Case No: C1/2014/1702

Neutral Citation Number: [2014] EWCA Civ 1610

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISON (PLANNING COURT)

MR JUSTICE HICKINBOTTOM

CO/17668/2013

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Wednesday 17th December 2014

Before :

LORD JUSTICE LAWS

LORD JUSTICE PATTEN

and

LORD JUSTICE FLOYD

- -

Between :

Solihull Metropolitan Borough Council **Appella**

- and -

(1) Gallagher Estates Limited **Respond**

(2) Lioncourt Homes

- -

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

- -

Mr Christopher Katkowski QC and Ms Rowena Meager (instructed by **Solihull MBC Legal Services**) for the **Appellant**

Mr Christopher Lockhart-Mummery QC and Mr Zack Simons (instructed by **Pinsent Masons LLP**) for the **Respondents**

Hearing dates : 25 November 2014

- -

Judgment

LORD JUSTICE LAWS:

INTRODUCTION

1.
Before the court are an appeal and a cross-appeal, both with permission granted by Sullivan LJ on 9 July 2014 and 2 October 2014 respectively, against the order of Hickinbottom J of 15 May 2014 following his judgment delivered on 30 April 2014 in the Planning Court at Birmingham. The two claimant companies in the case, now respondents, applied to the High Court under s.113(3) of the Planning and Compulsory Purchase Act 2004 to challenge the adoption on 3 December 2013 by the Solihull Metropolitan Borough Council, now the appellant, of the Solihull Local Plan (the SLP). The respondents have interests in two sites in the Tidbury Green area of Solihull where they propose to undertake housing development. But the SLP placed both sites in the Green Belt. If that state of affairs persists any application for planning permission for housing will, as the judge observed at paragraph 1 of his judgment, almost inevitably now be refused.

2.
S.113(3) of the 2004 Act, which I need not set out, allows such a challenge to be brought on conventional public law grounds. The judge upheld the claim, which was brought on three grounds, and ordered that those parts of the SLP which he found to be defective should be treated as not adopted and be remitted to the Planning Inspectorate for re-examination by a different inspector. The appellant authority sought and obtained permission to appeal in relation to the judge's conclusions on Grounds 1 and 3, and I will refer to the grounds of appeal in the same way. The issue on Ground 1, to borrow the language of Sullivan LJ granting permission, is whether (as the judge found) paragraph 47 of the National Planning Policy Framework (the NPPF) effected a "radical policy change in respect of housing provision" (judgment paragraph 98) so as to render unlawful the Inspector's treatment of housing provision in his Report following the examination-in-public (the EIP) of the SLP. The issue on Ground 3 is whether the factors identified by the Inspector at paragraph 137 of his Report were not as a matter of law (as the judge found they were not) capable of constituting "exceptional circumstances" for the purpose of paragraph 83 of the NPPF. I will of course cite the relevant parts of the NPPF and other germane legal materials.

3.
The respondent developers have permission to appeal in relation to the relief granted by the judge. They say the judge should have quashed those sections of the SLP which he found to be unlawful, rather than remit them for re-examination by another inspector. In the event there was something close to consensus between the parties in relation to the cross-appeal, to the effect that the right order (upon the premise that the appellant's appeal on Grounds 1 and 3 failed) was to remit the defective parts of the SLP not to the Inspectorate, but to the Council.

4.
The SLP is what under the Act of 2004 is called a "development plan document". The adoption of such a document is constrained by a series of statutory requirements described by the judge at paragraphs 10 – 19 of his judgment. He summarised the position at paragraph 20 as follows:

"In summary, these provisions mean that each development plan document is subject to an examination in public by an independent inspector appointed by the Secretary of State, who determines (i) whether the plan complies with various procedural requirements, (ii) whether the plan is 'sound'…, and (iii) whether it is reasonable to conclude that the local planning authority has complied with any duty to cooperate. Having done so, there are three courses open to the inspector:

i) If he is satisfied that the plan meets the procedural and ‘soundness’ requirements, he must recommend adoption of the plan and the authority may adopt the plan.

ii) If he is not satisfied as to these two matters, and is not satisfied that the authority has complied with its duty to cooperate, he must recommend non-adoption and the authority must not adopt the plan.

iii) If he is not satisfied as to these two matters, but is satisfied that the authority has complied with its duty to cooperate, he must recommend non-adoption; but, on the authority’s request, he must also recommend modifications to the plan that would make it satisfy those two requirements. The authority may then adopt the plan with those modifications.”

