Neutral Citation Number: [2016] EWCA Civ 1040

Case No: C1/2015/2447

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ADMINISTRATIVE COURT**
**PLANNING COURT IN BIRMINGHAM**
**MR JUSTICE HICKINBOTTOM**
**[2015] EWHC 1879 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2016

**Before:**

**Lady Justice Black**
**Lord Justice Tomlinson**
**and**
**Lord Justice Lindblom**

**Between:**

| | |
|---|---|
| **Oadby and Wigston Borough Council** | **Appellant** |
| **and** | |
| **(1) Secretary of State for Communities and Local Government**<br>**(2) Bloor Homes Ltd.** | **Respondents** |


(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

**Mr Timothy Leader** (instructed by **Oadby and Wigston Borough Council**) for the **Appellant**
**Mr Gwion Lewis** (instructed by **the Government Legal Department**) for the **First Respondent**
**Mr Reuben Taylor Q.C.** (instructed by **Squire Patton Boggs (UK) LLP**) for the **Second Respondent**

Hearing date: 28 July 2016

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

**Lord Justice Lindblom:**

*Introduction*

1. In this appeal we must decide whether an inspector erred in law in his understanding and application of government policy for housing development in the National Planning Policy Framework ("NPPF") when determining an appeal against a local planning authority's refusal of planning permission for a proposed development of housing on an unallocated site. The appeal raises no novel or controversial issues of law.

2. The appellant, Oadby and Wigston Borough Council, appeals against the order of Hickinbottom J., dated 3 July 2015, dismissing its application under section 288 of the Town and Country Planning Act 1990 against the decision of the inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, to allow an appeal of the second respondent, Bloor Homes Ltd., against the council's refusal of an application for outline planning permission for a development of up to 150 dwellings on land at Cottage Farm, Glen Road, Oadby in Leicestershire. The inspector held an inquiry into Bloor Homes Ltd.'s appeal over six days in November 2014 and January 2015. His decision letter is dated 10 February 2015. Hickinbottom J. rejected the council's challenge to the decision on all grounds. Permission to appeal against the judge's order was granted by Lewison L.J. on 5 October 2015.

*The issue in the appeal*

3. The central issue in the appeal is whether the judge erred in holding that the inspector had neither misinterpreted nor unlawfully applied government policy in the relevant passages of the NPPF, in particular paragraphs 47, 49, 157, 158 and 159.

*Policy in the NPPF*

4. Paragraph 17 of the NPPF, which identifies 12 "[core] planning principles", says that planning should be "genuinely plan-led …" and that "[every] effort should be made objectively to identify and then meet the housing … needs of an area …".

5. In the section of the NPPF headed "Delivering a wide choice of quality homes", paragraph 47 states:

> "To boost significantly the supply of housing, local planning authorities should:
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> ● 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;
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> ● identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an

additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;

- identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;

- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and

- set out their own approach to housing density to reflect local circumstances."

Paragraph 49 states:

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

6. In a later section of the NPPF, in the part relating to "Plan-making", the general policies for "Local Plans" state, in paragraph 157, that local plans should "… be based on co-operation with neighbouring authorities, public, voluntary and private sector organisations". Under the heading "Using a proportionate evidence base", paragraph 158 enjoins local planning authorities to ensure that their local plans are "based on adequate, up-to-date and relevant evidence about the economic, social and environmental characteristics and prospects of the area", and that "their assessment of and strategies for housing, employment and other uses are integrated, and that they take full account of relevant market and economic signals". Paragraph 159 relates specifically to "Housing". It states:

> "Local planning authorities should have a clear understanding of housing needs in their area. They should:
>
> - 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 that the local population is likely to need over the plan period which:
>
>  – meets household and population projections, taking account of migration and demographic change;
>  – addresses the need for all types of housing, including affordable housing and the needs of different groups in the community …; and
>  – caters for housing demand and the scale of housing supply necessary to meet this demand;

- prepare a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period."

7. Those policies in the NPPF are amplified in the Planning Practice Guidance ("PPG"), first published in March 2014. In its guidance on "Housing and economic development needs assessments" the PPG confirms that "[the] assessment of housing … development needs includes the Strategic Housing Market Assessment requirement as set out in the [NPPF]" (paragraph 2a-001-20140306). It refers to the "primary objective" of identifying need (paragraph 2a-002-20140306). It emphasizes that "[the] assessment of development needs is an objective assessment of need based on facts and unbiased evidence", and that plan-makers "should not apply constraints to the overall assessment of need …" (paragraph 2a-004-20140306). It says that "[there] is no one methodological approach … that will provide a definitive assessment of development need", but adds that the use of the "standard methodology" set out in the guidance is "strongly recommended" (paragraph 2a-005-20140306). It advises that local planning authorities "should assess their development needs working with the other local authorities in the relevant housing market area … in line with the duty to cooperate" (paragraph 2a-007-20140306). "Needs should be assessed in relation to the relevant functional area, [i.e.] housing market area …" (paragraph 2a-008-20140306). A "housing market area is a geographical area defined by household demand and preferences for all types of housing, reflecting key functional linkages between places where people live and work". The "extent of the housing market areas identified will vary, and many will in practice cut across various local planning authority administrative boundaries" (paragraph 2a-010-20140306). It is recognized that "[establishing] future need for housing is not an exact science" and that "[no] single approach will provide a definitive answer" (paragraph 2a-014-20140306). It is also acknowledged that "[the] household projection-based estimate of housing need may require adjustment to reflect factors affecting local demography and household formation rates which are not captured in past trends" (paragraph 2a-015-20140306). Under the heading "How should employment trends be taken into account?" paragraph 2a-018-20140306 states:

> "Plan makers should make an assessment of the likely change in job numbers based on past trends and/or economic forecasts as appropriate and also having regard to the growth of the working age population in the housing market area. Any cross-boundary migration assumptions, particularly where one area decides to assume a lower internal migration figure than the housing market area figures suggest, will need to be agreed with the other relevant local planning [authorities] under the duty to cooperate. Failure to do so will mean that there will be an increase in unmet housing need.
>
> …"

In the guidance on "Housing and economic land availability assessment", under the heading "What is the starting point for the five-year housing supply", paragraph 3-030-20140306 states:

> "Where evidence in Local Plans has become outdated and policies in emerging plans are not yet capable of carrying sufficient weight, information provided in the latest full assessment of housing needs should be considered. But the weight given to these assessments should take account of the fact they have not been tested or moderated against relevant constraints. Where there is no robust recent assessment of full

housing needs, the household projections published by the Department for Communities and Local Government should be used as the starting point, but the weight given to these should take account of the fact that they have not been tested …".

