Neutral Citation Number: [2019] EWCA Civ 2200

Case No: C1/2019/0140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
SIR ROSS CRANSTON (sitting as a judge of the High Court)
[2018] EWHC 3400 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2019

Before:

Lord Justice Underhill
Lord Justice Lindblom
and
Lord Justice Irwin

- -

Between:

R. (on the application of East Bergholt Parish Council)	**Appellant**
- and -	
Babergh District Council	**Respondent**
- and -	
(1) Mr and Mrs P. Aggett **(2) Countryside Properties Plc** **(3) Mr Michael Harris and Mr James Harris** **(4) Hills Residential Construction Ltd.**	**Interested Parties**

- -

Ms Sasha Blackmore (instructed by **Teacher Stern LLP**) for the **Appellant**
Mr Michael Bedford Q.C. (instructed by **Babergh District Council Legal Services**) for the **Respondent**
The Interested Parties did not appear and were not represented.

Hearing date: 18 July 2019

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

Lord Justice Lindblom:

Introduction

1. The main question in this appeal is whether a local planning authority, when assessing the five-year supply of housing land, misdirected itself on the relevant policies in the National Planning Policy Framework ("the NPPF") published by the Government in March 2012. It is not the first case of its kind. And no new issue of law is involved.

2. The appellant, East Bergholt Parish Council, appeals against the order dated 7 December 2018 of Sir Ross Cranston, sitting as a judge of the High Court, by which he dismissed its claim for judicial review of three grants of planning permission by the respondent, Babergh District Council, for housing development on sites in East Bergholt. In total, the three developments would provide up to 229 new dwellings: 10 for residents over the age of 55 on a site at Hadleigh Road, for which planning permission was granted on 10 November 2017; 144 on a site at Moores Lane, for which permission was granted on 23 November 2017; and up to 75 on a site at Heath Road, for which permission was granted on 9 February 2018. The district council's Planning Committee resolved to approve all three proposals on 2 August 2017. In each case the proposal did not accord with the development plan, which included the Babergh Core Strategy, adopted by the district council in February 2014, and the East Bergholt Neighbourhood Plan, made in September 2016. But the district council concluded that the five-year housing land supply required under government policy in paragraph 47 of the NPPF did not exist, so that, under the policy in paragraph 49, the policy for the "presumption in favour of sustainable development" in paragraph 14 was engaged and a decision to grant planning permission was justified.

3. The thrust of the parish council's challenge is that the district council's approach to the assessment of housing land supply when it decided to grant planning permission for these three developments, was flawed by its misunderstanding of the concept of "deliverability" in the NPPF, wrongly equating it to "certainty" or even "absolute certainty" of delivery. A further complaint is that in approving these developments the district council was influenced by the potential cost of opposing subsequent appeals if it refused permission. These grounds were rejected by the judge. Permission to appeal was granted by Singh L.J. on 18 February 2019, on two of the four grounds in the appellant's notice – grounds 1 and 2.

The issues in the appeal

4. Two main issues arise. First, did the district council err in law in its assessment of housing land supply, misinterpreting and misapplying NPPF policy, and including only sites on which it was certain, or absolutely certain, that housing would be delivered within five years – an approach said to be contrary to the decision of this court in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2018] P.T.S.R. 746 (ground 1 and ground 2 in part, and the district council's respondent's notice)? And second, did it improperly take into account the possible financial consequences for itself of fighting appeals against the refusal of planning permission (ground 2 in part).

The policy in paragraph 47 of the NPPF

5. We are concerned only with the policies of the NPPF as they were at the time of the decisions under challenge, in August 2017. The NPPF has, however, twice been revised since then, in July 2018 and again in February 2019.

6. Paragraph 47 of the NPPF stated:

> "47. To boost significantly the supply of housing, local planning authorities should:
> …
> - 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;
>
> …".

Footnote 11 explained the meaning of the word "deliverable":

> "To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

Footnote 12 said that "[to] be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged".

7. The policy in paragraph 49 stated that "[housing] applications should be considered in the context of the presumption in favour of sustainable development", and that "[relevant] policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites". The policy in paragraph 14 envisaged the "presumption in favour of sustainable development" operating "where the development plan is … out-of-date", subject to two exceptions, one of which was that "any adverse impacts of [approving the proposal] would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole".

8. The relevant policy in paragraph 47 has remained substantially unchanged in the subsequent revisions of the NPPF. The definition of a "deliverable" site was changed in both revisions. The definition given in the glossary in Annex 2 to the 2019 version states:

> "To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:
>
> a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).
>
> b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years."

The guidance in the Planning Practice Guidance ("the PPG")

9. The policy in paragraph 47 of the NPPF was amplified in the PPG, first published by the Government in March 2014 and later updated. I shall consider the guidance as it was at the time of the district council's decisions.

10. Paragraph 3-019-20140306 of the PPG explained the factors to be considered when assessing the "suitability" of sites for development. It said that "[sites] in existing development plans or with planning permission will generally be considered suitable for development although it may be necessary to assess whether circumstances have changed which would alter their suitability".

11. Paragraph 3-030-20140306 advised that the starting point for calculating the five-year housing land supply should be "the Housing requirement figures in up-to-date adopted Local Plans", but went on to say that "[where] evidence in Local Plans has become outdated and policies in emerging plans are not yet capable of carrying significant weight, information provided in the latest full assessment of housing needs should be considered". Paragraph 3-031-20140306, under the heading "What constitutes a 'deliverable site' in the context of housing policy?", said:

> "Deliverable sites for housing could include those that are allocated for housing in the development plan and sites with planning permission (outline or full that have not been implemented) unless there is clear evidence that schemes will not be implemented within five years.
>
> However, planning permission or allocation in a development plan is not a prerequisite for a site being deliverable in terms of the 5-year supply. Local planning authorities will need to provide robust, up to date evidence to support the deliverability of sites, ensuring that their judgements on deliverability are clearly and transparently set out. If there are no significant constraints … to overcome such as infrastructure sites not allocated within a development plan or without planning

> permission can be considered capable of being delivered within a 5-year timeframe."

Paragraph 3-033-20150327 provided guidance on "Updating evidence on the supply of specific deliverable sites sufficient to provide 5 years worth of housing against housing requirements", stating that "… local planning authorities should consider both the delivery of sites against the forecast trajectory and also the deliverability of all the sites in the 5 year supply". It went on to say:

> "Local planning authorities should ensure that they carry out their annual assessment in a robust and timely fashion, based on up-to-date and sound evidence, taking into account the anticipated trajectory of housing delivery, and consideration of associated risks, and an assessment of the local delivery record. Such assessment, including the evidence used, should be realistic and made publicly available in an accessible format.
> … ."

The district council's consideration of housing land supply between 2013 and 2017

12. In the annual monitoring report for 2013-2014 there was said to be a housing land supply of 7.1 years, using a 5% buffer. In the annual monitoring report for 2014-2015 it was said to be 6.3 years, again using a 5% buffer. And in the annual monitoring report for 2015-2016 it was said to be 5.7 years, using a 20% buffer for past under-delivery; 6.6 years using a 5% buffer. In April 2017, having received a report prepared by Bidwells for Countryside Properties Plc, the intending developer of the Moores Lane site, the district council published an interim statement acknowledging that the housing land supply, with a 20% buffer, was only three years; with a 5% buffer, 3.4 years. The interim statement was based on evidence in a draft strategic housing market assessment ("SHMA"), which had been produced in February 2017.