5.
It is convenient at once to set out the material part of NPPF paragraph 47:

“To boost significantly the supply of housing, local planning authorities should:

•
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;

•
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…”

I should also refer to NPPF paragraph 14, which provides amongst other things that in furtherance of the presumption in favour of sustainable development –

“Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:

•
any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

•
specific policies in this Framework indicate development should be restricted…”

I shall refer to other materials in addressing the arguments, including PPS3 (the earlier Planning Policy Statement on Housing) which was replaced by Part 6 of the NPPF. Amongst other things PPS3 referred (paragraph 33) to “Strategic Housing Market Assessments” (SHMAs) and (paragraph 34) “Regional Spatial Strategies” (RSSs). As I shall show their use survived in the NPPF regime.

THE APPELLANT’S CASE ON GROUND 1 SUMMARISED

6.
I may describe the appellant’s argument on Ground 1 in the very broadest terms by adapting the summary at paragraph 36 of the skeleton argument for the respondents prepared by Mr Lockhart-Mummery QC. This approach is, I apprehend, loyal to the submissions made by Mr Katkowski QC for the appellants:

i)
The judge was wrong to conclude that in respect of housing provision NPPF effected a “radical change” (a phrase used by the judge below at paragraph 98 of his judgment) from the previous policy articulated in PPS3.

ii)
The judge was also wrong to hold that NPPF paragraph 47 required a two-step approach: first, an objective assessment of full housing needs, and secondly an assessment as to whether other policies dictate or justify constraint.

iii)
The judge should have held that the process by which the Inspector came to recommend adoption of the SLP satisfied the requirements of NPPF paragraph 47.

iv)
The judge should have held that the Inspector was entitled to conclude (as a matter of planning judgment) that the objective assessment of needs (OAN) was “embedded” in the earlier work of what is called the Phase II RSS Review Panel.

If these four points were resolved as the appellant contends, it would follow that the respondent developers’ challenge based on Ground 1 should have failed. The first two of the four points run together: the “radical change”, which the judge found was effected by the NPPF, consisted essentially in the requirement of the two-step approach which the appellant authority seeks to repudiate. I shall therefore consider them together. The fourth point, which is derived from paragraph 33 of the appellant’s skeleton argument prepared by Mr Katkowski QC, became rather more generalised in the course of argument: Mr Katkowski’s more compendious submission was that on a careful reading of the Inspector’s Report, it can be seen that he made an OAN. I shall deal with that.

GROUND 1: “RADICAL CHANGE” AND THE TWO-STEP APPROACH

7.
I turn to the first two points. I have set out NPPF paragraph 47. PPS3, the earlier policy, included the following advice (written, of course, at a time when planning strategy was considered at a regional, as well as local, level). Under the heading “Assessing an appropriate level of housing”:

“32. The level of housing provision should be determined taking a strategic, evidence-based approach that takes into account relevant local, sub-regional, regional and national policies and strategies achieved through widespread collaboration with stakeholders.

33. In determining the local, sub-regional and regional level of housing provision, Local Planning Authorities and Regional Planning Bodies, working together, should take into account:

•
Local and sub-regional evidence of need and demand, set out in Strategic Housing Market Assessments [‘SHMAs’] and other relevant market information such as long term house prices…

34. Regional Spatial Strategies [RSS] should set out the level of overall housing provision for the region [expressed as net additional dwellings (and gross if appropriate)], broadly illustrated in a housing delivery trajectory, for a sufficient period to enable Local Planning Authorities to plan for housing over a period of at least 15 years. This should be distributed amongst constituent housing market and Local Planning Authority areas.”

8.
The judge said this at paragraph 31:

“31 Thus, the NPPF departed from the previous national guidance in two important ways.

i) In line with the Localism Act 2011, the NPPF abandoned the regional, top down, approach to housing strategy in favour of localism with a duty to cooperate with neighbouring authorities. The burden of developing housing strategy now falls on local planning authorities.

ii) Whilst clearly subject to a requirement that both plan-making and decision-taking must be consistent with other NPPF policies – including those designed to protect the environment – the NPPF put considerable new emphasis on the policy imperative of increasing the supply of housing. As reflected in the first words of the Ministerial Foreword…, in relation to dwellings, there was a policy objective to achieve a significant increase in supply. Therefore, the NPPF imposed the policy goal on a local authority of meeting its full, objectively assessed needs for market and affordable housing, unless and only to the extent that other policies were inconsistent with that goal. Thus, paragraph 47 makes full objectively assessed housing needs, not just a material consideration, but a consideration of particular standing.”

