Neutral Citation Number: [2015] EWHC 410 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2015

Before:
THE HONOURABLE MRS JUSTICE LANG DBE
-

Between:

CHESHIRE EAST BOROUGH COUNCIL

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(2) RICHBOROUGH ESTATES PARTNERSHIPS LLP

Claimant

Defendants

Anthony Crean QC (instructed by Sharpe Pritchard) for the Claimant
Richard Honey (instructed by The Treasury Solicitor) for the First Defendant
Christopher Young (instructed by Gateley LLP) for the Second Defendant

Hearing date: 12 February 2015

Approved Judgment
Mrs Justice Lang:

Introduction

1. In this claim under section 288 of the Town and Country Planning Act 1990 (“TCPA 1990”), Cheshire East Borough Council (“the Council”) applies to quash the decision of the Secretary of State for Communities and Local Government, dated 1 August 2014, made on his behalf by an Inspector (Mr Alan Boyland), in which he allowed an appeal by Richborough Estates (“the developer”), and granted outline planning permission for up to 146 dwellings on land north of Moorfields, Willaston, Cheshire.

2. Willaston is a village between the towns of Nantwich and Crewe. For many years, the Council’s local planning policies have sought to maintain the separate identities of Nantwich, Crewe and the settlements between them and to preserve areas of open countryside from encroachment. The proposed development is contrary to those policies and is controversial among local residents. On the other hand, the Defendant concluded that the proposed dwellings would make an important contribution towards housing requirements in a district where there was not a demonstrable a 5 year supply of deliverable housing site, as required under the NPPF.

3. On 2 April 2014, after the appeal was made, the Council’s Strategic Planning Board considered the proposal and resolved it was minded to refuse outline planning permission for the proposed development for the following reasons:

   a) It was unsustainable development located within open countryside, and it would harm interests of acknowledged importance, contrary to Policies NE.2 (Open Countryside) and RES.5 (Housing in the Open Countryside) of the Crewe and Nantwich Replacement Local Plan 2011, Policy PG5 of the emerging Cheshire East Local Plan Strategy – Submission Version, and the principles of the National Planning Policy Framework (NPPF) which seek to ensure that development is directed to the right location and open countryside is protected from inappropriate development and maintained for future generations enjoyment and use.

   b) It would result in loss of the best and most versatile agricultural land contrary to NE.12 (Agricultural Land Quality) of the Crewe and Nantwich Replacement Local Plan 2011 and the NPPF, and was unsustainable development.

   c) It would cause a significant erosion of the Green Gap between the built-up areas of Willaston and Rope, contrary to Policy NE.4 (Green Gaps) of the Crewe and Nantwich Replacement Local Plan 2011 and the NPPF.

   d) The Council could demonstrate a 5 year supply of housing land in accordance with the NPPF and consequently there were no material circumstances to indicate that permission should be granted contrary to the development plan.

4. The Inspector conducted site visits and held an Inquiry. His conclusions were as follows:
a) There was not a demonstrable 5 year supply of deliverable housing sites.

b) In the light of the finding at (a), the weight of policies relevant to the supply of housing was reduced. This applied to policies NE.2, NE.4 and RES.5 in so far as their extent derived from settlement boundaries that reflect out of date housing requirements, though policy NE.4 had a wider purpose in maintaining gaps between settlements.

c) The emerging Local Plan was subject to significant objections material to this issue and had yet to be examined and so only limited weight should be attached to it.

d) Overall, the proposed scheme represented sustainable development.

5. The Claimant challenges the decision on the following grounds:

a) **Sustainable development.** The Inspector failed to understand or correctly apply the requirement of sustainable development in paragraph 14 of the NPPF, and to apply the conclusions on Green Wedges by Lindblom J. in *Bloor Homes East Midlands v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin).

b) **Housing supply.** The Inspector irrationally and/or wrongly concluded that 1350 dwellings per annum represented the full objectively assessed need for housing, and failed to have regard to other decisions made by the Defendant on this issue, and to give adequate reasons for departing from them.

c) **Policy NE.4 Green Gaps.** The Inspector erred in his approach to the NPPF and section 38(6) of the Planning and Compulsory Purchase Act 2004, in treating Policy NE.4 Green Gaps as a policy for the supply of housing under paragraph 49 of the NPPF, and thus out-of-date.

