Neutral Citation Number: [2020] EWCA Civ 805

Case No: C1/2019/2124

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE PLANNING COURT
HHJ KLEIN
CO/4430/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2020

Before:

LORD JUSTICE UNDERHILL
VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)
LORD JUSTICE LEWISON
and
LADY JUSTICE CARR

- -

Between :

OXTON FARM	**Appellant**
- and -	
HARROGATE BOROUGH COUNCIL	**Respondent**
- and –	
D NOBLE LIMITED	
	Interested Party

- -
- -

Richard Wald QC (instructed by **Pinsent Masons LLP**) for the **Appellant**
John Hunter (instructed by **Harrogate Borough Council (Legal Services)**) for the **Respondent**

Hearing date : 9 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Thursday 25th June 2020.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether Harrogate BC ("Harrogate") lawfully granted outline planning permission for 21 new houses and a village shop on land at Turnpike Lane, Bickerton, North Yorkshire. HHJ Klein held that the grant was lawful. His judgment is at [2019] EWHC 1370 (Admin).

2. D Noble Ltd applied to Harrogate for planning permission on 8 December 2017. One of Harrogate's planning officers reported on 28 August 2018; and, following her recommendation, conditional outline planning permission was granted on 25 September 2018.

Legal and policy framework

3. Section 70 (2) of the Town and Country Planning Act 1970 provides that:

> "In dealing with an application for planning permission … the authority shall have regard to -
>
> (a) the provisions of the development plan, so far as material to the application, … [and]
>
> (c) any other material considerations."

4. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 provides that:

> "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."

5. The starting point, therefore, is the development plan. In February 2009, Harrogate adopted Core Strategy Policies SG1, SG2 and SG3. Those policies provide that:

> "[Policy SG1:] [Harrogate] will make provision for 390 new homes per annum (net annual average) in Harrogate District during the period 2004 to 2023. In doing so it will seek to ensure that (as an interim target) about 160 of this annual provision will be homes for local people at affordable prices and that 70% of these new homes are in new buildings or conversions on previously developed land…
>
> [Policy SG2:] Development or infill limits will be drawn around the settlements listed…to allow the sustainable growth and development of those settlements within the District that have the best access to jobs, shops and services…

> [Policy SG3:] Outside the development and infill limits of the settlements listed in policy SG2 of this Core Strategy, land will be classified as countryside and there will be strict control over new development in accordance with national and regional planning policy protecting the countryside and Green Belt…"

6. Bickerton was not among the settlements listed under policy SG2. The explanatory notes to policy SG2 stated:

> "Those settlements (villages and hamlets) not listed in this policy have very few services and facilities and often no defined built up area. In accordance with national and regional planning policy regarding the promotion of more sustainable patterns of growth, the settlements should not accommodate new market housing apart from the suitable conversion of existing buildings…"

7. The heart of the case for Oxton Farm is that the grant of planning permission did not comply with policy SG3.

8. Apart from the development plan, a local planning authority must also have regard to material considerations; and material considerations may justify a departure from the development plan. Material considerations fall into two categories: those which the decision-maker may take into account (but need not) and those which the decision-maker must take into account. The point was neatly encapsulated by Holgate J in *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) at [99]:

> "In *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 the Supreme Court endorsed the legal tests in *Derbyshire Dales District Council* [2010] 1 P & CR 19 and *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or entitled* to take into account. But a decision-maker does not *fail* to take a relevant consideration into account *unless he was under an obligation to do so*. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account." (Original emphasis)

9. Among the material considerations to which a local planning authority must have regard is national planning policy. At the date of the decision, that policy was

contained in the 2018 version of the National Planning Policy Framework ("the NPPF"). One of the key policies of the NPPF is that local planning authorities must be able to demonstrate a 5 year supply of deliverable sites for housing.

10. Paragraph 11 of the NPPF provides:

> "Plans and decisions should apply a presumption in favour of sustainable development…
>
> For **decision-taking** this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:
>
> …ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

11. Footnote 7 provides:

> "This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73) …"

12. The buffer referred to varies from 5 to 20 per cent. The approach to decision-taking in paragraph 11 of the NPPF is referred to in the jargon as the "tilted balance".

13. Paragraph 48 of the NPPF provides:

> "Local planning authorities may give weight to relevant policies in emerging plans according to:
>
> a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given);
>
> b) the extent to which there are unresolved objections to relevant policies (the less significant the objections, the greater the weight that may be given);
>
> c) the degree of consistency of the relevant policies in the emerging plan to this Framework (the closer the policies in the emerging plan to policies in the Framework, the greater the weight that may be given)."

