



Neutral Citation Number: [2016] EWHC 103 (Admin)

Case No: CO/3058 2015 AND CO/3062/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2016

Before:

MR. JUSTICE HOLGATE

Between:

Edward Ware Homes Ltd

- and -

**Secretary of State for Communities and Local
Government**

-and-

Bath and North Somerset Council

Claimant

**First
Defendant**

**Second
Defendant**

Suzanne Ornsby Q.C. and George Mackenzie (instructed by **Davies and Partners**) for the
Claimant

Hereward Phillpot Q.C. (instructed by **Treasury Solicitor**) for the **First Defendant**
The Second Defendant was not represented

Hearing dates: 7th December 2015

Approved Judgment

Mr. Justice Holgate:

Introduction

1. The Claimant, Edward Ware Homes Limited (“EWHL”) made applications to the Second Defendant, Bath and North East Somerset Council (“BANES”) for residential development on three different sites, namely 47 dwellings on land at Abbots Farm Close, Paulton, 124 dwellings on land at Boxbury Hill, Midsomer Norton, and 32 dwellings on land at Cappards Road, Bishop Sutton. All three applications were refused by BANES and EWHL appealed against these refusals to the First Defendant, the Secretary of State for Communities and Local Government, under section 78 of the Town and Country Planning Act 1990 (“TCPA 1990”). The appeals were conjoined.
2. A public inquiry was held into the three appeals between 27 January and 27 February 2015. On 20 May 2015 the appeal concerning the Bishop Sutton site was recovered for determination by the Secretary of State. The appeal will be the subject of a report to the Secretary of State by the Inspector who conducted the public inquiry and a decision letter by the Secretary of State. The Court was informed that that appeal has yet to be determined.
3. On 20 May 2015 the Inspector issued decision letters dismissing EWHL’s appeals in respect of the other two sites. EWHL has brought claims under section 288 of TCPA 1990 to quash the decisions in respect of the Midsomer Norton site (CO/3058/2015) and the Paulton site (CO/3062/2015). For the purpose of these claims there is no material difference between the decision letters issued in respect of the sites. The grounds of challenge are in substance identical. The claims were listed to be heard together. EWHL and the Secretary of State, but not BANES, were represented at the hearing. EWHL and the Secretary of State agreed that their submissions should be made by reference to the hearing bundle for CO/3062/2015 (with a few additional insertions). The parties’ legal submissions were identical for each of the two claims and they agreed that the outcome of each ground of challenge in one claim must be the same in the other claim.
4. In each of the two appeals the Inspector identified one of the main issues to be:-

“Whether there is a 5-year housing land supply available in the Housing Market Area, and how that may bear upon the relevance of development plan policies affecting the direction for growth and the release of housing sites.”

The grounds of challenge relate to the manner in which the Inspector dealt with that issue adversely to EWHL. The decisions on both the Paulton and Midsomer North sites also included adverse findings on other aspects of the appeal proposals. But the Secretary of State accepts that the Inspector did not treat any of those findings as a freestanding reason sufficient to justify the dismissal of the appeals, irrespective of the Inspector’s treatment of the housing land supply issues. Accordingly, the parties agree that I am able to deal with the merits of each of the claims by reference to the material in CO/3062/2015.

The National Planning Policy Framework

5. The requirement that a local planning authority should be able to identify a 5 year supply of housing land against the requirements set out in its Local Plan is contained in paragraphs 47 and 48 of the National Planning Policy Framework (“NPPF”). Where such a supply cannot be identified the consequences for the determination of planning applications and appeals are set out essentially in paragraphs 49 and 14 of the NPPF. In summary, a presumption in favour of granting permission arises, 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.”

6. In their submissions EWHL placed considerable reliance upon the analysis of the NPPF and summary of the authorities dealing with those policies in Woodcock v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin); [2015] J.P.L 1151. Both parties in these proceedings agreed with the analysis set out in paragraphs 86 to 108 of Woodcock which need not be repeated in this judgment.

7. In the appeals before the Inspector EWHL contended that BANES was unable to identify a 5 year supply of housing land so the presumption in paragraph 14 of the NPPF applied. BANES disagreed. As was pointed out by Lindblom J (as he then was) in Crane v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin), even where this presumption applies, the NPPF does not, indeed it could not, displace the statutory framework for the determination of planning applications contained in section 70(2) of the TCPA 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”). It does not displace the statutory presumption in favour of the development plan. The NPPF operates within that framework. Although the NPPF *deems* housing supply policies set out in the development plan to be out of date, that is essentially a mechanism for engaging the presumption in paragraph 14 of the NPPF. The Framework does not go on to prescribe that no weight or little weight should be given to those housing supply policies. Indeed, it says nothing about how much weight they should or might receive. That is a matter for the judgment of the decision-maker dealing with a particular planning application (see paragraphs 62 to 74 of Crane). That judgment would take into account the nature of and reasons for the shortfall and how it is being addressed. As Lindblom J put it:-

- “[Paragraph 14 of the NPPF] does not prevent a decision-maker from giving as much weight as he judges to be right to a proposal’s conflict with the strategy in the plan...”

The Bath and North East Somerset Core Strategy

8. The development plan policies central to the Inspector’s decisions and EWHL’s challenge are contained in the Core Strategy adopted by BANES on 10 July 2014.

9. Policy DW1 sets a spatial strategy for the whole of the district to promote sustainable development by focussing new housing, jobs and community facilities in Bath, Keynsham, and the Somer Valley. The Paulton and Midsomer Norton sites are greenfield locations in the Somer Valley area and outside settlement boundaries. Policy DW1(1) seeks to ensure that for the Somer Valley:-

“there is deliverable space to enable job growth in the towns and principal villages...to a create a thriving and vibrant area which is more self-reliant socially and economically”

Policy DW1(2) makes provision for (inter alia) “an increase in the supply of housing by around 13,000 homes” in the district as a whole. Policy DW1(3) prioritises “the use of brownfield opportunities for new development in order to limit the need for development on greenfield sites.”