6. The Defendants’ response was, in summary:

a) **Sustainability.** The Inspector was entitled to assess sustainability after he reached his conclusions on the weight to be attached to the development plan and the housing supply issue, and since these issues were relevant to the overall question of sustainability, it was appropriate for him to do so. Sustainability was a question of planning judgment on the facts of the individual case. Lindblom J’s conclusions in *Bloor* did not lay down any general principle in respect of Green Wedge policies.

b) **Housing supply.** The Inspector made a legitimate exercise of planning judgment on the evidence before him, adopting a benchmark figure from the Council’s own emerging Local Plan. The previous inspectors’ decisions did not establish a clear consensus on the housing requirement figure and the RSS figure was a “constrained” figure which could no longer be relied upon following *Hunston v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1510. The Inspector’s reasons for his conclusions on this issue were made clear to the Claimant in the decision letter.
c) **Policy NE.4 Green Gaps.** The Inspector correctly decided that it was a policy for the supply of housing under paragraph 49 of the NPPF and so should be treated as out-of-date. Nonetheless he considered the extent to which the proposed development breached the Green Gap policy and concluded that the adverse effects would not be significant.

**Legal framework**

7. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and in consequence, the interests of the applicant have been substantially prejudiced.

8. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.


   “An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision.

10. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004, read together with section 70(2) TCPA 1990. The NPPF is a material consideration for these purposes.


   “It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 2319, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as
inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of City of Edinburgh Council v Secretary of State for Scotland 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with whom the other members of the House expressed their agreement. At p.44, 1459, his lordship observed:

“In the practical application of sec. 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.”

12. Lord Reed rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. He said:

“18. … The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained…..these considerations suggest that, in principle, in this area of public administration as in others (as discussed, for example, in R(Raisi) v Secretary of State for the Home Department [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context. They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the
ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 659, 780 per Lord Hoffmann).”

13. An Inspector’s decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well informed reader who understands the principal controversial issues in the case: see Lord Bridge in South Lakeland v Secretary of State for the Environment [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in Clarke Homes v Secretary of State for the Environment (1993) 66 P & CR 263, at 271; Seddon Properties v Secretary of State for the Environment (1981) 42 P & CR 26, at 28; and South Somerset District Council v Secretary of State for the Environment (1993) 66 P & CR 83.


15. The standard of reasons required was described by Lord Brown in South Bucks District Council and another v Porter (No 2) [2004] 1 WL.R. 1953:

“36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

Sustainable development

16. The Claimant submitted that the Inspector was required to make a primary finding on whether or not the development was sustainable, before he considered the weight to be given to the development plan and the Claimant’s housing supply. Instead he
wrongly considered the question of sustainability after he had determined those two issues.

17. It is common ground that the presumption in paragraph 14 of the NPPF only applies in favour of “sustainable” development. In *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin), I said at paragraph 37:

“I accept Mr Maurici’s submission that paragraph 14 NPPF only applies to a scheme which has been found to be sustainable development. It would be contrary to the fundamental principles of the NPPF if the presumption in favour of development in paragraph 14 applied equally to sustainable and non-sustainable development.”

18. In *Dartford BC v Secretary of State for Communities and Local Government* [2014] EWHC 2636 (Admin), Patterson J rejected the submission that a sequential approach to decision-taking was required. She said, at [54]:

“As was recognised in the case of *William Davis* (supra) at para.38 the ultimate decision on sustainability is one of planning judgment. There is nothing in NPPF, whether at para.7 or para.14 which sets out a sequential approach of the sort that Mr Whale, on behalf of the Claimant, seeks to read into the judgment of Lang J at para.37. I agree with Lang J in her conclusion that it would be contrary to the fundamental principles of the NPPF if the presumption in favour of development, in para.14, applied equally to sustainable and non-sustainable development. To do so would make a nonsense of Government policy on sustainable development.”

