

Case No: CO/1032/2018

Neutral Citation Number: [2018] EWHC 2906 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 November 2018

Before :
JUSTINE THORNTON QC SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

CHESHIRE EAST COUNCIL

Claimant

- and -

**SECRETARY OF STATE FOR HOUSING
COMMUNITIES & LOCAL GOVERNMENT**

First Defendant

-and-

(1) GRAHAM KIRKHAM
(2) ANGELA MARY KIRKHAM

Second Defendants

Reuben Taylor QC (instructed by **Sharp Pritchard**) for the **Claimant**
Richard Honey (instructed by **Government Legal Department**) for the **First Defendant**
Freddie Humphreys (instructed by **Addleshaw Goddard**) for the **Second Defendants**

Hearing date: 26 September 2018

Judgment

Justine Thornton QC, Deputy High Court Judge:

Introduction

1. This is an application pursuant to Section 288 of the Town & Country Planning Act 1990 (“the 1990 Act”), in which the Claimant, Cheshire East Council (“the Council”), seeks an order quashing the decision of an inspector appointed by the Secretary of State for Housing Communities and Local Government, granting outline planning permission for 29 dwellings.
2. The central issue arising in this claim is whether the inspector misunderstood and / or misapplied paragraph 47 of the National Planning Policy Framework (“the NPPF”), in particular, the requirement for local planning authorities to demonstrate a five year deliverable housing supply. The grounds of challenge before the Court are that the inspector erred in law in granting planning permission because he:
 - i) misinterpreted the NPPF in relation to the circumstances when the presumption in favour of granting permission, known as the “tilted balance”, in paragraph 14 is to be applied and thereby applied the tilted balance on a precautionary basis;
 - ii) misinterpreted the NPPF and the National Planning Practice Guidance as requiring the Claimant to provide “*robust, up to date evidence to support the deliverability*” of housing in respect of all sites within the housing supply upon which it relied; and
 - iii) failed to provide adequate reasons.

Background

3. Provision for housing in the Cheshire East area has been controversial for a number of years. The Cheshire East Local Plan Strategy (“CELPS”) was adopted in July 2017. The report by the inspector following examination of the plan assessed the housing provision as follows:

“68. *At a Local Plan examination, it is important to establish the basis of future housing land supply, both for five year supply and throughout the plan period. Firstly, CEC has acknowledged that, at present, it is unlikely to be able to demonstrate a five year supply of housing land. However, with the identification and endorsement of the strategic site allocations included in the CELPS-PC, this situation should be resolved, particularly with the abandonment of the phasing policy included in the original CELPS-SD. Much will depend on whether the committed and proposed housing sites come forward in line with the anticipated timescale and amended housing trajectory. Although there may be arguments about*

specific sites, developers and landowners have confirmed the capacity, timescale, viability and deliverability of almost all the proposed strategic site allocations.

69. *CEC has undertaken much detailed work in establishing the timescales and delivery of these sites, including setting out the methodology for assessing build rates and lead in times, using developers' information where available and responding to specific concerns. Although there may be some slippage or advancement in some cases, I am satisfied that, in overall terms, there are no fundamental constraints which would delay, defer or prevent the implementation of the overall housing strategy. The monitoring framework also includes specific indicators related to housing supply with triggers to indicate the need for review. I deal with site specific issues later in my report on a town by town basis. On the basis of the evidence currently available, I am satisfied that CEC has undertaken a robust, comprehensive and proportionate assessment of the delivery of its housing land supply, which confirms a future five year supply of around 5.3 years.*

...

75. *CEC has drawn up a revised housing trajectory, based on its assessments of the delivery and timescales of the main components of housing supply, including the proposed strategic housing sites. This shows the annual delivery rates, including significantly increased rates of housing completions between 2016 / 17 – 2024/25, ranging from 2,000 to over 3,500 DW/YR, fully meeting the required delivery rates. Although these higher delivery rates will be challenging and ambitious, the CELPS-PC includes sufficient committed and allocated sites to ensure that the plan can be implemented, with adequate choice and flexibility.*
76. *On the basis of the evidence before me, I conclude that the CELPS-PC, as updated and amended, would provide a realistic, deliverable and effective supply of housing land, to fully meet the objectively assessed housing requirement, with enough flexibility to ensure that the housing strategy is successfully implemented. Similarly, CEC should be able to demonstrate that there is at least a five year supply of housing land when the CELPS is adopted.”*

4. At the time the planning application which led to the permission under challenge was determined by the Council, the Cheshire East Local Plan Strategy was still an emerging

document. However, it was subsequently adopted in July 2017 and formed part of the statutory development plan at the time of the inspector's decision. The inspector's decision is dated 30 January 2018.