8. Some of the main concepts here were considered by Hickinbottom J. in *Gallagher Estates Ltd. v Solihull Metropolitan Borough Council* [2014] EWHC 1283 (Admin) (at paragraph 37):

> "(i) Household projections: These are demographic, trend-based projections indicating the likely number and type of future households if the underlying trends and demographic assumptions are realised. …
>
> (ii) Full Objective Assessment of Need for Housing: This is the objectively assessed need for housing in an area, leaving aside policy considerations. It is therefore closely linked to the relevant household projection; but it is not necessarily the same. An objective assessment of housing need may result in a different figure from that based on purely demographics …
>
> (iii) Housing Requirement: This is the figure which reflects, not only the assessed need for housing, but also any policy considerations that might require that figure to be manipulated to determine the actual housing target for an area. For example, built development in an area might be constrained by the extent of land which is the subject of policy protection, such as Green Belt or Areas of Outstanding Natural Beauty. Or it might be decided, as a matter of policy, to encourage or discourage particular migration reflected in demographic trends. Once these policy considerations have been applied to the figure for full objectively assessed need for housing in an area, the result is a "policy on" figure for housing requirement. Subject to it being determined by a proper process, the housing requirement figure will be the target against which housing supply will normally be measured."

9. The housing supply policies in the NPPF brought about a "radical change" in national planning policy, as Laws L.J. observed, with the agreement of Patten and Floyd L.JJ., in *Solihull Metropolitan Borough Council v Gallagher Estates Ltd.* [2014] EWCA Civ 1610 (at paragraph 16 of his judgment). The "two-step approach" in paragraph 47 of the NPPF, he said, "means that housing need is clearly and cleanly ascertained".

10. In the sphere of decision-making on individual applications and appeals, the implications of the policy for plan-making in paragraph 47 were explained by Sir David Keene (with the agreement of Maurice Kay and Ryder L.JJ.) in *Hunston Properties Ltd. v St Albans City and District Council* [2013] EWCA Civ 1610 (at paragraphs 21 to 27). The issue for the court in that case was the approach to be taken to a proposal for housing development on an unallocated site – there a site in the Green Belt – when the housing requirement for the relevant area has not yet been established by the adoption of a local plan produced in accordance with the policies in the NPPF (paragraph 21 of Sir David Keene's judgment). Sir David said this (in paragraphs 26 and 27):

> "26. … I accept [counsel's] submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an

exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal. … [It] seems to me to have been mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.

27. It follows from this that I agree with the judge below that the inspector erred by adopting such a constrained figure for housing need. It led her to find that there was no shortfall in housing land supply in the district. She should have concluded, using the correct policy approach, that there was such a shortfall. The supply fell below the objectively assessed five year requirement."

*The evidence and submissions on housing need at the inquiry*

11. Hickinbottom J. set out, in paragraphs 22 to 31 of his judgment, an ample account of the evidence and submissions presented to the inspector on housing need and supply, which I gratefully adopt without repeating in full.

12. The council relied on the Strategic Housing Market Assessment, dated June 2014, which had been prepared for several administrative areas in the housing market area, including Oadby and Wigston. It contended that its housing requirement was for between 80 and 100 dwellings a year – comparable with the requirement of 90 dwellings per annum in Policy CS1 of the core strategy. It maintained, through the evidence of its witness on housing need and supply, Mr Gardner, that the upper end of the range of 80 to 100 dwellings per annum was "based on seeking to enhance affordable housing delivery and growth in the workforce" (paragraph 3.41 of Mr Gardner's proof of evidence) and that this range "clearly" reflected a "policy off assessment" (paragraph 3.43).

13. The Strategic Housing Market Assessment had identified a "demographic-led" requirement for 79 dwellings per annum for the administrative area of Oadby and Wigston for the period 2011-2031, but indicated that when economic growth and the need for affordable housing were taken into account the requirement would rise to 173 dwellings per annum and 163 dwellings per annum respectively (Table 84 of the Strategic Housing Market Assessment). As for affordable housing, the Strategic Housing Market Assessment said that "the private rented sector makes a potentially significant contribution to meeting affordable housing needs" (paragraph 9.12). It acknowledged, however, that "[the] extent to which the Councils wish to see the private rented sector being used to make up for shortages of affordable housing is plainly a local policy decision which is outside the scope of this study" (also paragraph 9.12). It accepted that a "proportionate adjustment" to the figures for housing provision was appropriate, given that "some households in housing need are able to live within the Private Rented Sector …" (paragraph 9.21). It said that an "additional uplift … from the baseline demographic need" had been made for each of the local authorities. In Oadby and Wigston this had been done "[to] support the provision of additional affordable housing and to ease acute levels of need" (paragraph 9.25). The uplift had been made using "reasonable assumptions" which, it was considered, would achieve the aim "to improve affordability and/or delivery [of] affordable housing" (paragraph 9.26).

14. The evidence and submissions for Bloor Homes Ltd. attacked the Strategic Housing Market Assessment as an inadequate basis for assessing the need for housing, which had not been

formally tested through the process of an examination. Bloor Homes Ltd.'s witness on housing need and supply, Mr Longley, presented four scenarios. Two of those scenarios, which indicated a need for, respectively, 147 and 161 dwellings per annum, were, as Mr Longley conceded in cross-examination, based on flawed migration figures. In his closing submissions Bloor Homes Ltd.'s counsel, Mr Reuben Taylor Q.C., argued that, in view of the employment-related housing requirement and the identified need for affordable housing, the full, objectively assessed needs for housing must be "far higher" than the figure of 100 dwellings per annum indicated in the Strategic Housing Market Assessment (paragraph 71); that Leicester City Council had not committed to providing housing "to house the employees to meet Oadby and Wigston's housing needs" (paragraph 85); that reliance on the private rented sector to address the need for affordable housing represented a "policy-on" position (paragraph 113), and there was "no evidence of an agreement between the HMA authorities that [Oadby and Wigston's] affordable housing needs will be accommodated elsewhere" (paragraph 117); and that the "only reasonable conclusion" was that the appropriate figure to adopt as the housing requirement was "substantially in excess of 150 [dwellings per annum]" (paragraph 120).

*The inspector's decision letter*

15. In paragraph 4 of his decision letter, the inspector identified two "main issues" in Bloor Homes Ltd.'s appeal. The council's challenge concerns only the first: "[whether] there is a 5 year housing land supply in the local authority area and how this may impinge upon the applicability of current development plan policies with particular regard to the distribution of new housing development".

