Neutral Citation Number: [2018] EWCA Civ 24

Case No: C1/2016/4558

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE GREEN
[2016] EWHC 2979 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 January 2018

Before:

Lord Justice Rupert Jackson
Lord Justice Lindblom
and
Lord Justice Peter Jackson

- -

Between:

Jelson Ltd. — **Appellant**

- and -

(1) Secretary of State for Communities and Local Government
(2) Hinckley and Bosworth Borough Council — **Respondents**

- -

Mr Christopher Lockhart-Mummery Q.C. (instructed by **Shakespeare Martineau LLP**) for the **Appellant**
Mr Hereward Phillpot Q.C. and Ms Sasha Blackmore (instructed by **the Government Legal Department**) for the **First Respondent**
Ms Thea Osmund-Smith (instructed by **Hinckley and Bosworth Borough Council**) for the **Second Respondent**

Hearing date: 17 October 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Did an inspector who dismissed an appeal against a local planning authority's refusal of planning permission for housing development err in law when assessing the need for housing in the authority's area? That is the central question in this appeal. It does not raise any novel issue of law.

2. The appellant, Jelson Ltd., appeals against the order of Green J., dated 22 November 2016, dismissing an application under section 288 of the Town and Country Planning Act 1990. By that application it had challenged the decision of the inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, to determine its appeal under section 78 of the 1990 Act against the refusal of outline planning permission by the second respondent, Hinckley and Bosworth Borough Council, for a development of housing on land off Sherborne Road, Burbage in Leicestershire. The site is about 5.6 hectares of undeveloped land to the east of Burbage, outside the settlement boundary, in an area where Policy 4 of the Hinckley and Bosworth Core Strategy says the council will "[protect] and preserve the open landscape … which provides an important setting for the village …". Jelson's proposal was for the construction of 73 dwellings. The inspector held an inquiry into the section 78 appeal in December 2015 and February 2016. Her decision letter is dated 4 May 2016. Green J. rejected Jelson's challenge on all grounds. Permission to appeal was granted by Lewison L.J. on 10 February 2017.

The issue in the appeal

3. The principal issue in the appeal is whether the inspector adopted a lawful approach to identifying the "full, objectively assessed needs" for housing, and, in particular, whether she lawfully rejected the figure of 980 dwellings per annum as "a figure that should be considered in the calculation".

Government policy and guidance

4. In a section of the National Planning Policy Framework ("the NPPF") setting out government policy for "Delivering a wide choice of high quality homes", paragraph 47 says that "[to] boost significantly the supply of housing, local planning authorities should" do several things. The first is to "use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period".

5. Paragraph 49 of the NPPF says that "[housing] applications should be considered in the context of the presumption in favour of sustainable development", and that "[relevant] policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites". One consequence of a

local planning authority being unable to do that is that the policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF is brought into play (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraphs 22 and 23).

6. In the part of the NPPF devoted to "Plan-making", paragraph 159 says that local planning authorities "should have a clear understanding of housing needs in their area". They should, among other things, "prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries". The Strategic Housing Market Assessment "should identify the scale and mix of housing and the range of tenures … the local population is likely to need over the plan period" to "[meet] household and population projections, taking account of migration and demographic change", to "[address] the need for all types of housing, including affordable housing and the needs of different groups in the community …", and to "[cater] for housing demand and the scale of housing supply necessary to meet this demand …".

7. Those policies in the NPPF are amplified in passages of the Planning Practice Guidance first issued by the Government in March 2014 ("the PPG"). Under the heading "Methodology: assessing housing need", paragraph 2a-014-20140306 of the PPG says that "[establishing] future need for housing is not an exact science", and that "[no] single approach will provide a definitive answer". Paragraph 2a-015-20140306 states that "[household] projections published by the Department for Communities and Local Government should provide the starting point estimate of overall housing need". Paragraph 2a-017-20140306 emphasizes that the Government's population and household projections are "statistically robust and … based on nationally consistent assumptions", but confirms that "plan makers may consider sensitivity testing, specific to their local circumstances, based on alternative assumptions in relation to the underlying demographic projections and household formation rates". Paragraph 2a-029-20140306, under the heading "What is the total need for affordable housing?", says that "[the] total affordable housing need should … be considered in the context of its likely delivery as a proportion of mixed market and affordable housing developments, given the probable percentage of affordable housing to be delivered by market housing led developments …" and that "[an] increase in the total housing figures included in the local plan should be considered where it could help deliver the required number of affordable homes".

8. We are not concerned in this appeal with the Government's more recent efforts to bring simplicity and consistency to the methodology for identifying housing need, in the White Paper "Fixing our broken housing market" published in February 2017, and its "Planning for the right homes in the right places: consultation proposals" published in September 2017.

9. As Mr Christopher Lockhart-Mummery Q.C., for Jelson, reminded us, the NPPF policies relating to a local planning authority's task of identifying "the full, objectively assessed needs for market and affordable housing …" have already been considered by this court on at least three occasions: in *City and District Council of St Albans v Hunston Properties Ltd.* [2013] EWCA Civ 1610 (see the judgment of Sir David Keene at paragraphs 25 and 26), in *Solihull Metropolitan Borough Council v Gallagher Estates Ltd.* [2014] EWCA 1610 (see the judgment of Laws L.J. at paragraphs 9 and 10), and in *Oadby and Wigston Borough Council v*

Secretary of State for Communities and Local Government [2016] EWCA Civ 1040 (see my judgment, at paragraphs 34 to 56).

The inspector's decision letter

10. In paragraph 4 of her decision letter the inspector identified two "Main Issues" in Jelson's section 78 appeal. The first was "whether there is a 5 year supply of housing land in the Borough". The second was "the effect of the proposed development on the character and appearance of the surrounding landscape".

