

Queen's Bench Division

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**Tewkesbury Borough Council v Secretary of State
for Housing, Communities and Local Government**

[2021] EWHC 2782 (Admin)

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2021 July 21, 22;
Oct 18

Dove J

Planning — Development — Planning permission — Calculation of five-year housing land supply — Whether national planning policy permitting past oversupply of housing measured against annual requirement to be taken into account when calculating current housing land supply — Whether inspector erring in failing to credit past oversupply against current shortfall — National Planning Policy Framework (2019), para 73

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On the interested parties' appeal against the local planning authority's refusal of outline planning permission for a proposed residential development, the key issue was the extent of the shortfall in the local authority's five-year housing land supply for the purposes of paragraph 73 of the National Planning Policy Framework (2019) ("NPPF")¹, which provided that local authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies. In particular, the question arose whether past oversupply of housing measured against an annual requirement could be taken into account when calculating the current housing land supply. The local authority's case was that crediting past oversupply towards the current five-year supply was not contrary to paragraph 73 and would be consistent with the published Planning Practice Guidance ("PPG"). The inspector took the view that the NPPF made no allowance for subtracting additional supply from the annual requirement and that while the guidance in the PPG enabled local planning authorities to take additional supply into account, there was no requirement to do so. Proceeding on the basis that the past additional supply should not be used to discount the authority's housing requirement, she found the shortfall in supply to be concerning and, allowing the interested parties' appeal, granted planning permission notwithstanding that the development conflicted with the development plan.

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On the claimant's application for statutory review of the inspector's decision—
Held, refusing the application, that there was no suggestion in the National Planning Policy Framework that any oversupply in housing land supply in earlier years would automatically be counted within the five-year housing supply calculation; that there was therefore no text calling for the court's interpretation and neither was it appropriate for the court to introduce, by way of inference, text into the policy of the Framework which did not exist; that it was not the task of the court to seek to fill in gaps in the policy of the NPPF but, rather, it was a matter for the planning judgment of the decision-maker to determine, in the particular circumstances of the case being considered, whether an oversupply of housing prior to the five-year period being assessed ought to be taken into account in the calculation of the five-year housing land supply; that rather than there being a binary or arithmetical choice between

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¹ National Planning Policy Framework (2019), para 73: see post, para 17.

A either taking past oversupply into account or not, there were, in reality, several broad policy approaches which might be taken to the question of how to account for past oversupply in calculating the five-year supply; that, read in context and as a whole, the inspector's conclusions on housing land supply had been an expression of the application of planning judgment to the particular circumstances of the claimant's five-year housing land supply calculation and she had not proceeded on the erroneous basis that the NPPF prohibited her from taking into account earlier additional supply;

B that neither could her approach to housing supply be characterised as irrational; and that the inspector had given clear and adequate reasons for her judgment that the oversupply ought not to be taken into account, leading to greater weight being attributed to the shortfall in the five-year housing land supply (post, paras 42–47, 49, 50, 52, 54, 57, 59).

C The following cases are referred to in the judgment:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Hallam Land Management Ltd v Secretary of State for Communities and Local Government [2018] EWCA Civ 1808; [2019] JPL 63, CA

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

D *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137, CA

R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] UKSC 3; [2020] PTSR 221; [2020] 3 All ER 527, SC(E)

South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)

E *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, SC(Sc)

The following additional cases were cited in argument or referred to in the skeleton arguments:

Braintree District Council v Secretary of State for Communities and Local Government [2018] EWCA Civ 610; [2018] 2 P & CR 9, CA

Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19

F *Dylon 2 Ltd v Bromley London Borough Council* [2019] EWHC 2366 (Admin)

Keep Bourne End Green v Buckingham Council [2020] EWHC 1984 (Admin); [2021] JPL 181

Newick (Baroness Cumberlege of) v Secretary of State for Communities and Local Government [2018] EWCA Civ 1305; [2018] PTSR 2063, CA

News Smith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74; [2017] PTSR 1126

G *R (Richborough Estates Ltd) v Secretary of State for Communities and Local Government* [2018] EWHC 33 (Admin); [2018] PTSR 1168

R (Solo Retail Ltd) v Torridge District Council [2019] EWHC 489 (Admin)

R (Tewkesbury Borough Council) v Secretary of State for Housing, Communities and Local Government [2019] EWHC 1775 (Admin); [2019] PTSR 2144

H **APPLICATION** under section 288 of the Town and Country Planning Act 1990

By a claim form, and with permission granted by Lang J on 26 April 2021, the claimant local planning authority, Tewkesbury Borough Council, applied for statutory review under section 288 of the Town and Country Planning Act 1990 seeking the quashing of the decision dated 12 January

2021 of an inspector appointed by the defendant, the Secretary of State for Housing, Communities and Local Government, allowing the appeal of the interested parties, (1) the developer JJ Gallagher Ltd and (2) the landowner Richard Cook, against the local planning authority's decision dated 16 June 2020 refusing planning permission for the erection of up to 50 dwellings with associated site works, open space, car parking and site remediation in respect of a site described as land off Ashmead Drive, Gotherington. The grounds of challenge were: (1) that read properly and in its context, and by necessary implication, the National Planning Policy Framework (2019) ("NPPF"), and paragraph 73 in particular, required past over and undersupply to be taken into account when carrying out the assessment of the available five-year housing land supply and that the inspector had erred in law in proceeding on the basis that the NPPF had prohibited her from taking account of the identified past oversupply; (2) that, alternatively, it had been unreasonable for the inspector to take no account of the past oversupply of housing in assessing the housing land supply calculation; (3) that it had been irrational for the inspector in reaching her conclusions (a) to take into account that houses already delivered could not meet the definition of deliverable housing contained within the NPPF, that being irrelevant to the issue whether oversupply could be taken into account in calculating the five-year housing land supply, and (b) to rely on the observation that the housing requirement of 9,899 dwellings contained in the Gloucester, Cheltenham and Tewkesbury Joint Core Strategy for the plan period was not a maximum, that being similarly irrelevant; and (4) that the inspector's reasons had (a) not dealt adequately with all the points raised by the planning authority and (b) not dealt at all with the decision of a previous inspector that oversupply should be taken into account in calculating the five-year housing land supply.

The facts are stated in the judgment, post, paras 1, 3–12.

Josef Cannon (instructed by *One Legal, Tewkesbury*) for the local planning authority.

Tim Buley QC (instructed by *Treasury Solicitor*) for the Secretary of State.

Killian Garvey (instructed by *Shoosmiths LLP*) for the first interested party.

The second interested party did not appear and was not represented.

The court took time for consideration.

18 October 2021. **DOVE J** handed down the following judgment.

1 On 25 October 2019 the interested party applied to the claimant for outline planning permission for the erection of up to 50 dwellings with associated site works, open space, car parking and site remediation in respect of a site described as land off Ashmead Drive, Gotherington. The application was refused by the claimant on 16 June 2020 and the interested parties appealed, collectively. The appeal was conducted by way of the public inquiry procedure, and the inspector appointed by the defendant to determine the appeal issued her decision letter on 12 January 2021, in which she allowed the appeal and granted planning permission.