5. The permission granted is for residential development of up to 29 dwellings and associated infrastructure at Shavington Villa, Rope Lane, Shavington, CW2 5DT. The permission is outline, with all matters reserved for future consideration, except for means of access. The appeal was made by the Second Defendants, Mr and Mrs Kirkham, following the decision of Cheshire East Council, to refuse permission, by Notice dated 13th April 2017. The appeal to the Inspector was made under Section 78 of the 1990 Act.

The Decision Letters

6. In the decision under challenge (referred to as the 'Shavington Lane' decision) the inspector relied on the assessment of the deliverability of the five year housing supply in two other decision letters, which I refer to as the 'White Moss decision letter' and the 'Willaston decision letter' (along with 'the White Moss inspector', 'the Willaston inspector' and 'the Shavington inspector'). It is therefore necessary to set out relevant extracts from all three decisions.
7. The Council makes no criticism of the Shavington inspector's decision to rely on the analysis and assessment reached by the Inspectors in the other two decisions. The Shavington appeal proceeded by way of written representations whereas the White Moss and Willaston decision letters followed a public inquiry, which provided greater scope to examine the question of the Council's housing supply.

The Shavington Lane decision

8. The inspector identified the main issue before him as being whether the Council was able to demonstrate a five year supply of deliverable housing sites:

"6 The Council's ability to demonstrate a five year supply of deliverable housing sites is one of the main issues in determining this appeal. It affects whether or not the appeal is to be considered against the "tilted balance" set out in the fourth bullet point of paragraph 14 of the National Planning Policy Framework ("the Framework").

7 Paragraph 49 of the Framework states that relevant policies for the supply of housing should not be considered up to date if the Council is unable to demonstrate a five year supply. Where paragraph 49 of the Framework applies, paragraph 14 states that permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

- 8 *The Council asserts in its Statement that it is able to demonstrate a five year supply of deliverable housing sites. However, the Appellant has drawn my attention to a recent appeal decision elsewhere in the borough that found that the five year supply position should be considered marginal and potentially in doubt. That Inspector concluded that it would be both cautious and prudent to regard policies for the supply of housing as not being up to date, thus engaging the “tilted balance” at paragraph 14 of the Framework.*
- 9 *The Council subsequently referred me to evidence it had submitted in relation to another case that had recently been subject to a public inquiry. However, that decision was published on the 4th January 2018 and similarly concluded that the Council’s five year supply position was marginal. Accordingly, the Inspector considered that appeal against the “tilted balance” at paragraph 14 of the Framework.*
- 10 *Both of these recent appeal decisions were determined following a public inquiry, which would have allowed the Council’s housing land supply to be scrutinised in detail. In both cases, the Council’s supply position was found to be marginal and the “tilted balance” was applied. I see no reason to take a different view and I, therefore, regard policies for the supply of housing as being not up to date. Accordingly, I have considered the appeal against paragraph 14 of the Framework. I return to this matter in the overall balance below.”*

9. The inspector assessed the proposal as being contrary to the development plan on grounds that it would affect the undeveloped character of the Strategic Green Gap between Shavington and Crewe / Willaston, and that it would result in the loss of an area of the best and most versatile agricultural land (paragraphs 19 and 21 of the decision letter).

10. Under a heading “*Overall Balance & Conclusion*” the inspector set out his conclusion as follows:

“33. ... as set out above, recent appeal decisions have found the Council’s five year supply position to be marginal and have, therefore, applied the ‘tilted balance’ at the fourth bullet point of paragraph 14. I have adopted the same approach here.

34. *In terms of the adverse impacts of the development, the appeal site is within the open countryside and a strategic green gap between Shavington and Crewe. In this regard, it would be contrary to policies PG5 and PG6 of the CELPS, and saved policies NE.4 and RES.5*

of the Borough of Crewe & Nantwich Adopted Replacement Local Plan. However, as set out above, the harm to the surrounding landscape would be limited and there will be no significant erosion of the physical and visual gap between Shavington and Crewe. In these circumstances, and in the context of the 'tilted balance' at paragraph 14 of the Framework, I attach limited weight to the conflict with these policies. The development would also involve the loss of an area of best and most versatile farmland, although this would be modest in scale."

11. The inspector then went on to consider the benefits of the development before concluding, at paragraph 36:

"On balance, and taking all matters into consideration, I conclude that the adverse impacts would not significantly and demonstrably outweigh the benefits of the development. The development would therefore comprise sustainable development as set out in the Framework. In this case, the conflict with the Development Plan would be outweighed by other material considerations."