The meeting on 22 May 2017

13. Some residents of East Bergholt were concerned by the change in the district council's position. The parish council sought a meeting with the district council to discuss the matter. The meeting took place on 22 May 2017. It was attended by parish councillors, including Councillor Miller, the district council's Corporate Manager for Strategic Planning, Mr Newman, and a Senior Policy Strategy Planner, Mr Deakin. Councillor Miller made a note of what was said, which the judge described as being "near contemporaneous", with "the ring of authenticity", and "[in] all material respects … an accurate record of what was said" (paragraph 22 of the judgment). The note "records a statement that the interim AMR was prepared because of a challenge by developers" (paragraph 23). It also "records that when asked why with the interim 5YHLS a number of planning applications had been held back and not included in the figures, Mr [Newman] explained that this was because of a conflict with the JR decision" (paragraph 24). It goes on to say:

> "[These] have been omitted from [the district council's figures] because there was no certainty they would be built. [Mr Newman] had decided that what was in the list was absolute certainties rather than ones affected by JR."

14. In his witness statement dated 23 May 2018 Mr Deakin explains (at paragraph 32) the reference to sites "affected by JR". These were sites on which the district council had granted planning permission or resolved to grant planning permission for housing development, relying on an incorrect understanding of development plan policy. The court had quashed the permission for the development on a site called "Gatton House" in East Bergholt in December 2016, but the proposals – for that site and for the site at Moores Lane – had yet to be taken back to the Planning Committee for redetermination at "the base date [for the annual monitoring report for 2016-2017] of 31 March 2017" (see *R. (on the application of East Bergholt Parish Council) v Babergh District Council* [2016] EWHC 3400 (Admin)).

15. Councillor Miller's note also records that the parish councillors were told the methodology used by the district council was the one advocated in the NPPF, and the figures to be published in June 2017 would "nail the AMR number".

16. On 22 May 2017, in response to a request made by a local resident, Mr Cave, under the Freedom of Information Act 2000, the district council sought to explain why 14 applications for planning permission for a total of 674 dwellings had not been included in the calculation of housing land supply. It said:

> "The sites listed have not been granted planning permission, nor are they sites allocated in the Local Plan. They would therefore fail to meet the tests of footnote 11 of [the NPPF] and have not been included within the Babergh Interim 5 year housing land supply assessment."

In a subsequent email sent on 12 July 2017, responding to Mr Cave's request for a re-calculated housing land supply taking into account the 14 applications, the district council's Chief Executive contended that such a calculation "would not be consistent with how we are required to establish 5 year land supply".

The annual monitoring report for 2016-2017

17. The "Babergh and Mid Suffolk Joint Annual Monitoring Report 2016-2017" was published by the district council and Mid Suffolk District Council on 13 June 2017. It stated (in paragraph 1.1) that "[all] of the information reported is the most up-to-date available at the time of publication". It referred (in paragraph 1.2) to the duty of local planning authorities to co-operate, under section 33A of the Planning and Compulsory Purchase Act 2004. And it confirmed (in paragraph 3.1) that the two authorities had "taken the key decision to produce a Joint Local Plan for Babergh and Mid Suffolk districts", and that "[a] new joint [local development scheme] was agreed in March 2017".

18. Under the heading "Housing Trajectory & Five-Year Land Supply", the annual monitoring report referred (in paragraph 4.9) to the policy in paragraph 47 of the NPPF "[requiring] Councils to identify and update on an annual basis a supply of specific deliverable sites sufficient to provide for five years' worth of housing against their identified requirements". It acknowledged that, under the policy in paragraph 47 of the NPPF, "[for] sites to be considered deliverable they have to be available, suitable, achievable and viable". It said (in paragraph 4.11) that the district council "has identified a housing land supply of 4.1 years

based on the Core Strategy housing target", and "a land supply of 3.1 years based on the SHMA housing target".

19. The "Babergh District Council 5 year housing land supply assessment", dated June 2017, was appended as Appendix 1. The "Introduction" to Appendix 1 referred again to the policy in paragraph 47 of the NPPF, and the guidance in paragraph 3-030-20140306 of the PPG. Like the text in paragraph 4.9, it explicitly acknowledged that "[for] sites to be considered deliverable they have to be available, suitable, achievable and viable". It said that the district council had "published the Ipswich and Waveney Housing Market Areas [SHMA] in May 2017 which is important new evidence for the emerging [joint local plan]". The five-year housing land supply had therefore been calculated for "both the adopted Core Strategy based figures and the new SHMA based figures". The "Core Strategy based supply for 2017 to 2022 [was] 4.1 years", and the "SHMA based supply for 2017 to 2022 [was] 3.1 years". In the tables for the "Babergh Land supply targets and buffers 2017/18-2021/22", the adjusted targets assuming a 20% buffer were, respectively, 2,071 and 2,742 dwellings. In the tables showing the "Babergh Land supply 2017/2018-2021/22" the "[total] supply" for both assessments was 1,699 dwellings, comprising 110 dwellings in the line "No permission/Allocated sites", 120 in the line "S106 to Sign" and none in the line "Application", plus 480 in the line "Windfall and small sites", plus a total of 989 for "Permission outline", "Permission full" and "In construction" with a "lapse rate" of 10%.

20. A table headed "Babergh Housing Land Supply Trajectory Table" identified the "Site Status" of each site, and for each site the total number of dwellings to be developed and the number in each of three periods, or "phases": 2017-2022, 2022-2027, and after 2027. It included two sites, known as "Hadleigh East" and "Chilton Woods", each of them a "Strategic Allocation" whose "Site Status" was said to be "No permission, Strategic Core Strategy Allocation". These two sites were assumed to provide a total of 110 dwellings in the period 2017-2022 – 80 at Hadleigh East, with 170 to follow in the period 2022-2027; 30 at Chilton Woods, with 230 to follow in the period 2022-2027, and 790 after 2027. A site known as "Wolsey Grange", another "Strategic Allocation", but with the "Site Status" of "S106 to Sign …", was assumed to provide 120 dwellings in the period 2017-2022, 200 in the period 2022-2027, and 155 in the period after 2027.

21. The officer responsible for the preparation of the annual monitoring report was Mr Deakin. In his witness statement he explains how he approached the assessment of housing land supply. The new SHMA had been prepared by consultants, instructed in September 2016 (paragraph 12). New household projections had been published by the Government in July 2016. The draft SHMA, which emerged in February 2017, identified a higher level of housing need (355 dwellings per annum) than the core strategy requirement (220 dwellings per annum for the period 2011-2016, and then 325 dwellings per annum until 2031). This higher level of need was assumed when the housing land supply was calculated (paragraph 13). But because the SHMA was still emerging, an assessment using the core strategy was also presented (paragraph 14).

22. On the effect of NPPF policy, Mr Deakin says this (in paragraph 20):

> "… [A] 5YHLS assessment tends to come under close scrutiny in the development management process for the determination of planning applications. Because decisions to refuse planning permission can be appealed … and appeals are

> resource-intensive both financially and with regard to officer time, and there is a risk of a costs award if [the district council] is found to have acted unreasonably, [the district council], like many other planning authorities, seeks to ensure that its 5YHLS assessment is robust and able to withstand scrutiny. This helps to ensure sound decision-making, deter unjustified appeals, and minimise the risks of [the district council] losing appeals."