10. The spatial strategy for the district distinguishes between Bath, Keynsham, the Somer Valley and the Rural Areas. Paragraph 1.06 of the Core Strategy states that Bath is the main urban centre of the district, complemented by a range of towns and villages. According to paragraph 1.10, the Somer Valley “covers the urban areas of Midsomer Norton...together with a rural hinterland containing the principal villages of Peasedown, St. John and Paulton”. The area houses 25% of the district’s population. The Somer Valley was formerly part of the North Somerset coalfield. It is now an important centre for the printing and packaging industry, but “a number of recent factory closures have increased the already high level of out-commuting”. The overall challenge for the district is said to be to achieve growth in a manner that is socially, economically and environmentally sustainable, which includes “increased local employment, less overall commuting ...” (page 11 of the plan).
11. The Strategic Objectives of the Core Strategy identify issues needing to be addressed by the policies of the plan (see paragraph 1.15). Objective 1 includes “reducing the need to travel by achieving a closer alignment of homes, jobs, infrastructure and services”. Objective 2 includes “making optimum use of brownfield opportunities in meeting housing and economic development needs and avoiding greenfield land as far as possible”. Paragraph 1.16 states that “the principal purpose of the Core Strategy is to set out clearly the spatial distribution of development within the District in order to deliver the ... strategic objectives outlined above”.
12. Paragraph 1.26g of the Core Strategy states that the 5 year supply of housing land will be maintained against the district-wide requirement of about 13,000 new dwellings. That figure is said not to be a cap on housing delivery. For example, additional large windfall sites may come forward for development. EWHL accepted before the Inspector (see paragraph 171 their Closing Submissions) that Table 1b forms part of the spatial strategy in the development plan. The Table sets out the distribution of the new housing required across the district (with percentages added):-

Bath	7,250	(54%)
Keynsham	2,150	(16.5%)
Somer Valley	2,470	(19%)
Rural Areas	1,120	(8.5%)
Whitchurch Green Bell	200	(1.5%)
	12,960	

Paragraph 1.26g of the Core Strategy states:-

“The strategy is to locate new development in the most sustainable locations and the priority is to steer growth primarily to brownfield land in urban areas of Bath, Keynsham and the larger settlements in the Somer Valley.”

However, the Core Strategy recognises that in order to meet housing requirements and facilitate economic growth some greenfield land is also required.

13. According to paragraph 1.27, Bath is the district’s economic driver and the primary focus for new development. As to the Somer Valley, paragraph 1.29 states:-

“In the **Somer Valley** there is significant net out-commuting due the (sic) size of the employment base but there are also significant residential commitments on both greenfield and brownfield sites. The area does not have an operating rail link, there are no direct links to the motorways and there is limited scope to provide substantial infrastructure improvements in the Plan period. The strategy therefore recognises this position, and seeks to facilitate economic-led regeneration enabling job growth in the area. The focus for change will be in the town centres and on vacant and under-used sites within the Housing Development Boundary. The Housing Development Boundary will be reviewed in the Placemaking Plan.”

14. Chapter 4 of the Core Strategy deals with the Somer Valley. Paragraph 4.07a deals with Paulton in the following terms:-

“Paulton was originally an agricultural village which grew significantly as a result of coal mining. Following closure of the mines its economic base became industrial printing. In the last twenty years a number of the larger local employers including Polestar have closed resulting in reduced local employment opportunities, increased out-commuting, but also a number of redevelopment opportunities.”

Under the heading “Strategic Issues” paragraph 4.08 states:-

“Recent incremental housing development and a decline in the manufacturing sector has led to an imbalance between jobs and homes.”

Paragraph 4.09 identifies a number of challenges and strengths for the Somer Valley. There are “high levels of out-commuting due to lack of local employment opportunities” and a “high level of existing housing commitments of about 2,470 dwellings, exacerbating imbalance of housing over jobs”. As against those factors, the Somer Valley enjoys “relative lower cost of housing compared to elsewhere in the district”.

15. In the section dealing with the spatial strategy for the Somer Valley, paragraph 4.15 states:-

“There is already a significant number of housing commitments in the Somer Valley and a limited capacity to generate new jobs. New housing on the Somer Valley will therefore be restrained in the interest of sustainability but some additional housing is likely to come forward on brownfield sites. The Housing Development Boundary will be reviewed in the Placemaking Plan to facilitate this and to reflect recent planning permissions on greenfield sites. However, in light of the objective of economic led revitalisation, it is important that the additional housing does not significantly worsen the balance between homes and jobs and the out-commuting problems and the Council may therefore seek to ensure an economic benefit from new housing.”

16. Policy SV1 of the Core Strategy sets out the Spatial Strategy for the Somer Valley. The strategy prioritises the development of brownfield sites, protects land in use for employment purposes, and promotes the delivery of additional jobs. On housing the policy enables “around 2,470 new homes to be built at Midsomer Norton, Paulton by amending the housing development boundary as necessary and to reflect existing commitments”

The Inspector’s decision letter

17. Having set out the main issues in the appeal on the Paulton site, the decision was structured as follows¹:-

- 5 year housing land supply (DL 5 to DL 31)
- whether the proposal would represent unsustainable development on other grounds (DL 32 to DL 45)
- conditions and section 106 obligation (DL 46 to DL 50)
- overall conclusions (DL 51 to DL 53)

5 year housing land supply

18. In summary the Inspector’s reasoning was as follows:-

- (i) Under policy DW1 there is a need for 13,000 new homes across the district over the plan period 2011 – 2019. It was common ground that because of the under-delivery of housing which had previously occurred, the 5 year land supply requirement had to be increased by 20% (DL 5);
- (ii) According to the supporting justification in the Core Strategy for policy DW1 the distribution of housing sites across the district is divided into 5 policy

¹ This judgment uses the convention of DL followed by a number to identify a particular paragraph in the decision letter.

areas. Bath is the primary focus for new development and in the Somer Valley a balance should be achieved between jobs and houses so as to minimise the need for out-commuting from that area. In order to support a sustainable pattern of development, the Core Strategy is based upon a strong rationale for directing growth at appropriate levels or proportions into the various policy areas (DL 6);

- (iii) Although BANES relied upon the endorsement by the Inspector who conducted the examination of the Core Strategy that there was a 5 year land supply, it was not unreasonable for EWHL to challenge that view on the basis of up to date information. BANES accepted that there were weaknesses in the information presented to the examination, and also that not all of the sites in its latest version of the Strategic Housing Land Availability Assessment (“SHLAA”) would come forward, either as soon as projected or at all. BANES therefore conceded that its estimate of the 5 year supply of housing land should be reduced from 5,945 dwellings to 5,407. On the other hand EWHL contended that the figure should be as low as 4,589 (DL 7 to DL 12);
- (iv) For the reasons set out in DL 6 (see point (ii) above) it was agreed between the parties at the inquiry that the distribution of 5 year supply figures should be considered against the apportionment in DW1. Tables 1 and 2 of the decision letter then set out how that distribution would translate into (a) an annual requirement figure for each policy area over the 18 year period of the plan and (b) a 5 year requirement figure for each policy area, taking into account adjustments for an agreed “back-log” and the 20% uplift (DL 13 to DL 15). [On this basis the 5 year requirement figure for the district as a whole was given in Table 2 as 5,022 rather than the agreed figure of 5,062. But it was common ground in the hearing before the Court that the difference between these two figures is immaterial for the purposes of these proceedings].
- (v) Taking into account the concessions made by BANES, Table 3 set out the supply of housing land over 5 years both for the 5 policy areas and the district as a whole using the Council’s data. On those figures BANES could demonstrate 5.38 years’ supply for the district as a whole (and on that basis the presumption in paragraph 14 of the NPPF would not apply) and a supply in excess of 5 years for all policy areas other than Bath. However, the Inspector gave reasons as to why the revised figures adopted by BANES should not be treated as determinative (DL 16 to DL 18);
- (vi) Using data relied upon by EWHL, taken from Table 15 of the proof of evidence of its expert Mr. Harbottle, Table 4 in the decision letter shows the 5 year supply position for the district as a whole and by policy area. On that basis the Inspector accepted that there would not be a 5 year supply for the district as a whole and the presumption in paragraph 14 of the NPPF would apply. In other words “planning 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” (DL 19 to DL 21);
- (vii) Even if it were to be confirmed that there is a shortfall in the 5 year land supply for the district, it is also relevant to consider whether it is appropriate to