14. Paragraph 59 of the NPPF reaffirms the Government's objective of significantly boosting the supply of homes. It continues at paragraph 60:

> "To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for."

15. Paragraph 73 of the NPPF provides:

> "Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period… Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old. [37]"

16. Footnote 37 qualifies this by allowing benchmarking against strategic policies that are more than five years old where they have been reviewed and found not to require updating. The glossary to the NPPF defines "local housing need" as:

> "… the number of homes identified as being needed through the application of the standard method set out in national planning guidance, or a justified alternative approach."

17. The "standard method" to which paragraph 60 and the glossary referred takes the most recent household projections made by the Office of National Statistics as its baseline. The Government policy document (NPPG) giving guidance on the standard method explained that:

> "The standard method set out below identifies a minimum annual housing need figure. It does not produce a housing requirement."

18. It also made it clear that use of the standard method was not mandatory. It went on to state:

> "The government is committed to ensuring more homes are built and are supportive of ambitious authorities who want to plan for growth. The standard method provides the minimum starting point in deciding the number of homes needed in an area."

19. A later part of the policy document states:

> "Where a strategic policy-making authority can demonstrate an alternative approach than that identified using the standard

> method for assessing local housing need, the approach should be considered sound as it will have exceeded the minimum starting point."

The facts

20. In July 2018, Harrogate published its Housing Land Supply Update showing the land supply as at 30 June 2018. The Update recorded that (i) a Housing and Economic Development Needs Assessment had concluded that housing need for the Harrogate District was 669 dwellings per year, (ii) that need was the starting point for calculating Harrogate's 5 Year Housing Land Supply and that Harrogate had, as at 30 June 2018, 5.02 years Housing Land Supply. It will be noted that this calculation of housing need was considerably greater than that envisaged by policy SG1.

21. At the same time, Harrogate had been preparing an updated development plan, which adopted the figure of 669 dwellings per year derived from the Housing Land Supply Update. The plan was sufficiently advanced for it to be sent for examination on 31 August 2018. A few days earlier the planning officer had compiled her report on the application for planning permission.

22. Her recommendation appeared in the summary at the start of the report:

> "On balance, it is considered that there are no adverse impacts that would significantly and demonstrably outweigh the benefits of this scheme. [Harrogate] can only demonstrate a 5.02 year supply of housing and this is not sufficiently above the 5 year supply that paragraph 11 of the NPPF can be ignored. Given this position and the proximity of nearby service settlements, officers consider the scheme should be approved. **RECOMMENDATION: Approve subject to conditions**."

23. It will be noted that the summary did not say that paragraph 11 of the NPPF applied; but that it could not be ignored. Section 5 of the report identified the relevant policies in the development plan documents and also stated that the application was to be determined in accordance with the development plan unless material considerations indicated otherwise. Section 9 of the report dealt with housing land supply. The relevant parts of it read:

> "9.8 [Harrogate's] Housing and Economic Development Needs Assessment provides information on objectively assessed housing need. This document concludes that there is a requirement for 669 dwellings per annum to meet the needs of the district.
>
> 9.9 NPPF requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of 5 years' worth of housing against their housing requirement with appropriate buffer. Where an authority cannot demonstrate a five year supply of housing land, policies relating to the supply of housing land are

> rendered out of date (NPPF, para.11(d), footnote 7). Instead, housing applications should be assessed under paragraph 11 of the NPPF and the presumption in favour of sustainable development, with permission granted unless policies of the NPPF provide a clear reason for refusing the development proposed or any adverse impacts would significantly and demonstrably outweigh the benefits.
>
> 9.10 The July 2018 update has been completed. This shows that [Harrogate] has a 5.02 year supply, meaning that paragraph 11 of the NPPF is not automatically triggered on that particular basis. However, the supply position is marginal and it will be important to take steps to maintain it.
>
> 9.11 In order to maintain supply position, greenfield land outside the existing development limits will continue to be needed. This means that development limits are considered out of date and can be given no more than limited weight. Only limited weight can be attached to Core Strategy policies SG1, SG2 and SG3 as these were based on a housing target that is out of date. By virtue of this paragraph 11 of the NPPF is once again engaged.
>
> 9.12 In light of the benefits that would come from the delivery of new homes in maintaining the 5 year supply, applications will therefore need to be determined on a case-by-case basis, only refusing them where the planning harm significantly and demonstrably outweighs the benefits."