19. In deciding whether or not a development is “sustainable”, an Inspector has to consider both the description of sustainable development in paragraphs 6 to 10 of the NPPF, and the guidance on the way in which sustainable development may be achieved, set out in paragraphs 11 to 149 of the NPPF, to the extent s/he considers appropriate and relevant in the particular case.

20. As Patterson J explained in *Dartford BC*, at [46]:

““sustainability” therefore inherently requires a balance to be made of the factors that favour any proposed development and those that favour refusing it in accordance with the relevant national and local policies. However, policy may give a factor a particular weight, or may require a particular approach to be adopted towards a specific factor; and where it does so, that weighing or approach is itself a material consideration that must be taken into account.”

21. In my judgment, it was logical for the Inspector in this appeal to decide what weight he should attach to the development plan, and to determine the issue of housing supply, before he considered the issue of sustainability, as these findings were
relevant to the question of sustainability. Whilst not intending to prescribe any sequence for future appeals, I note that in *William Davis Ltd* the Secretary of State took a similar approach. He assessed the weight to be given to the Green Wedge policy in the development plan, and found that the authority could not demonstrate a 5 year housing supply, before concluding that the proposed development was not sustainable.

22. The Claimant also submitted that, if development would cause harm to an area of Green Wedge protected by policy, it cannot “sensibly” be considered as “sustainable”, applying *Bloor Homes East Midlands v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) per Lindblom J at [179]:

“On any sensible view, if the development would harm the Green Wedge by damaging its character and appearance or its function in separating the villages of Groby and Ratby, or by spoiling its amenity for people walking on public footpaths nearby, it would not be sustainable development within the wide scope drawn for that concept in paragraphs 18 to 219 of the NPPF.”

23. In *William Davis Ltd*, the Secretary of State also found that the proposed development over the major part of a policy-protected Green Wedge between Coalville and Whitwick was not sustainable development.

24. However, the question whether or not the development is sustainable is a planning judgment for the Inspector to make on the evidence in the appeal before him (see *William Davis Ltd* at [38]; *Dartford BC* at [54]). The Inspector was not required to follow, nor treat as material considerations, planning judgments reached on the application of different policies to different development proposals in different locations.

**Housing supply**

25. Paragraph 47 of the NPPF requires local planning authorities to “boost significantly the supply of housing” by ensuring that their Local Plan meets the “full, objectively assessed needs” for market and affordable housing. They are required to identify a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements, with an additional percentage ‘buffer’. By paragraph 49, if they are not able to demonstrate a five year supply of deliverable housing sites, their policies for the supply of housing are to be treated as out-of-date.

26. The Council submitted that there was a requirement of 1150 dwellings per annum (‘dpa’) for the District based upon the evidence underlying the figures in the Regional Spatial Strategy (‘RSS’) for the North West (now revoked).
27. The Inspector rejected the Council’s submission, and found “little objective and up-to-date evidence to support any need figure significantly below 1350 dpa”, for the following reasons:

a) The RSS figures were based on household projections from 2003 and more recent projections were now available.

b) The RSS figures were constrained by the strategy directing growth to the large conurbations in the North West and so reducing growth in what is now the Cheshire East District. The figure of 1150 dpa was below household projections and economic growth areas for the District at that time. It was not therefore a “full objectively assessed” figure.

c) In the Council’s emerging Local Plan, the “full objectively assessed” figure was assessed as 1350 dpa in both the March 2014 Housing Background Paper and Policy PG 1, although the policy was subject to objection and examination, so the final adopted figure was not yet determined.

d) The developer’s evidence identified a demographic-only requirement of 1300 dpa but indicated that 1800 dpa would be required to address suppressed need and to support the economic growth identified in the emerging Local Plan.

28. The Inspector concluded that the Council was not able to demonstrate that it had a 5 year supply of deliverable housing sites for “fully assessed objective needs” of 1350 dpa. I cannot accept the submission that this conclusion was irrational – it was a planning judgment which the Inspector was entitled to reach on the evidence before him.