Hunston Properties Ltd

9.
The proper interpretation of NPPF paragraph 47 was earlier considered in Hunston Properties Ltd [EWCA] Civ 1610, discussed by Hickinbottom J in the present case at paragraphs 85 – 91 of his judgment. At paragraph 25 of Hunston Sir David Keene, with whom Ryder and Maurice Kay LJJ agreed, said this:

“The words in paragraph 47(1), ‘as far as is consistent with the policies set out in this Framework’ remind one that the Framework is to be read as a whole, but their specific role in that sub-paragraph seems to me to be related to the approach to be adopted in producing the Local Plan. If one looks at what is said in that sub-paragraph, it is advising local planning authorities:

‘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.’

That qualification contained in the last clause quoted is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs. The needs assessment, objectively arrived at, is not affected in advance of the production of the Local Plan, which will then set the requirement figure.”

10.
Hunston arose in the context of a planning application rather than a local development plan. But NPPF paragraph 47 is of course dealing with the production of Local Plans. Sir David Keene’s observations are not obiter, and in my judgment offer a construction of paragraph 47 which cannot be distinguished for the purposes of the present case. The passage I have cited is binding authority for the proposition that the making of the OAN is an exercise which is prior to, and separate from, the application to that assessment of the impact of other relevant NPPF policies: the phrase “as far as is consistent with the policy set out in this Framework” “is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs”. This conclusion is undiminished by references in paragraph 26 to a “constrained housing requirement figure” and “rounded assessment”.

This, moreover, is exactly how Hickinbottom J understood NPPF paragraph 47 – as with respect he was bound to do. He said this at paragraph 94 of his judgment:

"… [It] is clear that paragraph 47 of the NPPF requires full housing needs to be assessed in some way. It is insufficient, for NPPF purposes, for all material considerations (including need, demand and other relevant policies) simply to be weighed together. Nor is it sufficient simply to determine the maximum housing supply available, and constrain housing provision targets to that figure. Paragraph 47 requires full housing needs to be objectively assessed, and then a distinct assessment made as to whether (and, if so, to what extent) other policies dictate or justify constraint. Here, numbers matter; because the larger the need, the more pressure will or might be applied to infringe [sic: I apprehend 'impinge' is meant] on other inconsistent policies. The balancing exercise required by paragraph 47 cannot be performed without being informed by the actual full housing need."

Arguments and Conclusion

11.
It was and is Mr Katkowski's submission that paragraph 47 is to be construed in light of the fact that earlier evidence might properly be drawn upon for the purpose of the assessment which the paragraph requires. So far as it goes, that is correct. NPPF paragraph 218 provides:

"Where it would be appropriate and assist the process of preparing or amending Local Plans, regional strategy policies can be reflected in Local Plans by undertaking a partial review focusing on the specific issues involved. Local planning authorities may also continue to draw on evidence that informed the preparation of regional strategies to support Local Plan policies, supplemented as needed by up-to-date, robust local evidence."

12.
Mr Katkowski prayed this in aid in support of his overall submission that NPPF by no means effected a radical change in the methodology of assessing housing need for the purpose of a Local Plan. He placed much emphasis on the fact that, just as with the NPPF, there were onerous requirements in previous policies. Thus he referred to PPS1, showing that "sustainable development" was the core principle: PPS1 paragraph 27(iv) required that sufficient land to meet expected needs for housing should be brought forward. Then PPS3 (specifically concerned with housing) paragraph 9 articulated a key policy as being to ensure that everyone can live in a decent home where they want to live; paragraph 11 required a robust evidence base for housing need and demand. Mr Katkowski also drew attention to paragraphs 32, 33, 52, 54, and Annex 2 to PPS3. I have already set out part of this material. The key passage is perhaps paragraph 32:

"The level of housing provision should be determined taking a strategic, evidence-based approach that takes into account relevant local, sub-regional, regional and national policies and strategies…"

Mr Katkowski also drew our attention to PPS12 (Local Spatial Planning), which refers at paragraph 2.4 to the availability of the necessary land.

13.
In summary Mr Katkowski's argument was that while NPPF is expressed in much crisper language, the approach to the ascertainment of housing need is essentially the same: need has to be considered along with other factors and in particular the impact of other policies, such as those relating to the Green Belt. There was no "radical change", and no mandatory two-step approach.