2 The claimant's application is made under section 288 of the Town and Country Planning Act 1990 and seeks to quash the inspector's decision.

- A The claimant is represented by Mr Josef Cannon, the defendant by Mr Tim Buley QC and the interested party by Mr Killian Garvey. The attribution of submissions set out below should be read accordingly. I am very grateful to all counsel and also to their legal teams for their extremely helpful written and oral submissions and, in particular, for the thoughtful preparation that went into a focused hearing bundle which provided simply the essential documentation necessary for the purpose of the hearing. A tribute to the care
- B which had gone into the preparation of the hearing bundle was that (with the exception of some material which emerged subsequent to its preparation) there was no need to delve into any other documentation.

The facts

- C 3 The requirement to demonstrate a five-year housing land supply is a central feature of national planning policy in relation to residential development. The details of that policy are set out below but, suffice to say, it was an issue which the claimant and the interested parties considered should be addressed as part of the merits of the appeal proposal. It was an agreed position that at the time of the public inquiry the claimant could not
- D demonstrate that there was a five-year supply of housing in their area.

4 The issue between the claimant and the interested parties for the purposes of the appeal was the extent of the shortfall in the five-year housing land supply. There were individual elements to that dispute but, for the purposes of the present case, the key question was whether or not past oversupply of housing measured against an annual requirement could be taken into account when calculating the current housing land supply.

- E 5 The nature of the dispute as to whether it could be taken into account or not was helpfully crystallised for the purposes of the debate at the public inquiry in the statement of common ground (“the SOCG”). The relevant passages from the SOCG setting out the differences between the parties provided as follows:

- F “Use of ‘Oversupply’ as part of Housing Land Supply Calculation
“1.4 It is the appellants’ position that ‘oversupply’ from the previous monitoring years should not be included within the council’s five-year housing land supply calculation. This is consistent with the Secretary of State appeal decision at Oakridge, Highnam (Tewkesbury Borough Council Reference: 16/00486/OUT; Appeal Reference: APP/G1630/W/17/3184272) dated 20 December 2018.

- G “1.5 The council do not agree with that approach and considers that past over-delivery can be credited towards the five-year supply. That approach was also accepted, without comment, in earlier appeal decisions prior to the Highnam decision. There is no express policy on this issue in the Framework, although the Planning Practice Guidance contains guidance that supports the council’s approach. There is no case law that directly addresses this issue. Moreover, no conclusions as to the interpretation of planning policy in an appeal decision is binding.”
- H

“1.8 In terms of how past shortfalls and past over supply can be addressed, paragraph 031 (Reference ID: 68-031-20190722) explains that the level of deficit or shortfall will need to be calculated from the base date of the adopted plan and should be added to the plan

requirements. Paragraph 032 (Reference ID: 68-032-20190722) follows and states that where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years.

“1.9 Contrary to the appellant’s position, the council is of the view that its approach is consistent with the Framework. This is for the following reasons.

“1.10 First, when calculating five-year supply, the principle of adjusting the annual requirement for future years, by reference to past years’ delivery rates, is clearly established by national policy: see the approach expressly advised in respect of past years’ under-delivery (para 31 above). A symmetrical approach to past years’ over-delivery is consistent with policy.

“1.11 Secondly, the paragraph from the Planning Practice Guidance cited above at para 34 supports the council’s approach. Notwithstanding the council’s current housing land supply position, the council’s area is one of those areas that previously ‘delivered more completions than required’ and ‘this additional supply’ (ie the surplus) ‘can be used to offset any shortfalls ...’ The words ‘against requirements from previous years’ used in the Guidance, when read in the context of the heading for this paragraph, must be taken to mean ‘the requirements delivered in previous years’. The heading makes it clear that the paragraph is intended to address the relationship between past oversupply and planned (ie future) requirements.

“1.12 Thirdly, reliance upon policy to boost significantly the supply of homes, and on policy stating that the five-year requirement is a minimum, are nothing to the point. The policy objective to boost supply in paragraph 59 of the Framework is linked to the need for a sufficient amount and variety of land, and not the calculation of a five-year supply in a development control context.”

6 It was the claimant’s contention in the SOCG that they were able to demonstrate a five-year housing land supply of 4.37 years if the oversupply from previous years within the plan period was taken into account. It was the interested parties’ position that removal of the oversupply would reduce the five-year housing land supply to 2.4 years; there were disputed sites included in the housing supply and once those were removed the housing supply was further reduced, in the opinion of the interested parties, to 1.84 years.

7 Shortly prior to the completion of the SOCG, and undoubtedly forming part of the background to it, the claimant published its five-year housing land supply statement, in October 2020. This document related the housing supply to the housing requirement derived from the Gloucester, Cheltenham and Tewkesbury Joint Core Strategy (“the JCS”). As set out in greater detail below, the JCS provided a total housing requirement for the claimant of 9,899 dwellings for the plan period 2011 to 2031, equating to a need to provide 495 dwellings per annum. The five-year housing land supply statement demonstrated that over the first nine years of the plan period housing completions in the claimant’s administrative area had exceeded the housing need, when measured at 495 dwellings per annum, by 1,115 dwellings. In other words, the requirement over nine years measured at 495 dwellings per annum amounted to 4,455 dwellings and, during that period,

A 5,570 dwellings had been completed. This oversupply of housing was taken into account in the five-year housing land supply statement in the calculation of the five-year supply, giving rise to the claimant's figure in the SOCG of 4.37 years or an undersupply of 180 dwellings.

B 8 The claimant made closing submissions in writing to the inspector at the public inquiry, which included submissions in relation to the housing land supply position. In that regard, the claimant's submissions recorded as follows:

C "10. *Housing Land Supply*. Currently the council cannot demonstrate a five-year housing land supply. The issue before the Inquiry, which was considered at the round table session, was the extent of the shortfall. There is a range with the appellant claiming the council can only demonstrate 1.82 years whereas the council claims it can demonstrate 4.37 years. The council acknowledges that the shortfall, on its own figures, is significant.

D "The basis for the divergence between the two sides is how previous over delivery against the HLS is taken into account. The appellants claim it cannot be taken into account, whereas, the council claims it can be and should be.

E "The council's case is that taking account of previous oversupply is not against either the requirement of paragraph 73 of the NPPF and is consistent with PPG. In particular, paragraphs 31 and 32. The PPG is silent on over supply but provides advice on under supply. Paragraph 32 'Where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years' (Ref ID 68-032-20190722). The council submits that logic implies a symmetrical approach would follow and therefore previous oversupply should be credited against any future under supply over the five-year period.

F "If this approach cannot be taken previous oversupply is, in effect, lost. The houses are built, and occupied, but in effect disappear. This is not what the NPPF intended as it could amount to a perverse incentive to restrict supply in early years of the period to ensure there is no shortfall in the latter years. This would work against the desire to boost the supply of homes. (paragraph 59 NPPF).