16. It is necessary to set out the relevant parts of the inspector's decision letter, to show how he approached that issue and the analysis that led him to conclude as he did.

17. The inspector noted that the Oadby & Wigston Core Strategy (September 2010) had been "adopted relatively recently" and it was therefore necessary, under paragraph 215 of the NPPF, to consider whether its policies were consistent with the NPPF (paragraph 9 of the decision letter). He observed that the housing figures underpinning Policy CS1 of the core strategy were derived from the revoked East Midlands Regional Plan, which was based on 2004 population projections that were now "considerably out of date" and superseded by the 2012 Sub-National Population Projections ("the 2012 SNPP") (paragraph 11). Although the Leicester and Leicestershire Member Advisory Group had "recently been set up to consider strategic planning matters across the county, including the role of the [Leicester Principal Urban Area]", this was, he said, "a group without decision making powers: there is no formal planning mechanism to co-ordinate implementation, monitoring and review of the PUA housing requirement across all the local planning authorities which have a stake in the PUA" (paragraph 12).

18. Having acknowledged, in the light of the Court of Appeal's decision in *Hunston Properties Ltd.*, that it was "necessary to consider the full, objective assessment of need", the inspector said that evidence had been "put forward to show that the assumptions underlying the [core strategy] are not compliant with NPPF in terms of them being based on reliable, up-to-date and tested information" (paragraph 13). In the light of the first instance decision in *Gallagher Estates Ltd.* ([2014] EWHC 1283 (Admin)), he acknowledged (in paragraph 14) that "a variation from the FOAN (ie the "requirement") should only emerge after an up to date local plan has been examined and where compliance with the duty to cooperate has

shown that local housing need can and should be met on sites outside the local planning authority area". In this case, he said, there was "no post-NPPF review of the [core strategy]", and "this must further undermine the degree to which the [core strategy] can be relied upon as the basis for decision making".

19. In his view, it was "not … appropriate for [him] to come to a definitive view as to what the likely housing need might currently be in Oadby & Wigston". But he saw "several areas of concern … which could be taken as indicating that the housing provision allowed for by Policy CS1 is insufficient" (paragraph 16). He referred to the argument that "to … consider Oadby & Wigston as a separate or independent planning unit would not reflect the circumstances of the HMA and how the interactions within the HMA bear upon the proportion or quantum of need within or close to the PUA, having regard to the operation of the local housing market over recent years" (paragraph 18). He recognized that the "[successful] operation of the HMA in the Leicester area depends upon close cooperation between the neighbouring planning authorities". There seemed to be "no formally constituted working arrangement between the authorities for strategic planning purposes in terms of some sort of standing joint committee …", though the Strategic Housing Market Assessment produced in May 2014 on behalf of Leicester City Council and the Leicestershire authorities had been accepted by the council as "indicative of the current assessment of need" (paragraph 19).

20. The inspector continued (in paragraphs 20 and 21):

> "20. The SHMA puts forward its conclusions as representing the "policy off" assessment. However, the SHMA has not been tested through a formal examination, and there are some points where questions are raised as to how accurate it is. In particular, the SHMA is based upon 2011 population projections whereas the methodology set out in PPG expects the latest population projections to be used as the basis for assessing need. As noted above, the 2012 SNPP figures are now available.
>
> 21. The Leicester and Leicestershire Member Advisory Group has produced a Memorandum of Understanding (seemingly primarily to support the Charnwood Borough Local Plan), aligning the authorities with the conclusions of the SHMA, but this does not have the force of a formally constituted liaison or cooperation as outlined at paragraph 157 of NPPF, in that policies (and associated numerical limits etc), which may be covered by the Memorandum of Understanding have not yet been subject to post-NPPF scrutiny through a local plan examination. Of particular significance is how the SHMA has taken employment-led growth and affordable housing provision into account, and how that is reconciled across the HMA on a district-by-district basis."

21. In paragraphs 22 to 26 the inspector expressed serious misgivings about the approach adopted in the Strategic Housing Market Assessment:

> "22. There are indeed significant questions relating to the provision for affordable housing. Paragraph 9.25 of the SHMA particularly notes that there are "acute levels of need" for affordable housing in Oadby & Wigston. Table 39 in the SHMA identifies a backlog of 412 households in "unsuitable housing" which is translated into a 'Gross Need' figure for affordable housing of 251 in Table 40. To which can be added the 188 newly forming households in affordable housing

need shown in Table 41. Table 42 gives an annual requirement of 51 affordable dwellings up to 2036 to accommodate the need arising from existing households. This comes to 188+51 = 239 per annum for existing and newly forming households, to which has to be added at least a proportion of the backlog figure (251) to give an objective assessment of annual need for affordable housing.

23. However, taking account of the back-log of affordable housing provision, to support "full affordable housing delivery" Table 84 gives an annual need for just affordable housing of 163 2011-2031 and Table 85 gives a figure of 160 per annum for 2011-2036; both figures being more than double the figure which would be needed simply to fulfil the demographic-led (ie SNPP) projection. Nevertheless, Table 84 concludes with an OAN range for all housing for Oadby & Wigston of 80-100 per annum for 2011-2031 and Table 85 gives an annual range of 75-95 for 2011-2036. Both ranges are below the notional identified need for affordable housing of not less than 239 per annum noted above, let alone any need for open market housing.

24. The discrepancies between the apparent identified need and the OAN conclusions were explained at the inquiry to be attributable to cross-boundary provision and economic growth being accommodated by commuting for work purposes within the HMA. However, the mechanism for implementing and monitoring the success of this – particularly for affordable housing – is not clear; for example, no evidence was provided to show there is a mutual acceptance between neighbouring authorities of households on housing waiting lists.

25. Private rented housing is seen to be meeting a proportion of the affordable housing need in that it provides accommodation for households in receipt of housing benefit payments. Whereas there may have been historical reliance on the private rented sector to meet some of the demand for affordable housing, there have to be question over whether this truly meets the needs of such households in terms of security of tenure and quality of accommodation. Paragraph 50 of NPPF looks for either housing to be provided or a financial contribution of broadly equivalent value to have been put in place – ie it is the development industry and public sector together which should be providing affordable housing, not the private rented sector drawing on subsidies *via* social benefit payments.

26. I acknowledge that 100% of the affordable housing needs could not be met even within the SHMA's housing growth numbers discussed at [this] inquiry. However, as noted [at] paragraph 6.64 of the SHMA, what the acceptable proportion to be accommodated by the private rented sector would be is a "policy on" decision."