14.

I accept that there are aspects of the NPPF which reflect earlier planning policy. But there are also significant changes. They include the requirement in paragraph 47 to "boost" housing supply "significantly", the formulation in paragraph 47 "to ensure that their Local Plan meets the full, objectively assessed needs…" (my emphasis), and the treatment of "soundness" in NPPF paragraph 182, which I need not read. I do not accept that Mr Katkowski's comparison of the old policy with the new advances his case on the interpretation of the NPPF.

15.
I should next set out the whole of paragraphs 96 – 98 of the judgment below:

"96. Mr Dove submitted that paragraph 218 of the NPPF encouraged – or at least allowed – the use of regional strategy policies and evidence that informed the preparation of regional strategy in the preparation of Local Plans. It was therefore open to the Inspector to take the policy on figure derived from the WM [sc. West Midlands] RSS Phase 2 Revision process, into which relevant demographic and other housing need evidence had gone, together with the relevant policy considerations, and which had been tested at an examination in public; and then see whether any more recent housing need evidence (e.g. later projections and SHMAs), or change in policy, undermined the Panel's figure. That there had been no material alteration in circumstances was a matter for the planning judgment of the Inspector. The conclusion he reached had a clear evidential foundation, and was unimpeachable in law.

97. However, that fails to acknowledge the major policy changes in relation to housing supply brought into play by the NPPF. As I have emphasised, in terms of housing strategy, unlike its predecessor (which required a balancing exercise involving all material considerations, including need, demand and relevant policy factors), the NPPF requires plan-makers to focus on full objectively assessed need for housing, and to meet that need unless (and only to the extent that) other policy factors within the NPPF dictate otherwise. That, too, requires a balancing exercise – to see whether other policy factors significantly and demonstrably outweigh the benefits of such housing provision – but that is a very different exercise from that required pre-NPPF. The change of emphasis in the NPPF clearly intended that paragraph 47 should, on occasions, yield different results from earlier policy scheme; and it is clear that it may do so.

98. Where housing data survive from an earlier regional strategy exercise, they can of course be used in the exercise of making a local plan now – paragraph 218 of the NPPF makes that clear – but where, as in this case, the plan-maker uses a policy on figure from an earlier regional strategy, even as a starting point, he can only do so with extreme caution – because of the radical policy change in respect of housing provision effected by the NPPF. In this case, I accept that it was open to the Inspector to decide that the urban renaissance policy continued to be potent, and even (possibly) that the evidence of housing need had not significantly changed since the WM RSS Phase 2 Revision Draft target was set – those were matters of planning judgment, for him. However, in my judgment, in his approach, he failed to acknowledge the new, NPPF world, with its greater policy emphasis on housing provision; and its approach to start with full objectively assessed housing need and then proceed to determine whether other NPPF policies require that, in a particular area, less than the housing needed be provided. The WM RSS Phase 2 Revision Panel did not, of course, adopt that approach. Nor did the guidance provided by the Secretary of State on the revocation of regional strategies in 2010… take the new policy into account. Both were pre-March 2012, when the NPPF was published."

16.

That reasoning seems to me to be entirely correct. I think it is supported not only by the language of paragraph 47 but also by the terms of NPPF paragraph 14 which I have read. It is not undermined, notwithstanding Mr Katkowski's submission to the contrary, by the terms of the second indent to the second bullet point in that paragraph. It reflects the construction of paragraph 47 given by this court in Hunston, which bound Hickinbottom J and binds us. The NPPF indeed effected a radical change. It consisted in the two-step approach which paragraph 47 enjoined. The previous policy's methodology was essentially the striking of a balance. By contrast paragraph 47 required the OAN to be made first, and to be given effect in the Local Plan save only to the extent that that would be inconsistent with other NPPF policies. Mr Katkowski in his skeleton argument characterised this result as mechanistic. I cannot see why it should be so described. The two-step approach is by no means barren or technical. It means that housing need is clearly and cleanly ascertained. And as the judge said at paragraph 94, "[h]ere, numbers matter; because the larger the need, the more pressure will or might be applied to [impinge] on other inconsistent policies".

GROUND 1: DID THE INSPECTOR FULFIL THE REQUIREMENTS OF NPPF PARAGRAPH 47?