11. The inspector began her discussion of the first main issue by considering "Housing land supply – OAN", in paragraphs 5 to 17 of her decision letter. In paragraph 5 she said:

> "5. In order to boost significantly the supply of housing local planning authorities are required to use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs (OAN) for market and affordable housing in the housing market area. The Hinckley and Bosworth (H&B) Core Strategy … was adopted in 2009, predating the publication of [the NPPF] in 2012. The [core strategy] target is to deliver 9000 dwellings up to 2026, that is, 450 units per annum. This requirement, however, is derived from the revoked East Midlands Regional Plan, the dwelling targets in which were based on 2004 household projections. The [core strategy] requirement is not the OAN and is not, therefore, consistent with [the NPPF]."

A footnote (footnote 1) to the first sentence of that paragraph confirmed that the inspector had in mind the policy in paragraph 47 of the NPPF. In paragraphs 6 and 7, she explained her understanding of the concept of "OAN":

> "6. The starting point for the calculation of OAN is demographic calculations based on the most recent, available population projections. This is made clear in paragraph 159 of [the NPPF] which states that the strategic housing market assessment (SHMA) should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which meet household and population projections, taking account of migration and demographic change. The Council, together with the other Leicestershire district and borough councils and Leicester City Council, commissioned a SHMA which was published in June 2014 [namely, the Leicester and Leicestershire Strategic Housing Market Assessment, prepared by GL Hearn Ltd. and Justin Gardner Consulting ["the SHMA"]].
>
> 7. Demographic calculations result in the total number, expressed as a range, of people and households likely to live in the Borough during the plan period, regardless of the type of dwelling which they might desire or require. The latter needs, for example the numbers requiring housing for families; for older people; for those with low mobility; or for those who cannot afford market housing, are the products of separate and different calculations and assessments. In theory they are included within the total population arising from population projections and a demographic methodology and should be consistent with them."

In paragraph 8 she referred to a dispute between Jelson and the council over the approach to "OAN":

> "8. A main area of dispute between the parties is whether affordable housing need should be fully met by the OAN. The appellant's view is that the OAN arising from the SHMA is a constrained or policy-on figure and that, consequently, the upper end of the range is not properly identified. On the other hand, the Council concurs with the guidance set out in the Planning Advisory Service's technical advice note on the matter. This describes those factors which should not contribute to OAN as being 'below the line'; they are matters which should not be included in the OAN calculation but which should be taken into account at a later stage when formulating provision targets. The technical advice note argues that affordable housing need is not measured in a way that is directly comparable with OAN and should not be a constituent of it; affordable housing should thus be below the line and a policy consideration."

A footnote (footnote 3) identifies the document referred to in the third sentence of that paragraph as the second edition of the Planning Advisory Service's "Objectively Assessed Need and Housing Targets" Technical Advice Note, published in July 2015. The inspector then went on, in paragraph 9, to refer to the salient figures in the SHMA:

> "9. Based on demographic-led household projections the SHMA concluded that the bottom end of the OAN range for H&B up to 2031 was 375. Due to the mechanism by which the vast majority of affordable housing is delivered, that is as a percentage of all residential schemes over a threshold of units (and subject to viability), it might be necessary to increase the number of dwellings required overall in order to maximise the provision of affordable housing. This measure, which is referred to in [the] PPG, is a policy decision and thus appropriately calculated outside of OAN. In H&B the number of homes needed for supporting proportionate economic growth was identified through the SHMA as 467 and the affordable housing need as 248 per annum. In order to support the provision of additional affordable housing and a growth in employment/labour supply, therefore, the top end of the range was put at 450; that is therefore a policy-on figure."

The relevant passage in the PPG is identified in a footnote (footnote 4) as paragraph 2a-029-20140306. Two further footnotes confirm that Table 84 in the SHMA ("OAN Conclusions, 2011-31") was the source of the figures of "467" for "the number of homes needed for supporting proportionate economic growth", and "248" for "the affordable housing need", per annum (footnote 5), and "450" as "the top end of the range" (footnote 6). Turning next to the "OAN Range" of "375" to "450" in Table 84 in the SHMA, the inspector said this, in paragraph 10:

> "10. There is no dispute that there is a significant need for affordable housing in Hinckley and in Burbage. The most recent analysis is in the SHMA which puts the figure at about 250 dpa. In increasing the demographically produced figure of 375 up to 450, a

20% uplift, specifically to provide for affordable housing and economic growth, the OAN properly takes account of that need."

In paragraph 11 she came to Jelson's contention that the figure of 980 for the "Annual Housing Need" in "Hinckley & Bosworth" in Table 48 in the SHMA ("Scale of Overall Housing Delivery to Meet Affordable Housing Need on Current Policy Basis Per Annum") should be taken as the higher of the figures in the "OAN" range:

"11. The appellant's view is that the top of the OAN range should be at least the 980 dwellings identified in the SHMA as the total amount of housing necessary to deliver the indicated housing need under current policy. This is clearly impractical and unreasonable; the corollary would be a requirement of 196,825 units in the HMA as a whole, a considerable, inconsistent and thus unjustifiable increase on the 75,000 or so dwellings calculated from household projections to be needed by 2031. The 980 figure identified in the SHMA is thus purely theoretical although it could be used as a pointer to further policy adjustments, such as a change in the percentage of affordable housing required. Significant issues in the area such as shortcomings in housing provision, including affordable housing, should be addressed through the Local Plan."

Further population projections had been published after the SHMA was produced. The inspector referred to these in paragraph 12:

"12. Since the SHMA was produced more recent population projections, for 2012, have been published. Analysis of them shows a need for 364 dpa in H&B derived from the total figure for Leicestershire. This is lower than the bottom end of the SHMA OAN but generally consistent with it. In my opinion the figure confirms the Council's approach and validates the [core strategy] housing provision of 450 dwellings which is about 24% above that needed to meet demographic increases."