29. The Claimant submits that, since previous planning decisions by other inspectors acted upon the RSS figures put forward by the Council, this Inspector had to have regard to them as material considerations and give proper reasons for departing from them (see Fox Strategic Land & Property Ltd v Secretary of State for the Communities and Local Government [2013] 1 P. & C.R. 6, at [12] – [13] and the cases cited therein and Cotswold DC v Secretary of State for the Communities and Local Government [2013] EWHC 3719 (Admin), at [69])

30. Although the Inspector did not refer in his decision to the other decision letters in 2013 and 2014 in which the RSS figure of 1150 dpa had been accepted, I am unable to infer that he disregarded them, as they were listed among the ‘Documents submitted to the Inquiry’ and referred to during the Inquiry (save for those which post-dated the Inquiry and were not drawn to his attention by the parties). He was entitled not to follow them because they had limited evidential or probative value. In all save one, the Council and the developer agreed the figures. In contrast, in this appeal the figures were disputed and the Inspector was required by the parties to analyse the more recent primary evidence relating to housing supply, which was either not adduced in the other appeals or not critically assessed.

31. Moreover, following the judgment of the Court of Appeal in Hunston v Secretary of State for Communities and Local Government [2013] EWCA Civ 1510, handed down in December 2013, it was no longer lawful for the Inspector to rely on a “constrained” figure that did not represent the “full objectively assessed needs” (see per Sir David...
Keene at [26] – [27]). As the Court of Appeal indicated in *Solihull MBC v Gallagher Estates* [2014] EWCA Civ 1610, housing data from an earlier RSS exercise has to be used with extreme caution because of the policy changes in the NPPF (at [15] – [16], approving Hickinbottom J.’s judgment at [98]).

32. Applying the principles in *Porter*, I consider that the Inspector gave adequate reasons for his findings on the housing supply issue, enabling the Council to understand why it had lost. The Inspector was not required to set out in his reasons every matter presented to him during the Inquiry. For the reasons I have given, the previous decisions of inspectors carried little weight. Moreover, the failure to refer to them did not prejudice the Claimant as it was clear why the Inspector reached his conclusions on this issue.

**The Green Gap policy**

33. Once the Inspector decided that the Council had not demonstrated a five year supply of deliverable housing sites, he had to go on to consider which policies in the Local Plan were “relevant policies for the supply of housing” pursuant to paragraph 49 of the NPPF. Such policies are deemed to be out-of-date, even if, as here, the policies are still in force.

34. Policies ‘NE.2 Open Countryside’, ‘RES.5 Housing in the Open Countryside’ and ‘NE.4 Green Gaps’ were part of the Crewe and Nantwich Replacement Local Plan (2011) which was adopted in 2005 with an end date of 2011. The policies were saved by the Secretary of State in 2008.

35. The Inspector concluded that Policy NE.2, which treated all land outside defined settlement boundaries as open countryside upon which only “essential development” as defined should be permitted, was a policy relevant to the supply of housing for the purposes of paragraph 49 of the NPPF, and therefore should be treated as out-of-date. The Council conceded this point.

36. The Inspector also concluded Policy NE.2 was out-of-date because it reflected housing requirements to March 2011, not beyond. The emerging Local Plan (submitted in 2014) proposed some sites for housing development currently within Policy NE.2, indicating that the release of land currently subject to NE.2 could not be ruled out.

37. The Inspector found that Policy RES.5, which made provision for housing for persons engaged in agriculture or forestry within open countryside, as defined by Policy NE.2, was broadly consistent with the NPPF but, because its settlement boundaries reflected those in NE.2, he only afforded it the reduced weight which he gave to NE.2. He concluded that fell within paragraph 49, NPPF, and accordingly its weight was reduced.

38. The Inspector also concluded that Policy NE.4 Green Gap was a policy relevant to the supply of housing for the purposes of paragraph 49. Policy NE.4 stated:

“**NE.4 GREEN GAPS**
The following areas defined on the proposals map are Green Gaps in the open countryside:

WILLASTON / ROPE GAP;

HASLINGTON / CREWE GAP;

SHAVINGTON / WESTON / CREWE GAP.