"Lastly, there is nothing within the NPPF nor the PPG to stipulate that this approach cannot be taken."

G 9 In determining the appeal, the inspector had to address a number of material considerations related to the development plan, the interests of the area of outstanding natural beauty ("AONB") and the impact of the proposals on the village of Gotherington. Amongst the matters assessed by the inspector was the extent of the shortfall in the five-year housing land supply.

H 10 In the light of the nature of the issues that the inspector had to address, and the contentions raised by the parties in this case, it is necessary to set out her conclusions in respect of the housing land supply issues in some detail. Having set out the differences between each party's assessment of the five-year housing land supply she addressed the question of the additional or oversupply of housing, and the role it might play in calculating the five-year housing land supply, in the following paragraphs:

“Additional supply

“58. The council indicate that their approach to incorporating additional supply is consistent with Planning Practice Guidance (PPG) paragraph 32. This states that ‘where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years’. However, paragraph 73 of the Framework states ‘LPAs should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years’ worth of housing against their housing requirement set out in adopted strategic policies’.

“59. The policy in the Framework makes no allowance for subtracting additional supply from the annual requirement. Moreover, whilst the guidance in the PPG enables LPAs to take additional supply into account, there is no requirement to do so. It is not a symmetrical approach to dealing with undersupply as advocated by the council.

“60. PPG paragraph 32 details that the additional supply can be used to offset shortfalls against requirements from previous years. Therefore, shortfalls against requirements from previous years would be necessary, in order to take account of any additional supply. The requirement from previous years, being those since the development plan was adopted, is 495 dwellings per annum (dpa). In the three years since adoption, there has been an overall surplus of 797 dwellings, and since the base date there has been an overall surplus of 1,115 dwellings. Therefore, there is no shortfall against requirements from previous years which could conceivably be offset.

“61. Furthermore, for a site to be considered deliverable, it 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. Housing already delivered cannot possibly meet this definition.

“62. The council’s argument that the loss of additional housing delivery would have significant implications for plan making, potentially resulting in Council’s holding back sites and restricting sites, is unfounded. This is because it would be unreasonable to refuse planning permission for housing if there had been additional supply, bearing in mind the Government’s objective of significantly boosting the supply of homes. Additionally, Policy SP1 of the JCS requires at least 9,899 new homes. There is no maximum number.

“63. Whilst it is clear that housing above the annual requirements has been delivered in the area and housing supply has been boosted in line with the Framework; it is my view that additional supply is not a tool that can be used to discount the council’s housing requirement set out in its adopted strategic policies. Consequently, the annual requirement should be 495 dpa as set out in the adopted strategic policies, and the future supply should reflect this. Therefore, the past additional supply should be removed from the five-year housing requirement. As detailed by the appellant, this would reduce the housing land supply to 2.4 years.”

11 The inspector then addressed the disputed sites and concluded that neither of them could properly be incorporated within the assessment of the

A five-year housing land supply. The inspector then went on to assess evidence in relation to future supply before reaching her conclusion in respect of the overall issue. She reasoned these matters as follows:

“Future supply

B “68. Aside from the two disputed sites and windfall developments, there is only one other site beyond years one and two in the trajectory which is predicted to deliver five dwellings. Notwithstanding my findings on the above sites, this is a grave situation.

C “69. The council asserts that the eLP contains numerous housing allocations, which will feed into the supply following adoption. However, at the current time, the plan is of limited weight and these allocations should not be included in the trajectory. Furthermore, the eLP details that it is not the role of the plan to meet the shortfall identified by the JCS, but it could contribute towards meeting some of this housing need.

“70. The JCS was adopted with a shortfall, which was to be remedied by an immediate review on the plan. It is now three years later and there is little progress towards this.

D “71. The trajectory does not include sites which have a resolution to permit awaiting planning obligations. I also have very little evidence to indicate if any of these would come forward in the next five years. There are also, it is asserted, numerous major applications for housing being considered. Nonetheless, as these sites are not been included in the trajectory, I have little evidence whether these would be deliverable.

E “72. Therefore, despite the council’s arguments, the future supply in the borough, at the current time is deeply concerning.

“Conclusion on housing land supply

F “73. Considering my conclusions on the additional supply and the disputed sites, the housing land supply would reduce to 1.82 years. This reflects the appellant’s conclusions. Additionally, the lack of supply beyond year three is deeply concerning; and, even if I had taken account of the additional supply, the council would still not have a five-year housing land supply and the past trend of additional supply is not projected to continue.”

12 The inspector’s overall conclusions in relation to the planning balance drew the threads of her assessment together in the following terms:

G *“Planning Balance*

H “90. The proposal would conflict with the spatial strategy of the area and the NDP. It is clearly not plan-led development. However, given my conclusions on the housing land supply, the policies which govern the spatial strategy and housing development in the area are deemed out of date by Framework paragraph 11 d). Because of the very poor housing land supply position, this indicates that the spatial strategy is not effective and therefore these policies are of limited weight.

“91. There would be limited harm to landscape character and appearance of the area and the setting of the AONB, and moderate harm to views from the AONB. This would conflict with the JCS, NDP, LP, Framework 172 and the MP in this regard. However, the harm is limited for the purposes of the character and appearance of the area

and this attracts limited weight against the proposal. Nevertheless, I give great weight to the moderate harm to the AONB as required by the Framework. A

“92. In favour of the development is the provision of housing in general, affordable housing, net gains in biodiversity and the delivery of onsite facilities that would contribute towards the village’s social wellbeing. The delivery of affordable and market housing would be a very significant benefit, of overriding importance when considering the chronic housing land supply position. The net gains in biodiversity are of considerable weight and the onsite public open space would be of moderate weight. Additionally, there would be economic benefits during construction and from the additional residents that would contribute towards spending in the area. This is of moderate weight. B

“93. Framework paragraph 11(d) requires permission to be granted unless (i) the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed. Even giving great weight to the moderate harm to the AONB, it is my view that this does not provide a clear reason for refusing the development. C

“94. Taking account of all the above, the adverse impacts of granting planning permission would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. As such, the material considerations indicate a decision other than in accordance with the development plan.” D

13 Prior to the appeal with which this case is concerned there had been an earlier appeal made by the interested parties in relation to a similar application, made on 2 August 2016 and refused on 21 February 2017. The interested parties appealed and the matter was determined, following a hearing on 7 December 2017. The appeal was dismissed in a decision letter dated 27 April 2018. There was an issue in that appeal in relation to housing land supply, related, in particular, to housing delivery. The inspector set out the dispute and his views in the following paragraphs: E

“Other matters—housing land supply, heritage and highways F

“38. In relation to housing land supply there are a number of areas of agreement between the main parties. Most importantly the housing requirement as set out in the JCS is agreed (9,899) along with completions. The Borough has an identified shortfall, as set out in the JCS inspector’s report, of around 2,400 dwellings against objectively assessed need. G

“39. The main difference is how to deal with delivery. The council’s position is to deal with this over five years whilst the appellant advocates delivery over the whole plan period. The parties agreed that there is no established approach, but I have some sympathy with the council’s position which is that the houses in question are largely already in existence, and that to spread delivery over the whole plan period would be an artificial approach. There is also a difference related to build out rates. H

“40. The appellants have evidenced a 4.19 year supply based on their assessment of the housing target, surplus and supply, with a 20% buffer and the oversupply addressed across the plan period. The appellant

A has also calculated the position based on the council's housing target and supply figures, with the oversupply spread across the plan period and a 20% buffer. This gives a 4.94 year supply. In either case, on the appellants' figures, the authority does not have a five-year housing land supply.