23. Mr Deakin stresses the importance of using a "consistent base date for monitoring", which in the annual monitoring report for 2016-2017 was 31 March 2017 (paragraph 21). In preparing the five-year housing land supply assessment, as in previous years, he first considered whether a site was "suitable" for housing development before going on to consider whether it was "available" and "achievable". Bearing in mind that the question of whether a site was "suitable" involved questions of judgment on which opinions might differ, and that he was seeking to achieve a "robust and defendable assessment", he took the view that "there should be some confirmation of the suitability of development from some prior decision of [the district council] or from an appeal Inspector". Sites with planning permission that remained capable of implementation he regarded as suitable for housing development; and so too sites without planning permission but the subject of a policy in the development plan or in a "made" neighbourhood plan. Where a site did not have planning permission and was not an allocated site, but had a Planning Committee resolution to grant permission subject to the entering into of a planning obligation, "this meant that the … Planning Committee had accepted that the site could be developed for housing", and he "therefore regarded such a site as also suitable for housing development" (paragraph 26). But where an application for planning permission had been made and there was "no resolution or decision of the Planning Committee on the acceptability of the proposal", he "considered that the suitability of the site was not established or confirmed, and … made the judgment that such a site should not be regarded as suitable for housing development at that point of time" (paragraph 27).

24. He then went on to consider whether the sites that were suitable for housing development were "available", and "how many dwellings, if any, should be included in the 5YHLS assessment". For developments of 10 dwellings or more, he took into account what he had been able to discover from landowners, agents or developers in response to a letter he sent to each of them in April 2017. He then made his own assessment, which he discussed with colleagues (paragraph 28). The results of this work were in Appendix 1 to the annual monitoring report for 2016-2017 (paragraph 29).

The Planning Committee meeting on 5 July 2017

25. After the annual monitoring report for 2016-2017 had been published, the district council's Planning Committee relied on the assessment of housing land supply in it when determining applications for planning permission – for example, at its meeting on 5 July 2017 when it considered proposals for housing development in Capel St Mary and Long Melford. At that meeting, when called upon by a member of the public, Mr Watts, to account for the change in the district council's position on housing land supply since 2016, the Chairman of the committee, Councillor Ridley, mentioned two things: first, the change in the relevant housing target in the SHMA; and second, the district council's review, site by site, of the expected dates of delivery – the annual target not having been met in any of the previous three years. In his witness statement Mr Deakin acknowledges that Councillor

Ridley, when referring to the review, had mentioned only sites with planning permission. But he confirms that, as the list of sites set out in Appendix 1 to the annual monitoring report for 2016-2017 shows, "the 5YHLS also included sites without planning permission which were development plan allocations and sites which had received a resolution to approve". When he was considering how many of the dwellings on the sites identified as suitable would be "achievable" in the relevant five-year period, he was "not looking for certainty about what would definitely happen but what [he] realistically expected to happen, based on the information known to [him] and [his] general experience of housing developments in the district" (paragraph 34).

The Full Council meeting on 18 July 2017

26. The district council held a Full Council meeting on 18 July 2017, which was attended by all but two of the members of the Planning Committee who would be present at its meeting on 2 August 2017. At the Full Council meeting, Mr Cave asked why, in the light of footnote 11 to paragraph 47 of the NPPF, the district council had excluded the 14 applications for planning permission to which he had referred in his Freedom of Information Act request. The response came from the district council's Cabinet Member for Planning, Councillor Parker:

> "…
>
> The key difference in the sites identified in the assessments is principally a result of the delivery status of each site[, i.e.] whether a site has now been fully built out, is under construction, or has recently gained planning permission.
>
> For sites with the benefit of planning permissions and/or allocations, whilst these sites have the greater certainty of delivery, they are only included in the 5 year land supply if it is considered that there is a realistic prospect that housing will be delivered within 5 years.
>
> Sites without planning permission or allocation are less certain in their suitability, availability and achievability. Their suitability and achievability is appropriately considered through the planning application process including the full extent of infrastructure provision required to make them acceptable. For this reason, [the district council] considers it robust to consider sites without planning permission in the 5 year land supply assessment only where the Planning Committee has given a resolution to grant planning permission, subject to a Section 106 legal agreement for planning obligations."

The Planning Committee's decisions at its meeting on 2 August 2017

27. With the benefit of advice from its planning consultants, Planning Direct, the parish council objected to all three of the applications for planning permission. "On its face", said the judge, the parish council's objection "seemed to accept the AMR figures" (paragraph 38). The East Bergholt Society also objected, maintaining there was no real shortfall in the supply of housing land in the district council's area if one included the 14 sites to which Mr Cave had referred. A local resident, Mr Brigden, objected on similar grounds.

28. The committee had an officer's report for each of the three proposals. It is common ground that the assessment in his report on the development proposed on the site in Moores Lane corresponds to the essential parts of the assessment in the other two.

29. In the "Summary" at the beginning of the report, having referred to section 38(6) of the 2004 Act, and having acknowledged that the proposal was contrary to several policies of the development plan, the officer recommended that planning permission be granted. He said:

> "… Whilst the proposal is found to be contrary to development plan policies CS2, CS11 and CS15, the authority cannot currently demonstrate a five year housing land supply and the adverse impacts of the development, including those areas of non-conformity with the development plan policies referred to, are not considered to significantly and demonstrably outweigh the benefits of the development."

The officer recognized that there would be harm to "heritage assets", but this, in his view, was "less than substantial" and was outweighed by the "public benefits" of the proposed development. The proposal was for "sustainable development". Under the NPPF, there was a "presumption in [its] favour".

30. The points made in response to consultation and in objections were set out (paragraph 8 of the report). In Appendix 1 to the report a large number of objections were summarized. They included an objection complaining that the district council had manipulated the housing land supply figures in the interim statement to distort the supply from 5.7 years to three years. The objections of the East Bergholt Society and Mr Brigden were before the committee when it met.

31. The officer explained the relevant policies in the NPPF and guidance in the PPG (paragraphs 35 to 38). He said the new SHMA was "important new evidence for the emerging Babergh and Mid Suffolk Joint Local Plan", and confirmed that "the 5 year land supply has been calculated for both the adopted Core Strategy based figures and the new SHMA based figures". He reminded the committee that "it will be for the decision taker to consider appropriate weight to be given to these assessments and the relevant policies of the development plan" (paragraph 39). His advice was that the housing land supply was either 4.1 years (based on the core strategy) or 3.1 years (based on the SHMA) (paragraph 40). He went on to say (in paragraph 41):

> "… Since there is not, on any measure, a 5 year land supply, paragraph 49 of the NPPF deems the relevant housing policies of the Core Strategy to be out-of-date, so triggering both the 'tilted balance' in paragraph 14 of the NPPF, and the operation of Policy CS1."

32. Weighing the "Planning Balance" at the end of his report, the officer concluded that "[in] consideration of the contribution towards the Council's housing targets (that has now become more acute due to the accepted lack of five year housing land supply), the provision of affordable housing and economic and infrastructure benefits which arise from the development, … these material considerations would outweigh the less than significant harm to the heritage [assets]" (paragraph 274).

33. At the committee meeting representatives of the parish council and the East Bergholt Society spoke, as did Mr Brigden and other objectors. As the minutes record, the speakers were "listened to, and questioned, … at length". When the members came to consider the proposal for the Hadleigh Road site, the officer dealing with that proposal referred to the "lack of a five year housing land supply". In the discussion on the proposal for the Heath Road site, Mr Newman told them that "significant and demonstrable adverse effects" would have to be identified if planning permission were to be refused "in the current absence of [the district council's] 5 year supply for which no firm indication was available or when it would be met".