12. The inspector granted permission for the development.

The White Moss decision letter

13. The White Moss decision letter is dated 8th November 2017 and concerned an application for the provision of up to 400 residential units in Barthomley Crewe. The inspector dismissed the appeal and upheld the notice to refuse permission by Cheshire East Council.
14. The inspector identified the main issue as whether the Council can "*demonstrate a realistic and deliverable five year supply of housing land based on the Housing Monitoring Update (August 2017 – base date 31 March 2017) having particular regard to the methodology used to forecast supply and the predicted delivery of selected sites*" (paragraph 11a of the decision letter).
15. The inspector recognised that the examination of the local plan had endorsed the Council's assessment that it had a 5 year deliverable supply of housing. However, the recently published Housing Monitor update had advanced the evidence base by a year and provided a basis for gauging progress with delivery. The applicant for planning permission disputed the Council's revised assessment of its housing supply as 16,057 deliverable units (a 5.42 year housing land supply). The Council relied on its long-term work of appraising sites over a period of some ten years, whereas the applicant for planning permission had provided a snapshot with, the inspector noted, very different conclusions.

"To my mind the up to date evidence showing the current performance of major development sites seriously undermines

*the wider historic view promulgated by the Council”
(paragraph 17 of the letter)*

16. The inspector’s assessment of the evidence, whereby he considered the progress at each of the housing sites where deliverability was challenged, led to the following conclusions about the Council’s housing assessment:

“60. From the foregoing, it is apparent that a significant number of dwellings included in the Council’s five year supply, are at risk of failing to materialise within the timeframe identified, amounting to some 1,033 to 1,636 dwellings, as set out in the following table.”

17. Having set the figures out in a table, he continued:

“61. This would at best provide the Council with a headroom of 200 units; and the supply of 5.07 years. At worst, there would be a deficit of 130 dwellings and a supply of 4.96 years. To my mind, even though the calculated supply includes a 20% buffer, the five year supply should be considered to be marginal and, potentially, in doubt.

62. Therefore, on the basis of the fact-specific evidence before me, and the illustrated risk of available housing supply falling slightly below the five year requirement, I cannot determine with confidence that a marginal best case excess amounts to a sufficiently robust supply of specific deliverable sites. Given the importance of the five year baseline, and the aim to significantly boost the supply of housing, I conclude that it would be both cautious and prudent in the circumstances of this case to regard policies for the supply of housing to be considered not up to date, thus engaging the ‘tilted balance’ of paragraph 14 of the Framework.”

18. He returned to the topic in the overall planning balance at the end of his decision:

“87. The Framework sets out the importance of Local Planning Authorities being able to demonstrate a five year supply of specific deliverable housing sites. Whilst much analysis has underpinned the recent adoption of the CELPS, and its affirmed supply of 5.3 years, the base data has now rolled forward by a year with a publication of the Housing Monitoring Update in 2017.

88. The assessment of a five year supply is by no means an exact science and it requires forethought and professional judgement. The Local Planning Authority has the benefit of long-term statistical data, extensive local knowledge and regular dialogue with landowners

and / or developers. However, the exercise undertaken by the Appellant, although considerably more limited in scope, calls into question some of the assumptions made by the Council sufficient to warrant examination of the likely future prospects of a number of identified sites.

89. *Moreover, detailed analysis of those sites on which the parties disagree, confirms a degree of over-optimism on the Council's part and raises doubt about the robustness of its five year supply. In this regard, delivery has continued to lag and considerable improvements will be required to achieve the necessary number of completions. Nonetheless, the adoption of the CELPS has seen the release and confirmation of sites for development and there has been a notable increase in the number of new homes with planning permission or with the resolution to approve.*
90. *Overall, the question mark hanging over the five year supply has to be seen in this wider context and, on the basis of the Appellant's one year exercise, it is too early to assess whether or not the assumptions on which the CELPS is based are robust. Nonetheless, it would be prudent on the fact-specific circumstances of this case to consider relevant policies for the supply of housing to be on the cusp of being considered not up to date and, as a precaution, to apply the 'tilted balance' of paragraph 14 of the Framework...*
92. *In terms of the existing relevant Development Plan Policies, in the absence of a five year supply, existing, generally long-established and dated settlement boundaries, albeit sanctioned by the CELPS pending review, should be considered to be out of date. On this basis, limited weight applies to the identified conflict with CELPS policy PG6 and C&NRLP Policy RES.5.*
- ...
98. *In the final balance, the conflict with policies PG.2 and PG.7 of the recently adopted CELPS, and also with policies PG.6 and RES.5, as described above, provides the totality of the planning harm. Paragraph 14 of the Framework indicates that where relevant policies in the Development Plan are out of date, in this case arising from the marginality of a sufficiently convincing five year housing land supply, planning permission should be granted unless any adverse effects of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework as a whole."*

19. Having arrived at the view that the adverse effects of the development would significantly and demonstrably outweigh the benefits, the inspector dismissed the appeal by the developers and upheld the Council's refusal of planning permission.