17.
Here I address points 3 and 4 of the four propositions I set out at paragraph 6 as a summary of Mr Katkowski's argument. He submitted that an OAN is in fact to be found in the Inspector's Report, though it is not spelt out and expressed as such. In the court below Mr Dove QC (as he then was) on the appellant's behalf conceded that no OAN is identified in the Report: see paragraphs 70 and 83(iii) of the judgment. Paragraph 99 (to which I will return) expresses the concession more baldly: "Mr Dove conceded – as he had to do – that neither the SLP nor the Inspector provided any full and objective assessment of housing need". But Mr Katkowski sought to qualify Mr Dove's concessions. He accepted that nowhere in the Report does the inspector expressly indicate a figure for OAN; however he submitted that it is to be found there if, as it were, the reader looks hard enough. This is close to Mr Dove's counterblast to his own concession in the court below, as recorded by the judge at paragraph 70:

"…but, he submitted, it was not necessary for a plan to identify such a figure and, on a proper analysis of the Inspector's Report, the substantive requirements of the NPPF (including those of paragraphs 47 and 159) were satisfied in this case."

18.
Mr Katkowski's argument that NPPF paragraph 47 is in fact satisfied by the Inspector's Report is predicated upon his construction of that paragraph. As I understood him he accepted without cavil that the Inspector did not undertake the two-step approach which, in agreement with the judge, I have found to be mandatory. Accordingly his submission that an OAN is to be found in the Report cannot carry the appeal if my Lords agree with my conclusions on the construction issue. But in deference to the argument I will address the point, albeit shortly.

19.
Mr Katkowski said the Inspector took account of assessments of housing needs which were before him, and referred to paragraphs 10, 24, 25 and 26 of the Report. These paragraphs variously refer to the WM RSS Phase 2 Revision, the 2009 Solihull SHMA and other materials. These are also referred to in paragraphs 51 – 64, the central passage of the Report for present purposes: it is headed "Overall level of housing provision", and Mr Katkowski of course paid it close attention. None of these documents arguably constitutes or includes an OAN. The RSS review figure, which plainly feeds into the Inspector's conclusion, was expressly not an assessment of OAN. The Council made that very clear

in submissions to the Inspector in March 2013: I will not set them out. (As I have foreshadowed, Mr Katkowski did not emphasise the specific submission advanced in his skeleton argument that the OAN was “embedded” in the RSS, and I need not address it distinctly.) As for the SHMA, it did not purport to assess OAN, as the Council acknowledged in a supplementary statement to the Inspector of 18 January 2013:

“The SHMA does not attempt to model new-build housing need as it is set in the context of the requirements of the emerging RSS.”

See also paragraph 45 of the judgment.

20.
I should refer also to the Department for Communities and Local Government interim projections (published in April 2013), another item of evidence having to do with housing need, and referred to in some of the passages in the Report to which Mr Katkowski drew attention. However this only gave figures for 2011-2021, whereas the SLP period was 2006-2028. And again it was the Council’s own position that the DCLG projections could not and did not purport to model housing need: see also the judge’s discussion at paragraph 37(i) of the judgment.

21.
In paragraphs 105-109 the Inspector dealt with affordable housing need, and at paragraph 108 gives what appears to be a figure, or at least a range, for the full need for such housing. Mr Katkowski sought to make something of this; but of course the need for affordable housing cannot constitute the whole picture.

22.
I turn next to a submission which was largely developed by Mr Katkowski in his reply. It turns on paragraph 54 of the Inspector’s Report, which reads in part:

“Furthermore, the proposed housing provision level in the SLP [sc. 11,000 new dwellings] exceeds that which would be needed by the Borough’s own population and includes a significant element (60-65%) associated with in-migration, reflecting the urban renaissance strategy. With a successful continued implementation of the urban renaissance strategy, there may not actually be any shortfall in housing provision compared with the latest 2008 and 2011-based household projections.”

Mr Katkowski laid emphasis on the fact that the “urban renaissance strategy” is part and parcel of planning policy. He submitted that these observations by the Inspector disclose a finding that the OAN is in fact well under 11,000. That figure includes in-migration, which is simply attributable to planning policy and should be left out of account. I cannot see why that should be so. The Solihull SHMA updated in 2009 fed into the Inspector’s conclusions (see paragraph 56 of the Report). NPPF paragraph 159 shows that the SHMA to be prepared by the local planning authority “should identify the scale and mix of housing… 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”. That must mean actual projections. There was nothing notional about that part of the 11,000 figure which represented prospective in-migration in line with the urban renaissance strategy.