Subsequent events

34. On 19 March 2018 – after the three planning permissions had been granted – the district council's Overview and Scrutiny Committee received a report from Mr Newman. Under the heading "Financial Implications" (in paragraph 3.1), he said it was necessary to produce a "robust assessment" of housing land supply, which could be used in determining applications for planning permission. He added that "[producing] a five-year housing land supply that has not considered all the available information robustly could result in costs against [the district council] at a Planning Appeal". The Overview and Scrutiny Committee resolved that the housing land supply should be reviewed every six months and monitored regularly. In its annual report, presented to the Full Council at its meeting on 22 May 2018, the committee asked to be given an opportunity to scrutinize the assessment of housing land supply. The scoping document for this exercise referred to a "mixed understanding among Councillors and communities regarding the 5 year housing land supply – both how it's calculated and the implications of not having one".

35. The annual monitoring report for 2017-2018 was published in July 2018. It noted that 331 new dwellings had been built in the district in the past year, which was 102% of the target figure. Based on the core strategy, the housing land supply stood at 6.7 years; based on the SHMA, five years.

The judge's reasoning

36. The parish council contended in the court below that at its meeting on 2 August 2017 the Planning Committee did not properly apply the relevant policies in the NPPF and guidance in the PPG on the deliverability of sites. Errors had been made in the calculation of the supply of housing land, both in the interim statement and in the annual monitoring report published in June 2017. Too high a test had been applied, contrary to the reasoning of this court in *St Modwen Developments Ltd.*, and unlike the approach taken by other local planning authorities. According to Councillor Ireland, the Chair of the parish council, in his witness statement dated 21 December 2017, several sites on which housing could be delivered within five years had been wrongly omitted from the supply.

37. The judge rejected that argument. In reality, as he saw it, the parish council's challenge went not to the decisions made by the district council's Planning Committee on 2 August 2017, but to the assessment of housing land supply in the 2017 annual monitoring report, foreshadowed in the interim statement (paragraph 62 of the judgment). At its meeting on 2 August 2017, as on 5 July 2017, the committee had applied the housing land supply

"already decided in light of planning judgment". It was unsurprising that other authorities should carry out their assessments in different ways, "given the broadly worded requirement in paragraph 47 of the NPPF and the absence of any prescribed method of assessment" (paragraph 63). But in any event the planning judgments involved in the assessments undertaken by the district council were not flawed. In *St Modwen Developments Ltd.* the Court of Appeal did not hold that a site must be included in the five-year housing land supply if there was "any realistic prospect" of delivery; this was "not the only element of the test". And it was not to be assumed that sites excluded from the assessment of supply in the annual monitoring report had been left out of account "because [the district council] misapplied the realistic prospect criterion, rather than that other planning judgments were exercised that the site was not suitable, available or viable" (paragraph 64).

38. In the judge's view the officer's reports for the 2 August 2017 committee meeting were not misleading (paragraph 65). They had to be read in the context of what had happened at the Planning Committee meeting on 5 July 2017, in particular what had been said by Councillor Ridley (paragraph 66), and at the Full Council meeting on 18 July 2017, when Councillor Parker had "echoed the language of footnote 11 in explaining that [the district council's] approach was to include in the 5YHLS only sites with planning permission, with an allocation, or with a resolution to approve subject to a legal agreement" (paragraph 67). The members of the Planning Committee "should have known by the time of the 2 August meeting that [the district council's] position was that it did not have a 5YHLS, and should have been aware of the reasons for the officers including some sites but not others in the calculation". If not, they would have enquired – because for some time the district council's approach to housing land supply had been generating discussion in the community. The judge accepted that it was "not necessary for the officer's reports … to set out the detailed reasoning which had led [the district council] to conclude that it could not demonstrate a 5YHLS". That reasoning was "generally available to those who attended and in the minutes of the 5 July [Planning Committee] meeting and the 18 July Full Council meeting", and it met "the requisite standard" (paragraph 68). At the meeting on 2 August, objectors who questioned the calculation of housing land supply addressed the committee; their written representations were before the members; the officer dealt with housing land supply in an oral presentation; there was a member's question about it; and the speakers were questioned at length (paragraph 69).

39. Adding two "footnotes" to his conclusions, the judge said the meeting on 22 May 2017 had taken place before the annual monitoring report was finalized in June 2017. But if the district council had really been "working on certainties" in calculating the housing land supply, this "would not be impermissible as a matter of planning judgment and would not conflict with the legal principles in [*St Modwen Developments Ltd.*]". And the consideration of housing land supply by the Oversight and Scrutiny Committee on 15 March 2018 "says nothing about the understanding of [the Planning Committee] on 2 August 2017" (paragraph 70).

40. The judge did not accept that the district council had "misdirected itself on the applicable test", or "failed to give adequate reasons for its approach" (paragraph 71). In *St Modwen Developments Ltd.* the Court of Appeal had not "[altered] the meaning of "deliverable" in footnote 11 of the NPPF or … [established] a lower bar" (paragraph 72).

Did the district council err in law in its approach to the assessment of housing land supply?

41. Ms Sasha Blackmore, for the parish council, argued that the judge's reasoning and conclusions were wrong. The district council had misinterpreted and misapplied the policy in paragraph 47 of the NPPF and the corresponding guidance in the PPG. It had conflated the concept of "deliverability" with "certainty", or even "absolute certainty", of "delivery". Government policy and guidance did not require "certainty", or anything like it. Although the question of whether there was a "realistic prospect" of housing being delivered on a site within five years was a matter of planning judgment, the decision-maker must understand and apply the policy test. In this case the district council failed to do that. This, Ms Blackmore submitted, was an error of law. The district council had adopted a "blanket approach", which was impossible to reconcile with the Court of Appeal's decision in *St Modwen Developments Ltd.*. That decision had made it clear that to require "certainties" when applying the policy in paragraph 47 was impermissible. Whether or not the court had laid down any principle of law, its reasoning had provided clear guidance to local planning authorities, giving them confidence to create housing trajectories based on a "realistic prospect" of delivery. They could reach robust judgments without having to surmount "golden hurdles". The practical effect of the court's guidance was to be seen, for example, in the annual monitoring report for 2017-2018, published in July 2018, which identified a housing land supply of 6.7 years. Even if it had been lawful to adopt the approach the Planning Committee did, and bearing in mind that the largest of these three proposals would have removed the shortfall calculated on the basis of the core strategy, the members ought to have been reassured that they had a discretion under NPPF policy not to apply so stringent a test as "certainty". But they were not; they were told there was "not, on any measure, a 5 year land supply".

42. Ms Blackmore submitted that the contemporaneous evidence – in particular, the district council's response to Mr Cave's Freedom of Information Act request in May 2017, that sites without planning permission or a local plan allocation would fail the test of deliverability in footnote 11 to paragraph 47 of the NPPF, and its subsequent email in July 2017 rejecting his request for a re-calculated housing land supply taking into account sites on which planning permission had been applied for but not granted – manifested an approach of seeking "certainty" that a site would deliver housing within five years before it could be included in the supply. It clearly believed that such an approach was required by NPPF policy. This conclusion, Ms Blackmore submitted, is not displaced by the "ex post facto" evidence on which the district council now seeks to rely.