grant permission to address that shortfall in locations, *which although acceptable in all other respects*, could skew the sustainable distribution of growth embodied in policy DW1 of the Core Strategy. That Strategy was only recently adopted and there are sound reasons (set out in DL 6) for supporting the distribution of development between the 5 policy areas set out in policy DW1 (emphasis added). [The parties agreed that that reference to DW1 should also be taken to embrace Table 1b and policy SV1 of the Core Strategy]. The “plan-led” principle in paragraph 17 of the NPPF was of “paramount importance” in the circumstances of the appeal (DL 22 to 23);

- (viii) Whether using the figures of BANES (Table 3) or EWHL (Table 4) there is a greater than 5 year supply for the Somer Valley and no “urgent necessity” to increase the supply of housing land in that area (DL 24);
- (ix) The figure of 2470 for the Somer Valley (given in SV1) is not a cap. It is “an indicative about figure”, suggesting that variations above and below that figure would be compliant with policy. On the basis of the data supplied both by BANES and by EWHL, an excess of up to 10% might not unduly skew the overall target for the Somer Valley policy area. But such figures relate to land supply over *the whole of the plan period* (DL 25 and 26 in both decision letters);
- (x) The appeal sites would bring the land supply in the Somer Valley to something over 50% of the allocation for the 18 year period of the Core Strategy within the first 8 years of the plan (44%), leaving only 890 or 967 of the 2470 required by the plan to meet the needs of the last 10 years of the plan period. Consequently the rate of growth within Somer Valley “would be significantly biased towards the beginning of the plan period”. If all permissions were to be built-out then this could lead to the situation where greater restraints might have to be applied towards the end of the plan period, leaving the plan potentially unable to respond appropriately to future – and as yet unforeseen – needs. That would not be consistent with the plan, monitor, manage principle underlying the local plan system (DL 26 to DL 27);
- (xi) “*More to the point* the corollary of allowing a greater proportion of housing development in the Somer Valley solely to make up the possible overall shortfall across the District, would undermine and dilute the strategy of directing the main initiatives for growth to Bath and accommodating a smaller proportion of additional housing in the other Policy Areas – where some degree of limitation or restraint is seen to be appropriate for reasons of achieving a balanced, sustainable growth strategy”. Even on the figures in Table 4 (i.e. using EWHL’s data), it would be contrary to the first core planning principle (the plan-led system – see paragraph 17 of the NPPF) “to permit a *dilution* of its strategy [the Core Strategy] so early in the plan period by *diverting pressure away from the Bath Policy Area*” (emphasis added). The failure to comply with paragraph 49 of the NPPF should be addressed within the Bath Policy Area and not the plan area as a whole (DL 28 to DL 29);
- (xii) Drawing the points together on the first main issue, although the figures from BANES were not reliable and the figures from EWHL were too pessimistic, on either view there is a greater than 5 year supply in all policy areas except Bath.

It would not be in accordance with core planning principles in the NPPF to accept that the shortfall in housing local supply in the Bath area “automatically justifies” permitting additional housing elsewhere across the district. Applying paragraph 14 of the NPPF, permitting additional significant growth in areas outside Bath would undermine the principles of sustainable development in the Core Strategy, which, so soon after its adoption, would undermine the plan-making process and constitute “an adverse impact that would significantly and demonstrably outweigh the benefits of topping up the housing supply by permitting further development in the Somer Valley” (DL 30 and DL 31);

The Inspector’s Overall Conclusions

“51. I have come to the conclusion that there is a shortfall in the 5-year housing land supply in the Housing Market area, and therefore the expectations set out at paragraph 49 of NPPF come into play. However, for rational reasons of promoting sustainable development, the Housing Market Area requirement given in the CS is distributed across five Policy Areas and it is only in the Bath Policy Area that there is a shortfall in supply; in the Policy Area relevant in this appeal (Somer Valley) there is more than a 5-year supply of developable housing land. Despite the shortfall in the Bath Policy Area, I do not consider that the CS can be considered to be out of date and that paragraph 14 of the NPPF is not engaged in the determination of this appeal in seeking to address the shortfall.

52. Nevertheless, even though there may be a 5-year land supply, this does not automatically preclude granting planning permission for further development, subject to the proposed scheme complying with other development plan policies. However, as discussed above, I have concluded that granting planning permission for the proposed development would unacceptably prejudice the implementation of the Core Strategy, and would be contrary to the objectives of the BANESLP.

53. Although there are positive aspects of the scheme, not least the 35% proportion of affordable housing being offered, I consider that the adverse impacts of approving the proposal would significantly and demonstrably outweigh the benefits. Accordingly the appeal should be dismissed.”

19. From the analysis set out above it can be seen that the Inspector dismissed each of the two appeals on the basis that, although there was a shortfall in the 5 year supply of housing land for the district as a whole so that the approach in paragraph 14 of the NPPF applied, and although the proposals might not unduly skew the housing target for the Somer Valley over the whole of the plan period, they had two adverse impacts which significantly and demonstrably outweighed the benefits of the proposals, namely (1) the front-loading of the supply of housing land in the Somer Valley (point

(x) in paragraph 18 above) and (2) diverting development pressure away from Bath so as to dilute or undermine the strategy of directing the main initiatives for growth to Bath (point (xi) in paragraph 18 above). Thus, the Inspector's conclusion was in effect that because the rationale for the housing distribution policy in the Core Strategy remained sound that policy remained up to date (applying the approach set out in Crane - see paragraph 7 above), and the two adverse impacts to that strategy which he identified overrode the "presumption" in paragraph 14 of the NPPF.

Legal Principles for challenging an Inspector's decision

20. The general principles upon which the High Court may be asked to quash an Inspector's decision on a planning appeal were summarised by Lindblom J in paragraph 19 of Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) and need not be repeated here.
21. I now turn to deal with the grounds of challenge, as set out in the skeleton argument of Ms. Suzanne Ornsby Q.C. and Mr. George Mackenzie on behalf of EWHL. The Secretary of State pointed out that these grounds differed in some respects from those contained in the "Details of Claim" for each case, but he was nevertheless content that the claims be dealt with on the basis of the grounds set out in EWHL's skeleton argument.
22. In summary, the grounds of challenge were made under the following headings (although some included further alternative arguments which are dealt with below):-
 - (1) The Inspector took into account an irrelevant consideration, namely the 5 year supply of housing land in the 5 policy areas rather than simply the district as a whole;
 - (2) The Inspector took into account an irrelevant consideration, namely that there would be harm to the spatial strategy in the Core Strategy as a result of the appeal schemes being delivered in the Somer Valley;
 - (3) The Inspector took into account an irrelevant consideration, namely that there would be harm to the spatial strategy in the Core Strategy through the front-loading of the delivery of housing in the Somer Valley area;
 - (4) The Inspector failed to take into account a relevant consideration, namely the contribution of the appeal schemes to the 5 year supply of housing land for the district as a whole;
 - (5) The Inspector failed to determine whether the appeal schemes accorded with the statutory development plan pursuant to section 38(6) of PCPA 2004;
 - (6) The Inspector misdirected himself as to the NPPF by failing to apply the presumption in paragraph 14.