The Willaston decision letter

20. The other decision relied on by the Shavington inspector was the Willaston decision, dated 4 January 2018. The main issue was whether or not the Council could demonstrate a five year supply of deliverable housing sites:

"11. Whether or not the Council can demonstrate a five year supply of deliverable housing sites is one of the main issues in this case. It affects whether or not the appeal falls to be determined under the 'tilted balance' in the fourth bullet point of paragraph 14 of the Framework. At the time the appeal was submitted, the Council stated it could not demonstrate a five year supply of deliverable housing sites. However, following the adoption of the CELPS, it is the Council's case that it can now demonstrate a five year housing land supply. This is disputed by the Appellant."

21. The inspector analysed the housing land supply as follows:

"43. A statement of common ground on housing land supply was submitted by the Council and the Appellant at the inquiry. It confirms that the housing requirement side of the land supply calculation is agreed between the main parties. The five year supply that must be demonstrated totals 14,824 dwellings over the period 1st April 2017 to 31st March 2022.

...

46. The Council's position is that it can demonstrate a supply of deliverable housing sites sufficient to provide 16,042 dwellings within the five year period, which amounts to 5.14 years' supply. The Appellant contends that only 13,792 dwellings could be realistically delivered, giving 4.65 years' supply. The main reasons for the difference between the two supply calculations are a combination of 'in principle' and site specific differences between the Council and the Appellant about the lead in times for sites to commence delivery and the resultant yield in the number of dwellings which could realistically be built within the five year period.

47. In considering these differences, I have taken account of the findings of the Court of Appeal in the St. Modwen Judgment on the distinction to be drawn between

'deliverability' and 'delivery' in assessing the five year housing land supply. I acknowledge, as stated in the St. Modwen Judgment, that proving the 'deliverability' of the housing land supply does not require certainty that sites will be developed within the five year period, particularly given the range of market factors affecting housing delivery, which can be difficult to predict and is subject to change over time.

48. *However, the likelihood and rate of delivery are part of the assessment of the 'deliverability' of the supply, as set out in the Framework in the PPG. Footnote 11 to the Framework is clear that for a site to be considered 'deliverable' there should be a 'realistic prospect' that housing would be delivered on the site within five years. Paragraph 3-031 of the PPG, in its guidance on what constitutes a deliverable site for housing, expects local authorities to provide robust, up to date evidence to support the deliverability of sites and to consider the time it will take to commence development on site and build out rates to ensure a robust five year supply.*

49. *These matters are considered in both the Council's and the Appellant's approach to assessing the deliverability of sites. They are reflected in the Council's housing trajectory, as presented in the Housing Monitoring Updates ("HMUs"). I acknowledge that the HMU and Trajectory are prepared at a point in time and that changes in the progress of sites will take place throughout the year. However, in order to assess whether there is a deliverable five year housing land supply for the purposes of this appeal, it is necessary to test the robustness of the assumptions on which the trajectory is based and the progress on sites, against the current available evidence as submitted to the Inquiry."*

22. The inspector analysed the progress of the 32 sites whose contribution to the five year supply was in dispute, including the following two sites, which he assessed as follows:

"58. *Beginning with the land off Dunwoody Way, Crewe (Ref 1934), although the site is under construction with 53 units complete, no completions have been recorded since 2013 / 14. The Council confirmed at the roundtable session that the site had stalled due to financial difficulties. Although it is possible that the remaining 29 units could be built within the next five years, in the absence of any evidence of ongoing discussions with potential developers to take the site forward, there appears no realistic prospect at this stage of the site being completed. Accordingly, these 29 units should be deducted from the supply.*

...

66. *The King's School, Westminster Road, Macclesfield (4302) has outline planning permission for redevelopment for 150 units, pending the relocation of the school to a new site. The Council confirm that the timescale for the opening of the new school in vacating this site has been revised to September 2020, pushing back commencement of development on this site until then. Accordingly, its revised prediction is that 15 units would be constructed on the site in the second half of 2020 / 21. However, allowing for site preparation and infrastructure works, realistically construction of units will be unlikely to start until the beginning of 2021 /22. Whilst further land has become available at Cumberland Street, which the Council suggested could compensate for the delay on the main site, the yield from this site is uncertain, given the need for listed building consent for the conversion of the old school buildings. Very little evidence was before me on which to make a reasoned judgement about the likely contribution of this site to the five year supply. Therefore, a reduction in the five year supply of 45 units from that predicted in the table attached to the SOCG would be justified for the Westminster Road site."*

23. Having completed the site specific assessments the inspector reached the following view:

"93. *Based on my analysis of the disputed sites, which is summarised in the table below, I conclude there is a realistic prospect of between 1,181 and 1,421 dwellings included in the Council's five year housing land supply will not be delivered within the five year period.*

94. *The Council's estimated supply of 16,042 dwellings exceeds the five year requirement of 14,824 dwellings by 1,218 dwellings. However, based on the above analysis, the supply would be between 14,861 and 14,621 dwellings. Therefore, the range falls either side of a five year supply, from a surplus of 37 dwellings or 5.01 years' supply to a shortfall of 203 dwellings or 4.93 years.*

...