Within these areas, which are also subject to policy NE.2, approval will not be given for the construction of new buildings or the change of use of existing buildings or land which would result in erosion of the physical gaps between built up areas; or adversely affect the visual character of the landscape. Exceptions to this policy will only be considered where it can be demonstrated that no suitable alternative location is available.

Justification. These areas need additional protection in order to maintain the definition and separation of existing communities, and to indicate support for the longer term objective of preventing Crewe, Willaston, Wistaston, Nantwich, Haslington and Shavington from merging into one another. The bulking of principal traffic routes through the narrow gaps between the settlements has the potential to increase pressure for new development up to and along these routes. That pressure is already manifest in the Green Gaps, justifying a stricter level of developmental control to ensure continuing separation of the settlements.”

39. The Inspector recognised that the policy “performs strategic functions in maintaining the separation and definition of settlements and in landscape protection, and thus remains pertinent.”

40. However, since the inner boundaries of the Green Gaps were formed by the settlement boundaries, he found that the considerations that applied to Policy NE.2 also pertained to Policy NE.4. He said it was significant that two of the proposed housing sites in the emerging Local Plan were in designated Green Gaps around Crewe and said “it could not be assumed that the appeal site will remain outside the defined settlement boundary”. He concluded that the policy was not up-to-date and he only gave it reduced weight.

41. In his conclusions at paragraph 94, he said:

“I have concluded that there is not a demonstrable 5-year supply of deliverable housing sites … In the light of that, the weight of policies in the extant RLP relevant to the supply of housing is reduced … That applies particularly to policies NE.2, NE.4 and RES.5 insofar as their extent derives from
settlement boundaries, though Policy NE.4 also has a wider purpose in maintaining gaps between settlements.”

42. I turn now to consider whether the Inspector erred in law in his approach to NE.4 and paragraph 49 of the NPPF.

43. Paragraph 49 states:

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

44. Where a policy is considered out-of-date, there is a presumption in favour of granting planning permission for sustainable development. By paragraph 14 of the NPPF, the presumption operates in the following way when decisions are made:

“where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

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

- specific policies in this Framework indicate development should be restricted.”

45. In *South Northamptonshire Council v Secretary of State for Communities and Local Government & Ors* [2014] EWHC 573 (Admin), Ouseley J. held that a policy which stated planning permission would not be granted for development in the open countryside, subject to certain exceptions, was a policy for the supply of housing within paragraph 49 of the NPPF. In considering the proper interpretation of paragraph 49 of the NPPF he said:

“46. [The] phraseology is either very narrow and specific, confining itself simply to policies which deal with the numbers and distribution of housing, ignoring any other policies dealing generally with the location of development or areas of environmental restriction, or alternatively it requires a broader approach which examines the degree to which a particular policy generally affects housing number, distribution and location in a significant manner.

47. It is my judgment that the language of the policy cannot sensibly be given a very narrow meaning. This would mean that policies for the provision of housing which were regarded as out of date, nonetheless would be given weight, indirectly but effectively though the operation of their counterpart
provisions in policies restrictive of where development should go. Such policies are the obvious counterparts to policies designed to provide for an appropriate distribution and location of development. They may be generally applicable to all or most common forms of development, as with EV2, stating that they would not be permitted in open countryside, which as here could be very broadly defined. Such very general policies contrast with policies designed to protect specific areas or features, such as gaps between settlements, the particular character of villages, or a specific landscape designation, all of which could sensibly exist regardless of the distribution and location of housing or other development.”

46. Other policies which have been held by the courts to be policies for the supply of housing within paragraph 49 of the NPFF either expressly address housing or are general policies restricting development, and so come within Ouseley J’s first category:

   a) Cotswold District Council v Secretary of State for Communities and Local Government [2013] EWHC 3719 (Admin), Lewis J. A policy which restricted development outside development boundaries, and dealt with new-builds and other matters if the authority was to allow housing outside the development boundary, was a policy for the supply of housing within paragraph 49.

   b) Hopkins Homes Ltd v Secretary of State for Communities and Local Government & Ors [2015] EWHC 132 (Admin), Supperstone J. A policy which restricted new development outside the physical limits of settlements, subject to exceptions, was a policy for the supply of housing within paragraph 49.