In paragraph 13 she went on to consider the level of OAN at which the supply of housing land would be less than the "five-year supply of deliverable housing sites" required in NPPF policy:

"13. It is not my role in this decision to identify an alternative OAN. The appellant has calculated however that, all things being equal, the housing land supply would fall below five years where the OAN was 539 dpa. This figure would be a 44% uplift on the 375 demographically-led household projection which, to my mind, would represent a considerable number of additional affordable dwellings. If I had considered, therefore, that the 450 dph housing requirement was wanting it would still not have been necessary to increase it beyond the 539 threshold whereby a five year supply was not available."

In paragraphs 14, 15 and 16 she referred to three first instance judgments in the Planning Court in which national policy and guidance on "OAN" had been considered: *Satnam Millenium Ltd. v Warrington Borough Council* [2015] EWHC 370 (Admin), *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2015] EWHC 1879 (Admin), and *King's Lynn and West Norfolk Borough Council v Secretary of State for*

Communities and Local Government and Elm Park Holdings [2015] EWHC 2464 (Admin). In paragraph 15 she referred to the judgement of Hickinbottom J., as he then was, in *Oadby and Wigston Borough Council*:

> "15. In respect of [*Oadby and Wigston Borough Council*] the Court found that the inspector had been entitled to exercise his planning judgement on all of the evidence before him. He had lawfully concluded that the range arising from the Leicestershire SHMA, the same document as is central to this case, was "policy on" and that it failed properly to reflect the affordable housing needs and the needs generated by economic factors. A significant difference between that case and the one before me here is that in Oadby and Wigston the Council's housing requirement figure of 80-100 dpa was well below the SHMA affordable housing need of 160 dpa."

In paragraph 16 she referred to Dove J.'s judgment in *King's Lynn and West Norfolk Borough Council*:

> "16. The judgement in [*King's Lynn and West Norfolk Borough Council*] stated that [the NPPF] made it clear that affordable housing needs should be addressed in determining the full OAN, but neither it nor the PPG suggested that they had to be met in full by the full OAN. This judge disagreed with the conclusions of the [*Oadby and Wigston Borough Council*] judge."

Lastly in this part of her decision letter, she referred in paragraph 17 to the report of the inspector into Charnwood Borough Council's core strategy:

> "17. The inspector undertaking the Charnwood [core strategy] examination concluded in September 2015, after a thorough assessment, that the Leicester and Leicestershire SHMA provided an up-to-date and robust assessment of housing needs in the HMA. He agreed that the OAN for the Housing Market Area (HMA) should be 4,215 dpa; the H&B OAN of 375-450 is a component of that overall figure. These conclusions further support the Council's position."

12. Under the heading "Housing land supply – buffer", in paragraph 20, she concluded that "there has not been persistent under delivery and a buffer of 5% is sufficient".

13. Her conclusion on "Housing land supply – deliverable sites", in paragraph 29, was this:

> "29. Finally on the matter of deliverable sites, the Council's calculation of housing land supply is five years and ten months; an 'overprovision' (column h) of 461 units makes the period comfortably longer than five years. It thus provides for some slippage or non-delivery of the sites comprising the housing supply."

A footnote (footnote 19) refers to Table 1 in the proof of evidence of the council's planning witness, Mr Murphy, in which the figure of 450 dwellings per annum for housing need was used in the calculation of housing land supply.

14. Under the heading "Housing land supply – conclusions", the inspector said, in paragraph 30:

> "30. All in all I have found that the calculation of OAN takes account of the substantial need for affordable housing and is otherwise sound. In addition there is no record of persistent under delivery and a 5% buffer is adequate. The identification of sites contributing to the five year supply and the prediction of when and how many dwellings will be delivered is reasonable. I therefore conclude that there is sufficient housing land in H&B to meet housing needs for the following five years."

15. On the second main issue the inspector concluded, in paragraph 42, that the development "would not protect or preserve the open landscape to the east of Burbage, contrary to [core strategy] Policy 4".

16. In her "Overall Planning Balance and Conclusions", she confirmed, in paragraph 53, that she had found there was "a five year supply of housing land in the Borough at this time", and that "relevant policies for the supply of housing are not, therefore, … out-of-date". In paragraph 54 she acknowledged the benefits of the proposed development, including "the provision of market and affordable housing in an area where the latter is much needed", but concluded that they did not outweigh the harm to the landscape. She said in paragraph 55 that the proposed development would be "contrary to the development plan as a whole", and that she had "found no compelling arguments to allow the appeal". She therefore concluded, in paragraph 56, that Jelson's appeal should be dismissed.

Was the inspector's approach to determining the housing requirement lawful?

17. Green J. was satisfied that it was clear from the decision letter, read as a whole, that the inspector had been "seeking to establish a working "policy off" FOAN for the purpose of resolving the dispute before her and she was doing this in accordance with demographically led, trend based, projections which took account of affordable housing need", and there was "no confusion between absolute (policy off) need and actual (policy on) fulfilment" (paragraph 53 of the judgment).

18. In arguing that those conclusions of the judge were wrong, Mr Lockhart-Mummery submitted that the inspector's decision letter displays a fatal confusion of the forbidden "policy-on" approach to the assessment of housing need with the "policy-off". This was to be seen, said Mr Lockhart-Mummery, in the contradictory statements in paragraphs 8 to 11 on the question of whether the need for affordable housing should be included in the "full, objectively assessed needs" for housing; in her rejection, in paragraph 11, of the figure of 980 dwellings per annum as "clearly impractical and unreasonable" and "purely theoretical"; in her self-direction in paragraph 13 that it was "not [her] role in this decision to identify an alternative OAN"; in her observation in paragraph 15 that in *Oadby and Wigston Borough Council* it had been acknowledged by the court that the relevant "range arising from the … SHMA … was "policy on"" and had "failed properly to reflect the affordable housing needs and the needs generated by economic factors"; and in her conclusion in paragraph 30 that the "calculation of OAN" she had accepted was "sound", which was not the test to be applied.