B "41. The authority considers it has a 5.3 year supply (applying a 20% buffer) or 6.06 years with a 5% buffer. The council's evidence, especially the Tewkesbury Borough Housing Land Supply Statement (2017), represents a robust evidence base which persuasively demonstrates more than a five-year housing land supply."

C 14 The inspector set out his view that the JCS was a robust and recently adopted plan and ultimately concluded that a five-year housing land supply had been demonstrated and that the "tilted balance" from the National Planning Policy Framework ("the Framework"), a concept discussed below, was not engaged. The appeal was dismissed.

Relevant policy

D 15 National Planning Policy is contained within the Framework at chapter 5. The introductory paragraphs to this chapter provide as follows:

"5. Delivering a sufficient supply of homes

E "59. To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay.

F "60. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance—unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for."

G 16 The Framework goes on to describe the need for diversity in size, type and tenure of housing to ensure that all of the communities' housing needs are met. The Framework then describes the approach to be taken in relation to identifying a housing requirement and land for housing in the following terms:

H "65. Strategic policy making authorities should establish a housing requirement figure for their whole area, which shows the extent to which their identified housing need (and any needs that cannot be met within neighbouring areas) can be met over the plan period. Within this overall requirement, strategic policies should also set out a housing requirement for designated neighbourhood areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations.

"Identifying land for homes

"66. Where it is not possible to provide a requirement figure for a neighbourhood area, the local planning authority should provide an indicative figure, if requested to do so by the neighbourhood planning

body. This figure should take into account factors such as the latest evidence of local housing need, the population of the neighbourhood area and the most recently available planning strategy of the local planning authority. Identifying land for homes

“67. Strategic policy-making authorities should have a clear understanding of the land available in their area through the preparation of a strategic housing land availability assessment. From this, planning policies should identify a sufficient supply and mix of sites, taking into account their availability, suitability, and likely economic viability. Planning policies should identify a supply of: (a) specific, deliverable sites for years one to five of the plan period; and (b) specific, deliverable sites or broad locations for growth, for years 6–10 and, where possible, for years 11–15 of the plan.”

17 In respect of maintaining an appropriate housing land supply the Framework provides as follows in paragraphs 73 and 74:

“Maintaining supply and delivery

“73. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years’ worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of: (a) 5% to ensure choice and competition in the market for land; (b) 10% where the local planning authority wishes to demonstrate a five-year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or (c) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply.

“74. A five-year supply of deliverable housing sites, with the appropriate buffer, can be demonstrated where it has been established in a recently adopted plan, or in a subsequent annual position statement which: (a) has been produced through engagement with developers and others who have an impact on delivery, and been considered by the Secretary of State; and (b) incorporates the recommendation of the Secretary of State, where the position on specific sites could not be agreed during the engagement process.” (Footnotes omitted.)

18 The failure to demonstrate a five-year supply of housing land has policy consequences in terms of the provisions of the Framework. In particular, paragraph 11, which addresses the presumption in favour of sustainable development, together with footnote 7 of the Framework that requires that applications are determined through an assessment using what is known in common parlance as the tilted balance in cases where a five-year land supply cannot be demonstrated. The relevant provisions of the Framework in this respect are as follows:

- A “*The presumption in favour of sustainable development*
 “11. Plans and decisions should apply a presumption in favour of sustainable development.”
 “*For decision-taking* this means: (c) approving development proposals that accord with an up-to-date development plan without delay; or (d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date [footnote 7], granting permission unless: (i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or (ii) 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.
- B
- C “Footnote 7: This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with the appropriate buffer as set out in paragraph 73).”
- 19 Additional assistance in relation to the application of the Framework can be derived from the defendant’s Planning Practice Guidance (“the PPG”) in relation to how an under supply in the earlier years of the plan period should be addressed. The PPG provides the following guidance:
- D “How can past shortfalls in housing completions against planned requirements be addressed?
 “Where shortfalls in housing completions have been identified against planned requirements, strategic policy-making authorities may consider what factors might have led to this and whether there are any measures that the authority can take, either alone or jointly with other authorities, which may counter the trend. Where the standard method for assessing local housing need is used as the starting point in forming the planned requirement for housing, Step 2 of the standard method factors in past under-delivery as part of the affordability ratio, so there is no requirement to specifically address under-delivery separately when establishing the minimum annual local housing need figure. Under-delivery may need to be considered where the plan being prepared is part way through its proposed plan period, and delivery falls below the housing requirement level set out in the emerging relevant strategic policies for housing.
- E
- F “Where relevant, strategic policy-makers will need to consider the recommendations from the local authority’s action plan prepared as a result of past under-delivery, as confirmed by the Housing Delivery Test.
 “The level of deficit or shortfall will need to be calculated from the base date of the adopted plan and should be added to the plan requirements for the next five-year period (the Sedgfield approach), then the appropriate buffer should be applied. If a strategic policy-making authority wishes to deal with past under delivery over a longer period, then a case may be made as part of the plan-making and examination process rather than on a case by case basis on appeal.
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- H “Where strategic policy-making authorities are unable to address shortfalls over a five-year period due to their scale, they may need to reconsider their approach to bringing land forward and

the assumptions which they make. For example, by considering developers' past performance on delivery; reducing the length of time a permission is valid; re-prioritising reserve sites which are 'ready to go'; delivering development directly or through arms' length organisations; or sub-dividing major sites where appropriate, and where it can be demonstrated that this would not be detrimental to the quality or deliverability of a scheme.

"Paragraph: 031 Reference ID: 68-031-20190722

"Revision date: 22 July 2019

"How can past oversupply of housing completions against planned requirements be addressed?

"Where areas deliver more completions than required, the additional supply can be used to offset any shortfalls against requirements from previous years.

"Paragraph: 032 Reference ID: 68-032-20190722

"Revision date: 22 July 2019."

20 The relevant element of the development plan for present purposes is the Gloucester, Cheltenham and Tewkesbury Joint Core Strategy 2011–2031 which was adopted in December 2017 ("the JCS"). Part 3 of the JCS set out its key spatial policies for the relevant area. Policy SP1 identified that in relation to housing the claimant should provide "at least 9,899 new homes". This figure was reiterated in policy SP2.