47. A case in Ouseley J’s second category cited to me was William Davis Ltd v Secretary of State for Communities and Local Government [2013] EWHC 3058 (Admin), in which I decided that a Green Wedge policy, intended to prevent the merging of settlements and preserve open space, was not a policy for the supply of housing within paragraph 49.

48. Mr Crean submits that Policy NE.4 Green Gaps plainly fell within the second category identified by Ouseley J: it was a policy “designed to protect specific areas or features, such as gaps between settlements” which could exist “regardless of the distribution and location of housing or other development”. It was not a policy for the supply of housing within the meaning of paragraph 49.

49. The Defendants did not disagree with Ouseley J’s approach in principle but submitted that the Inspector was entitled to form his own view as to whether this particular policy was, or was not, a policy for the supply of housing within paragraph 49 of the NPPF. They submitted that the Inspector’s decision on this issue was a valid exercise of planning judgment, for the reasons he gave.

50. The House of Lords in Tesco Stores v Dundee City Council confirmed that policy statements should be interpreted “objectively in accordance with the language used, read as always in its proper context” though not as if it were a statute or contract (per
Lord Reed at [18] & [19]). Although that case related to local policy, the same principles apply to national policy. Planning decision-makers, including individual inspectors, ought not to interpret the NPPF differently from one another. Their area of discretion lies in the application of the policy, once properly interpreted.

51. The natural meaning of the words “policies for the supply of housing” is policies which make provision for housing. There are many such policies in local plans. Paragraph 49 could have been worded so as to read “policies which may restrict housing development” or “policies affecting housing development” in which case it would have been broader in scope. The adjective “relevant” is attached to the word “policies”, and means policies which are relevant to the site in question. It does not have the meaning suggested to me in court, namely, policies “relevant to the supply of housing”. That is an impermissible re-writing of the sentence.

52. The immediate context of paragraph 49 suggests that the Minister intended to refer to policies for the supply of housing rather than to any policy which may have the indirect effect of restricting housing development, such as a Green Gap policy. Section 6 of the NPPF is headed “Delivering a wide choice of high quality homes”. Paragraph 47 sets out the steps local planning authorities should take “to boost significantly the supply of housing”, by inter alia ensuring that the policies in their Local Plan meet the full objectively assessed needs for housing in their area. The reference in paragraph 49 to the consequences of a failure to demonstrate five-year supply of deliverable housing sites follows on directly from the duty in paragraph 47 “to identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing”. In paragraph 47 the Minister is exhorting local planning authorities to adopt policies for the supply of housing, sufficient to provide five years worth of housing, and in paragraph 49 he sets out the consequences of a failure to comply with this exhortation.

53. I understand and endorse Ouseley J’s reasons for giving paragraph 49 a broader purposive interpretation. However, in my view, it is not open to inspectors to disregard the distinction he drew between general policies to restrict development and those policies designed to protect specific areas or features, as this goes to the heart of the meaning and purpose of paragraph 49, in the context of the NPPF as a whole and within its proper statutory context.

54. Obviously policies which restrict development in order to afford a Green Gap between settlements do restrict housing development in those areas. But the need for housing is not the only consideration in national planning policy. Looking at the NPPF more widely, protection and enhancement of the natural environment is identified as a key dimension of sustainable development which the planning system is intended to achieve: see paragraphs 7 and section 11 “Conserving and enhancing the natural environment”. It is acknowledged (at paragraph 156) that the Local Plan should have policies to deliver conservation of the natural environment, including landscape, and at paragraph 157, that Local Plans should identify land where development would be inappropriate. Therefore it seems unlikely that the Minister intended local policies protecting the environment or identifying areas where development would be inappropriate to be treated as out-of-date, solely on the ground that their indirect effect was to restrict the supply of housing in those areas, without consideration of their wider planning purpose and value.
55. The NPPF makes provision elsewhere for the treatment of out-of-date policies. Paragraph 215 provides:

“due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the Framework, the greater the weight that may be given).”