19. It was essential, submitted Mr Lockhart-Mummery, that the inspector should determine the "full, objectively assessed needs" for housing with "clarity and precision" (see the first instance judgment in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), at paragraph 105); and that the figure she identified must be "policy-off", in the sense described by this court in *Hunston Properties Ltd.* and *Gallagher Estates Ltd.*, and in the first instance judgment in *Oadby and Wigston Borough Council* (at paragraphs 34 to 36). Her reliance on the Planning Advisory Service's technical advice note as support for the proposition, stated in paragraph 8 of the decision letter, that "affordable housing should thus be below the line and a policy consideration" betrayed a "legally incorrect approach". The figure of 450 dwellings per annum, taken from the SHMA, was demonstrably a "policy-on" figure, as the inspector acknowledged in paragraph 9. In accepting 450 dwellings per annum as the relevant need, she fell into the error identified by this court in *Oadby and Wigston Borough Council* and *Hunston Properties Ltd.*. Green J. was wrong to conclude (in paragraph 68 of his judgment) that her approach to the assessment of housing need was lawful.

20. Mr Lockhart-Mummery submitted that the judge was wrong to conclude (in paragraphs 61, 62 and 65(ii) of his judgment) that the inspector neither failed to have regard to the figure of 980 dwellings per annum in the column headed "Annual Housing Need" in Table 48 of the SHMA as a material consideration in assessing the relevant housing need nor unreasonably minimized its significance as "a relevant factor to be taken into account". Support for this figure as a measure of the "full, objectively assessed needs" for housing, or at least as "a relevant ingredient in the calculation" of housing need, was to be found in Holgate J.'s judgment in *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2016] EWHC 3028 (Admin), at paragraph 47, where he endorsed the use of a corresponding figure – 834 dwellings per annum – as "a measure of the FOAN". Contrary to what Green J. said (in paragraphs 33, 60 and 61 of his judgment), the court in *Oadby and Wigston Borough Council* did not reject the use of the "Annual Housing Need" figure of 800 dwellings per annum for that area in Table 48 – which was analogous to the figure of 834 dwellings per annum in *Trustees of the Barker Mill Estates*. The figure of 800 dwellings per annum was never contended for by the developer in that case.

21. As a result, Mr Lockhart-Mummery submitted, the inspector failed to approach her assessment of the "full need" for affordable housing as she should have done, and failed to identify, with "clarity and precision", a robust figure for the "full, objectively assessed needs" for housing in the council's area.

22. I cannot accept those submissions. They collide with the most basic principle in the court's jurisdiction to review planning decisions, which is that matters of planning judgment are not for the court, but for the decision-maker – here an inspector appointed by the Secretary of State – and that the decision-maker's exercise of planning judgment will not be overturned except on clearly demonstrated public law grounds.

23. In my view, as was submitted by Mr Hereward Phillpot Q.C. for the Secretary of State and Ms Thea Osmund-Smith for the council, it cannot be said that the inspector either neglected or failed to understand any relevant policy in the NPPF, or any relevant guidance in the PPG, bearing on the task she had to perform in assessing the "full, objectively assessed needs" for

housing. Nor can it be said that she failed to apply the relevant policy and guidance lawfully. She referred to the relevant policies in paragraphs 47 and 159 of the NPPF – in paragraphs 5 and 6 of her decision letter respectively; and to the guidance in paragraph 2a-029-20140306 of the PPG – in paragraph 9. That she might have misunderstood such elementary and familiar statements of national policy and guidance is, I think, improbable. That she might have done so despite the help she will have had from counsel on either side at the inquiry is less likely still. And there is nothing in her decision letter to suggest that she did.

24. As this court has emphasized in *Oadby and Wigston Borough Council*, against the background of its earlier decisions in *Hunston Properties Ltd.* and *Gallagher Estates Ltd.*, national policy and guidance does not dictate, for decision-making on applications for planning permission and appeals, exactly how a decision-maker is to go about identifying a realistic and reliable figure for housing need against which to test the relevant supply (see paragraphs 35 and 36 of my judgment). In this respect, government policy, though elaborated at length in the guidance in the PPG, is not prescriptive. Where the Government wanted to be more specific in the parameters it set for decision-makers considering whether a local planning authority could demonstrate the required five-year supply of housing land, it was – in laying down the approach to calculating the supply of deliverable housing sites in paragraphs 47 and 49 of the NPPF, and, in particular, in carefully defining the concept of a "deliverable" site (see my judgment in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at paragraph 36).

25. Responsibility for the assessment of housing need lies with the decision-maker, and is no part of the court's role in reviewing the decision. Although the decision-maker is clearly expected to establish, at least to a reasonable level of accuracy and reliability, a level of housing need that represents the "full, objectively assessed needs" as a basis for determining whether a five-year supply exists, this is not an "exact science" (the expression used in paragraph 2a-014-20140306 of the PPG). It is an evaluation that involves the decision-maker's exercise of planning judgment on the available material, which may not be perfect or complete (see the judgment of Lang J. in *Shropshire Council v Secretary of State for Communities and Local Government* [2016] EWHC 2733 (Admin), at paragraph 27). The scope for a reasonable and lawful planning judgment here is broad (see the judgment of Hickinbottom J. in *Stratford-on-Avon District Council v Secretary of State for Communities and Local Government* [2013] EWHC 2074 (Admin), at paragraph 43). Often there may be no single correct figure representing the "full, objectively assessed needs" for housing in the relevant area. More than one figure may be reasonable to use. It may well be sensible to adopt a range, rather than trying to identify a single figure. Unless relevant policy in the NPPF or guidance in the PPG has plainly been misunderstood or misapplied, the crucial question will always be whether planning judgment has been exercised lawfully, on the relevant material, in assessing housing need in the relevant area (see paragraphs 32 to 38 of my judgment in *Oadby and Wigston Borough Council*). A legalistic approach is more likely to obscure the answer to this question than reveal it (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*).