23. Ground 4 as originally set out in the Details of Claim raised a freestanding allegation that the Inspector acted in breach of the rules of natural justice by relying upon matters which were not raised during the appeal process. In the Claimant's skeleton this aspect has been raised as part of other reformulated grounds of challenge, rather than as a freestanding ground. I will deal with the issues of fairness in the same way.
24. In parts of its skeleton argument EWHL appeared to be complaining that the Inspector failed to make a finding as to what in his view was the amount of housing land available in the district as a whole, against the 5 year requirement (see e.g. paragraphs 23, 24 and 36). That argument was not pursued and indeed, as the Secretary of State submitted (footnote 3 of his skeleton), it would have been a difficult contention to advance in the light of decisions such as Cheshire East Council v. Secretary of State for Communities and Local Government [2014 EWHC 3536 (Admin)] (para. 34); Eastleigh Borough Council v. Secretary of State [2014] EWHC 4225 (Admin) (para.18); Oadby & Wigston Borough Council v. Secretary of State [2015] EWHC 1879 (Admin) (paras. 42(ii) and 48). However, it is clear from the analysis of the decision letter in paragraph 18 above that (1) the Inspector used Tables 3 and 4 to carry out some sensitivity testing of the data on housing land supply, (2) he concluded that the supply lay between the figures supplied by BANES and by EWHL, and (3) it amounted to less than 5 years' worth. That was made plain beyond any doubt in DL 51. Ultimately it was revealed in paragraph 49 of its skeleton that EWHL accepts that the Inspector proceeded in this way.

Ground (6)

25. I deal with this ground first because it goes to a fundamental issue, namely the approach taken by the Inspector to paragraphs 14 and 49 of the NPPF. It is submitted for EWHL that because the Inspector determined as *a matter of fact* that the housing distribution policy should be treated as up-to-date, he must have misinterpreted paragraph 49 of the NPPF which deemed the housing supply policies in the development plan to be out-of-date (see Woodcock (supra) at paragraphs 87, 101 to 103 and 105). It is then submitted that because of this error the Inspector failed in substance to apply the presumption in paragraph 14 of the NPPF; any language in the decision letter suggesting that the Inspector applied the tests in paragraph 14 did no more than pay lip service to that provision.
26. I reject this ground. In my judgment it is unarguable. First, the Claimant has cited passages from Woodcock selectively. It is correct that where a 5 year supply of housing land does not exist, paragraph 49 of the NPPF deems the policies in the local plan for the supply of housing land to be out-of-date, even if that would not otherwise be the case under paragraph 14. So paragraphs 49 and 14 apply where the supply of housing land does not meet the 5 year requirement, even if the plan has only recently been adopted and the housing supply policies would otherwise be treated as up-to-date (see e.g. Woodcock at paragraphs 101 and 106). But the object of the deeming provision in paragraph 49 is simply to engage the presumption in favour of development in paragraph 14 (Woodcock paragraph 101). The NPPF does not go on to prescribe the weight to be given to the housing supply policies of the development plan (see Crane and Woodstock). That is left to be assessed by the decision-maker as a matter of judgment, taking into account such matters as the nature of the shortfall and the reasons for, or causes of, that shortfall and any evidence as to how it is likely to be overcome (see e.g. Woodcock paragraphs 105 and 107 to 108).

27. “Housing supply policies” in a development plan may include policies which deal with or direct the distribution of the housing to be provided during the plan period. Where there is a shortfall in the 5 year land supply, and an assessment has to be made of *the weight* to be given to a distribution policy which has only recently been adopted, it is plainly possible for the decision-maker to take into account the rationale for that policy (and the evidence upon which it was based) in order to assess the continuing soundness of the justification for the policy’s distribution of development. Where the development plan upon which the calculation of the 5 year requirement for a district is based contains a policy distributing development to different areas of the district, the decision-maker may consider such matters as whether a failure to provide a 5 year supply for the district is in fact attributable to problems with delivering sites in a discrete part of the district, whether reliance upon the development proposed to address the shortfall would breach the objectives of a distribution policy which continue to be soundly justified and whether the shortfall will be addressed within an appropriate timescale by other means which would not breach the distribution policy.
28. Thus, paragraphs 14 and 49 of the NPPF do not prevent a decision-maker from identifying sound evidence and reasons as to why the justification for and objectives of (for example) a housing distribution policy are of continuing importance and therefore *weight*. In that sense when a decision-maker reaches the stage of assessing the *weight* to be attached to that policy, he or she may properly arrive at a reasoned conclusion that the policy is up-to-date, notwithstanding paragraphs 14 and 49 of the NPPF.
29. Although the Claimant accepts that Crane and Woodcock correctly interpreted the NPPF, its argument under ground 6 effectively contends that where a 5-year supply cannot be demonstrated, paragraph 49 does not simply provide a trigger to engage paragraph 14, but creates an *irrefutable* presumption that all housing supply policies are out-of-date when their *weight* comes to be assessed. An irrefutable presumption of that nature makes no sense whatsoever given that it is the decision-maker’s task to assess the *weight* to be given to the housing supply policies, including any housing distribution policy. The weight to be attributed to a policy must be capable of including a decision-maker’s assessment as to whether the justification for and terms of that policy continue to be sound.
30. In the present case the Inspector applied the correct approach as explained in Crane, Woodcock and above. He decided that the rationale for the distribution policies in DW1 and SV1 continued to be strong notwithstanding the lack of a 5 year supply for the district as a whole (e.g. DL 6, 23, 30, 31 and 51).
31. There is no basis for contending that the balancing exercise carried out by the Inspector merely paid lip service to the tests in paragraph 14 of the NPPF. It is plain that the Inspector explicitly applied those tests (see e.g. DL 21, 31 and 53). Read fairly in the context of the decision letter as a whole, the phrase in DL 51 that “paragraph 14 of NPPF is not engaged” cannot be taken to mean that the Inspector did not apply paragraph 14. Rather it is clear that the Inspector took the view that the presumption in paragraph 14 was not determinative of the appeals, because of the adverse impacts which significantly and demonstrably outweighed the benefits.
32. The additional points in paragraph 76 of the Claimant’s skeleton amount to no more than a barely disguised disagreement with the Inspector’s judgment on matters of

planning merit. For example, it is clear that the Inspector did take into account the extent to which the appeal proposals would provide housing to offset a shortfall in the 5 year supply of land within the Housing Market Area (see e.g. DL 4, 17, 21, 22 and 31). The points advanced on behalf of EWHL could not possibly overcome the high hurdle for an irrationality challenge (see paragraphs 6 to 8 in R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC 74 (Admin)).