22. That analysis led to the following conclusions in paragraphs 27 to 31 of the inspector's decision letter:

"27. There is, therefore, a degree of uncertainty over what is the actual FOAN, including the provision for affordable housing. That could lead to a significant lacuna in meeting housing need; the consequences of which would include some form of shared housing, overcrowding and perhaps eventually homelessness. All

of which would be contrary to the expectations of NPPF which looks for a significant boost in the supply of high quality housing. I do, therefore, have sympathy with the view put forward at the inquiry by the appellant that the FOAN for Oadby & Wigston could be considerably more than the 90 per annum which is the basis for [core strategy] Policy CS1, and the maximum of 100 given in Table 84 of the SHMA.

28. The [council] argued that even if the [core strategy] is not seen to be compliant with the NPPF on account of it being based upon the revoked EMRP, the SHMA figures are broadly similar to the [core strategy], and therefore there is no practical difference with regard to the amount of development growth to be planned for. However, whilst I do not necessarily endorse any of the four scenarios put forward by the appellant as being definitive, from the evidence given at this inquiry, until the SHMA has been tested through a local plan examination the degree of uncertainty is so great that it would be unreasonable to accept that the figures given in the SHMA are in accordance with the expectations of NPPF and the methodology in PPG.

29. As stated above, I acknowledge that the SHMA states that it presents a "policy off" appraisal – but that is "policy off" for the HMA as a whole, not for the constituent local authorities with a stake within the HMA. I recognise that the historical performance of the housing market in the HMA cannot be ignored and the SHMA is accepted by the local planning authorities within the HMA as being a reasonable basis for the distribution of housing provision. This is supported by the Memorandum of Understanding, which has to be an indication of a degree of cooperation between the authorities with a stake in the HMA. However, that also implies that the housing need figure for Oadby & Wigston could be a constrained, "policy on", figure in terms of at least the distribution of growth across the HMA and between the various authorities.

30. Without any mechanism to formalise a reliance on cross-boundary provision, the conclusions set out in the SHMA, not least relating to affordable housing provision, have to be seen as an unsupported or untested "policy on" position – which would not correspond with the Hunston judgment. The initial distribution of development within the PUA was arrived at through the EMRP examination, which was held well before the NPPF was published and its expectations of how local plans should be prepared and scrutinised. That is, the overall figure for the HMA may be "policy off", but the distribution of the identified need between the various authorities would be – at least in part – a "policy on" position. That apportionment has not been tested at a NPPF compliant local plan examination.

31. Taking all of the above into account, I come to the view that these represent material considerations which could, subject to my findings on other matters, justify coming to a decision on the appeal scheme which would not accord with the development plan."

23. With those conclusions in place, the inspector turned to the question: "What is the housing need?". His conclusions on the annual figure are in paragraphs 33 and 34 of the decision letter:

"33. Although I do not regard any of the scenarios put forward at the inquiry as being definitive of the housing need for Oadby & Wigston, as discussed above, the figure is likely to be in excess of the 90 dwellings per annum set out in Policy CS1. Whether the FOAN is as high as the 161 per annum postulated in one of the scenarios has to be open to question but, if using the Chelmer Model and based on only the household (demographic) projection figure – not allowing for economic growth adjustments – the figure could be in the order of 147 per annum.

34. In any event, whatever the calculated figure might be, it is not consistent with the NPPF to regard that as a ceiling. The driving principle behind the NPPF policy is, as noted above, to significantly boost the supply of housing and, unless a particular scheme would not be compliant with other aspects of NPPF, it would not be necessary or even desirable to resist any theoretical 'oversupply' in the number of houses to be permitted. Having said that, for the purposes of this appeal I will adopt 147 per annum as the indicative figure for calculating whether the [council] is able to demonstrate a 5-year supply of housing land."

24. In the inspector's view, the figure of 147 dwellings a year, though it did not include "any specific allowance for the number of affordable homes needed" was appropriate, and "should give the opportunity to make inroads into that requirement" (paragraph 35 of the decision letter). A "cumulative shortfall of 93 dwellings" from earlier years in the plan period had to be added (paragraph 36). This was, said the inspector, "a persistent shortfall", justifying, in accordance with paragraph 47 of the NPPF, the addition of "a 20% buffer to the annual need figure to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land" (paragraph 37). Under the "Sedgefield" approach, it was appropriate to add the "backlog" to the first five years of the plan period (paragraph 38). Thus the evidence pointed to a five-year need for sites for a total of 975 dwellings – 195 dwellings a year: 147 dwellings a year for five years (735 dwellings) plus the 20% buffer (147 dwellings) plus the backlog from earlier years in the plan period (93 dwellings) (paragraph 39).

25. Under the heading "Housing land supply", in conclusions not contentious in these proceedings, the inspector found there was a total supply of sites in Oadby and Wigston for 705 dwellings (paragraphs 40 to 53 of the decision letter). This represented "3.6 years' housing land supply set against the estimated 5-year need (975)". There was therefore "a shortfall of 270 dwellings to bring it up to a full 5-year supply". The inspector acknowledged that his analysis of both the need and the supply figures had "not been subject to the detailed examination that might be applied at a local plan examination and they should not be taken as being precise", but added that in his view "until such time as the "policy on" distribution implied in the SHMA has been tested and endorsed through a local plan examination … they represent reasonable indications of the need/supply situation in Oadby & Wigston" (paragraph 55). Thus, on his first main issue he concluded that there was a "need to identify additional housing sites and particularly for affordable housing" (paragraph 56).

26. The inspector returned in his "Conclusion" to his principal conclusions on housing need and supply:

"85. The appeal site is outside the defined limits of development for the PUA, as set in the Core Strategy. However, the Core Strategy pre-dates the publication of the

> NPPF and its policies are not compliant with the expectations of the NPPF, in particular with regard to the adequacy of housing land supply to meet identified local needs. Whereas there have been efforts to draw up a housing strategy which addresses the whole of the PUA the SHMA has not been tested through a local plan examination and there is uncertainty over the operation of any joint or mutually agreed policy to meet needs across local authority boundaries. That is, the quantum of the full, objectively assessed need as looked for by NPPF is not settled, and neither is it certain that the level of cooperation – and its implementation – implied by the Memorandum of Understanding and the SHMA satisfy the duty to cooperate set out at paragraph 157 of NPPF."

The proposed development would make "a significant contribution" to meeting the shortfall of 270 dwellings in the five-year housing need (paragraph 86). And it would be "sustainable development" (paragraph 87). The inspector therefore concluded that the appeal should be allowed, and conditional planning permission granted (paragraph 88).