23.
The Inspector’s conclusion at paragraph 64 reads as follows:

“Taking account of all the evidence and having examined all the elements that go into making an objective assessment of housing requirements, a total level of 11,000 dwellings or 500 dwellings/year

represents an effective, justified and soundly based figure which would meet the current identified housing needs of the district over the plan period and, with the agreed amendments, is consistent with the overall requirements of national policy in the NPPF."

24.
The 11,000 is very plainly a "policy-on" figure, not an OAN within the meaning of NPPF paragraph 47. So much is clear from the Inspector's language ("consistent with the overall requirements of national policy in the NPPF"). The Council had not for its part proposed an OAN, as the document setting out its case on housing before the Inspector, to which Mr Lockhart-Mummery referred, amply demonstrates. In the SLP itself the "justification" for policy 5 (Provision of Land for Housing) has this at paragraph 8.4.2:

"It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 households (2006-2028). This is the level of housing provision that the Council considers can be provided without adverse impact on the Meriden Gap, without an unsustainable short-term urban extension south of Shirley and without risking any more generalised threat to Solihull's high quality environment."

25.
The judge gathered this part of the case together at paragraph 99:

"The Inspector did not acknowledge, or take into account, that change. I accept that the Inspector might have taken that change into account in a number of ways. However, in one way or another, he was required to assess, fully and objectively, the housing need in the area. In the event, he made no attempt to do so. Mr Dove conceded – as he had to do – that neither the SLP nor the Inspector provided any full and objective assessment of housing need. Nor is there any evidence that the WM RSS Phase 2 Revision Panel made such an assessment, either: they had evidence of need before them, but there is no evidence that, as required by the NPPF, they assessed the full and objective housing need before considering constraints on meeting that need. Indeed, the evidence is that they went straight to policy on figures for the region in a conventional planning balancing exercise, with all material factors in play – as they were entitled to do under the pre-NPPF regime – and then proceeded to carve up that policy on requirement between the various areas within the region. Even as a surrogate, that did not comply with the NPPF requirements, properly construed. The further projections and 2009 SHMA did nothing to assist in this regard."

The judge added this at paragraph 100:

"…When the report is read as a whole, far from full objectively assessed housing need being a driver in terms of the housing requirement target – as the NPPF requires – it is at best a back-seat passenger. Nowhere is the full housing need in fact objectively assessed. As I have said, the reference to the work done by the WM RSS Phase 2 Revision Panel does not assist, because there is no evidence that they assessed such need either. In any event, the Inspector appears to accept that the WM RSS Phase 2 Revision Panel target did not fully meet all housing needs (paragraph 53). Further, in paragraph 10… he says:

'There is insufficient evidence to demonstrate that Solihull does not intend to full meet its objectively assessed housing requirements …'

All of this makes clear, in my view, that the Inspector erred in his approach to this issue: he failed to have proper regard to the policy requirements of the NPPF."

Conclusion

26.
In the result it is in my judgment clear that the process by which the Inspector came to recommend the adoption of the SLP did not meet the requirements of the NPPF. The reality is that neither the appellant Council in proposing the SLP nor the Inspector in recommending its adoption undertook an OAN as a separate and prior exercise to the consideration of the impact of other policies. The Inspector's recommendation was therefore flawed by error of law, as the judge found.

27.
There is a postscript to Ground 1. It has been described as the "technical issue". It concerns the treatment of the DCLG interim projections which were published in April 2013. As I have said these cover the 10 year period up to 2011. The appellant Council claimed that the data could be extrapolated forward to 2028. That was disputed. The issue's resolution was, no doubt, a matter of planning judgment. The inspector recognised that there was a dispute (paragraph 55 of the Report). But there are signs in paragraphs 52 and 53 that he may have proceeded on the basis of the Council's approach without reasoning why it was right to do so; though the DCLG projections were of course only one factor in a web of materials. It is unnecessary to decide whether there was here a further legal error; I mention the point only because it seems to me (given that the DCLG projections were clearly not an OAN) to underline the conclusion that the two-step approach enjoined by NPPF in paragraph 47 was not followed.

GROUND 3: "EXCEPTIONAL CIRCUMSTANCES"

28.
Ground 3 concerns the Inspector's treatment of "exceptional circumstances". NPPF paragraph 83 provides:

"…Local planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. Once established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period." (emphasis added)

29.
The issue on this part of the case is whether the provision in the SLP (following the Inspector's recommendation) by which the respondents' two sites were allocated to the Green Belt was lawful having regard to paragraph 83. The judge said this at paragraph 120:

"120. The SLP allocated the Sites to the Green Belt, whilst removing other sites (particularly in the north of the borough) as the most appropriate means of providing land sufficient to meet the housing requirement which it of course set at 11,000 new dwellings by 2028. There were strong objections to the reallocation of the Sites, on the basis that a reallocation could only be made in exceptional circumstances – and no such circumstances existed in this case."