21 Within the JCS at para 7.1.36 a chart was provided which set out year by year the volume of completions and projected completions measured against an annual housing requirement from the JCS of 495 dwellings. This assessment, which included forecasting for future years, was said to demonstrate "sufficient housing land supply, including a five-year supply, until the middle of the plan period at 2024/25 where there is a shortfall against the cumulative requirement". The purpose of noting this was to identify that this would "enable adequate time to undertake an immediate review of Tewkesbury's housing supply while maintaining a five-year supply". The immediate review required by the JCS is currently in process.

The law

22 The decision whether to grant planning permission is principally governed by section 70 of the Town and Country Planning Act 1990. Section 70(1) provides the power to approve or refuse planning permission, and section 70(2) provides that when dealing with an application for planning permission the local planning authority shall have regard to the provisions of the development plan so far as material and any other material considerations. For present purposes the Framework is one such material consideration. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that the determination of a planning application shall be in accordance with the development plan unless a material consideration indicates otherwise.

23 The question of the interpretation of planning policy, whether contained within the Framework or the development plan (or other less formal policy) is a question of law for the court: see *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983. When considering questions of

A interpretation, it is important to recognise the nature and status of planning policy. Planning policy should not be construed as if it were a statute or contract, or some other similar legal instrument. As Lord Reed JSC observed in para 19 of *Tesco Stores*, development plans are often full of broad statements of policy which may superficially conflict with each other and require to be balanced in order to undertake the exercise of planning judgment on any given decision against the background of the factual circumstances of the case under consideration. These points were re-emphasised by Lord Carnwath JSC in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, in which he noted that, in addition to the role of the court not being overstated, the role of specialist planning inspectors should be respected in relation to the interpretation and understanding of planning policy.

C 24 When considering the correct interpretation of planning policy the context of the policy and, in particular, its subject matter and objectives will undoubtedly be of considerable importance and assistance. It will also frequently be necessary to consider the wider policy framework within which the policy being interpreted sits, and to which it therefore relates, as part of the context. This point was emphasised by Lord Reed JSC in *Tesco Stores* at para 18.

D 25 In understanding the role of the court it is essential to distinguish between what is properly the interpretation of a policy and, by contrast, what in truth amounts to its application. Whilst the interpretation of policy is, where it is required, a question for the court, the application of a policy will be a matter of planning judgment for the decision-maker and, therefore, subject to the limits of rationality, not a matter for the court. In para 21 of Lord Reed JSC's judgment in *Tesco Stores*, and para 24 of Lord Carnwath JSC's judgment in *Hopkins Homes*, it was emphasised that a question of interpretation arose in *Tesco Stores*, whether the word "suitable" meant "suitable for the development proposed by the applicant" or, alternatively, "suitable for meeting identified deficiencies in retail provision in the area". This was a question of the interpretation of the term "suitable", which arose logically prior to the exercise of judgment in respect of a site's suitability measured against the correct understanding of the language of the policy. In short, the question of interpretation related to resolving an understanding of the language of policy prior to the application of planning judgment in relation to the particular facts of the case.

G 26 In addition to this understanding of the nature of the interpretation of planning policies, as set out above, it needs to be borne in mind that policies will often include broad statements or broad terms which, as Lord Carnwath JSC observed, "may not require, nor lend themselves to, the same level of legal analysis" as the word suitable in the *Tesco Stores* case. Further, whilst an important aspect of the interpretation of planning policy is that it is to be understood and applied by the public for whose benefit the policy is developed, it is also produced to be understood and applied by planning professionals, and as such will on occasion contain planning concepts or terms of art.

H 27 An example of this would be the use of the term "openness" in Green Belt policy, which is a policy concept introduced and developed by planning professionals and policy-makers. As was noted by Lord Carnwath JSC in paras 22 and following of his judgment in *R (Samuel*

Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2020] PTSR 221, “openness” is an example of the kind of broad policy concept which was being referred to in *Tesco Stores*, set out above. At para 23 of his judgment in the *Samuel Smith* case Lord Carnwath JSC expressed his surprise in relation to the legal controversy which was to be discerned in the authorities with respect to the relationship between openness and visual impact. At para 39 of his judgment, Lord Carnwath JSC concluded, having reviewed the authorities, that “the matters relevant to openness in any particular case are a matter of planning judgment not law”. Thus, it is necessary to observe that within planning policy there will be references to broad policy concepts which are themselves the signal for the need for the application of planning judgment rather than amounting to terms requiring interpretation by lawyers.

28 Returning to the question of the five-year housing land supply, as set out above, on the facts of the present case there was no dispute as to the failure of the claimant to demonstrate a five-year supply of housing; the issue in question was the extent of such a shortfall. The potential materiality of the extent of any shortfall in the five-year housing land supply was the subject of examination by the Court of Appeal in *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2019] JPL 63. Lindblom LJ gave consideration to the policies in relation to housing need and housing land supply in the following terms:

“50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in paragraphs 47 and 39 of the NPPF and the corresponding guidance in the Planning Practice Guidance (‘the PPG’). The Government has chosen to express its policy in the way that it has—sometimes broadly, sometimes with more elaboration, sometimes with the aid of definitions or footnotes, sometimes not (see *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2017] JPL 358, para 33; [*Jelson Ltd v Secretary of State for Communities and Local Government* [2018] JPL 790], paras 24 and 25; and *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, paras 36 and 37). It is not the role of the court to add or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.

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

A the local planning authority is doing to reduce it, and how much of it the development will meet.

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

E 29 Adding observations of his own in relation to these matters, Davis LJ observed as follows:

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

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

G “83. The reason is obvious and involves no excessive legalism at all. The extent (be it relatively large or relatively small) of any such shortfall will bear directly on the weight to be given to the benefits or disbenefits of the proposed development. That is borne out by the observations of Lindblom LJ in the Court of Appeal at para 47 of *Hopkins Homes*. I agree also with the observations of Lang J at paras 27 and 28 of her judgment in [*Shropshire Council v Secretary of State for Communities and Local Government* [2016] EWHC 2733 (Admin)] and in particular with her statements that ‘inspectors generally will be required to make judgments about housing need and supply’. However these will not involve the kind of detailed analysis which would be appropriate at a

‘Development Plan inquiry’ and that ‘the extent of any shortfall may well be relevant to the balancing exercise required under NPPF 14’. I do not regard the decisions of Gilbert J, cited above, when properly analysed, as contrary to this approach. A

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

30 Thus, in addition to the question of whether or not the tilted balance in paragraph 11 of the Framework is engaged by virtue of the inability of the local planning authority to demonstrate a five-year housing land supply, consideration should be given to the question of the extent of any shortfall, even in terms of a broad magnitude, so as to enable the decision-maker to understand the weight which can properly be given to that shortfall as a material consideration, albeit there may be exceptional cases where it is simply not possible for that to be done. None of the parties in the present case suggested that that exception was relevant. D

31 Another form of material consideration, which features in the submissions in the present case, is the existence of an earlier relevant appeal decision. In that connection, the correct approach was identified by Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137 as follows: E

“In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest, and it would be wrong to do so, that like cases *must* be decided alike. An Inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision. F G

“To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this H

- A case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate.”
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32 Finally, the claimant makes submissions as to the adequacy of the inspector’s reasoning in the present case. The correct approach to judging whether reasons are legally adequate in respect of an inspector’s appeal decision are to be found in the well-known observations of Lord Brown of Eaton-under-Heywood at paras 35 and 36 of his speech in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953.