43. If, as Ms Blackmore maintained, the district council had misapplied the test of deliverability by seeking "certainty" of delivery, its error could not, she said, be treated as insignificant simply because it had also discounted sites it regarded as not "suitable". This was contrary to the approach approved in *St Modwen Developments Ltd.*. As Councillor Ireland's evidence showed, sites that were "suitable" – for which there was a resolution to grant and a section 106 obligation outstanding – had been excluded sites from the five-year housing land supply.

44. I do not accept that argument. In my view, as Mr Michael Bedford Q.C. submitted on behalf of the district council, the decisive parts of the judge's reasoning on this issue were correct.

45. Judgment on the appeal in *St Modwen Developments Ltd.* was handed down on 20 October 2017 – after the Planning Committee had resolved to approve these three proposals. In that case the inspector had accepted that sites could properly be included in the five-year supply of housing land even though they were not certain of delivery, and the Secretary of State had agreed. At first instance Ouseley J. had found no error of law in the inspector's approach. Upholding Ouseley J.'s conclusion, this court emphasized the distinction between the concept of "deliverability" under the policy in paragraph 47 of the NPPF and the concept of an "expected rate of delivery" (paragraphs 34 to 37 of my judgment). The fact that a site is "capable of being delivered" within five years "does not mean … it necessarily will be" (paragraph 35). Each of the considerations referred to in footnote 11 to paragraph 47 went to "a site's capability of being delivered within five years: not to the certainty, or … the probability, that it actually will be". To be included in the five-year supply, a site did "not necessarily have to have planning permission already granted for housing development on it". Sites "may be included … if the likelihood of housing being delivered on them within the five-year period is no greater than a "realistic prospect"". This "[did] not mean that for a site properly to be regarded as "deliverable" it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years" (paragraph 38). The judge had acknowledged that the evaluation of housing land supply involved the exercise of "planning judgment" (paragraph 43). And it was "not open to [the appellant] now to go behind the inspector's conclusions on the credibility and reliability of the parties' respective cases on housing land supply". Such conclusions, the court stressed, were "well within the exclusive province of planning judgment" (paragraph 51).

46. This court's decision in *St Modwen Developments Ltd.* did not create new law. The court applied basic legal principles often put to the test in challenges to planning decisions involving the application of national planning policy and guidance – and on several occasions in cases where NPPF policy for housing development has been in issue (see, for example, the decisions of this court in *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808; [2019] J.P.L. 63, and *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040; [2017] J.P.L. 358; and the first instance judgments of Dove J. in *Eastleigh Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin), and Stuart-Smith J. in *Wainhomes (South West) Holdings Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin); [2013] J.P.L. 1145).

47. The principles themselves are well established. The court will not intrude into the territory of planning judgment, which is the exclusive domain of the decision-maker, nor will it subject the decision-maker's own exercise of planning judgment to review beyond the range of public law (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). Formulating national planning policy and guidance is the Government's responsibility, not the court's. Where the meaning of statements of policy is in dispute, the court has a proper role in construing the policy (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13; [2012] P.T.S.R. 983, at paragraphs 17 to 22). A decision-maker's failure to understand relevant policy is an error of law, and the court may then intervene (see the judgment of Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] P.T.S.R. 623, at paragraphs 22 to 26; and the judgment of Stephen Richards L.J. in *R. (on the application of Timmins) v Gedling*

Borough Council [2015] EWCA Civ 10; [2015] P.T.S.R. 837, at paragraph 24). However, the court's interpretation of planning policy does not generate new legal principles or tests to replace or reinforce the policy principles or tests it has construed.

48. That is not what the court was doing in *St Modwen Developments Ltd.*. Rather, it was considering whether, on a true understanding of the policy in paragraph 47 and, in particular, the concept of a "realistic prospect" of delivery, the Secretary of State was entitled to include in the five-year housing land supply sites that were not "certain" to be developed for housing within five years. The court held that he was. But if in that case the Secretary of State, in the exercise of his planning judgment, had adopted a somewhat more cautious view when assessing a "realistic prospect", this would not necessarily have been precluded by the policy in paragraph 47, or unreasonable. That is not what the court said, and not a logical consequence of its reasoning.

49. There is, in my view, no need to enlarge the court's reasoning in *St Modwen Developments Ltd.*. What it demonstrates is that the whole exercise of assessing the "deliverability" of sites under the policy in paragraph 47 is replete with planning judgment and must always be sensitive to the facts (see paragraphs 27 to 30, 34, 41 to 43 and 51 of my judgment). And this may be said, in particular, of the question of "achievability" – whether there is a "realistic prospect" of housing being delivered on a site within five years. A "realistic prospect" is not a legal concept. It is a broad concept of policy, which gives ample scope for a decision-maker's reasonable planning judgment on the likelihood of development proceeding on a site within five years – a predictive judgment on future events that are inevitably not certain. The court recognized the range of legitimate planning judgment available to the decision-maker when considering whether sites have a "realistic prospect" of development in the five-year period. The relevant passages in the judgment refer to a site not "necessarily" having to have planning permission to be regarded as deliverable under the policy, and to it not "necessarily" having to be certain that housing would be delivered on the site within five years (paragraph 38 of my judgment).

50. The policy is not prescriptive. It does not lay down any fixed method for applying the test of "deliverability", to be used in every case. A "realistic prospect" is not equated to any specific level of likelihood. Nor are there any criteria for deciding this question beyond what is said about the treatment of "[sites] with planning permission" in footnote 11. Subject to that, and to the further relevant guidance in the PPG, the policy leaves the assessment of a "realistic prospect" to the decision-maker's own planning judgment, which the court will only undo on conventional public law grounds. It is not for the court to stipulate how firm a "prospect" must be if it is to be "realistic".

51. The policy does not prevent a decision-maker reasonably taking the view, as a matter of planning judgment, that a particular site or sites on which it was not certain or confident that development would occur within five years should be excluded from the five-year supply of housing land. It does not state, for example, that sites without planning permission, but with a resolution to grant subject to a section 106 planning obligation being entered into, should always, or usually, be included in the supply, or that such sites should be included if they have been allocated for housing in the development plan. The same may also be said of the subsequent revisions of the policy in 2018 and in 2019 – in which the definition of a "deliverable" site has been somewhat expanded. Put simply, the degree of confidence required in the "deliverability" of sites is for the decision-maker to decide, within the bounds of reasonable planning judgment.

52. The latitude in the policy itself is also reflected in the relevant guidance in the PPG. Paragraph 3-031-20140306 says that deliverable sites "could" – not "must" – include those allocated for housing in the development plan, and also that a planning permission or allocation is "not a prerequisite" for a site's inclusion in the five-year supply. But it does not say that any site merely with a resolution to grant, subject to a planning obligation, must be included. It calls for "robust" evidence to support an authority's assessment of deliverability. Paragraph 3-033-20150327 uses the same adjective in its advice on annual assessments. The guidance does not, in principle, disqualify as insufficiently "robust" an assessment that excludes from the five-year housing land supply a site or sites yet to receive a grant of planning permission.

53. It is clear then that the policy in paragraph 47, and the PPG guidance upon it, accommodate different views on a "realistic prospect" of delivery. A local planning authority can take a more cautious view on this question, or a more optimistic view, than other authorities might. If it does, it is not for that reason acting contrary to the policy, or unreasonably. Had the Government meant to impose a rigid approach, or greater consistency than the policy and guidance require, it would surely have done so. If it had wanted to define exactly what it meant by a "realistic prospect" it could and would have done that. But it has not – either in the policy it originally issued or in the two revisions, or in the PPG.