33. For all the above reasons I reject ground (6).

Ground (4)

34. For the same reasons I also reject EWHL's contention that the Inspector failed to have regard to the contributions which the appeal proposals would make to addressing the shortfall in the 5 year supply of housing land for the district. This ground largely appears to be based upon DL 39 and 45 in which the Inspector relied upon the existence of more than a 5 year supply of housing land *in the Somer Valley*. But the decision letter expressly indicated that that language was simply shorthand for the more elaborate reasoning in DL 5 to 31 which are not open to attack under ground (4).

Ground (1)

35. EWHC submits that because the concept of a 5 year supply of housing land is entirely a creature of policy and relates solely to the supply of land across a district as a whole (or a Housing Market Area), it is irrelevant to consider whether a 5 year supply exists in parts of that district. The Claimant also points out that paragraph 1.26e of the Core Strategy plainly states that the requirement for a 5 year supply of housing land is to be maintained against the district-wide requirement for 13,000 new homes. The Core Strategy does not contain any policy or statement indicating that the concept of a 5 year supply should also be considered on a Policy Area basis.
36. I accept the Claimant's submissions that the NPPF and the Core Strategy require the demonstration of a 5 year supply of housing land for the whole of the area of a local planning authority (or the Housing Market Area). But it does not follow that if such a supply cannot be demonstrated, then it is *legally irrelevant* for a decision-maker to consider the distribution of housing land supply in parts or sub-areas of the district, whether over 5 years or the plan period.
37. It is well-established that any consideration relating to the use and development of land, or which serves a planning purpose in that it relates to the character of the use of land, is *legally* capable of being a relevant planning consideration (Westminster City Council v Great Portland Estates Ltd [1985] A.C 661, 670; Stringer v Minister of Housing and Local Government [1970] 1WLR 1281, 1294).
38. For the reasons already given under ground (6) (see paragraphs 26 to 29 above) the distribution of housing land supply across a district, or in sub-areas of a district, could be a *legally* relevant consideration to be placed into the planning balance when a 5 year supply of housing land cannot be identified for the whole district. This aspect may be relevant to the relative merits of measures for redressing a district-wide shortfall, whether as proposed by a particular developer or by the local authority or others, including the sustainability of such measures. Likewise I do not see why these

considerations should not be *legally* relevant even where the local plan does not contain a distribution policy. Although these matters are relevant as a matter of law, the *weight* to be given to them in any particular case is a matter for the decision-maker.

39. The Claimant submits in the alternative under ground 1 that if the Court should decide that a 5 year supply in sub-areas of the district was a relevant planning consideration, then the Inspector acted unfairly by having regard to this matter without giving the parties an opportunity to be heard on (a) the weight that should be attached to it and (b) how the 5 year supply should be calculated.
40. In my judgment there is no merit in this alternative allegation. EWHL accepts that Table 4 in the Inspector's decision letter was derived from the figures in Table 15 of the proof given by its expert, Mr. Harbottle. That Table gave the Claimant's position on the "5 year housing supply" for each of the five sub-areas as well as the district as a whole. No evidence has been produced to show that the Claimant would have wished to adjust its 5 year supply figures in some specific way before being included in Table 4 and so point (b) is untenable.
41. As to point (a), DL 13 states unequivocally that for the reasons given in DL 6 (i.e. the rationale for the spatial distribution policy DW1 and policy SV1), the witnesses for the principal parties at the inquiry agreed that it was reasonable to consider in addition the distribution of the 5 year land supply figures against the apportionment in the Core Strategy of housing provision between the policy areas. The decision letter did not suggest, however, that what has sometimes been referred to as the "disaggregated approach" should be applied in substitution for the district-wide approach. This understanding of the decision letter is consistent with paragraphs 7 to 8 of the witness statement dated 29 June 2015 by Mr. Jewson (the planning consultant for EWHL).
42. However, in paragraphs 9 to 12 of his statement Mr. Jewson says that he had understood at the inquiry that the spatial distribution issue was only to be considered if the Inspector should find that there was a 5 year supply of housing land for the whole of the district. I am unable to accept that evidence as a sufficient basis for contradicting DL 13. First, there is no support for Mr. Jewson's assertion in any contemporaneous document put before the Court. Notably, the Claimant did not rely upon any part of its lengthy and detailed closing submissions to the Inspector in order to support this part of Mr. Jewson's witness statement (see for example, paragraphs 134 and 244 of the Closing Submissions). Second, no sound reason was advanced for taking into account 5 year supply figures in sub-areas if there is a 5 year supply in the district as a whole, but not if there is a shortfall in the 5 year supply for the district. A distortion in the delivery of housing could be a significant factor in either case. It is therefore implausible that the agreed position at the inquiry would have been as Mr Jewson has suggested. Third, Mr. Jewson's additional note to the Inspector in February 2015 on "Employment/Housing Balance" refers to 5 year land supply figures for the Somer Valley without any suggestion that this was only germane if the current land supply for the district as a whole was found to exceed 5 years. Fourth, the distinction drawn by Mr. Jewson is legally flawed in any event (see paragraphs 26 to 29 and 36 to 38 above).
43. Applying the well-established principles in Secretary of State for Communities and Local Government v Bleaklow Industries Limited (2009) 2 P&CR 21 (para 43) and

Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1145 (paras 47 to 49 and 62 to 63), it is plain that the subject of the 5 year supply of housing land in the context of the spatial distribution policies in the Core Strategy was raised by the Inspector, as Mr. Jewson accepts in his witness statement. It is also plain that the Claimant had no reason to think that that material would not be placed in the planning balance in any event, but would only be deployed if the appeals should be determined on the basis that the district-wide supply of housing land met or exceeded the 5 year requirement. The real issue in the present case concerns the way in which the Inspector's reasoning proceeded from the second sentence in DL 26 to DL 29, which is the subject of grounds (2) and (3).