26. In this case it is, I think, clear that the inspector did exercise her planning judgment lawfully in assessing, for the purposes of the decision she had to make, the "full, objectively assessed

needs" for market and affordable housing, in a manner consistent with NPPF policy and the relevant guidance in the PPG.

27. It was agreed between Jelson and the council that the housing requirement of 450 dwellings per annum in the core strategy was not the product of an assessment of housing need undertaken in accordance with government policy in the NPPF. That figure, drawn from the now revoked East Midlands Regional Plan, had been based on the 2004 household projections. The council therefore relied on the SHMA in contending for a figure of 450 dwellings per annum, or a range from 375 to 450, as representing unconstrained housing need, consistent with NPPF policy. Jelson contended for the figure of 980 dwellings per annum as realistic, or at least as an appropriate figure to take for the higher end of the range.

28. The inspector went about her assessment of housing need in what I would regard as an orthodox way. She did not adopt the requirement figure of "450 units per annum" in the core strategy as representing the "full, objectively assessed needs" for housing under current government policy and guidance. Given the origins of that requirement figure, she was well aware that it was "not the OAN and … not, therefore, consistent with [the NPPF]" (paragraph 5 of the decision letter). She was conscious of the need to take as her "starting point for the calculation of OAN … demographic calculations based on the most recent, available population projections" (paragraph 6). She took account of the most recent, complete assessment of housing needs, which was in the SHMA. She was entitled – and I would say obviously right – to take this approach, which was consistent with government policy in the NPPF. She acknowledged, however, that "[demographic] calculations result in the total number, expressed as a range, of people and households likely to live in the Borough during the plan period, regardless of the type of dwelling which they might desire or require", including "those who cannot afford market housing". The need for affordable housing and the other particular needs to which she referred were, as she said, "the products of separate and different calculations and assessments". She understood that there was inevitably some overlap between the needs resulting from those "calculations and assessments", and that the needs to which she referred were, at least in theory, "… included within the total population arising from population projections and a demographic methodology and should be consistent with them" (paragraph 7).

29. As the inspector said in paragraph 8 of the decision letter, a "main area of dispute" was "whether affordable housing need should be fully met by the OAN". In identifying that dispute, she did not, in my view, misdirect herself in what she said about the Planning Advisory Service's technical advice note. Her assessment of housing needs was not affected by any conflict between government policy in the NPPF and guidance in the PPG and the guidance in the technical advice note. She dealt with the issue between the parties in the following paragraphs – in particular, paragraphs 9, 10 and 13. It is clear from those paragraphs that she accepted the relevance of the need for affordable housing to her assessment of housing needs, and exercised her planning judgment in taking it into account. She did not ignore it, or put it to one side as a consideration "below the line".

30. It is also clear that she understood how the need for affordable housing as a component of the "full, objectively assessed needs" for housing had been addressed in the SHMA, and, in

particular, how it had been included in the "OAN Range" for each local planning authority's area in the SHMA's "OAN Conclusions, 2011-31" in Table 84.

31. The figure at the lower end of the range – 375 dwellings per annum – was, as she said in paragraph 9 of the decision letter, "[based] on demographic-led housing projections". More recent demographic projections had indicated a slightly lower figure – 364 dwellings per annum – to which she referred in paragraph 12. This was, as she said, "generally consistent" with the figure of 375. It was therefore possible to regard 375 dwellings per annum as a realistic and reliable minimum figure for the present level of housing need, assessed in accordance with national policy and guidance.

32. The "Executive Summary" of the SHMA explains that "[the] lower end of the range would support the demographic projections", and "[the] higher end of the range would support stronger delivery of both market and affordable housing taking account of the need for affordable housing and market signals, and support proportionate economic growth in different parts of the HMA". In section 9, "Conclusions and Recommendations", under the heading "Overall Conclusion on Housing Needs", paragraph 9.20 says that the authors of the SHMA had "sought to draw the range of evidence together to define objectively-assessed need for housing", and that their approach had included five steps, the last of which was to "[identify] the higher level of the range to take account of the market signals, economic evidence and affordable housing need". Paragraph 9.21 confirms that "[in] interpreting the affordable housing needs evidence", they had recognized that "… some households in housing need are able to live within the Private Rented Sector supported by Local Housing Allowance", and that "[a] proportionate adjustment is thus appropriate to enhance affordable delivery where applicable". Paragraph 9.25 states that "[in] line with the practice guidance [in the PPG], the additional uplift, from the baseline demographic need is considered sufficient to … support improvements in affordability, make a tangible difference to meeting affordable housing needs and supporting proportionate economic growth". The basis of the "upwards adjustment" for Hinckley and Bosworth was "[to] support the provision of additional affordable housing and to support growth in employment/labour supply". Paragraph 9.27 stresses that "[it] should be recognised that this is an objective assessment of housing need and takes no account of land supply, development constraints, environmental constraints or the feasibility of delivering infrastructure to support sustainable development". That is the context in which the figures in Table 84 are presented.

33. The inspector acknowledged, in paragraph 9 of the decision letter, that because "the vast majority" of affordable housing is delivered as a proportion of residential development schemes of more than a particular number of dwellings, "it might be necessary to increase the number of dwellings required overall in order to maximise the provision of affordable housing". She recognized that such a mechanism for the delivery of affordable housing is "a policy decision and thus appropriately calculated outside of OAN". She therefore acknowledged that the top end of the "OAN Range" for the council's area in Table 84, the figure of 450, which would "support the provision of additional affordable housing and a growth in employment/labour supply", was "a policy-on figure".