54. As the judge recognized, "achievability" was only one of four elements that together went to the question of "deliverability", the other three being "availability", "suitability" and "viability" (see paragraph 38 of my judgment in *St Modwen Developments Ltd.*). All four elements must be present if a site is to be regarded as "deliverable". And all of them entail the exercise of planning judgment. Thus, for example, a site judged by the local planning authority not to be "a suitable location" for housing development "now" could properly be excluded from the calculation of the five-year housing land supply even if it was clearly "available now", and also "achievable with a realistic prospect that housing will be delivered on the site within five years", and development "viable". In those circumstances, and despite the existence of a "realistic prospect" of the site's development, however strong that prospect might be, the site could properly be judged by the authority not to qualify as "deliverable" under the policy.

55. With those points in mind, I do not think the assessment of the five-year housing land supply underlying the officer's advice to the Planning Committee at its meeting on 2 August 2017 was at odds with the approach endorsed by this court in *St Modwen Developments Ltd.*. It does not, in my view, betray any misdirection on the meaning and effect of the policy in paragraph 47 of the NPPF, or the relevant guidance in the PPG, or a misapplication of that policy and guidance. None of the planning judgments embodied in it were unlawful.

56. The real challenge in this claim, as the judge said (in paragraph 62 of his judgment), is to the assessment of the five-year housing land supply in the recently published annual monitoring report for 2016-2017, which was relied upon by the officers in their reports to committee on the applications for planning permission. The assessment set out in Appendix 1 to the annual monitoring report was an up to date assessment, published in June 2017 – only two months before the Planning Committee met on 2 August 2017. It was informed by an up to date SHMA, published in May 2017. It expressly referred to the relevant policy, in paragraph 47 of the NPPF, including the essential content of footnote 11, and it did so

accurately. The text in paragraph 4.9 of the annual report did the same. It expressly acknowledged the four elements of "deliverability" under the policy. It did not confuse "deliverability" with actual "delivery". And there is no reference to a test of "certainty" or "absolute certainty" as a proxy for the concept of a "realistic prospect" in footnote 11.

57. No such suggestion is to be seen in the five-year housing land supply assessment itself. The calculation of the supply was consistently presented for either basis of assessment – the housing requirement figures in the core strategy and the latest assessment of housing need in the SHMA – and it produced the same total supply figure for both, namely 1,699 dwellings for the five-year period from 2017 to 2022. It was founded on a site by site appraisal in which the status of each site was identified. The supply included not only sites with planning permission and where construction was already under way, but also sites allocated for housing in the development plan but as yet with no planning permission – Hadleigh East and Chilton Woods – and another site with a resolution to grant permission and a section 106 obligation still to be signed – "Strategic Allocation – Wolsey Grange", which was allocated under Policy CS7 for the "Ipswich Fringe" in the core strategy. Hadleigh East and Chilton Woods were expected to deliver a total of 110 dwellings in the relevant five-year period; Wolsey Grange, 120.

58. Ms Blackmore pointed out that those three sites, all of them allocations in the development plan, must already have been assessed for availability, suitability, achievability and viability in the plan period. There were no other sites in the trajectory table indicated as delivering housing within five years that simply had a resolution to grant planning permission and a section 106 obligation outstanding. The site known as "Land East of Artiss Close & Rotherham Road" in Bildeston, which had a resolution to grant subject to a section 106 obligation, was expected to deliver 48 dwellings, but – surprisingly – not within five years (see paragraph 21 of Councillor Ireland's witness statement). The section 106 agreement was signed on 20 October 2017 and planning permission granted (see paragraph 30 of the witness statement of Councillor Moss, dated 2 August 2018). The site known as "Former Brett Works and 109 High Street, Hadleigh", which also had a resolution to grant subject to a section 106 obligation, was expected to deliver 65 dwellings in Phase 2 of the development, but none in Phase 1 – again surprisingly, because in December 2017 dwellings on the site were already on the market (see paragraph 23 of Councillor Ireland's witness statement). This evidence had not been rebutted by Mr Deakin in his witness statement. It proved, Ms Blackmore submitted, that the district council had applied a test of "certainty" in assessing the deliverability of sites.

59. I disagree. In fact, as Mr Bedford submitted, the assessment of the five-year housing land supply in the annual monitoring report demonstrates an approach considerably less ambitious than a quest for "certainty" of delivery within that time. The inclusion of allocated sites still without a planning permission, or with a resolution to grant and a section 106 obligation outstanding, goes against the argument that the district council had set itself so rigorous a test – nothing less than a total absence of doubt. Neither of those categories of site could realistically be said to represent a "certainty" of any particular number of dwellings being developed on them within five years. The same might also be said of the sites included in the supply for which outline or full planning permission had already been granted – with a 10% adjustment for "lapse" – in accordance with the approach to sites with planning permission indicated in footnote 11. But in any event it is clear that a substantial portion of the housing land supply assessed in the annual monitoring report – 230 dwellings – comprised sites for which planning permission had not yet been

granted, to which a degree of uncertainty in both the amount and timing of development must attach. How much uncertainty may be moot.

60. Ultimately, as I have said, this was a matter for the district council's planning judgment. It may or may not be fair to describe its exercise of planning judgment as more circumspect than other local planning authorities' in similar circumstances would have been – or indeed the Secretary of State or his inspector on appeal. And it may or may not be right to suggest, as the parish council does, that there was a strong case for including developments on smaller sites, such as Artiss Close and the former Brett Works, in the five-year supply. Such arguments, however, tend dangerously close to the merits of including individual sites in the five-year supply, which it is not the court's role to consider. They do not, in my view, demonstrate a failure by the district council to understand government policy in paragraph 47 of the NPPF or guidance in the PPG, or a misapplication of that policy and guidance, or an exercise of planning judgment outside the generous scope that public law permits.

61. This analysis does not yield to Ms Blackmore's submissions on events before and after the publication of the annual monitoring report, and after the Planning Committee's meeting on 2 August 2017. The meeting with parish councillors on 22 May 2017 took place before the publication of the annual monitoring report for 2016-2017. The parish councillors were told, in effect, that the new annual monitoring report would settle the question of the five-year housing land supply in the light of government policy in the NPPF. Mr Newman's reference to there being "no certainty" that some of the sites discussed would deliver housing within five years, and his comment that the list of sites included "absolute certainties rather than ones affected by JR" – whether or not this was, as Mr Bedford submitted, merely a "hyperbolic contrast" with the sites and proposals yet to be reconsidered by the Planning Committee – does not negate the assessment of the five-year supply later to emerge in the annual monitoring report. That assessment was plainly not confined to "certainty" of delivery or "absolute certainties". And at the time of the meeting, the district council could not be sure that the sites "affected by JR" were "suitable for development now".

62. The district council's response on 22 May 2017 to Mr Cave's Freedom of Information Act request also preceded the publication of the new annual monitoring report. As Mr Deakin explains in his witness statement (at paragraph 31), the sites in question "did not benefit from a Planning Committee resolution to approve or a development plan allocation", and "were not regarded … as having sufficient confirmation that they were suitable for housing development so as to be included in the 5YHLS".