C

The grounds

- 33 The claimant’s ground 1 is that, whilst the Framework does not explicitly address the question of how past housing oversupply should be taken into account, the correct interpretation of the Framework and, in particular paragraph 73, is that oversupply is to be taken into account when carrying out the assessment of the available five-year housing land supply. The context in which this interpretation arises is as follows. Firstly, the planning objective of the policy is to maintain a supply and delivery of sufficient homes in order to meet the local planning authorities’ areas’ assessed needs. The purpose of the requirement to demonstrate a five-year supply is to ensure delivery of the housing requirement across the whole of the plan period and it is the total housing need rather than annualised figures that are the housing requirement. If oversupply against the annualised housing requirement were not taken into account, then the five-year supply would not be being calculated against the housing requirement but, instead, against an arbitrary figure which would change from year to year. This approach to interpretation is supported by the PPG in which, in paragraph 032, a specific point is made in relation to taking account of additional supply in offsetting any shortfalls against requirements from previous years. Thus, in context, the reference to “the housing requirement” in paragraph 73 of the Framework is a reference to the total requirement over the plan period, and it follows that as the plan period progresses account needs to be taken of progress towards meeting the requirement, which includes acknowledgement of where the annual requirement has been exceeded. The claimant points out that this is not simply a semantic point, as failure to account for oversupply has the potential to apply the tilted balance in circumstances for which it was not designed. The purpose of the tilted balance is to foster the grant of planning permission for housing in order to assist in alleviating shortfalls in housing land supply, not in circumstances where there has been a history of oversupply against the plan’s requirement.
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34 The claimant goes on to observe that, therefore, the inspector misinterpreted the policy of the Framework in concluding that the oversupply in the present case should be left out of account. Indeed, the claimant submits that it is clear from the inspector’s reasoning that she proceeded on an inaccurate basis, namely that the Framework prohibited her from

taking account of identified past oversupply. Her observation in para 59 that the Framework made no allowance for subtracting additional supply from the annual requirement illustrated this, along with her observations in paras 61 and 63 of the decision letter, where she indicated that housing already delivered could not fall within the definition of deliverable housing supply and that past oversupply was not a tool to be used by the claimant to discount a housing requirement set out in the JCS. This reasoning was predicated upon the false assumption that the Framework precluded taking account of oversupply of housing in earlier years.

35 The defendant's response to these contentions is that in truth the Framework and the PPG are silent on the topic of whether or not any oversupply of housing in previous years should be taken into account when calculating the current five-year housing land requirement. Thus, there is no policy on this issue to be interpreted, as neither the Framework nor the PPG seek to address it. It is not the task of the court to create policy by filling gaps where policy might have been introduced but the policy-maker did not do so. It is open to a policy-maker to produce a policy which does not have universal coverage but which leaves gaps to be addressed by the exercise of planning judgment in individual cases. In any event, the defendant points out that there are a variety of different policy options which would be available were the previous oversupply to be taken into account in the calculation. The defendant rejects the claimant's contention that the inspector considered that she was prohibited from taking past oversupply into account. The defendant submits that, properly understood, the inspector was simply rejecting each of the reasons given by the claimant for taking account of the oversupply, providing her justification for why the interested parties' approach was to be preferred.

36 The claimant's ground 2 is, in effect, an alternative to ground 1. The claimant submits that if the court is satisfied that the Framework is silent in relation to the treatment of past oversupply, and the inspector did not regard herself as prohibited from taking it into account, then it was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) for her to have taken no account of it in assessing the housing land supply calculation. The claimant contends that the past oversupply of housing was such an obvious consideration, in particular where it amounted to in excess of 1,000 homes, that the inspector was bound to take it into account. Furthermore, her reference in para 90 of the decision to the poor housing landing supply position, indicating that the spatial strategy was not effective, was a conclusion that was simply not open to her on the basis that the development plan policies had already delivered 1,000 homes in excess of the requirement to that point in the plan period.

37 In response to these submissions, the defendant contends that since this ground proceeds on the basis that national policy was silent as to how to treat an element of oversupply in previous years it was open to the inspector to exercise her own planning judgment as to how to do so. There were a wide range of alternatives available to her in respect of how to address past oversupply, including not taking it into account at all. In the absence of any policy it could not properly be said to be irrational for the inspector, in the circumstances of the particular case, to determine that no credit should be given for it in calculating the five-year housing land supply.

A 38 The claimant's ground 3 is the contention that it was irrational for the Inspector to take account in reaching her conclusions that houses already delivered could not meet the definition of deliverable housing contained within the Framework. This was quite irrelevant to the issue that the inspector was addressing, namely, whether oversupply could be taken into account in calculating the five-year housing land supply. Secondly, it was irrational of the inspector, at para 62 of the decision letter, to rely upon the observation that the housing requirement of 9,899 dwellings contained in the JCS for the plan period was not a maximum. Whilst that observation was correct it was nothing to the point in relation to whether or not past oversupply should not be taken into account in calculating the five-year housing land supply. Thus, under ground 3 it is contended that two irrelevant considerations were taken into account, rendering the inspector's conclusions irrational.

C 39 In response to this contention, the defendant submits that, once the decision is read as a whole, it is clear that in relation to the point relating to deliverable housing the inspector was merely looking at the other side of the equation and confirming, for completeness, that housing already delivered could not be added to the supply and be part of a supply of deliverable housing for the purposes of the five-year housing land supply calculation. Secondly, in relation to her reference to the JCS housing requirement not being a maximum number the defendant submits that the inspector's observations were accurate and rational. She was simply pointing out that the housing requirement was not a maximum, as part of her justification for her conclusion that it would be unreasonable for the claimant to refuse planning permissions as a result of past oversupply.

D 40 The claimant's ground 4 is a criticism of the inspector's reasoning. Firstly, the claimant criticises the adequacy of the inspector's reasons in rejecting all of the points which were made by the claimant in favour of taking the past oversupply of housing into account. The inspector's reasons do not deal with all the points raised. Further, the inspector failed to deal at all with the decision of the previous inspector in relation to the interested parties' earlier appeal and its bearing upon the current appeal, in circumstances where it was an agreed position in that earlier appeal that oversupply should be taken into account in calculating the five-year housing land supply.

E 41 Replying to these submissions, the defendant contends that the inspector's reasons were clear and adequate in relation to her rejection of the taking into account of the oversupply of housing in previous years. In respect of the earlier appeal decision the claimant had not suggested that that decision had a relevant bearing upon the question of the five-year housing land supply calculation. In addition the interested parties draw attention to the fact that the point now relied upon by the claimant simply did not arise in the earlier appeal decision. The point which the inspector in that case had to resolve was a debate in relation to the Liverpool or Sedgfield method of calculation of the five-year housing land supply, not the question of whether oversupply should be taken into account in the way contended for by the claimant. There were, in reality, no reasons provided by the earlier inspector with which this inspector needed to become engaged.