34. However, as she went on to say in paragraph 10, there was no dispute as to the existence of "a significant need for affordable housing", both in the borough of Hinckley and Bosworth and in

Burbage. The "most recent analysis" of this need was in the SHMA. That analysis had "[put] the figure at about 250 dpa". In the light of all the material before her – including the SHMA, but also the whole of the evidence on housing need given on either side at the inquiry – she was clearly satisfied that "a 20% uplift" on the figure based on "demographic-led household projections", the figure of 375 dwellings per annum, to 450 dwellings per annum, specifically to provide both for affordable housing and economic growth, "properly [took] account of" the need for affordable housing. This was, in my view, an entirely legitimate exercise of planning judgment, consistent with NPPF policy and the guidance in the PPG. It was an essential part of the inspector's own assessment of housing needs in the council's area, including the need for affordable housing, with a view to determining whether there was, as the council maintained, a five-year supply of housing land.

35. The inspector did not simply adopt the "OAN Range" in Table 84 in the SHMA and apply it uncritically. For all the reasons she gave in paragraphs 5 to 17 of her decision letter, she came independently to the view that, for the purposes of the decision she had to make, the range of 375 to 450 dwellings per annum could be taken as a complete and sufficiently robust assessment of housing needs, including the need for affordable housing, but that even if the level of housing need had been considerably higher than that range, the required five-year supply would still exist.

36. This case is not analogous to *Hunston Properties Ltd.* and *Gallagher Estates Ltd.*, where the decision-maker had adopted a level of housing need constrained by policy considerations – so called "policy-on" factors, as they were referred to in *Gallagher Estates Ltd.*. As Mr Phillpot and Ms Osmund-Smith submitted, the figure of 450 dwellings per annum identified by the inspector as the upper end of her range was not, in fact, a "constrained" figure. In her view, as a matter of planning judgment, it sufficiently embraced the need for affordable housing as a necessary component of the "full, objectively assessed needs" for housing in the council's area. It was the result not of a policy-driven subtraction from the figure of 375 dwellings per annum at the lower end of her range – the figure based on "demographic-led household projections" – but of an appropriate addition to that figure to ensure that the need for affordable housing was not omitted or understated. As the inspector clearly appreciated, a simple addition of the figures of 375 dwellings per annum in the column headed "Demographic-Led Household Projections to 2031" in Table 84 of the SHMA and 248 dwellings per annum in the column headed "Affordable Housing Need per Annum" would have been inappropriate. That would have been, to some degree, double-counting. Planning judgment was required in gauging a suitable uplift to take account of the need for affordable housing, without either understating or overstating that need. The inspector grasped that. She exercised her planning judgment accordingly, doing the best she could on the evidence before her.

37. Before us, Mr Lockhart-Mummery did not contend that the figure of 980 dwellings per annum in the column headed "Annual Housing Need" in Table 48 of the SHMA could be equated to the "full, objectively assessed needs" for housing – an assertion made in the evidence given by Jelson's planning witness, Mr Thorley, at the inquiry. I think Mr Lockhart-Mummery was right not to pursue that argument. But any suggestion that the inspector failed to take into account the figure of 980 dwellings per annum in her assessment of housing need, or failed to come to a conclusion about it, is also, in my view, untenable. She manifestly did take it into account.

She devoted a whole paragraph of the decision letter to it – paragraph 11 – and came to a firm conclusion about it. That conclusion, again, was a matter of planning judgment for her, and her planning judgment here seems wholly unexceptionable as a matter of law. Indeed, I think any other conclusion would have been impossible – for three reasons.

38. First, the figure of 980 dwellings per annum finds no place in the tabulation of the SHMA's "OAN Conclusions, 2011-31" – in Table 84. Nowhere in the SHMA is it put forward as representing the "full, objectively assessed needs" for housing in the council's area. It is more than twice the figure at the upper level of the "OAN Range" in Table 84 – the figure of 450 dwellings per annum – and more than 600 dwellings per annum above the figure of 375 at the lower end of the range, based on the household and population projections.

39. Secondly, the true status of the figure of 980 dwellings per annum is made clear in the text of the SHMA introducing Table 48, and in the title of the table itself. As paragraph 6.62 explains, it is the product of a calculation of "the level of overall housing provision that would be needed in order to meet the level of affordable housing need identified". This calculation was "based on the current affordable housing contribution percentages required by each local [authority's] own policies". Paragraph 6.63 says that "[at] present" the local planning authorities in Leicestershire "expect between 10% and 40% contribution from private housing development over a certain scale", and that Table 84 "outlines the scale of overall housing needed to deliver affordable housing at the current affordable housing policies". This explanation is carried into the title of Table 48 – "Scale of Overall Housing Delivery to Meet Affordable Housing Need on Current Policy Basis Per Annum".

40. Like the other figures in the column headed "Annual Housing Need" in Table 48, the figure of 980 dwellings per annum is the product of arithmetic driven by current development plan policy for the provision of affordable housing as a percentage of the total number of dwellings in a proposal above a given size. The "need" here is elastic. The figure of 980 dwellings per annum is the notional amount of housing that would have to be delivered to bring forward the number of dwellings in the column headed "Affordable Need" – 245 dwellings per annum – on the basis of an average requirement of 25% affordable housing in relevant developments under the current applicable policy in the development plan. If that policy was changed, the arithmetic would change too, and different figures would emerge in the columns headed "Annual Housing Need" and "Total Housing Required Based on Current Policy": the lower the percentage requirement in the policy, the higher the total "need" for housing – potentially far beyond the "full, objectively assessed needs" for housing to which NPPF policy refers.