63. After the new annual monitoring report was published and before the Planning Committee met on 2 August 2017, the district council did not change its stance on the five-year housing land supply. It relied on the assessment in the annual monitoring report. As the judge said (in paragraph 68 of his judgment), the explanation for it is to be found in the minutes of the Planning Committee's meeting on 5 July 2017 – including the reasons given by Councillor Ridley for the changed situation since 2016 – and the meeting of the Full Council on 18 July 2017 – including Councillor Parker's answer to Mr Cave's question, in which he distinguished between the concepts of "suitability", "availability" and "achievability".

64. It is clear from what Councillor Parker said that, in assessing "deliverability", the district council had regard to each of these considerations, not just "achievability". It is also clear

that, in principle, a site without either planning permission or a development plan allocation would not automatically be discounted. Such a site might still be regarded as "suitable" if it had a resolution to grant permission, subject to a section 106 planning obligation – though, of course, this was not to say that it would automatically be included in the five-year supply. It would not be included if it failed the test of "availability" or the test of "achievability". Councillor Parker's reference to sites with planning permission or a development plan allocation, or both, having "the greater certainty" of delivery, and, by contrast, sites without permission or an allocation being "less certain" in their suitability, availability and achievability, belies the submission that the district council was intent on including only sites "certain" to deliver housing in the five-year supply. He was plainly using the words "certainty" and "certain" in a relative sense – not absolute.

65. I accept Mr Bedford's submission here. The approach taken in the annual monitoring report for 2016-2017, described by councillors at the Planning Committee meeting on 5 July 2017 and the Full Council meeting on 18 July 2017, and effectively adopted by the Planning Committee at its meeting on 2 August 2017, cannot be regarded as irrational. As a means of determining the "deliverability" of sites, in every necessary respect, and thus their inclusion in a "robust" assessment of the five-year housing land supply, it was legally unimpeachable.

66. Turning finally to events after the challenged decisions were made, again I think the judge's conclusion (in paragraph 70 of his judgment) was correct. The deliberations of the Overview and Scrutiny Committee at its meeting on 19 March 2018, and its annual report presented to the Full Council on 22 May 2018, had no bearing on the process culminating in the planning permissions granted for these three proposals – in November 2017 for the developments on the sites at Hadleigh Road and Moores Lane, and in February 2018 for the development on the site at Heath Road. And the annual monitoring report for 2017-2018, published in July 2018, which demonstrated a five-year supply of housing land, does not cast doubt on the lawfulness of those decisions.

67. Our conclusion, in my view, must be that Ms Blackmore's argument here cannot succeed. It does not show that the assessment of the five-year housing land supply on which the district council's Planning Committee relied in approving these three proposals displayed a misinterpretation of the policy in paragraph 47 of the NPPF, or an unlawful application of that policy, or irrationality, or any other public law error.

Did the district council improperly take into account the possible financial consequences of fighting appeals?

68. Ms Blackmore submitted to the judge that when the district council assessed housing land supply it had taken into account "developer pressure, as evidenced by the Bidwells report and the meeting following it, and the further irrelevant consideration that the developers might mount legal challenges" (paragraph 71 of the judgment). The judge rejected that argument. He accepted Mr Bedford's submission that it was "not unlawful for a local planning authority to want to have confidence that it will be able to robustly defend the judgments it forms on the deliverability of housing sites". He therefore concluded that "the concern about challenges from developers was lawfully taken into account as a factor in decision-making" (paragraph 72).

69. Before us, Ms Blackmore argued that the judge's conclusion was wrong. The financial burden for the district council in defending its position on housing land supply on appeal, and the financial risk of an award of costs being made against it if its position were found to be indefensible, were not considerations "[relating] to the use and development of land" (see the judgment of Cooke J. in *Stringer v Minister of Housing and Local Government* [1971] 1 W.L.R. 1281, at p.1295), or as Jonathan Parker L.J. put it in *R. (on the application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370; [2003] 1 P. & C.R. 19 (at paragraph 121), "rationally related to land use issues". They had nothing to do with the approach to assessing the deliverability of sites under government policy in paragraph 47 of the NPPF endorsed in *St Modwen Developments Ltd.*, or the guidance in paragraph 3-033-20150327 of the PPG calling for "robust" assessment. Having regard to them was impermissible as a matter of law. There was no warrant for doing so in section 70(2)(b) of the Town and Country Planning Act 1990, which requires a local planning authority to have regard to "any local finance considerations, so far as material to the application [for planning permission]". They were not financial considerations "material to the application". This was not a case where the financial viability of a development was at stake or where two or more developments were financially dependent on each other (see the speech of Lord Collins of Mapesbury in *R. (on the application of Sainsbury's Supermarkets Ltd.) v Wolverhampton City Council* [2010] UKSC 20; [2010] 2 W.L.R. 1173, at paragraph 70; and the speech of Lord Walker of Gestingthorpe, at paragraphs 86 and 87). The prospect of savings to the public purse if the cost of fighting appeals were avoided was an immaterial consideration. It was a free-standing "financial [consideration] unrelated to the use and development of land" (see, for example, the judgment of Kenneth Parker J. in *Samuel Smith Old Brewery Tadcaster v Selby District Council* [2013] EWHC 1159 (Admin), at paragraphs 39 and 40).

70. In my view this argument is not cogent. The reality here is that the district council made its decisions to grant planning permission lawfully, with a true understanding of relevant policy and on the strength of land use considerations that were material; it did not resort to considerations that were immaterial.

71. Neither in the officers' reports to the Planning Committee for its meeting on 2 August 2017 nor in the minutes of that meeting, nor in the annual monitoring report for 2016-2017, nor in the minutes of the committee meeting on 5 July 2017 or the Full Council meeting on 18 July 2017 does one find any support for the suggestion that the district council's assessment of the five-year housing land supply was undertaken contrary to the relevant policy in the NPPF and guidance in the PPG, or on the basis of any immaterial consideration. There is no evidence of an approach whose aim was to avoid for the district council the financial burden and risk of appeals, rather than one that would produce a "robust" assessment in accordance with national policy and guidance. And there is nothing there to suggest – nor does Mr Deakin say in his witness statement – that, in its assessment of the five-year housing land supply, the district council adopted a more cautious view when establishing which sites had a "realistic prospect" of housing being delivered on them within five years than it would otherwise have done because it was concerned about the possible need to expend public money in resisting appeals, or because it feared the prospect of being ordered to pay the appellants' costs if such appeals were pursued. Such considerations did not play any part in the officers' assessment of the proposals on their planning merits in the committee reports, nor are they to be seen in the members' deliberations as recorded in the minutes.

72. The observation made in Mr Newman's report to the Overview and Scrutiny Committee for its meeting on 19 March 2018 to the effect that a failure to produce a "robust" assessment of housing land supply might expose the district council to an award of costs on appeal, which is no doubt true as a matter of fact, came more than nine months after the Planning Committee meeting on 2 August 2017 and some three months after the last of the three planning permissions was granted.

73. Mr Bedford submitted that there is no general rule that a public authority may not have regard to the financial consequences of an administrative decision when making that decision. And he went further, submitting that unless there is some statutory prohibition, it might be contrary to common sense for an authority to have no regard to the implications for the public purse. He did not refer, though he properly could have done, to the decision of the Supreme Court in *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34; [2012] 1 W.L.R. 2264 – a case concerning the provisions for revocation in section 97 of the 1990 Act – where Lord Carnwath observed (at paragraph 48) that "general principles would normally dictate that a public authority should take into account the financial consequences for the public purse of its decisions". Lord Carnwath went on to say (at paragraph 50) that "[under] section 70 the planning authority … must either grant or refuse permission", that its decision "must be governed by considerations material to that limited choice", and that "the decision normally has no direct cost consequences for [it] (unless exceptionally it has a direct financial interest in the development, when other constraints come into play)".