96. *I acknowledge that the assessment of a five year supply is not an exact science, but involves professional judgement, particularly on lead in and delivery timescales. However, notwithstanding the conclusions of the CELPS Examination Report in respect of a five*

year land supply and other recent appeal decisions on this issue, based on my analysis of the evidence at this appeal, I cannot be certain that the Council is able to demonstrate a robust five year supply of deliverable housing sites. I have found that the housing land supply position is either marginally above or slightly below five years. On this basis, I propose to adopt a precautionary approach to the housing land supply position and, in the light of paragraph 49 of the framework, apply the 'tilted balance' in the determination of this appeal, as set out in the fourth bullet point of paragraph 14 of the Framework."

24. He concluded with his decision on the planning balance:

"103. Section 38(6) of the Planning & Compulsory Purchase Act 2004 requires that applications for planning permission must be determined in accordance with the Development Plan unless material considerations indicate otherwise. An important material consideration is the presumption in favour of sustainable development in paragraph 14 of the Framework. I have not been able to come to a definitive view on the question of a five year housing land supply in this appeal. Therefore, I propose to adopt a precautionary approach, taking the worst case position within the range on housing land supply as I have found it, and apply the 'tilted balance' in the fourth bullet point of paragraph 14 in the determination of this case. This provides that where the Development Plan is silent or relevant policies are out of date, permission should be granted unless the adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole."

25. Having weighed the benefits, he dismissed the appeal against the Council's refusal of planning permission.

The NPPF and Planning Policy Guidance

26. The National Planning Policy Framework sets out national planning policy. It is a material consideration in any application for planning permission. This application is not concerned with the policies in the revised NPPF, which was published on 24 July 2018, but with the policies in the first NPPF.

27. Paragraph 47 provides:

"47. To boost significantly the supply of housing, local planning authorities should:

...

- *identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements 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;"*

28. The word “deliverable” is explained in footnote 11, which states:

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

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

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

30. Paragraph 14 deals with the “*presumption in favour of sustainable development*” which is said to be “*at the heart of*” the NPPF and which should be seen as “*a golden thread running through both plan making and decision taking*”. It continues:

“For decision-taking this means:

- *approving development proposals that accord with the development plan without delay; and*
- *where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:*
 - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when*

assessed against the policies in this Framework taken as a whole; or

- specific policies in this Framework indicate development should be restricted.”*

The Law

31. The legal principles applicable to the Court’s review of an inspector’s decision letter are well established and were summarised recently by Lindblom LJ in *St. Modwen Developments v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643:

“6. *In my judgment at first instance in Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) (at paragraph 19) I set out the “seven familiar principles” that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:*

‘(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know that the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to ‘rehearse every argument relating to each matter in every paragraph’ (see the judgment of Forbes J in Seddon Properties v Secretary of State for the Environment (1981) 42 P.&C.R 26, at p.28).

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

(3) *The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into Wednesbury irrationality' to give material considerations 'whatever weight [it] thinks fit or no weight at all' (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759, at p.780 F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74, at paragraph 6).*

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

(5) *When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffman L.J., as he then was, in South Somerset District Council v The Secretary of State for the Environment (1993) 66 P.&C.R. 80, at p.83 E-H).*

(6) *Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see,*

for example, the Judgment of Lang J. in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB), at paragraph 58).

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

7. *Both the Supreme Court and the Court of Appeal have, in recent cases, emphasized the limits to the court’s role in construing planning policy (see the judgment of Lord Carnwath in Suffolk Coastal District Council v Hopkins Homes Ltd. [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in Mansell v Tonbridge & Malling Borough Council [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in Barwood Strategic Land II LLP v East Staffordshire Borough Council [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or planning officers’ reports to committee. The conclusions in an inspector’s report or decision letter, or in an officer’s report, should not be laboriously dissected in an effort to find fault (see my judgment in Mansell, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63).”*

Submissions on behalf of the Claimant

32. *Ground 1 – Precautionary Approach to Housing Supply:* On behalf of the Council, Mr Taylor submitted that the inspectors erred in law in applying the tilted balance on a precautionary basis despite concluding there was a realistic prospect of a five year housing land supply. The Willaston and White Moss inspectors identified a range of sites with a realistic prospect of coming forward within 5 years. By then assuming the

worst-case position at the bottom of the range they adopted an additional and impermissible precautionary approach. There is nothing in policy or guidance that says that the benefit of the doubt about deliverability has to be given to the developer. The inspectors did not reach a reasoned conclusion as to why delivery at the bottom end of the housing range identified is considered more likely than delivery at the top end of the range. Furthermore the Willeston inspector erred in requiring certainty that the Claimant could demonstrate a robust five-year supply of specific deliverable sites.