*The judgment of Hickinbottom J.*

27. Hickinbottom J. identified the "conundrum" in the council's case: that, in the light of the Strategic Housing Market Assessment, it had adopted a "purportedly policy off housing requirement figure of 80-100 dpa – but the Strategic Housing Market Assessment itself assessed the housing need taking into account economic growth trends at 173 dpa, and the full affordable housing need alone at a net 160 dpa" (paragraph 34 of the judgment). He identified two particular difficulties in the council's position. The first was this (at paragraph 34(i)):

> "… For an authority to decide not to accommodate additional workers drawn to its area by increased employment opportunities is clearly a policy on decision which affects adjacent authorities who would be expected to house those additional commuting workers, unless there was evidence (accepted by the inspector or other planning decision-maker) that in fact the increase in employment in the borough would not increase the overall accommodation needs. In the absence of such evidence, or a development plan or any form of agreement between the authorities to the effect that adjacent authorities agree to increase their housing accommodation accordingly, the decision-maker is entitled to allow for provision to house those additional workers. To decide not to do so on the basis that they will be accommodated in adjacent authorities is a policy on decision."

And the second difficulty (at paragraph 34(ii)) was this:

> "Similarly, the justification provided for keeping the true affordable housing requirements out of the account is inadequate. First, insofar as the Council relied upon adjacent authorities to provide affordable accommodation, that is a policy on decision for the same reasons as set out above. Second, as the SHMA itself properly confirms, the benefit-subsidised private rented sector is not affordable housing, which has a particular definition (paragraph 6.79 …). Indeed, insofar as unmet need could be taken up by the private sector, that is described in the SHMA itself as "a matter for policy intervention and is outside the scope of this report" (paragraph 6.64). It remains policy intervention even if the private sector market would accommodate those who would otherwise require affordable housing, without any

> positive policy decision by the Council that they should do so: it becomes policy on as soon as the Council takes a course of not providing sufficient affordable housing to satisfy the FOAN for that type of housing and allowing the private sector market to take up the shortfall."

28. In view of the council's reliance on other authorities to provide housing "deriving from employment need and from those who require affordable housing", the judge said that he understood why the inspector had "described the SHMA as possibly policy off when the HMA was looked at as a whole". He rejected the submission made on behalf of the council by its counsel, Mr Timothy Leader, "that, although the FOAN for housing had to be understood at local authority level, it had to be assessed at HMA level; so that what was important was whether it was policy off at that level" (paragraph 35). In making that submission Mr Leader had relied on the judgment of Stewart J. in *Satnam Millenium Ltd. v Warrington Borough Council* [2015] EWHC 370 (Admin), and in particular his observation (at paragraph 25(iii)) that a local planning authority "has to have *the clear understanding* of their area housing needs, but in *assessing* their needs, is required to prepare a SHMA which may cross boundaries". But as Hickinbottom J. pointed out, Stewart J.'s comments "were made in the context of a challenge to a local plan under section 113 of the [Planning and Compulsory Purchase Act 2004]". He went on to say this:

> "… Housing requirements in such a plan are, of course, policy on. [Stewart J.] was not looking at housing requirements in a development control context – as I am. In that context, paragraph 49 of the NPPF refers to relevant policies for the supply of housing not being considered up-to-date "if *the local planning authority* cannot demonstrate a five-year supply of deliverable housing sites" (emphasis added). In a development control context, a local planning authority could not realistically demonstrate such a thing on a HMA-wide basis, which would require consideration of both housing needs and supply stocks across the whole HMA. Paragraph 49 is focused on the authority demonstrating a five-year housing land supply on the basis of its own needs and housing land stocks."

He therefore concluded (at paragraph 36) that "the Inspector was right – and, certainly, entitled – to conclude that the SHMA figures for housing requirements for Oadby & Wigston, as confirmed by the 2012-based SNPP and supported by Mr Gardner, were policy on and thus not the appropriate figures to take for the housing requirement for the relevant five year period".

29. All of those conclusions seemed to the judge "clear and certain" (paragraph 37). He questioned the inspector's adoption of a figure of 147 dwellings per annum as the "indicative figure" for housing need. But he concluded that the inspector was "entitled to approach the issue of five-year housing land supply on the basis that the FOAN – and thus the relevant housing requirement – was no less than 147 dpa" (paragraph 43).

*Did the inspector err in his understanding and application of NPPF policy?*

30. Before us, Mr Leader argued that the judge's conclusions were incorrect and cannot be reconciled with the decision of Stewart J. in *Satnam Millennium Ltd.*. Different levels of need could not apply in plan-making and in the making of development control decisions. Using the local planning authority's area rather than the housing market area as the "correct

unit of analysis" when assessing the "full, objectively assessed needs" for housing was wrong. The inspector had confused demographic trends across the housing market area – including the fact that many jobs in Oadby and Wigston had traditionally been taken by people living in other areas – which are essentially "policy off" considerations, with "policy on" intervention to adjust them. He was also wrong to regard the council's treatment of the need for affordable housing as "policy on". Under the policy in paragraph 47 of the NPPF, as amplified in the PPG, the "full, objectively assessed needs" must be assessed at the level of the housing market area, taking account of "cross-border issues" such as commuting patterns, and then specified for the local planning authority's area in the light of the authority's understanding of the implications of the Strategic Housing Market Assessment for its area. In this case the assessment of housing needs for the borough of Oadby and Wigston in the Strategic Housing Market Assessment was based not on the application of policy, but on "technical planning judgments" about the way in which the need for housing would in fact be met, assuming a certain level of population growth. The notion that the Strategic Housing Market Assessment was in material respects "policy on" was misconceived. Mr Leader sought to draw support for these submissions from the first instance decisions in *Kings Lynn and West Norfolk Borough Council v Secretary of State for Communities and Local Government* [2015] EWHC 2464 (Admin) and *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2016] EWHC 968 (Admin).

31. Mr Gwion Lewis for the Secretary of State and Mr Taylor for Bloor Homes Ltd. submitted that the inspector was right, and certainly entitled in law, to approach the issues of housing need and supply in the way he did, that government policy in the NPPF and guidance in the PPG did not constrain him to a different approach, and that the conclusions he reached on those issues, as a matter of planning judgment, were legally impeccable conclusions, and not at odds with any relevant authority.

32. I cannot accept Mr Leader's argument. In my view the judge was right to reject the complaints made about the inspector's approach and conclusions. I see no error of law in the inspector's decision. In my view his understanding and application of the relevant policies in the NPPF was entirely lawful, and his exercise of planning judgment on the matters he had to decide under those policies unassailable in proceedings such as these.