44. For the reasons given above I reject ground (1).

Ground (2)

45. In the first part of ground (2) EWHL argued that because the Inspector had accepted its figures on housing land supply in preference to those put forward by BANES, it was not open to the Inspector to conclude that either or both of the two appeal schemes would be harmful to the spatial strategy of the Core Strategy. It was sought to show by a number of calculations that the resultant provision of housing land over the whole of the plan period would still be "around" the "indicative figure" of 2470 for the Somer Valley and within a 10% tolerance suggested by the Inspector in DL 26. Put another way, the total contribution of housing in the Somer Valley over the plan period would still be about 19% of the total supply for the district as a whole (see paragraph 12 above).
46. This line of argument is misconceived because it presupposes that the Inspector's reason for criticising the appeal proposals as undermining the spatial strategy of the Core Strategy was that they would cause the land supply for the Somer Valley to be increased to a level significantly greater than "around 2470 new homes" (policy SV1). It was not. At the beginning of DL 26 the Inspector accepted that the figures resulting from the appeal proposals "might not unduly skew the overall target in the Policy Area". He was not troubled by that aspect. But he went on to say that that approach simply looked at land supply over *the whole of the plan period* and he criticised the appeal proposals for undermining the Core Strategy's spatial strategy in two other respects:-
- (i) frontloading the supply of housing land into the first 8 years of the plan period (DL 26 to DL 27) and
 - (ii) diverting growth away from the Bath area (DL 28 to DL 29) (and see paragraphs 18 to 19 above).

It emerged during oral argument that what grounds (2) and (3) are really concerned with are points (ii) and (i) respectively.

47. EWHL submits that the Inspector's conclusion that the appeal proposals would undermine the spatial strategy for directing the main growth initiatives to Bath by diverting development pressure away from Bath was not based on any evidence or submissions at the inquiry. It did not form part of the case put forward by BANES. EWHL submits that in these circumstances the Inspector acted unfairly by relying

upon this consideration as a significant part of his reasoning for the dismissal of the appeals.

48. This point was raised in paragraph 55 of the skeleton argument for EWHL. The skeleton argument filed for the Secretary of State did not attempt to deal with it.
49. The Court is grateful for the assistance provided by Mr. Hereward Phillpot QC, who appeared on behalf of the Secretary of State at relatively short notice. He accepted that the “Bath point” was not raised by BANES during the inquiry. This is confirmed, for example, by the closing submissions for the local authority.
50. Paragraph 167 of the Closing Submissions for EWHL record that during the inquiry the Inspector requested the parties to provide additional written evidence on two issues: (i) the approach to be taken to the use of the word “around” in policies DW1 and SV1 of the Core Strategy and (ii) the balance between jobs and homes sought by the strategy. The second point related to the outcommuting problem identified in relation to the Somer Valley in paragraph 1.29 of the Core Strategy. Mr. Jewson provided a written response on behalf of EWHL and Mr. Walker did likewise on behalf of BANES. Neither document addressed what became the Inspector’s “Bath point”. In particular, the local planning authority did not raise any concern that if the appeals were to be allowed, or the housing figure of around 2470 for the Somer Valley exceeded, that the strategy for directing a certain level of development to Bath would be undermined or development pressure would be diverted away from Bath or diluted. Although Mr. Walker did refer specifically to the jobs/homes imbalance *within* the Somer Valley (paragraphs 14 to 16 of his statement), he also stated that the use of the word “around” in the policies acknowledged that the housing figures for the sub-areas could be exceeded (paragraphs 4 to 5 of the statement).
51. Mr. Phillpot QC correctly submitted that by virtue of section 70(2) of TCPA and section 38(6) of PCPA 2004, if the statutory development plan raises a relevant consideration then ordinarily the decision-maker is obliged to take it into account, whether or not the matter had been referred to by a party to an appeal or in representations (see e.g. R (St. James Homes Ltd) v Secretary of State for Environment, Transport and the Regions [2001] PLCR 27 (paragraphs 32 to 53). However, he was unable to point to any part of the development plan which seeks to restrain development in the Somer Valley, or other parts of the district, in order to encourage or promote the delivery of development within Bath. The Core Strategy does not refer to any such objective or concern.
52. But what if the development plan had contained such a policy? I do not consider that it would automatically follow in any case where an Inspector is minded to determine an appeal on a point contained in the development plan, but not referred to by any party (whether directly or indirectly), that fairness would not require him to raise the matter with the parties so that they may have an opportunity to make representations. Although this point does not need to be decided here, and should be reserved for fuller consideration, I do not see why the statutory obligation to take into account the development plan should necessarily absolve the decision-maker from complying with the normal principles of procedural fairness. This must depend upon the circumstances of each case. For example, a development plan may be a lengthy document and the representations in an appeal may have not raised a topic which happens to be covered by that plan.

53. There is nothing in the decision letter to indicate that the “Bath point” had been raised at the inquiry. The only inquiry document which the Secretary of State produced in order to respond to the Claimant’s allegations of unfairness was the supplemental statement by Mr. Walker for BANES. The Inspector has not produced a witness statement to indicate that the subject was raised in some way at the inquiry or in the written representations which he received.
54. Mr. Phillpot QC relied upon Secretary of State for Communities and Local Government v Bleaklow Industries Limited [2009] 2 P&CR 21 for the proposition that even if a particular point is not raised at an inquiry there may be no procedural unfairness if the “point” fell within the ambit of a “topic” which is raised. Plainly the application of this approach must be very sensitive to the facts of any individual case (see e.g. Hopkins (supra) paragraph 85).
55. In Bleaklow the Court of Appeal held that, properly construed, an old mineral permission allowed the “working” of limestone but only in the course of “working” as opposed to “winning” fluorspar. “Winning” referred to the process of gaining access to the fluorspar deposit or vein. “Working” referred to the process of extracting the fluorspar from the vein. The Court held that the Inspector had been entitled to uphold an enforcement notice aimed at preventing the extraction of limestone which was not authorised by the permission. In order to express a measure of limestone extraction which would be outwith the permission, whilst at the same time taking an approach which would favour the landowner, the Inspector adopted a ratio of limestone to fluorspar greater than 2:1 (see e.g. paragraphs 15 and 45). The owner and lessees complained that although the “topic” of whether it was appropriate to use ratios *at all* was debated at the inquiry (an approach which they had sought to refute), the appropriateness of the ratio of 2:1 had not. But the Court of Appeal held that it had been unnecessary for the specific ratio of 2:1 to have been raised at the inquiry in order to achieve procedural fairness, given that (a) the Inspector had raised the topic of whether a ratio should be used and (b) the particular ratio the Inspector adopted was a conclusion at which he had arrived after having considered the evidence and arguments. The Inspector was under no legal obligation to put forward some form of draft conclusion for the parties to address (paragraphs 14 to 15 and 42 to 43).
56. In Bleaklow it is plain that the question of whether a ratio should be used at all was dealt with at the inquiry. It was not suggested by the landowners that the Inspector had been bound to agree with their contentions on that issue. It therefore followed that the landowners ought to have appreciated (a) that their stance might be rejected, in which case (b) the issue of what ratio to adopt would fall to be addressed. That, indeed, is what happened. It had therefore been open to the landowners to put forward such evidence and/or submissions on the ratio to be used in the event of the Inspector disagreeing with their case that a ratio should not be employed at all. It should also be noted that Bleaklow was not a case where the Inspector’s judgment was criticised because it was unsupported by any evidence.
57. In the present case the position is very different. At the inquiry there was discussion of the 5 year land supply for sub-areas as well as for the district as a whole. There was also discussion of the distribution of residential and employment development according to the spatial strategy, including the imbalance between housing and jobs *within* the Somer valley. But it is agreed that there was no discussion of whether allowing the appeals would divert development away from Bath or whether it would

impede the strategy of directing a certain level of growth to Bath. Furthermore, there is nothing in the Core Strategy to suggest that development in the Somer Valley should be restrained so as not to impede the achievement of development for Bath.