74. In this case, however, we are concerned with a different question: whether the district council's exercise of legitimate planning judgment was distorted by considerations relating not to the land use planning merits of the proposals before it, but to extraneous implications for its own resources.

75. I see no basis for Ms Blackmore's contention that the district council erred in law in that way. Mr Bedford acknowledged Mr Deakin's comments (in paragraph 20 of his witness statement) on "resource-intensive" appeals, which impose burdens on local planning authorities both financially and in the expense of officers' time, and the "risk of a costs award" if, on appeal, the authority is found to have acted unreasonably in relying on an unrealistic assessment of housing need. But as he submitted, not only is this a reality with which authorities have to contend; it is also in no way inconsistent with the requirements of national planning policy and guidance on the five-year housing land supply. It is a consequence of the basic requirement for authorities to maintain five years' supply under the policy in paragraph 47 of the NPPF and to be able to "demonstrate" such a supply under the policy in paragraph 49, and the guidance enjoining them to be able "to provide robust, up to date evidence to support the deliverability of sites …" in paragraph 3-031-20140306 of the PPG and to "ensure that they carry out their annual assessment in a robust and timely fashion, based on up-to-date and sound evidence …" in paragraph 3-033-20150327. Policy and guidance impose these responsibilities squarely on local planning authorities. It is up to them to demonstrate the existence of a five-year housing land supply in their decision-making, and if need be to defend their position before an appeal inspector.

76. Appeals can of course be made, and often are, against decisions of local planning authorities that prove to have been correct when the proposal is considered again on its merits by an inspector. And it is a truism that if a sound decision is appealed, the expense incurred by the authority in resisting an appeal will often be no less than in defending a

decision that is in the end overturned. As the Government's relevant guidance explains, adverse awards of costs are only made for conduct that is unreasonable, such as "preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations" (paragraph 16-049-20140306 of the PPG), and where an authority "has refused a planning application for a proposal that is not in accordance with the development plan policy, and no material considerations including national policy indicate that planning permission should have been granted, there should generally be no grounds for an award of costs against the … authority for unreasonable refusal of an application" (paragraph 16-050-20140306). "National policy" would clearly include the policy for the five-year housing land supply in the NPPF.

77. A "robust" assessment of the five-year housing land supply, which national policy and guidance expect, is synonymous with a defensible assessment. And a defensible assessment is inherently more likely to avoid the expenditure and delay for all parties – not only the local planning authority, but also applicants and objectors – of appeals against the refusal of planning permission that could have been avoided. It may deter such appeals. If there is an appeal and the five-year supply is in issue, a "robust" assessment is more likely to be capable of withstanding attack in evidence and cross-examination, more likely to be supported by the inspector, and also more likely to be proof against an award of costs being made against the local planning authority. Such an assessment will be faithful to national policy in the NPPF and national guidance in the PPG, and will also therefore be an assessment that saves unnecessary burdens on the public purse.

78. The simple point here therefore is this. National policy and guidance on the five-year housing land supply was necessarily a material consideration in the district council's decisions on these three proposals – being, as it obviously was, a consideration related to the use and development of land (see the judgment of Lord Carnwath in *Hopkins Homes Ltd.*, at paragraph 21). Essential to that national policy and guidance was the imperative of a "robust" assessment. A "robust" assessment was, by its nature, an assessment likely to reduce the district council's financial burden and risk. And the requirement in national policy for such an assessment was effectively reinforced by the guidance on awards of costs in the PPG.

79. This conclusion does not depend on the provision in section 70(2)(b) requiring "local finance considerations" to be taken into account, if "material to the application". That provision is not relevant in this case. The definition of a "local finance consideration" in section 70(4) is "(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown" or "(b) sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy".

80. Nor is there any offence to the principles in the case law governing the materiality of considerations that go to the viability of a development or to the economic interdependence of developments on different sites. Those principles are not involved here.

81. Our attention was drawn to the first instance decision in *R. v Royal Borough of Kensington and Chelsea Council, ex p. Stoop* [1992] 1 P.L.R. 58. In that case the local planning authority's committee was given advice, in closed session, on its prospects of successfully defending on appeal a refusal of planning permission for a mixed-use development,

including officers' advice on the possibility of an award of costs against the authority. Having referred to the Government's advice on awards of costs – which was then in paragraph 7 of Circular 2/87, under the heading "Unreasonable Refusal of Planning Permission" – Otton J., as he then was, said the officers were "doing no more than giving "sound and clear cut reasons for refusal" and that to refuse would put [the authority] in a position whereby they were vulnerable as to costs". In his view, "there was nothing wrong with this procedure or in the advice that was given or the consequences that flowed from the acceptance of that advice". Though the facts and circumstances in that case were obviously different, I see nothing in Otton J.'s reasoning to cast doubt on my conclusion here.

82. It need hardly be said that local planning authorities are not free to misread or misapply government policy because they fear the financial consequences for themselves if later faced with an appeal against a decision to refuse planning permission, or indeed, as in this case, proceedings for judicial review challenging a decision to grant. They must adhere, always, to a correct interpretation of relevant policy, apply such policy lawfully when assessing the proposals before them solely on the planning merits, and not allow the potential consequences of the decision for their own resources to influence their exercise of planning judgment. If authorities abide by that basic principle, they may still not avoid the expense of having to defend their decisions on appeal or resist claims for judicial review. That is beyond their control. But they will, at least, be acting in accordance with the law. And in this case, in my view, the district council did that.

83. I conclude, therefore, that the appeal should also fail on this issue.

Conclusion

84. For the reasons I have given, I would dismiss this appeal.

Lord Justice Irwin

85. I agree with both judgments.

Lord Justice Underhill

86. I agree that this appeal should be dismissed. As regards the issue of whether the Council made an error of law in its assessment of housing land supply, I have nothing to add to what Lindblom LJ says at paras. 41-67 of his judgment.

87. As regards the other issue, I agree with him (see paras. 71-72) that the evidence does not justify the conclusion that the impugned decision was made otherwise than on the basis of proper planning considerations. But I am bound to say that the passage from Mr Deakin's witness statement quoted at para. 22 of his judgment caused me some unease. It is true that in the real world councillors and officers are bound to be aware that a refusal of planning permission for a big development is likely to be appealed, and that, win or lose, the process will be expensive in terms both of officer resources and of legal costs incurred – let alone the further, though no doubt typically remote, risk of liability for the developer's costs if the appeal is successful and the council is held to have acted unreasonably. No doubt the risk of

those costs will encourage them to think carefully about any refusal decision, and that is fair enough – though of course in principle they should be doing so anyway. But that is not the same as allowing the risk of the costs associated with defending an adverse decision on appeal to influence them in the exercise of their planning judgement. That is not legitimate (Lord Carnwath's observations in the *HSE* case to which Lindblom LJ refers are directed to a different question). It is important that that distinction is not blurred; and there is a risk of that occurring if officers in their advice make express reference to the likely costs consequent on a refusal. Councillors' job is to exercise their planning judgement, and if that leads to an expensive appeal that cannot be helped. The same of course goes for planning decisions which cannot be appealed as such but which an adversely affected party may choose to challenge by way of judicial review. I therefore particularly endorse what Lindblom LJ says at para. 82.