41. The risk of exaggerating the "full, objectively assessed needs" by making a calculation of this kind was not lost on the inspector. As she said (in paragraph 11 of the decision letter), the level of housing need it implied was "clearly impractical and unreasonable". Its "corollary" was "a requirement of 196,825 units in the HMA as a whole, a considerable, inconsistent and thus unjustifiable increase on the 75,000 or so dwellings calculated from household projections to be needed by 2031".

42. Thirdly, this was not to say that there is an inconsistency between Table 48 and Table 84. There is not. The two tables are doing different things. Table 84 presents the "OAN Range". It gives a figure for "Affordable Housing Need per Annum" for each of the eight administrative

areas, and states the "Affordable Need as % Demographic-Led Projection". For Hinckley and Bosworth the "Affordable Housing Need per Annum" is stated to be 248, which corresponds to the figure of 245 for "Affordable Need" in Table 48. The assessment of the "OAN Range" provided in Table 84 demonstrably reflects the same understanding of the need for affordable housing in Hinckley and Bosworth as the policy-based calculation of "Annual Housing Need" in Table 48.

43. To describe the figure of 980 dwellings per annum as "purely theoretical", as the inspector did (in paragraph 11), was therefore correct. As she said (ibid.), it might be useful in the forthcoming plan-making process as "a pointer to further policy adjustments, such as a change in the percentage of affordable housing required". But it was not an indication of the "full, objectively assessed needs" for housing in the council's area. The inspector's conclusions to that effect were perfectly rational.

44. I do not think Mr Lockhart-Mummery's argument on this point gains any strength from the judgment of Holgate J. in *Trustees of the Barker Mill Estates*, handed down on 25 November 2016 – after Green J. had given judgment in these proceedings. The relevant proceedings in that case were the claimant's challenge under section 113 of the Planning and Compulsory Purchase Act 2004 to the adoption of a local plan. Holgate J. noted (in paragraph 38 of his judgment) that in *Oadby and Wigston Borough Council* this court had differentiated "the two stage exercise which is required for the preparation of a local plan … from the one stage FOAN exercise required where the 5 year supply of housing land has to be assessed in the determination of a planning application and a local plan has yet to be adopted". One of the submissions made on behalf of the claimant, as Holgate J. summarized it (in paragraph 45(i)), was that "[the] draft [local plan] treated the figure of 834 dwellings a year as the FOAN figure, but rejected it on grounds of deliverability and viability" and that the local planning authority had "unlawfully elided or merged stages one and two as laid down in [*Gallagher Estates Ltd.*]". Holgate J. rejected that argument.

45. The passage in Holgate J.'s judgment on which Mr Lockhart-Mummery relied is in paragraph 47:

> "47. It is perfectly plain that when the documents are read fairly and in context TVBC never identified the figure of 834 dwellings a year as an overall FOAN figure (or indeed any figure greater than 588). The figure of 834 dwellings a year was produced as part of an assessment of the level at which the policy for the annual dwelling requirement would need to be set if, applying the assumption that 35% of all housing development carried out would be provided as affordable homes, the FOAN for affordable housing (292 dwellings a year) were to be achieved. In carrying out this assessment both the Inspector and TVBC were faithfully applying paragraph 029 of the PPG ... . They both rejected the notion of including 834 dwellings a year as a *policy* requirement in the local plan on grounds of lack of market demand and sustainability objections. But in so doing they were not rejecting 834 dwellings a year as a measure of FOAN. They did not misinterpret either the NPPF or the PPG. More to the point their approach could not possibly be criticised in law as being an irrational application of policy."

46. Mr Lockhart-Mummery submitted that the last three sentences of that paragraph demonstrated a correct approach. But as Mr Phillpot submitted, those three sentences, if taken out of context, are liable to be misunderstood. If one reads paragraph 47 of Holgate J.'s judgment in full and in context, it is clear that he was not supporting the figure of 834 dwellings per annum as a measure of the "full, objectively assessed needs" for housing in that case. As he said (in the first sentence of paragraph 47), the local planning authority had not treated it as if it had that status. The inspector who had conducted the examination of the local plan had "recorded TVBC's position that the figure of 588 dwellings a year meets the FOAN for market housing and, in so far as it is realistic and deliverable, for affordable housing" (paragraph 43 of the judgment). In a subsequent passage Holgate J. referred to the "further exercise … carried out, in accordance with the PPG, to identify the amount of housing needing to be provided for those who cannot afford accommodation at open market prices (including current unmet housing need) in order to see whether, at the second stage in [*Gallagher Estates Ltd.*], the *overall* FOAN of 588 dwellings a year should be increased to enable that affordability FOAN to be met" (paragraph 51).

47. It seems to me therefore that the premise for Mr Lockhart-Mummery's submission here is false. Holgate J.'s judgment in *Trustees of the Barker Mill Estates* lends no force to the contention that in this case the inspector should have regarded the figure of 980 dwellings per annum as an indication of the "full, objectively assessed needs" for housing. Holgate J.'s analysis seems congruent with this court's in *Oadby and Wigston Borough Council*, and does not undermine Green J.'s conclusion that the inspector's assessment of housing need was legally sound. If anything, it would reinforce that conclusion.

48. I do not think the inspector went astray when she found in paragraph 12 of the decision letter that the figure of 364 dwellings per annum, which was below the lower end of the "OAN Range" in Table 84 of the SHMA, both confirmed the council's approach to the assessment of housing need and also "[validated] the [core strategy] housing provision of 450 dwellings which is about 24% above that needed to meet demographic increases". As Green J. said (in paragraph 67 of his judgment), there was no reason why she should not use the core strategy figure as a "benchmark" in that way. Again, this was a classic exercise of planning judgment on the relevant evidence, and, in my view, unassailable.