58. In these circumstances, I do not see why the conclusions which might be reached by the Inspector on (a) the balance between jobs and homes *within* the Somer Valley or (b) the amount of housing land in the Somer Valley (whether by itself or in comparison with other sub-areas) would include the issue of whether increasing housing land in the Somer Valley would reduce, or discourage, housing development in Bath. The latter is a different topic. Unlike the position in Bleaklow, the “Bath point” was not something which fell to be considered by the Inspector if he rejected the case of one party or another on a point which was debated at the inquiry.
59. In DL 28 the Inspector stated that the “corollary” or consequence, of increasing housing supply in the Somer Valley would be to undermine the Core Strategy by diverting growth away from Bath. However, in DL 25 to DL 26 the Inspector had already accepted that an increase of up to 10% on the indicative figure for the Somer Valley might not unduly skew the target for the policy area. It is therefore plain that in DL 28 and DL 29 the Inspector was asserting, or at least assuming, a link or causal effect between greater provision of housing in the Somer Valley and a reduction in the provision of housing in Bath. But that link was not relied upon by BANES at the inquiry (nor was it suggested by any other party) and it was not raised by the Inspector.
60. Mr. Phillpot QC submitted that the consequence of allowing a greater amount of housing in the *Somer Valley* in order to meet a shortfall in the 5 year housing land supply for the *district* would be to divert growth away from Bath. If that was a conclusion which followed as a matter of ineluctable logic, I can see that it could be argued (I put it no higher than that) that there would be no need for the issue to be raised by the Inspector or by a party in the appeal process in order to achieve fairness. But Mr. Phillpot QC did not go so far as to claim that this was a case of ineluctable logic. I would add that there is a difference between logic of that inescapable nature and an inference which it *may* be possible to draw as a matter of *judgment applied to evidence*. In the former case the inference is likely to be apparent. In the latter case that may not be so. In general terms fairness requires that the parties should be aware of the points to be addressed and have a reasonable opportunity to deal with them (Hopkins (supra) at paragraph 46).
61. In some cases it can be seen from the material before the inquiry that a party ought reasonably to have appreciated that a point should be addressed. But in this case the Secretary of State has not identified any material, or discussion at the inquiry, which suggested that increasing housing land supply in the Somer Valley might impact upon the deliverability of the housing target for Bath. In a case where there is a shortfall in the housing land supply for a district, it is one thing to argue about the merits of different locations for overcoming or mitigating that shortfall (see paragraphs 36 to 38 above); it is quite another to contend that locating development in one area will have an adverse effect upon the delivery of development in another. In this case there was no evidence or contention advanced that releasing the appeal sites (or land) in the Somer Valley for housing, would harm or discourage residential development in Bath in some way.

62. Two further principles in Hopkins should be noted. First, at paragraph 62 the Court of Appeal reiterated that procedural unfairness as a vitiating error depends upon whether the Claimant thereby suffered material prejudice. Second at paragraph 58 the Court accepted that, when deciding whether a party has had a fair opportunity to comment on an issue, or whether he might reasonably have anticipated that a point might be relied upon by the Inspector in the decision letter, it is important to bear in mind the highly focussed nature of modern public inquiries and the objective that parties should focus their cases on those matters that are in dispute. Here EWHL says that if they had appreciated that the Inspector might dismiss the appeals in reliance upon the “Bath point”, they would have produced evidence to show that the slower rate of delivery of housing in Bath was caused by constraints applicable to particular sites in that area and was not linked to the rate at which development takes place in the Somer Valley or elsewhere in the district (page 15 of the skeleton for EWHL). Because this topic was not raised by any party or by the Inspector EWHL has unfairly been denied the opportunity to present that evidence and to have it assessed and taken into account by the Inspector. Furthermore, in the absence of any suggestion that this point would be pursued, it would have been inconsistent with the focussed approach that parties to planning appeals are expected to take, for EWHL to have adduced this evidence in case the point subsequently appeared in the decision letters as part of the reasoning for dismissing the appeals.
63. For these reasons I uphold ground (2) to the extent indicated above.

Ground (3)

64. This ground challenges DL 26 to 27 and 30 to 31 in which the Inspector, having accepted that the appeal proposals did not unduly skew (which is taken to mean breach) the strategy for the distribution of housing across the district over the whole plan period, nonetheless relied upon the increase in the provision of housing land in the Somer Valley in the earlier part of the plan period, and consequential restraints on house building in the later part of the plan period, as reasons for dismissing the appeals.
65. It was first submitted on behalf of EWHL that this “frontloading” of housing supply was an immaterial consideration. I agree with Mr. Phillpot QC that it is impossible for the Court to hold that this issue was legally incapable of being a relevant planning consideration. It plainly is a land use planning consideration. It is unnecessary for a decision-maker to be able to point to a policy in the development plan for phasing the release of housing land or to a statement in the Core Strategy which discourages frontloading in order for this issue to be a legally relevant planning consideration. Nor does any consistency between the amount of the housing land supply in the Somer Valley (with the appeal proposals added) and the local authority’s housing trajectory over the plan period render frontloading an irrelevant consideration. Instead, EWHL’s submissions about the lack of policy support for the front loading objection relied upon by the Inspector, or about consistency with the housing trajectory, are simply matters going to the merits of these issues. These submissions go to weight and not legal relevance. Arguments of this kind are inappropriate for a High Court challenge, unless irrationality is alleged, which in this case it is not.
66. EWHL’s second and alternative ground was that the Inspector acted unfairly by rejecting the appeal proposals on the basis of frontloading, which also included his

concern that if the permissions in the Somer Valley (with the appeal proposals) were to be built out then “this could lead to the situation where greater restraints may have to be applied towards the end of the plan period, leaving the plan potentially unable to respond to future - and as yet unforeseen – needs”. EWHL submits that these objections were new points which were raised by the Inspector for the first time in his decision letter and were not raised previously during the appeal process.