33. This case is one of several to have come before the Planning Court – and this court too – in which criticism has been levelled at the Secretary of State and his inspectors for their interpretation and application of government policy in the NPPF, notably its policies for housing development (see, for example, the first instance decisions in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), and in two of the cases to which we have been taken in this appeal – *Kings Lynn and West Norfolk Borough Council* and *St Modwen Developments Ltd.*). These challenges usually invoke the Supreme Court's decision in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, where it considered the approach the court should adopt to the interpretation of planning policy (see the judgment of Lord Reed, in particular at paragraphs 17 to 19). Some of these challenges have succeeded. But most have not. This should come as no surprise to those familiar with the basic principles governing claims for judicial review and statutory applications seeking orders to quash planning decisions. As this appeal shows very well, the NPPF contains many broadly expressed statements of national policy, which, when they fall to be applied in the making of a development control decision, will require of the decision-maker an exercise of planning judgment in the particular circumstances of the case in hand.

34. The policy in paragraph 47 of the NPPF relates principally to the business of plan-making. The policy in paragraph 49 relates principally to applications for planning permission; it deals with the way in which "[housing] applications" should be considered. But it must of course be read in the light of the policy requirement in paragraph 47 for local planning authorities to plan for a continuous and deliverable five-year supply of housing land. The policies in paragraphs 157, 158 and 159 all relate to plan-making. The requirement, in paragraph 159, to prepare a Strategic Housing Market Assessment as part of the "evidence base" for a local plan corresponds to the policy in the first bullet point in paragraph 47, which requires local planning authorities 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 [the NPPF] …" (see the judgment of Dove J. in *Kings Lynn and West Norfolk Borough Council*, at paragraph 35). The "housing market area" is not necessarily co-extensive with a single local planning authority's administrative area – as is plain from the first bullet point in paragraph 159, which envisages co-operation between authorities "where housing market areas cross administrative boundaries".

35. It is important to keep in mind the essential differences between the distinct activities of development plan-making on the one hand and development control decision-making on the other, and between the policies of the NPPF relating respectively to those two activities. We are concerned here with a development control decision. The inspector was not conducting an examination of a local plan. He was making a decision, on appeal, on an application for planning permission for housing development. How did the policies in those paragraphs of the NPPF bear on that exercise?

36. The Court of Appeal has already considered this question, though in different circumstances, in *Hunston Properties Ltd.*. I see no reason to doubt the approach indicated there. The policy for plan-making in paragraph 47 of the NPPF explicitly requires that in the preparation of local plans the "full, objectively assessed needs for market and affordable housing in the housing market area" must be met, in so far as this can be done consistently with the policies of the NPPF as a whole (my emphasis). However, under the policy in paragraph 49, which relates specifically to development control decision-making, the effect of a local planning authority being unable to "demonstrate a five-year supply of deliverable housing sites" is that "[relevant] policies for the supply of housing" – which means relevant policies for the supply of housing in the development plan for that local planning authority's area – will not be considered up-to-date, with the potentially significant consequences for "decision-taking" under the policy in paragraph 14 of the NPPF (see paragraphs 42 to 48 of the judgment of the court in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2016] EWCA Civ 168). Paragraph 49 does not prescribe a particular method, applicable in every case and in all circumstances, for the comparison of the five-year housing requirement and housing supply in the making of a decision on a planning application or appeal. And one must not read into the policy in that paragraph an approach that prevents a realistic and robust comparison of housing need and supply for the purposes of making a development control decision.

37. The question here is whether in circumstances of the kind that arose in this case, where the relevant housing market area extended beyond the council's administrative area, it was permissible, in principle, for the inspector to identify the relevant housing requirements at the level he did, on the basis of the identifiable, objectively assessed needs for market and

affordable housing within that administrative area – having regard, of course, to all the material before him, including the Strategic Housing Market Assessment.

38. It is argued on behalf of the Secretary of State that the answer to that question is unequivocally and inevitably "Yes". I agree. It is also submitted that a decision-maker in a case such as this is not necessarily obliged to accept an apportionment – or distribution – of housing need "ascribed" in a Strategic Housing Market Assessment between different administrative areas in the housing market area. Again, I agree. A decision-maker in these circumstances may of course draw upon a Strategic Housing Market Assessment in seeking to fix the appropriate level of housing need against which to set the supply of deliverable housing sites. But he must not adopt a housing requirement below the full, unconstrained housing needs in the relevant area. He should not, for example, adopt a level of need for market or affordable housing that is, in truth, the product of a conscious redistribution of need from one local planning authority's area to another where this is effectively – in the inelegant jargon – an untested "policy on" decision, liable to be revisited and changed in a subsequent local plan process. Otherwise, he will likely fall into the kind of error that undid the inspector's decision in *Hunston Properties Ltd.* – where the inspector made the mistake of using "a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure" (paragraph 26 of Sir David Keene's judgment).

39. Here, as the inspector recognized (in paragraphs 12, 13 and 14 of his decision letter), the council's core strategy had not been prepared in accordance with the requirements of NPPF policy, and was not a reliable basis for decision-making. In these circumstances, as he also recognized, it was up to him, as decision-maker in the appeal, to evaluate for himself the full, unconstrained requirement for housing against which to test the council's ability to "demonstrate a five-year supply of deliverable housing sites" under the policy in paragraph 49 of the NPPF.

40. In my view the inspector did this in a legally impeccable way. I agree with Hickinbottom J.'s conclusion that he was entitled not to rely upon the distribution of housing need indicated in the Strategic Housing Market Assessment. He was not obliged to adopt without question a deliberate apportionment of housing needs between administrative areas that had not yet been the subject of any independent scrutiny in a local plan process, or any formal and final agreement between the authorities concerned. Nor did he have to accept the assertions made by the council about the means by which the need for affordable housing would be met. On these two points I would endorse the relevant conclusions of Hickinbottom J. in paragraphs 34 and 35 of his judgment.

41. There may be many good reasons for an inspector in a case such as this to hesitate before accepting an apportionment of housing needs between two or more local planning authorities' areas in a Strategic Housing Market Assessment. Considerations relevant to such a distribution of need may include, Mr Taylor submitted, the implications for transport infrastructure, the sustainability of a significant proportion of the population in one area commuting to and from work in another, the provision of affordable housing where it is needed, and various demographic, economic and social consequences of migration within the housing market area. Such considerations will influence planning policy, and will usually require formal co-operation between local planning authorities – as is now statutorily required under section 33A of the 2004 Act – as well as discussion in the statutory process of plan-making. The issues to which they give rise are inherently unsuitable for resolution at an inquiry into an appeal under section 78 of the 1990 Act.

