.

94. Reliance upon this erroneous and misleading analysis has involved the Defendant taking into account a material consideration which it ought not to have done.

GROUND 4: WMS IS IRRATIONAL, PERVERSE AND WEDNESBURY UNREASONABLE WHEN SET AGAINST THE GOVERNMENT'S CLEARLY STATED POLICY TO SIGNIFICANTLY BOOST THE SUPPLY OF HOUSING.

95. The WMS seeks to protect those areas with a NDP from windfall development. In the context of the number of new homes delivered through applications and appeals where there is no five year supply of housing land, the intention of the WMS is to seriously curtail this important supply of new homes coming forward in the form of windfall development.

96. It is irrational, perverse and Wednesbury unreasonable for the Defendant to introduce a policy which seeks to curtail the supply of planning permissions for new homes by seeking to protect NDP areas from windfall development, whilst claiming to have a policy which seeks to boost significantly the supply of new homes and "*build more homes*".

97. It is also illogical to apply the NPPF and the WMS at the same time given the policy in NPPF/215, when the WMS is plainly inconsistent with the NPPF/49.

GROUND 5: NO REGULATORY IMPACT ASSESSMENT

98. The Defendant is proposing a major change in national planning policy for housing. Such changes require a regulatory impact assessment (or similar names assessment).
99. It was Wednesbury Unreasonable for the Defendant not to have carried one out.
100. There is a legitimate expectation of such an assessment. None was done here.

GROUND 6: BREACH OF THE PUBLIC SECTOR EQUALITY DUTY

101. The Defendant has not assessed the extent and risk of certain adverse impacts arising from the WMS. No assessment was made upon persons with protected characteristics and falling within section 149(1).

DISCLOSURE

102. The Defendant has been requested to kindly provide the following documentation (this request was made in the pre-action letter):
- i. Full details and any correspondence or internal document of any kind relating to the Written Ministerial Statement, with a clear chronology setting out when it was drafted, and the author(s) of the draft and any evidential documents relied upon;
 - ii. Full details and any correspondence of any kind passing between the Defendant (and his Ministers or their advisors) and any Member of Parliament, Local Councillor, Local Planning Authority or Neighbourhood Plan Qualifying Body (Parish Council/Neighbourhood Forum) about the WMS its contents in advance of publication of the Written Ministerial Statement;
 - iii. Full details of the recovered s78 appeals in which a

Neighbourhood Plan or Draft Neighbourhood Plan forms part of the development plan or is an emerging document;

- iv. Full details and any correspondence of any kind passing between the Defendant and the Planning Inspectorate in respect of the WMS, including any internal notes to Inspectors (e.g. PINS Notes).

RELIEF

70. For any or all of the above reasons, the Claimant respectfully requests an Order:

- i. Granting permission to proceed with the claim; and thereafter
- ii. Allowing the claim;
- iii. Quashing the Written Ministerial Statement issued on 12 December 2017 on behalf of the Defendant by the Minister of State for Housing and Planning and Minister for London, the Right Honourable Gavin Barwell, MP
- iv. Requiring the Defendant to pay the Claimant's costs.

CHRISTOPHER YOUNG

JAMES CORBET BURCHER

NINA PINDHAM

*No 5 Chambers, Fountain Court,
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25 January 2017

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

IN THE MATTER OF AN APPLICATION FOR PERMISSION
TO APPLY FOR JUDICIAL REVIEW

BETWEEN

- (1) RICHBOROUGH ESTATES LIMITED
- (2) REDROW HOMES LIMITED
- (3) LINDEN LIMITED
- (4) WAINHOMES LIMITED
- (5) WILLIAM DAVIS LIMITED
- (6) MARTIN GRANT HOMES LIMITED
- (7) ACORN PROPERTY GROUP
- (8) HOPKINS HOMES LIMITED
- (9) CROUDACE LIMITED
- (10) NORTH OAK HOMES LIMITED
- (11) BARGATE HOMES LIMITED
- (12) LARKFLEET LIMITED
- (13) WEALDEN HOMES
- (14) DBA HOMES LIMITED
- (15) F W JOHNSONS LIMITED
- (16) ROBERT HITCHINS LIMITED
- (17) CATESBY ESTATES LIMITED
- (18) WELBECK STRATEGIC LAND II LIMITED
- (19) SOUTH WEST STRATEGIC DEVELOPMENT LIMITED
- (20) TEM LIMITED
- (21) HIMOR GROUP LIMITED
- (22) MAXIMUS LIMITED
- (23) GREVAYNE PROPERTIES LIMITED
- (24) BEEHCROFT LIMITED
- (25) ALLASTON DEVELOPMENTS LIMITED

Claimants

and

SECRETARY OF STATE
FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

STATEMENT OF FACT AND GROUNDS
ON BEHALF OF THE CLAIMANT

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