33. *Ground 2 – Robust and Up to Date Evidence:* The Willeston inspector fell into error in requiring the Council to provide “*robust, up to date evidence to support the deliverability of sites*” even where planning permission had been granted for the sites. This is contrary to the approach set out in NPPF footnote 11 which, in effect, creates a presumption that housing on sites with planning permission are to be considered to be specifically deliverable unless there is clear evidence to the contrary.
34. *Ground 3 – Reasons:* The inspectors failed to provide any or any adequate reasons to enable the Council to understand:
 - (1) Why a “*robust*” supply of specific deliverable sites must be established;
 - (2) Why a supply of specific deliverable sites must be established with “*certainty*”;
 - (3) Why a precautionary approach should be adopted where a robust supply of specific deliverable sites is not established with certainty;
 - (4) Why it is appropriate to apply the tilted balance when it has been concluded that the range of specifically deliverable sites would encompass a five-year supply of specific deliverable housing sites.

Submissions on behalf of the Defendants

35. *Ground 1 Precautionary approach:* Ground 1 is based on a false premise. The inspectors did not conclude that the ‘tilted balance’ should be applied in circumstances where they had found that there was a five year supply. They concluded that the Claimant could not demonstrate a five-year supply of deliverable housing sites for the purposes of paragraph 49 of the NPPF. They were unable to calculate a precise housing supply figure with confidence, not least because the assessment of housing land supply is not an exact science and involves professional judgement. The best they could do was to identify a range. The number of housing units with a realistic prospect of delivery was somewhere within the range. The inspectors recognised they still had to answer the “important question” whether the housing supply was above or below five years. Their answer was a matter of planning judgement. They were entitled to err on the side of caution, given the policy stipulation to boost significantly the supply of housing in paragraph 47 of the NPPF. Read fairly and in context, the Willaston inspector was not setting up a test requiring certainty. He was merely recording that, because his assessment led him to a range which straddled the five year mark, he could not be certain that the supply was above five years.
36. *Ground 2 – Robust Evidence:* In asking whether the evidence to support the Claimant’s claimed five year housing supply was robust, the Willison inspector acted consistently

with paragraph 49 of the NPPF. There is nothing in the wording of the Planning Policy Guidance to suggest that sites which have planning permission are somehow exempted from this requirement. Nor does footnote 11 create a “*presumption*” that sites with planning permission should be deemed deliverable, as the Claimant suggests. This is an example of the excessive legalism deprecated by the courts. Footnote 11 and the Planning Policy Guidance require the assessment of the supply in general, and the evidence underpinning it, to be robust. In reality the challenge under this ground amounts to a disagreement with the assessment of the relevant evidence by the Willaston inspector that the sites under scrutiny would not deliver the requisite units within the five year period, notwithstanding the existence of planning permission.

37. *Ground 3: Reasons:* This ground only arises because of the Claimant’s misreading of the three decisions letters and adds nothing to the first two grounds.

Discussion

38. There was no dispute between the parties as to the policy framework. The focus of the challenge was on the inspectors’ application of the framework.

The policy framework

39. Paragraph 47 of the NPPF sets down the objective of significantly boosting the supply of housing to deal with the national problem of unmet demand for housing. The message to planning authorities is unmistakable (*Hopkins Homes Limited v Secretary of State for Communities & Local Government* [2017] UKSC 37). In order to significantly boost their housing supply local authorities are required to identify a five year supply of deliverable housing sites. The test for deliverability is whether there is a realistic prospect of delivery of the housing within 5 years.
40. As paragraph 49 makes clear, it is the job of the Local Planning Authority to demonstrate the five year supply of deliverable housing. The paragraph indicates the way in which the lack of a five year supply of sites can be put right by triggering the operation of the tilted balance in paragraph 14 of the NPPG where the planning authority has failed to deliver the requisite supply. Once the trigger is activated the decision maker should be disposed to grant the planning application unless the presumption in favour of permission can be displaced *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37.
41. In accordance with the policy framework, in deciding an application for planning permission for a housing development, a planning inspector must decide whether or not a local planning authority has demonstrated a five year supply of deliverable housing, however hard or difficult a question this is to answer.

Application of the framework – ground 1 (precautionary approach to housing supply)

42. I turn then to the inspectors’ application of the policy framework in their decision making. In doing so, I remind myself that it is reasonable to assume that national planning policy is familiar to inspectors and that I should approach arguments that

inspectors have misapplied some fundamental components of planning policy with great hesitation (*St Modwen Developments Ltd v Secretary of State* [2017] EWCA Civ 1643).