This approach provides a more nuanced approach to the treatment of out-of-date policies than paragraph 49, with its sole focus on the supply of deliverable housing sites.

56. I accept Mr Crean’s submission that, in interpreting paragraph 49, the Court should have regard to statutory framework within which the NPPF operates. The power to dis-apply local policies even though they have been adopted by the local planning authority and remain in force is a significant departure from the plan-led approach to decision-making required by statute. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) provides:

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

57. Paragraph 2 of the NPPF re-states the statutory provisions, and explains that the NPPF is a material consideration in planning decision-taking. However, I doubt that the Minister intended the NPPF to be used to routinely bypass local policies protecting specific local features and landscapes, as that would undermine the statutory scheme. Indeed, the NPPF emphasises the value of local development plans since they reflect the needs and priorities of local people for their area:

“1…local people and their accountable councils can produce their own distinctive local and neighbourhood plans, which reflect the needs and priorities of their communities.”

“150. ….Local Plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities…”

The purpose of paragraph 49 was to prompt local planning authorities into updating their Local Plans, and meeting the housing supply requirements in paragraph 47. Unfortunately, the process of adopting a new Local Plan is often a lengthy one, as demonstrated in Cheshire East - perhaps longer than the Minister anticipated when drafting the NPPF.

58. I accept Mr Crean’s submission that Policy NE.4 was a Green Gap policy which, applying Ouseley J’s interpretation of paragraph 49, was “designed to protect specific areas or features, such as gaps between settlements”. The title of the policy is “Green Gaps”; it identifies the Green Gaps specifically by name; and its stated purposes are to prevent development which would result in “erosion of the physical gaps between
built up areas and adversely affect the visual character of the landscape”. The justification of the policy is to maintain “the definition and separation of existing communities, and to indicate support for the longer term objective of preventing Crewe, Willaston, Wistaston, Nantwich, Haslington and Shavington from merging into one another”.

59. I do not consider that the references to housing in the 2003 report of the Inspector on the 2011 Local Plan alter that conclusion. The thrust of the Inspector’s conclusions in 2003 was that the policy was “necessary to prevent the coalescence of Crewe, Nantwich and the various settlements in the immediate vicinity” and that standard open countryside policy was not adequate to protect the Green Gaps in these locations, which were under pressure from developers. As to the boundaries at the edges of the built-up areas, the Inspector observed; “It would be too easy to allow those edges to be nibbled away, eroding the extent of the gaps, and through a cumulative process eventually negating their purpose”. It is plain that the “purpose” he was referring to was maintaining the Green Gaps, not the provision of housing. His acknowledgment that the boundaries of the Green Gaps were a matter for the local planning authority to assess in the light of, amongst other things, the need for housing, is a statement of the obvious. Green Gaps do have the indirect effect of restricting housing development, but nonetheless the local planning authority considered that they have a legitimate planning purpose, and so did the Inspector in this appeal.

60. I also note that the Inspector in this appeal attached “little weight” to the 2003 Inspector’s report, and so presumably he did not rely upon the passages now relied upon by the Defendants when making his decision. This calls into question the extent to which it is proper to support his decision on appeal by reference to the 2003 report.

61. Paragraph 94 of the Inspector’s decision shows that the Inspector adopted the approach advocated by the developer’s counsel at the Inquiry, namely, to find that Policy NE.4 had dual functions – restricting housing and maintaining Green Gaps between settlements – and to seek to give effect to the Green Gap aspect of Policy NE.4, whilst dis-applying it under paragraph 49 in respect of its housing restrictions. In his decision at paragraphs 45 to 54 the Inspector gave detailed consideration to Policy NE.4, applying it to the appeal site. This was quite inconsistent with his earlier finding that the policy was out-of-date and should be given reduced weight.