42. Of course, as Mr Taylor conceded, there will be cases in which an appeal inspector finds he can safely rely on an apportionment of housing needs in a Strategic Housing Market Assessment. I would not want to define the circumstances in which an apportionment of need might be a secure basis for determining whether the local planning authority has succeeded in demonstrating a five-year supply of deliverable housing under the policy in paragraph 49. And I see no need for us to attempt that. It is enough to be satisfied – as I believe we can be – that in the particular circumstances of this case the inspector could reasonably conclude, for the reasons he gave, that the apportionment of need relied upon by the council was not a sure foundation upon which to assess the relevant housing needs, including the need for affordable housing, in the appeal before him.

43. Mr Taylor said the council had failed to provide the inspector with evidence – or at least convincing evidence – on some of the important questions arising from the apportionment of housing needs in the Strategic Housing Market Assessment. That seems to be so. But it is not the court's role to engage in the planning merits. They were for the inspector.

44. He was obviously conscious of the "interactions" between administrative areas in the housing market area, and understood their relevance to housing need and the operation of the local housing market in the PUA (paragraph 18 of the decision letter). But there was, as he put it, "no formally constituted working arrangement between the authorities for strategic planning purposes in terms of some sort of standing joint committee" (paragraph 19), with "the force of a formally constituted liaison or cooperation as outlined at paragraph 157 of NPPF" (paragraph 21). There were "significant questions relating to the provision for affordable housing" (paragraph 22). Notably, as he emphasized, the "OAN range for all housing for Oadby & Wigston" was "below the notional identified need for affordable housing … let alone any need for open market housing" (paragraph 23). And there was no identified "mechanism for implementing and monitoring the success" of the assumed "cross-boundary provision" and "economic growth being accommodated by commuting for work purposes within the HMA" (paragraph 24). He was unconvinced by the reliance placed on the private rented sector to absorb some of the need for affordable housing (paragraph 25). And he regarded the assumption as to the share of this need being met in that way – as the Strategic Housing Market Assessment itself acknowledged – as "a "policy on" decision" (paragraph 26).

45. All in all, notwithstanding the assumptions and conclusions in the Strategic Housing Market Assessment, the inspector was left with "a degree of uncertainty over what is the actual FOAN, including the provision for affordable housing". He recognized the prospect of "a significant lacuna in meeting housing need" – contrary to policy in the NPPF; and he saw the force of the argument put to him in evidence and submissions at the inquiry that "the FOAN for Oadby & Wigston could be considerably more than the 90 per annum which is the basis for [core strategy] Policy CS1, and the maximum of 100 given in Table 84 of the SHMA" (paragraph 27). In his view "until the SHMA has been tested through a local plan examination the degree of uncertainty is so great that it would be unreasonable to accept that the figures given in the SHMA are in accordance with the expectations of NPPF and the methodology in PPG" (paragraph 28). He was concerned that "the housing need figure for Oadby & Wigston could be a constrained, "policy on", figure in terms of at least the distribution of growth across the HMA and between the various authorities" (paragraph 29). In the absence of "any mechanism to formalise a reliance on cross-boundary provision" the conclusions of the Strategic Housing Market Assessment, "not least [those] relating to affordable housing provision", had to be seen as "an unsupported or untested "policy on"

position", which was not in line with the approach indicated by the Court of Appeal in *Hunston Properties Ltd.*. The "initial distribution of development within the PUA" had been undertaken before the advent of current government policy in the NPPF. Thus, he concluded, "the overall figure for the HMA [in the Strategic Housing Market Assessment] may be "policy off", but the distribution of the identified need between the various authorities would be – at least in part – a "policy on" position", and had "not been tested at a NPPF compliant local plan examination" (paragraph 30).

46. Those conclusions were clearly open to the inspector in the exercise of his planning judgment under the policies in the NPPF. I can see no legal flaw in them. They do not disclose any misinterpretation or misapplication of NPPF policy or of the guidance in the PPG.

47. Faced with making his own assessment of the appropriate level of housing need to inform the conclusion he had to draw under the policy in paragraph 49 of the NPPF, and doing the best he could in the light of the evidence and submissions he had heard, the inspector adopted an approximate and "indicative" figure of 147 dwellings per annum (paragraphs 33 and 34 of the decision letter), making no "specific allowance" for affordable housing (paragraph 35). Again, his conclusions embody the exercise of his own planning judgment, and I see no reason to interfere with them. He might simply have adopted a rounded and possibly conservative number to represent the global need for market and affordable housing in the council's area, such as the figure of 150 dwellings per annum, which in closing submissions for Bloor Homes Ltd. was said to be well below the actual level of need, or a higher figure closer to the 173 dwellings per annum referred to in the Strategic Housing Market Assessment. I accept that. But as Hickinbottom J. concluded, I do not think the court could conceivably regard the inspector's figure of 147 dwellings per annum as irrational, or otherwise unlawful.

48. Taken as a whole, therefore, the inspector's approach was in my view consistent with the decision of this court in *Hunston Properties Ltd.*, and lawful.

49. That conclusion is not shaken by the first instance decision in *Satnam Millennium Ltd.*. In that case the claimant contended that, in preparing its core strategy, the local planning authority had "failed to identify the OAN for housing, including affordable housing, whether in Warrington or the housing market area" (paragraph 12 of Stewart J.'s judgment). Stewart J. sought (in paragraph 25) to extract from the relevant statutory provisions and national policy and guidance the principles applying to this aspect of plan-making. He referred to paragraphs 47 and 159 of the NPPF:

> "…
>
> (ii) Paragraph 47 NPPF requires the Local Plan to meet the full OAN in the HMA. That much is clear.
>
> (iii) Paragraph 159 NPPF is helpful in clarifying this. It is to be noted that it deals particularly with housing. It begins by requiring LPAs to have a clear understanding of housing needs "in their area". It then proceeds to require LPAs to prepare a SHMA to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. In other words, the LPA has to have *the clear understanding* of

their area housing needs, but in *assessing* these needs, is required to prepare an SHMA which may cross boundaries.

…".

50. Stewart J. was not considering the policy in paragraph 49, or the way in which that policy is to be applied in circumstances such as those with which we are concerned here. His decision is not authority for the proposition that Mr Leader seeks to extract from it. It says nothing about the approach a decision-maker should take in a case where housing needs fall to be assessed in the absence of a local plan complying with policy for plan-making in the NPPF. It does not touch the reasoning in this court's decision in *Hunston Properties Ltd.*. And in my view it lends no force to the argument that the approach taken by the inspector in this case was bad in law.