43. In applying the policy framework, the key question for the inspectors to answer was whether the Council had demonstrated a 5 year supply of housing with a realistic prospect of being delivered. I do not accept Mr Taylor's submission that the Willaston and White Moss inspectors concluded that the Council had demonstrated a five year supply. It is clear that they concluded that the Council had not demonstrated the necessary supply.
44. Looking first at the Willeston decision, the Inspector demonstrates his understanding of policy framework and the Court of Appeal caselaw (paragraphs 11, 47 and 48 of the decision letter).
45. Having examined the evidence, the inspector arrived at the view that there was a realistic prospect that between 1,181 and 1,421 dwellings included in the Council's housing land supply will not be delivered within the 5 year period with the result that the supply would be between 14,861 and 14,621 dwellings. I accept Mr Honey's submission that, on a fair reading of the decision letter, the inspector's conclusion is that the number of housing units with a realistic prospect of being delivered lies somewhere within this range and he could not be more precise. It does not mean, as Mr Taylor contended, that all the units within the range had a realistic prospect of delivery. Were this to be the case, the inspector could simply have said that it was realistic to expect 14,861 dwellings to be delivered. The numerical range straddles the five year supply requiring the inspector to proceed to exercise his judgment to decide whether the Council had demonstrated the existence of the five year supply. He decided the Council has not done so and sets out his reasons:

"96. I acknowledge that the assessment of a five year supply is not an exact science but involves professional judgement, particularly on lead-in and delivery timescales. However, notwithstanding the conclusion of the CELPS Examination Report in respect of a five year land supply and other recent appeal decisions on this issue, based on my analysis of the evidence of this appeal, I cannot be certain that the Council is able to demonstrate a robust five year supply of deliverable housing sites. I have found that the housing land supply position is either marginally above or slightly below five years. On this basis, I propose to adopt a precautionary approach to the housing land supply position, and in the light of paragraph 49 of the Framework, apply the 'tilted balance' in the determination of this appeal, as set out in the fourth bullet point of paragraph 14 of the Framework.

...

103. I have not been able to come to a definitive view on the question of a five year housing land supply in this appeal. Therefore, I propose to adopt a precautionary approach, taking the worst case position within the range on housing land

supplies I have found it, and apply the 'tilted balance' in the fourth bullet point at paragraph 14 in the determination of this case. This provides that where the Development Plan is silent or relevant policies are out of date, permission should be granted unless the adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the framework taken as a whole."

46. In my judgement, there is no error of law in the inspector's application of the policy framework. He has considered the evidence and applied his judgment. His precautionary approach to the evidence before him is not, as Mr Taylor contended, an impermissible additional test but an application of his judgment to answer the central question of whether the Council had demonstrated a five year supply, within the context of a policy imperative to significantly boost the supply of housing. Mr Taylor's submissions subject the decision letter to the kind of hypercritical scrutiny that the Court should reject (*St Modwen Housing v Secretary of State for Communities and Local Government*).
47. The White Moss inspector adopted a similar approach to the Willaston inspector. Having asked himself the necessary question as to whether the Council could demonstrate a realistic and deliverable five year supply of housing he examined the evidence and identified that a significant number of dwellings included in the Council's five year supply that are at risk of failing to materialise within the timeframe identified, amounting to some 1,033 to 1,363 dwellings. Read fairly, the inspector's reference to a range is to be read as his assessment that the realistic number of deliverable housing units lies somewhere within the range. He was not able to be more precise. The range arrived at straddled the five year supply so the inspector proceeded to exercise his judgment on the basis of the evidence before him, to determine whether the Council had demonstrated a five year supply of housing. He answered the question in the negative and explained the reasons for his judgment:

"62. Therefore, on the basis of the fact specific evidence before me and the illustrated risk of available housing supply falling slightly below the five year requirement, I cannot determine with confidence that a marginal best case excess amounts to a sufficiently robust supply of specific deliverable sites. Given the importance of the five year baseline and the aim to significantly boost the supply of housing, I conclude that it would be both cautious and prudent in the circumstances of this case to regard policies for the supply of housing to be considered not up to date, thus engaging the tilted balance at paragraph 14 of the framework."