62. In my view, this approach was an ingenious attempt by the developer (set out in Mr Young’s submissions to the Inquiry) to avoid applying Ouseley J’s interpretation of paragraph 49 in South Northamptonshire Council and it led the Inspector into an error of law. I am persuaded by the submissions of Mr Crean and Mr Honey that a policy such as this one cannot be divided, according to its perceived purposes. It either comes within paragraph 49 or it does not. If it comes within paragraph 49, it is effectively dis-applied in its entirety. If it does not, the decision must be taken in accordance with the policy, pursuant to section 38(6) PCPA 2004, unless material considerations indicate otherwise. One such material consideration may be that paragraph 215 of the NPPF is applicable and the policy should be given less weight because it is out-of-date and inconsistent with the NPPF.

63. In my judgment, Policy NE.4 did not come within paragraph 49, properly interpreted, and the Inspector erred in finding that it did. Furthermore, it was an error of law to seek to divide the policy, so as to apply it in part only.
Relief

64. Mr Honey and Mr Young invited me to uphold the Inspector’s decision on the basis that, even if he had not erred in his approach to Policy NE.4, the outcome would have been no different. He applied the policy to the appeal site, and found only limited conflict.

65. It is an exceptional course to uphold an Inspector’s decision where there has been an error of law in the decision-making process, and there is a danger that the Court may be tempted to make its own judgment of the planning merits in deciding whether or not to do so.

66. In my judgment, it is not safe for me to conclude that the Inspector’s error of law would have made no difference to the outcome if his starting point had been that he was bound to apply Policy NE.4, unless material considerations indicated otherwise. The Inspector found, at paragraph 47, that (1) the appeal site was within the Willaston/Rope Green Gap protected by Policy NE.4 and (2) the development would narrow the gap, contrary to Policy NE.4. The next step under Policy NE.4 would have been to consider the remainder of the policy, which provided “Exceptions to this policy will only be considered where it can be demonstrated that no suitable alternative location is available”. The Inspector did not consider this provision at all. Instead he concluded that the adverse effects of the development would not be significant, because the gap would still be substantial at over 600 metres. In my view, he was substituting his own planning assessment, under the NPPF, for that of the local planning authority in its adopted local plan, which is not the approach he would have taken if he had concluded that the policy was to be given full effect.

67. I have also considered whether the Inspector would have found that Policy NE.4 out-of-date under paragraph 215 and reduced the weight accorded to it, thus reaching the same conclusion.

68. In paragraph 34 he found that Policy NE.4 performed strategic functions in maintaining the separation and definition of settlements and in landscape protection and remained “pertinent”, so in this respect the policy was not inconsistent with the NPPF, and paragraph 215 would not apply. In paragraph 35 he found that the inner boundaries of the Green Gaps were not up-to-date in terms of the NPPF, because of changes in housing requirements and the emerging Local Plan.

69. The emerging Local Plan had been submitted but not yet examined at the date of the Inquiry. The evidence before the Inspector was that the Willaston/Rope Green Gap, in which the appeal site was situated, was preserved as a Green Gap in the emerging Local Plan. It was not the site of any proposed housing developments. Moreover, Willaston was also potentially within a new area of Green Belt proposed by the emerging Local Plan, to be designated adjacent to Crewe to prevent its merger with Nantwich and other surrounding settlements. The emerging Local Plan thus continued the policy in the 2011 Local Plan of maintaining the separation of Crewe and Nantwich, and the settlements such as Willaston, and protecting the countryside between them. This evidence was referenced by the Inspector in his decision, at paragraph 36. There was therefore no evidence upon which to base an assumption that the appeal site would or might be a housing development site under the emerging
Local Plan. Insofar as it was safe to make assumptions about an emerging rather than an adopted Plan, the evidence indicated the opposite.

70. Of course, even though the Local Plan had reached submission stage, it might be subject to further change, particularly in the light of objections made. This was why the Inspector concluded that he could attach “little” or “limited” weight to it, at paragraphs 37 and 94. However, having decided to attach limited weight to it in other respects, it was inconsistent for the Inspector to treat it as significant in relation to NE.4.

71. In light of the above, I have concluded that this appeal ought to be considered afresh.