30.
Many years previously the sites had been designated Interim Green Belt. Their removal from the Green Belt was formalised in 1997. The matter was reconsidered in the March 2005 report of the

inquiry into the objections to the first Review of the UDP. The Inspector, in fact the same Inspector, Mr Pratt, who conducted the enquiry into the SLP in the present case, concluded:

“3.149…Both sites are well contained and the Green Belt boundary remains firm and well-defined. There is no erosion of the gap between Solihull and Redditch and, given the retention of the Green Belt around Grimes Hill in Bromsgrove DC, no risk of coalescence with this settlement. Their designation as safeguarded land would not harm the visual amenity or open character of the adjoining Green Belt, and provides certainty, rather than blight. Given the enduring nature of Green Belt boundaries and the firm advice in PPG2 that such boundaries should not be frequently changed, I can see no exceptional circumstances that would justify deleting the sites as safeguarded land or returning them to the Green Belt.”

The Inspector in the SLP Report with which we are concerned in this case said at paragraph 137:

“There is also serious concern about the proposed return to the Green Belt of some Safeguarded Land previously identified in the SUDP. However, when the SUDP was examined, it was made clear that the status of this land should be reviewed in the context of the approved and emerging WMRSS strategy of urban renaissance… SMBC [the Council] undertook this review, and rejected the future development sites at Tidbury Green because this settlement lacks the range of facilities necessary for further strategic housing growth; the scale of development envisaged would also be far too large to meet local housing needs and would threaten the coalescence with settlements, including Grimes Hill. National policy enables reviews of the Green Belt to be undertaken (NPPF paragraph 84), including considering the need to promote sustainable patterns of development, and it is clear from SMBC’s evidence that these sites would not meet this objective. These factors constitute legitimate reasons and represent the exceptional circumstances necessary to justify returning these sites to the Green Belt.”

31.
The adopted SLP has this at paragraph 11.6.6:

“The safeguarded land at Tidbury Green was removed from the Green Belt in the UDP 1997 for possible long term housing needs. Following assessment in the Strategic Housing Land Availability Assessment, this land is no longer considered suitable for development and is proposed to be returned to Green Belt.”

32.
The judge said this:

“135. I am persuaded by Mr Lockhart-Mummery that the Inspector, unfortunately, did not adopt the correct approach to the proposed revision of the Green Belt boundary to include the Sites, which had previously been white, unallocated land. He performed an exercise of simply balancing the various current policy factors, and, using his planning judgement, concluding that it was unlikely that either of these two sites would, under current policies, likely to be found suitable for development. That, in his judgment, may now be so: but that falls very far short of the stringent test for exceptional circumstances that any revision of the Green Belt boundary must satisfy. There is nothing in this case that suggests that any of the assumptions upon which the Green Belt boundary was set has proved unfounded, nor has anything occurred since the Green Belt boundary was set that might justify the redefinition of the boundary.”

33.

In COPAS [2001] EWCA Civ 180, [2002] PCR 16 Simon Brown LJ said this at paragraph 40:

“I would hold that the requisite necessity in a PPG 2 paragraph 2.7 case like the present – where the revision proposed is to increase the Green Belt – cannot be adjudged to arise unless some fundamental assumption which caused the land initially to be excluded from the Green Belt is thereafter clearly and permanently falsified by a later event. Only then could the continuing exclusion of the land from the Green Belt properly be described as ‘an incongruous anomaly’.”

Mr Katkowski submits that this case was decided under a different planning policy: PPG2 paragraph 2.7 referred to “exceptional circumstances… which necessitate such revision” (my emphasis). He says that the NPPF rule is different, in particular because paragraph 83 omits the requirement of necessity, and COPAS is accordingly no authority for its true construction.

34.
The policies are indeed differently worded. However, it is to be noted that the judge did not merely refer to COPAS. He referred also to Carpets of Worth, Ltd v Wyre Forest DC (1991) 62 PCR 334. I cite this passage from the judgment of Purchas LJ:

“… [O]nce a green belt has been established and approved as a result of all the normal statutory processes it must require exceptional circumstances rather than general planning concepts to justify an alteration. Whichever way the boundary is altered there must be serious prejudice one way or the other to the parties involved.”