48. I do not accept Mr Taylor's submission that the inspector concluded that the Council had demonstrated a five year supply, as is clear from the following paragraphs of the decision letter:

“This conclusion takes on greater materiality in circumstances where the Local Planning Authority is unable to demonstrate the robust five year housing land supply...” (paragraph 72)

“In terms of the relevant Development Plan Policies, in the absence of a five year supply, existing, generally long established and dated settlement boundaries, albeit sanctioned by the CELPS pending review, should be considered to be out of date...” (paragraph 92)

49. Accordingly, it follows from the above discussion that I find that the inspectors did not misinterpret the policy position by finding the Council had demonstrated a five year supply of deliverable housing, but nonetheless applying the tilted balance in paragraph 14.
50. In addition, Mr Taylor submitted that the Willaston inspector erred when stating that “I cannot be certain that the Council is able to demonstrate a robust five year supply of deliverable housing sites”. I do not accept the submission. Read fairly, the inspector uses the word “certain” in the paragraph to mean he cannot be confident or comfortable that the Council can demonstrate a supply, as is required of them to avoid the application of the trigger in paragraph 49. He is not setting up an additional test for deliverability beyond the realistic prospect of delivery test in footnote 11. This conclusion is supported by a reading of the decision letter as a whole and, in particular, the inspector’s reference to the judgment of the Court of Appeal in St. Modwen v SSCLG:

“I acknowledge, as stated in the St. Modwen Judgment, that proving the deliverability of the housing land supply does not require certainty that sites will be developed within the five year period...” (paragraph 47)

Ground 2 Requiring robust and up to date evidence for sites with planning permission

51. Mr Taylor submitted that the Willaston inspector misinterpreted footnote 11 in requiring two sites with planning permission (at Dunwoody Way and King’s School) to demonstrate robust evidence of deliverability before they could be included in the housing supply figures. Footnote 11, he argued, contains a clear presumption that sites with planning permission should be considered deliverable unless there was clear evidence to the contrary. The inspector displaced the presumption by relying on the absence of information to justify his decision to deduct 29 units at the Dunwoody Way site and 45 units at the King’s School site from the list of deliverable sites. Mr Taylor pointed to the following analysis

“In the absence of any evidence of ongoing discussions with potential developers to take the site forward there appears no realistic prospect at this stage of the site being completed. Accordingly these 29 units should be deducted from the supply (paragraph 58)

“...Very little evidence was before me on which to make a reasoned judgment about the likely contribution of this site to the 5 year supply. Therefore a reduction in the 5 year supply of 45 units..would be justified for the Westminster Road site” (paragraph 66)

52. In my judgement, Mr Taylor’s attack amounts to excessive legalism which is to be deprecated (see *St. Modwen* paragraph 7). When paragraphs 58 and 66 of the decision letter are read as a whole, it is apparent that the Inspector has identified clear evidence that the schemes will not be implemented in five years, as required by footnote 11. In the case of the Dunwoody site no completions have been recorded since 2013 to 2014; the site has stalled due to financial difficulties and there is no evidence of any ongoing discussions to take the site forward. In the case of the King’s School site, the timescale for the school vacating the site has been revised to September 2020 pushing back site preparation and infrastructure works. The prospect of further land being available at an alternative site is uncertain.
53. Mr Taylor sought to suggest that the third sentence in paragraph 31 of the Planning Policy Guidance (Local Planning Authorities will need to provide robust, up to date, evidence to support the deliverability of sites, ensuring that their judgements on deliverability are clearly and transparently set out) applies only to sites which do not have planning permission or are not allocated in a Local Development Plan and should not have been applied as they were to the Dunwoody and Kings School site. I have already arrived at the view that the inspector’s site specific assessments were entirely in accordance with footnote 11 and therefore this point does not arise. Nonetheless by way of brief response, I agree with Mr Honey’s submissions that the reference to “robust” in both paragraphs 31 and 33 is intended to be an echo of paragraph 49 of the NPPF which requires local planning authorities to demonstrate the existence of the requisite housing supply. I also accept Mr Honey’s submission that the implication of Mr Taylor’s submission is that weak or inadequate evidence is good enough for sites with planning permission, which would be nonsensical.

Ground 3- reasons

54. This ground falls away in light of my conclusions on Grounds 1 and 2.
55. Mr Taylor submitted that the Willaston inspector failed to explain why a ‘robust’ supply of specific deliverable sites must be established for sites with planning permission. As explained above the inspector correctly applied footnote 11 of the NPPF in finding clear evidence to displace the presumption, if that is what it is to be called, that sites with planning permission should be considered deliverable. The inspector provided adequate reasons.
56. Contrary to Mr Taylor’s submission, the Willaston inspector did not require the Council to demonstrate the existence of its housing supply to a standard of certainty. The inspector was using the word certain in its normal usage to refer to his not being comfortable/confident that the Council could demonstrate a deliverable supply. The inspector gave adequate reasons to explain his assessment.

57. The inspectors exercised their judgment to conclude that the Council had not demonstrated the five year supply. It was open to them to adopt a precautionary approach to the housing numbers before them given the policy stipulation to boost significantly the supply of housing. They gave adequate reasons to explain the exercise of their judgment.
58. The inspectors applied the tilted balance following their conclusion that the Council had not demonstrated a five year supply of deliverable housing. Mr Taylor's contention they had concluded otherwise is misconceived. The inspectors gave adequate reasons for their decision.

Conclusion

59. For the reasons set out above, the claim is dismissed.