49. When she said, in paragraph 13, that it was "not [her] role in this decision to identify an alternative OAN", the inspector was not – as Mr Lockhart-Mummery put it – taking an approach "diametrically inconsistent" with the decisions of this court in *Hunston Properties Ltd.*, *Gallagher Estates Ltd.* and *Oadby and Wigston Borough Council*. She was not saying that in the circumstances she considered herself constrained to use the requirement figure of 450 dwellings per annum in the core strategy. She was, I think, simply acknowledging that it was unnecessary for her, and not possible, to embark on the kind of exercise a local planning authority must now undertake in identifying the "full, objectively assessed needs" for housing in the course of preparing a local plan. What she had to do, in compliance with NPPF policy, was to establish a figure for housing need, including the need for affordable housing, in which she could be confident when addressing the critical question in her first main issue – whether or not the council could demonstrate the requisite five-year supply. She did that. She was satisfied, for the purposes of the decision she had to make, that the figure of 450 dwellings per annum for housing need, including the need for affordable housing, was a sound basis on

which to proceed. The figure of 539 dwellings per annum, which Jelson had calculated as the hypothetical level of need at which the housing land supply would fall below five years, was 44% above the "demographically-led household projection" of 375 dwellings per annum, much greater than the 20% judged by the inspector to be sufficient to accommodate the need for affordable housing. It did not represent an "objectively assessed" need for housing. It had no provenance in the SHMA. But it did serve as a useful test of the robustness of the inspector's approach and conclusions. That is how she used it. Once again, her exercise of planning judgment was reasonable and lawful.

50. The inspector saw nothing in the cases to which she referred in paragraphs 14 to 16 of her decision letter to upset the conclusion to which she had come on the "full, objectively assessed needs" for housing in the appeal before her, and in paragraph 17 she found support for that conclusion in the report of the inspector who had undertaken the examination into the core strategy for the borough of Charnwood. I cannot discern any error of law in those four paragraphs.

51. There can be no criticism of what the inspector said in paragraph 15, where she distinguished the present case from *Oadby and Wigston Borough Council* on its facts. As she said, in that case her fellow inspector had been entitled to conclude that the relevant range in the SHMA did not properly reflect the need for affordable housing in the borough of Oadby and Wigston. The figures given in the SHMA as the need for affordable housing in that borough – 160 dwellings in the "Affordable Need" column in Table 48, 163 in the column headed "Affordable Housing Need per Annum" in Table 84 – were well in excess of the relevant "OAN Range" in Table 84, which was only 80 to 100 dwellings per annum. The inspector described this as a "significant difference" from the case before her. She was right. As she acknowledged, at first instance in *Oadby and Wigston Borough Council* the court had found no reason to interfere with the decision-maker's assessment of housing need as 147 dwellings per annum – a conclusion later supported in the decision of this court (see paragraphs 44 to 48 of my judgment). She did not make the mistake of thinking that she was therefore obliged to exercise her own planning judgment on housing need in the appeal before her in any particular way. She was not. She was free, indeed required, to exercise her own planning judgment, on the evidence before her, in her own assessment of housing need in the council's area – which is what she did.

52. The outcome of the proceedings in *Oadby and Wigston Borough Council* turned on the lawfulness of the approach taken by the inspector in the particular circumstances of that case. I should add, however, that it makes no difference here that the figure of 800 dwellings per annum for "Annual Housing Need" for Oadby and Wigston in Table 48 was not put forward in that case as representing the "full, objectively assessed needs" for housing. But one can well understand why it was not. Like the figure of 980 dwellings per annum for Hinckley and Bosworth, in the same column in the same table, it was the product of arithmetic based on policy: the level of housing delivery that would theoretically be required each year to meet an "Affordable Need" of 160 dwellings assuming an "Affordable Housing Policy (Mid-Point)" of 20%. It had no better claim to be regarded as representing the "full, objectively assessed needs" for housing in the borough of Oadby and Wigston than did the figure of 980 dwellings per annum in the borough of Hinckley and Bosworth. That was the gist of Green J.'s relevant conclusions (in paragraphs 60 and 61 of his judgment).

53. Finally, I do not accept that the inspector went wrong in paragraph 16 of the decision letter, where she referred to the judgment of Dove J. in *King's Lynn and West Norfolk Borough Council*, in particular his observations (in paragraphs 34 to 36) to the effect that under the policy in paragraph 159 of the NPPF "the gross unmet need for affordable housing", though it must be "addressed", does not have to be "met in full when determining [the] FOAN" (see paragraph 55 of my judgment in *Oadby and Wigston Borough Council*). As always, such observations must be seen in their proper context. But the crucial point here is that, where development control decision-making is concerned, national policy in the NPPF and guidance in the PPG permit – and effectively require – the decision-maker to exercise planning judgment in determining how the need for affordable housing should be incorporated in the "full, objectively assessed needs" for housing in the relevant area. That exercise of planning judgment will inevitably depend on the particular circumstances of the case in hand.

54. In the circumstances of this case I think it would have been surprising if the inspector had judged the "full, objectively assessed needs" for housing to be at a level higher or lower than she did. Whether she would have been entitled to do so is beside the point. All that we need to decide is whether she committed any error of law in the conclusions she actually reached. In my view she did not. She assessed housing need, including the need for affordable housing, consistently with relevant policy in the NPPF and relevant guidance in the PPG, and with sufficient clarity and precision. Her approach conforms with the previous decisions of this court in *Hunston Properties Ltd.* and *Gallagher Estates Ltd.* and its subsequent decision in *Oadby and Wigston Borough Council*. Her conclusions were well within the bounds of reasonable planning judgment, coherent and not contradictory. Her reasons, though compact, were adequate and clear. The judge was right to uphold her decision.

Conclusion

55. For those reasons, I would dismiss this appeal.

Lord Justice Peter Jackson

56. I agree.

Lord Justice Rupert Jackson

57. I also agree.