51. When he granted permission to appeal in this case Lewison L.J. accepted it was arguable that the "full, objectively assessed needs" for housing ought to be the same in whichever context they were considered. If this were so, there was – he said – a "potential conflict" between Hickinbottom J.'s decision in this case and Stewart J.'s in *Satnam Millennium Ltd.*. Mr Lewis, on behalf of the Secretary of State, had the answer to this concern. As he submitted, there is no conflict between the two decisions; the issues and argument were quite different. There is, logically, no inconsistency between, on the one hand, the "full, objectively assessed needs" for housing in a housing market area wider than a single administrative area, when determined under the policies for plan-making in paragraphs 47 and 159 of the NPPF, and, on the other, the housing requirement for a local planning authority's own area within that housing market area, when determined for the purposes of the policy for development control in paragraph 49 in the manner indicated by this court in *Hunston Properties Ltd.*. They do not have to be the same. NPPF policy allows them to be different.

52. As I have said, Mr Leader relied too on the judgment of Ouseley J. in *St Modwen Developments Ltd.*. That case was distinctly different from this on its facts. The two local planning authorities concerned – Hull City Council and East Riding of Yorkshire Council – had in "[their] Joint Planning Statement of April 2014, for submission to the ERYC local plan examination, agreed they had a strong track record of working together" (paragraph 72 of the judgment). Ouseley J. agreed with the inspector "that the NPPF does not require housing needs to be assessed always and only by reference to the area of the development control authority" (paragraph 74) and observed that the Court of Appeal's decision in *Hunston Properties Ltd.* did not require him to reach a different conclusion (paragraph 75). He referred to paragraph 35 of Hickinbottom J.'s judgment in this case, in particular Hickinbottom J.'s comment to the effect – as he, Ouseley J., put it – that it would be an "impossible task" for a local planning authority making a development control decision "to assess the whole housing market area where it crossed administrative boundaries" (paragraph 76). He said he could not agree with this "as a matter of interpretation of [paragraph 159 of] the NPPF …" (paragraph 77). In the case before him there had been, he said, "no issue but that the apportionment [of need] reflected the agreed views of both Councils"; that "apportioned figure was taken by ERYC to be its objectively assessed figure, and was accepted as such by the Inspector" (paragraph 78).

53. In that case the inspector and Secretary of State were able to accept, as the appropriate basis for testing the sufficiency of the housing land supply, the agreed apportionment of housing needs between the two administrative areas in the housing market area – given the

authorities' long-standing and continuing co-operation in plan preparation. Ouseley J. saw nothing unlawful in that conclusion. He said (at paragraph 79):

> "… [Once] the relevant area for the assessment of housing needs, on the true interpretation of the NPPF, may cover more than the area of one district council, a basis for apportionment of need has to be found. That is where the co-operation and agreement of the local authorities comes in. It provides, on whatever basis it is done, for the full objectively assessed needs of each area. …"

and (at paragraph 81):

> "… Hull CC and ERYC had agreed that Hull CC should stem out-migration into ERY, in the interests of both, and so the past out-migration levels had not been carried forward into the future needs assessment of ERYC. If that is so, it would mean that no objectionable restraint policy had been applied anyway, no needs of ERYC were being left unmet. There is nothing in the parts of the PPG which deal with such issues which means that past migration patterns cannot be adjusted in the assessment of future need, responding to the provision of housing and other developments, without offending [paragraph 49 of the] NPPF. …".

54. In this case, however, for the detailed and cogent reasons he gave, the inspector was unable to accept the distribution of need in the Strategic Housing Market Assessment. Hickinbottom J. upheld the inspector's approach and conclusions as lawful, and in my view he was clearly right to do so. Taken as a whole, Ouseley J.'s reasoning in *St Modwen Developments Ltd.* does not cast any legal doubt on the inspector's decision here. His remarks on what Hickinbottom J. said in paragraph 35 of his judgment were not aimed at the judge's essential conclusions on the inspector's analysis – and in my view they do not upset those conclusions.

55. Mr Leader also sought to rely on the first instance decision in *Kings Lynn and West Norfolk Borough Council*. But I do not see anything in Dove J.'s judgment in that case to undermine Hickinbottom J.'s decision in this. Again, the facts and issues were different. The first issue for the court, as Dove J. described it (in paragraph 17 of his judgment), was whether the appeal inspector, in "accepting … adjustments to the FOAN for vacancies and second homes, … had unlawfully misapplied [paragraph 47 of the NPPF], in that this adjustment was contended to be a policy adjustment which was illegitimate when identifying the FOAN for the purpose of calculating the five-year housing land supply". Dove J. concluded that the inspector had not misapplied the policy. The inspector had been "entitled to form the view as a matter of judgment based on the empirical material that an allowance should be made …" (paragraph 36 of the judgment). In discussing that question Dove J. commented on paragraph 34(ii) of Hickinbottom J.'s judgment in this case. He disagreed with any suggestion "that in determining the FOAN, the total need for affordable housing must be met in full by its inclusion in the FOAN …" (paragraph 34). But he went on to say this (also in paragraph 34):

> "… As Hickinbottom [J.] found at [paragraph] 42 of that judgment, what the Inspector did in that case was to exercise his planning judgment, firstly, to conclude that the FOAN was higher than the council's figure and secondly, (again deploying planning judgment) to arrive pragmatically at a figure for the FOAN in order for it to be used to assess the five-year housing land supply. The council's figure was regarded by the Inspector in that case as being short because it failed to properly

> take account of factors which should have been included in the FOAN, including considering affordable housing need. Understood in this way, references to "policy on" and "policy off" become a red herring. The appropriate figure was for the Inspector's judgment to determine taking account of all the matters involved in finding the FOAN."

and (in paragraph 35):

> "… When a planning authority has undertaken or commissioned a SHMA, that will obviously be an important piece of evidence, but it is not in and of itself conclusive. It will be debated and tested at the local plan examination or (as in the present case) in appeals within the development control process."

As it seems to me, those observations of Dove J. sit perfectly well with Hickinbottom J.'s essential reasoning in this case.

56. In short, I do not think Mr Leader's argument gains strength from any of those first instance decisions – nor, indeed, from the decisions of this court in *Hunston Properties Ltd.* and *Gallagher Estates Ltd.*. And in my view, for the reasons I have given, it must be rejected.

*Conclusion*

57. I would therefore dismiss this appeal.

**Lord Justice Tomlinson**

58. I agree.

**Lady Justice Black**

59. I also agree.