67. The Secretary of State responded to this challenge by introducing the Supplemental Statement by Mr. Walker on behalf of BANES to which I have already referred. The second part of the statement (paragraphs 12 to 16) responded to a question from the Inspector seeking assistance on the balance between jobs and homes in the Somer Valley. In that document it was said on behalf of BANES that:-
- (i) The Somer Valley exhibits the greatest *planned* imbalance between homes (2470 new dwellings) and jobs (900) *over the plan period*;
 - (ii) The delivery of homes is all but guaranteed whereas the increase in employment is more uncertain and will take more time to materialise. Even if the employment targets are reached the Somer Valley will become more of a road-based commuting centre during the plan period.
 - (iii) Whereas the Somer Valley has been “haemorrhaging” employment rather than gaining it, approximately 2051 units (or 83%) of the housing requirement of 2,470 has been built or has planning permission three years into the plan period. Assuming that this is largely built out by 2019 in accordance with the housing trajectory issued by BANES, the vast majority of planned housing supply will have been built in the first half of the plan period;
 - (iv) *However*, there is no development plan policy to manage the release of *additional* housing land by reference to the grant of planning permission for employment growth.
68. In my judgment it is plain from this document that BANES raised no concern in respect of “frontloading” as a reason for opposing either of the two appeal schemes. Indeed, BANES made it clear that “frontloading” in the Somer Valley was an intrinsic feature of the housing trajectory which it had prepared in order to comply with paragraph 47 of the NPPF. BANES did not suggest that the appeal schemes would make a significant difference to the housing trajectory or would lead to greater restraints being applied to the release of housing land in the Somer Valley in the latter part of the plan period. On any fair reading of the Council’s submissions, BANES went no further than to raise points to counter any argument from the developer that there is a *need* to release, or *merit* in releasing, land within the Somer Valley area for housing at this stage (reflecting the approach set out at paragraphs 36 to 38 above). The Inspector did indeed make a similar point in an earlier part of his reasoning (DL 24).
69. It was suggested by Mr. Phillpot QC that the Inspector’s “frontloading” concern was raised as an issue by the Core Strategy so that EWHL was in effect put on notice to address the matter. He submitted that the best reference for this purpose was paragraph 4.15 (see paragraph 15 above). However, on the submissions I have heard I am not persuaded that that part of the Core Strategy raised “frontloading” of the

supply of housing land as an issue so as to avoid that supply being restrained during the latter part of the plan period. There was no phasing policy in the Core Strategy. Instead, paragraph 4.15 expressed the concern that an increase in housing land should not exacerbate the balance between jobs and homes and out-commuting problems. Paragraph 16 of Mr. Walker's supplemental statement is consistent with this understanding of the Core Strategy. But DL 26 and 27 went into subjects which do not appear to have been addressed by the Core Strategy, at least not on the material before the Court.

70. Mr. Jewson, on behalf of EWHL, prepared a paper for the Inspector dealing with the job/homes balance issue. He considered the matter by reference to the overall plan period and not the frontloading issue. That is consistent with EWHL's submission that "frontloading" was not raised by the Inspector as an issue for the inquiry to consider. The same applies to the written closing submissions for EWHL.
71. Although page 15 of the skeleton for EWHL raised the contention that the "frontloading" issue was a new point raised for the first time in the decision letter, there has been no witness statement from the Inspector to show that the issue was raised during the appeal, whether as a specific point or by reference to some broader topic.
72. EWHL's skeleton points out that because the frontloading issue was not raised in any way, it did not have the opportunity to make two points. First, the trajectory produced by BANES shows that the delivery of housing under the Core Strategy in order to meet the requirements of the NPPF is frontloaded in any event, because a substantial amount of development has already been completed or permitted, and the appeal schemes would not materially alter that approach. Second, although the Inspector considered that with the appeal schemes added the current supply of housing land in the Somer Valley would represent 54% or 57% of the figure of "around 2470" required for the whole of the plan period, it is also necessary to take into account the 483 dwellings already completed in the first three years of the plan, which would considerably increase the Inspector's figure of 54% to 74%. Indeed, the figure given by Mr. Walker for BANES was even higher at 83%. The Appellant has not had the opportunity to make the point for the Inspector to consider that *a fortiori* the appeal schemes would make no significant difference to the correct, but much higher, data for considering any frontloading effect.
73. Having reviewed the materials before the Inspector and the ambit of his request during the inquiry for further information I conclude that there was material prejudice to the Claimant and procedural unfairness because the Inspector relied upon the frontloading point as a further reason for dismissing the appeals, without the point being raised as an issue to be addressed. EWHL could not reasonably have anticipated that frontloading would form part of the basis for the dismissal of the appeals. For these reasons ground (3) succeeds.
74. Even if it be assumed, contrary to my decision, that the Inspector was not obliged to raise the "frontloading" point as an issue to be addressed in order for the appeal process to be procedurally fair, in my judgment ground (3) nevertheless succeeds on an alternative basis. On this *assumption* it would follow that the Inspector was entitled to draw his own conclusions from the material put before him. Plainly, that material included the housing trajectory produced by BANES which showed that the delivery

of housing land to satisfy the Core Strategy was predicated on the frontloading of housing land supply in the Somer Valley. In my judgment the points set out in paragraph 72 above were obviously material considerations and therefore the Inspector was obliged to take them into account. It is plain from the figures set out in DL 26 that the Inspector did not assess the true extent of the frontloading in the Somer Valley by taking into account the housing already built during the plan period. In addition, the Inspector failed to consider whether the appeal proposals would make a significant difference to the frontloading, correctly measured, which according to the trajectory issued by BANES would take place in any event if the appeals were to be dismissed.

75. The Secretary of State submitted, no doubt in order to avoid the legal flaws identified in the previous paragraph, that it was open to the Inspector to conclude that what the Secretary of State described as the “frontloading in the Core Strategy” ought not to be made *any* worse by permitting additional housing (paragraph 54 of the skeleton). However, the Inspector did not express any of his reasoning in that way. His stated concerns that there would be too little housing land left for the last 10 years of the plan period and that greater restraints might have to be applied towards the end of the plan period (DL 26 and DL 27), confirm that he did not take into account or address the points set out in paragraph 74 above.
76. Although I am in no doubt as to the Inspector’s failure to take these matters into account, at the very least the Claimant is entitled to succeed under ground (3) on the alternative basis that the reasoning in the decision letter on these important points was inadequate, applying the principles in South Bucks DC v Secretary of State for Transport, Local Government and the Regions [2004] 1 WLR 1953. Moreover, for the reasons set out in paragraph 69 above the Inspector failed to give adequate reasons to explain why the “frontloading” point should be treated as having an adverse impact upon the housing distribution policy in the Core Strategy.
77. For all these reasons, I uphold ground (3) to the extent indicated above.

Ground (5)

78. EWHL complains that the Inspector failed to make a finding under section 38(6) of PCPA 2004 as to whether the proposal accorded with the development plan as a whole. It was not suggested on behalf of the Claimant that the Inspector failed to deal with any policy of the development plan giving positive support for the appeal proposals. On the other hand it is plain from the decision letter that the Inspector considered that the proposals breached policies in the Core Strategy for the distribution of housing (e.g. DL 29, 31 and 52). Reading the decision letter as a whole, the Inspector did make it sufficiently clear as to how he considered each of the appeal proposals stood in relation to the development plan for the purposes of section 38(6). There is nothing in ground (5).

Conclusions

79. For the reasons and to the extent set out above, grounds (2) and (3) succeed in CO/3058/2015 and CO/3062/2015. Therefore the decision letters dated 20 May 2015 in respect of the Midsomer Norton and Paulton sites must be quashed.