Conclusions

A

42 In relation to ground 1, I am unable to accept the primary submission made by the claimant that the provisions of the Framework require any oversupply prior to the period for which a five-year housing land supply is being calculated to be taken into account. Firstly, the text of the Framework does not include any such suggestion. The claimant's argument depends upon this conclusion being a necessary inference from the way in which the Framework has been drafted. It is not an inference which, in my judgment, can properly be drawn. Whilst it is clear that the intention of the Framework is that planning authorities should meet the housing requirements set out in adopted strategic policies, that does not necessarily mean that any oversupply in earlier years as in the present case will automatically be counted within the five-year supply calculation. The text of the Framework is silent, or alternatively does not deal, with what account if any should be taken of oversupply achieved in earlier years when calculating the five-year supply.

B

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43 In the absence of any specific provision within the Framework there is no text falling for interpretation, and it is not the task of the court to seek to fill in gaps in the policy of the Framework. It is far from uncommon for there to be gaps in the coverage of relevant planning policies: they will seldom be able to be designed to cover every conceivable situation which may arise for consideration. Again, that is perhaps unsurprising given the breadth of the potential scenarios which may arise in the context of a planning application on any particular topic, especially where it is a high level policy with a broad scope like the Framework which is being considered. When it arises that there is no policy covering the situation under consideration then it calls for the exercise of planning judgment by the decision-maker to make the necessary assessment of the issue to determine the weight to be placed within the planning balance in respect of it. In the absence of policy within the Framework on the question of whether or not to take account of oversupply of housing prior to the five-year period being assessed in the calculation of the five-year housing land supply the question of whether or not to do so will be a matter of planning judgment for the decision-maker, bearing in mind the particular circumstances of the case being considered.

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44 I do not consider that the claimant's argument is assisted by the guidance contained within the PPG. Whilst the claimant contends that the observations within paras 31 and 32 of the PPG should be mirrored in relation to oversupply as a whole, I see no warrant for drawing that inference. It is clear that the PPG has sought to address a particular circumstance, namely, where there has been some shortfall as well as some oversupply in previous years. However, the PPG does not engage with the particular situation with which this case is concerned, and there is no reason to suppose that the defendant has done other than leave the particular question arising in this case to the exercise of planning judgment on a case-by-case basis. Had it been thought appropriate to offer specific guidance the defendant would have done so. The defendant did not and therefore the matter is left as a question of judgment for the situations in which the issue arises.

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45 Further submissions were offered by the claimant in relation to the purpose of the policy in relation to the five-year housing land supply requirement and the consequences of it not being demonstrated, in order to support their contentions that it can be inferred to be the policy of the

A Framework that an oversupply of housing in earlier years should be taken into account. I am not dissuaded from the conclusion I have reached by those arguments. In particular, they are predicated on the assumption that it is appropriate for the court to introduce, by way of inference, text into the policy of the Framework which does not exist. As set out above, that is, in my judgment, a clearly inappropriate course. Secondly, the points raised by the claimant in relation to the objective of the policy being to meet the strategic housing requirement across the plan period and the tilted balance being introduced by the five-year housing land supply to address circumstances where planning permissions are required to improve the prospects of meeting that requirement are contentions which would undoubtedly form part of the planning judgment to be made in each particular case as to whether or not earlier oversupply should be taken into account and, if so, how.

C 46 My conclusions in relation to the claimant's primary argument on ground 1 are reinforced by the practical considerations referred to by the defendant in the course of argument. These practical considerations provide some illuminating context as to why it may be that the defendant has left the issue which arises in this case to the exercise of planning judgment in individual applications. The defendant pointed out that whilst the assumption of the claimant's argument is that there is a binary or arithmetical choice between either taking past oversupply into account or not, the reality is that in practical terms there are several broad policy approaches which might be taken to the question of how to account for past oversupply in calculating the five-year supply. It might be taken into account on a one-for-one basis as essentially sought by the claimant; the oversupply might be credited but applied over the remaining plan period which would be likely to be less than one-for-one in terms of the credit allowed in calculating the five-year housing land supply; the policy choice might be that past oversupply cannot be credited at all; the question of whether credit is made in the next five years or carried across the remaining plan period could be a matter left for the planning judgment of the decision-maker; finally the issue could be one left in its entirety to the planning judgment of the decision-maker in each case. Thus, the issue is perhaps not as simple as the claimant's primary submission would suggest, and, in addition to the concerns set out above, the defendant's submission reinforces the concern of the court as to the propriety of second guessing these policy choices.

G 47 It follows that, for all of these reasons, the claimant's primary submission under ground 1, that the Framework required the oversupply from earlier years to be taken into account in the five-year housing land supply calculation, cannot succeed. The claimant contends that this primary submission proceeds on the basis that it is not the claimant's case as to the interpretation of the Framework that paragraph 73 of the Framework prescribes how an oversupply should be taken into account, but rather that whether to take it into account at all cannot be simply a matter of planning judgment but is required by the Framework. Again, similar points arise in relation to the absence from the Framework of any policy text which would justify such an approach. The Framework does not say, nor does the PPG, that oversupply must be taken into account in all circumstances. For the reasons already given, it is not for the court to supplement or add to the existing text of the policy. The question of whether or not to take into account past oversupply in the circumstances of the present case is, like

the question of how it is to be taken into account, a question of planning judgment, which is not addressed by the Framework or the PPG and for which, therefore, there is no policy. No doubt, in at least most cases, the question of oversupply will need to be considered in assessing housing needs and requirements. The fact this may be the case does not require the court to provide policy in relation to this issue which the policy-maker has chosen not to include.

48 The claimant's second submission in relation to ground 1 is the contention that the inspector proceeded on an incorrect basis namely that the Framework prohibited her from taking account of the identified past oversupply. In particular the claimant relies upon para 59 of the decision letter in which the inspector noted that the policy in the Framework "makes no allowance for subtracting additional supply from the annual requirement", going on to allude to the absence of a symmetrical approach to that in para 32 of the PPG in respect of earlier oversupply. Additionally, in para 61 of the decision letter the inspector observed that previous housing completions could not bring themselves within the definition of deliverable housing. At para 63 of the decision letter the inspector observed that "additional supply is not a tool that can be used to discount the council's housing requirement set out in its adopted strategic policies". Thus, the claimant contends that the inspector misinterpreted the Framework as preventing her from taking any account of oversupply in addressing the five-year housing supply calculation.