In this context I should also note paragraphs 79 and 80 of the NPPF:

“79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.

80. Green Belt serves five purposes:

•
To check the unrestricted sprawl of large built-up areas;

•
To prevent neighbouring towns merging into one another;

•
To assist in safeguarding the countryside from encroachment;

•
To prevent the setting and special character of historic towns; and

•
To assist in urban regeneration, by encouraging the recycling of

derelict and other urban land.”

It is also of some importance to notice what the judge said at paragraph 125(b):

“b) For redefinition of a Green Belt, paragraph 2.7 of PPG2 required exceptional circumstances which ‘necessitated’ a revision of the existing boundary. However, this is a single composite test; because, for these purposes, circumstances are not exceptional unless they do necessitate a revision of the

boundary (COPAS at [23] per Simon Brown LJ). Therefore, although the words requiring necessity for a boundary revision have been omitted from paragraph 83 of the NPPF, the test remains the same. Mr Dove expressly accepted that interpretation. He was right to do so."

35.
In the circumstances there is in my judgment nothing in the verbal differences between PPG2 and NPPF paragraph 83 which advances Ground 3. But that was not the end of Mr Katkowski's argument. The Inspector's reasoning at paragraph 137 of the Report describes factors tending against the use of the sites for housing. Mr Katkowski emphasised the terms of paragraph 84 of the NPPF:

"When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development. They should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards town and villages inset with the Green Belt or towards locations beyond the outer Green Belt boundary."

As I have shown, the Inspector refers to paragraph 84 in paragraph 137 of the Report. Mr Katkowski's submission is that the conclusion that these sites are in the circumstances not suitable for housing, shows – and the Inspector effectively found – that their exclusion from the Green Belt would not conduce to sustainable development, because housing in those locations would not constitute such development: so that on analysis the Inspector's recommendation that they should be returned to the Green Belt was based on a "Green Belt Reason".

36.
This is an ingenious submission, but I do not accept it. The fact that a particular site within a council's area happens not to be suitable for housing development cannot be said without more to constitute an exceptional circumstance, justifying an alteration of the Green Belt by the allocation to it of the site in question. Whether development would be permitted on the sites concerned in this case, were they to remain outside the Green Belt, would depend upon the Council's assessment of the merits of any planning application put forward. Moreover it is to my mind significant that in essence the merits or demerits of the possible use of these sites for housing have not apparently changed since 2005 when the same Inspector took a view diametrically opposed to his conclusion at paragraph 137: in March 2005 he had clearly concluded that the sites did not need to go into the Green Belt (and in the Solihull UDP of 2006 they were earmarked for review for housing). Yet at paragraph 137 of his current Report the Inspector makes no reference to his earlier opinion. For good measure, the SLP itself (paragraph 11.6.6, which I have read) plainly does not return the sites to the Green Belt for a Green Belt Reason.

37.
For these reasons I consider that Ground 3 fails, and if my Lords agree the appeal will be dismissed.

THE CROSS-APPEAL

38.
The cross appeal concerns the relief granted by the judge, which was as I have said to remit the case for re-examination by another inspector. The respondent developers say that he should have quashed the SLP.

39.

The court has wide powers under s.113(7) on the 2004 Act. It is clear (and uncontentious) that it may quash the SLP; remit the case for re-examination by another inspector, as the judge ordered; or remit it to the Council for reconsideration by them in light of the court's judgment.

40.
The appellant rightly submits (paragraph 66 of counsel's skeleton argument) that the legal errors in the case arose, or first arose, before the Inspector conducted the EIP. They arose in the Council's preparation of the SLP The Council failed to proceed upon a correct understanding of NPPF paragraph 47. They did not undertake or propose the two-step approach which NPPF required. In these circumstances I do not consider that the legal flaws in the SLP can be cured simply by a further examination before a different inspector. The Council needs to think again. But it is not necessary to quash the SLP; the right course is to remit it, rather those parts of it infected by legal error, to the Council requiring it to reconsider the proposed SLP in light of this court's judgment and to cure the illegalities in their earlier preparation.

41.
In these circumstances I would order those parts of the SLP which are tabulated in the schedule to the judge's order to be remitted to the Council. To that extent I would allow the cross-appeal.

LORD JUSTICE PATTEN:

42.
I agree.

LORD JUSTICE FLOYD:

43.
I also agree.