49 In my judgment, there are, first and foremost, two important pieces of context in relation to the claimant's argument. The first, which is trite, is that the inspector's decision letter must be read fairly and as a whole, in the spirit that its purpose is to convey an administrative decision on a planning appeal, rather than it being some form of legal instrument. Secondly, the purpose of the decision letter must be borne in mind, namely, to address the issues raised in the appeal by the parties. Bearing these factors in mind it is clear to me, firstly, that the inspector's observations in relation to additional supply must be read in the context of the overall section of her decision entitled "Housing Land Supply". The section in relation to additional supply must be read together with that pertaining to future supply in order to understand the inspector's overall conclusions on housing land supply and the planning judgments which she reached. Secondly, the issues which the inspector was addressing were those which were identified by the claimant and the interested parties. For instance, in neither the SOCG nor the claimant's closing submissions which have been set out above was the inspector being asked to rule definitively on an interpretation of paragraph 73 of the Framework. Rather, the contention made by the claimant was that in the particular circumstances of the case the earlier oversupply should be taken into account and could be taken into account, consistently with the policies of the Framework and the guidance in the PPG.

50 In that context the observations of the inspector in para 59 that there is no requirement in the PPG to take account of earlier oversupply reflects the need to exercise planning judgment and were consistent with the approach that in the absence of specific policy in the Framework it was necessary for the inspector to exercise her own planning judgment in relation to the question of whether to take oversupply into account. Her observation in para 61 about delivered housing not falling within the definition of deliverable housing

A simply reflected the reality of what could properly be taken account of as forward supply. The conclusion in para 63 is one which is clearly cast with the particular circumstances of the case in mind and has to be put in the context of the additional conclusions. These included the inspector's conclusions at paras 68–72 of the decision letter in relation to the shape of the future trajectory for housing supply in the claimant's administrative area, which she concluded was deeply concerning, particularly in relation to a lack of supply beyond year three in the calculation. This led to her conclusions, in para 73 of the decision letter, on housing land supply, incorporating the observation reflecting the concern about lack of supply beyond year three, and that "the past trend of additional supply is not projected to continue". Thus, read in context and as a whole, the inspector's conclusions on housing land supply are, in my view, an expression of the application of planning judgment to the particular circumstances of the claimant's five-year housing land supply calculation and do not proceed on the basis that the inspector was reading the Framework as prohibiting her from taking into account earlier additional supply. Indeed, her overall conclusion in para 73 addresses the position even had she taken it into account. I am therefore unpersuaded that there is any merit in the alternative way in which the claimant presents ground 1.

D 51 Ground 2 is the contention that even if the claimant is wrong in relation to ground 1, the oversupply was so obviously material that it was irrational for the inspector not to have taken it into account. It was so obvious, in the light of the fact that there had been an oversupply of over 1,000 homes, that it should be taken into account. Her failure to do so was plainly wrong, as was her observation that the spatial strategy was not effective (see para 90 of the decision letter).

E 52 I am unable to accept this submission. Firstly, it is very clear from the section of the decision dealing with housing land supply issues that the inspector was acutely aware of the earlier oversupply as a material consideration for her to address in her decision. She concluded, correctly, that how that was to be dealt with was a matter for the exercise of her planning judgment. The conclusion which she reached in relation to how the earlier oversupply was to be taken into account, if at all, was articulated in para 73 of the decision letter, which drew attention, not only to her observations in relation to the claimant's arguments which she made in paras 58–63, but also to her concerns in relation to the viability of the supply beyond year three of the five-year housing land supply calculation. The shape of the housing trajectory was also reflected in the weight which she gave to this issue in the planning balance and I am unable to find any basis to characterise her approach as being irrational.

G 53 Turning to ground 3, the focus of the claimant's case is on two paragraphs within the decision letter: firstly, para 61 in which, as set out above, the inspector observes that delivered housing cannot meet the definition of deliverable housing, and the second is para 62 in which the inspector observed that the housing requirement in policy SP1 of the JCS was not a maximum figure. The claimant contends that both of these observations were matters which it was irrational for the inspector to have taken into account. It is submitted that these are both relied upon by the inspector as reasons for not taking oversupply into account and it was irrational to rely upon them.

54 I am unpersuaded that there is any substance in these contentions. Reading the decision letter as a whole, the observation at para 61 of the decision letter was, as the defendant observes, simply observing the other side of the equation, or the other side of the coin, in relation to a five-year housing land supply by looking at housing delivery. It was a piece of context rather than the inspector relying upon this observation as a freestanding reason not to take account of previous additional supply. Similarly, the final sentence of para 62 of the decision letter is merely expressing an additional reason for concluding that the council's argument about the loss of additional housing leading to local planning authorities holding back or restricting housing permissions for sites to be unfounded. Again, this observation was not a freestanding reason not to take account of previous oversupply. There is, therefore, in my view, no substance in the complaints raised under ground 3 in relation to these matters.

55 Turning, finally, to ground 4, the claimant contends that the inspector's reasons were inadequate in two principal respects. Firstly, she failed to provide adequate reasons to explain why she had failed to take into account past oversupply and fully engage with the reasons that the claimant had identified for taking past oversupply into account. Secondly, she failed to deal with the previous inspector's decision on the same site in the relatively recent past, within which it was agreed that past oversupply should be taken into account (the issue being how it was to be taken into account).

56 In assessing these submissions it is necessary to bear in mind, firstly, that, as set out above, the inspector's conclusions on the issue raised in this case are not solely to be found in paras 58–63 where she deals with the particular arguments raised by the claimant on oversupply in the circumstances of the present case, but also in the other paras addressing housing land supply concerns and, in particular, para 73. Those reasons reflect that a part of the exercise of her planning judgment was her concern about the shape of the future trajectory of housing land supply during the five-year period. Secondly, it needs to be borne in mind, consistently with the approach from *South Bucks* [2004] 1 WLR 1953 that the inspector is not obliged to deal with every point raised by the claimant by providing reasons to support her conclusions on the main matters in issue.

57 Having reviewed the relevant material, and in particular the SOCG and the claimant's closing submissions, I am satisfied that the principal issues which were raised were addressed in the decision and, further, that the inspector's reasons for reaching the conclusions which she did are clear and fully explained. It was not necessary for the inspector to address every single point raised by the claimant in support of its contention that the oversupply in earlier years should be credited. She provided clear reasons for rejecting the claimant's approach and articulated the basis for her concerns in relation to the shape of the trajectory which underpinned her judgment that, on the facts of the present case, the correct judgment was that the oversupply ought not to be taken into account, leading to greater weight being attributed to the shortfall in the five-year housing land supply.

58 I accept the submissions made by the defendant and, in particular, the first interested party in relation to the earlier appeal decision on the same site. That appeal decision did not raise the question which the inspector had to address in the present case: indeed, it was common ground that oversupply should be taken into account. In effect, therefore, the inspector in the present

A case was determining that issue for the first time and there was nothing in the reasoning of the earlier inspector which has been set out above with which this inspector was required to deal in order to provide adequate reasons. In the circumstances, for the reasons set out above, I do not consider that there is substance in the claimant's ground 4.

B 59 For all of the reasons set out above, I have concluded that the claimant cannot succeed in relation to each of the four grounds which have been advanced, and therefore the claimant has no entitlement to relief in the present case.

Application refused.

CATHERINE MAY, Solicitor

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