24. At paragraph 9.18 the officer repeated her view that Harrogate's "existing development limit policies can only be given limited weight"; and that the proposed development would create "a reasonable rounding off of the existing built area of Bickerton". At paragraph 9.23 she said that the introduction of houses would help to sustain facilities in nearby and neighbouring settlements.

25. The final substantive section of the report was headed "Planning Balance and Conclusion". It stated:

> "10.1 At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development….
>
> 10.2 In the absence of a five year housing land supply, planning permission should be approved for the proposal unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits of the development.
>
> 10.3 The scheme will provide 21 new homes to the District. [Harrogate] can only demonstrate a 5.02 year supply of housing and this is not sufficiently above the 5 year supply that paragraph 11 of the NPPF can be ignored. The consideration

> therefore is whether the site's location is so unsustainable as to create significant harm…
>
> 10.5 The lack of sustainable transport choices in Bickerton is a negative aspect of allowing new houses here. However, the NPPF and High Court ruling state that in rural areas, approaches to transport modes should be flexible. It is therefore considered that the positive benefits of allowing the scheme outweigh the negative sustainability concerns."

26. This led to the recommendation for conditional approval.

27. On 20 September 2018 the Office of National Statistics published its 2016-based household projections for England. The application for planning permission went before Harrogate's planning committee on 25 September 2018. Mr Stuart Vendy, a planning consultant engaged by Mr Alan Shackell, a local resident, attended the meeting and spoke against the proposal. His speaking note stated:

> "1. Para.9.10 - 5 year land supply - advice of 5.02 years. Harrogate July 2018 Housing Plan Supply Update.
>
> a. not up-to-date - need advice on weight to be attached.
>
> b. also recently released (20 Sept 2018) ONS Population Projections.
>
> c. The Effect?…Equals 669 dpa [dwellings per annum] to 383 understanding methodology.
>
> 2. 10.2 - Not only wrong on my analysis, even on the officer's own evidence. There is no "absence" of a 5 year land supply, either with [Harrogate's] last position, nor the more up-to-date ONS data.
>
> 3. Para 11 of NPPF not triggered - even if it was, there is no advice with regard weight (if any) to be attached to land supply position…
>
> 5. Failures in the report lead to incomplete information and mis-advice."

28. We were given an explanation of how Mr Vendy arrived at his figure of 383 dwellings per annum; although the figure itself is not agreed.

29. Mr Vendy amplified what happened at the meeting in his two witness statements. In the first, he said:

> "I can confirm that I explained to members of the Planning Committee the importance of the weight that the officer had attached to the housing land supply situation in Harrogate Borough, DCLG's position with regard [to] the adoption of the standard methodology and the fact that there was no update

> from officers reflecting this and the newly released ONS data. I went on to explain that the application of the standard methodology and the up-to-date population data resulted in a reduction to the annual housing need for [Harrogate] from its current 669 dwellings per annum to approximately 383 dwellings per annum and that this was highly material to the consideration of the application…
>
> I explained that I considered the lack of advice from officers on both of these matters…amounted to incomplete information and consequently [mis-advice]."

30. In his second statement he said:

> "[F]rom my first-hand knowledge of the events that took place at [Harrogate's] Planning Committee meeting on 25 September 2018 I can make the following comments:
>
> Neither the planning officer nor anyone else provided any meaningful response to my point relating to the existence or effect of the publication of the 2016 ONS data and standard methodology. In fact the only response of any type given in relation to this matter was a tongue-in-cheek remark by one of the committee members to the effect that "it is refreshing to hear a planning consultant arguing that we have a larger than 5 year land supply"…
>
> The drop in minimum requirement from 669 dwellings per annum to 383 dwellings per annum which I explained to members of the Planning Committee…would clearly have a profound effect on the 5 year land supply situation…
>
> The difference in the minimum requirement figures alone would, to informed committee members and the attending planning officer, immediately indicate that the calculation of [the 5 Year Housing Land Supply] would be substantially altered…The effect of the application of the standard methodology and the 2016 ONS data is that [the 5 Year Housing Land Supply] would increase and therefore have an important effect on the consideration of the application…
>
> …Given that the only question I received related to existing bus services in the area I assumed that the matters I had raised were understood and would be taken into consideration in the committee's determination of the application before it. It is now apparent, however, that, for whatever reason, no such consideration was in fact given."

When is the tilted balance engaged?

31. Paragraph 11 (d) of the NPPF provides that the tilted balance is engaged where (a) there are no relevant development plan policies, or (b) the policies which are most important for determining the application are out-of-date. The lack of a 5 year supply of housing land is a policy that is deemed to be out of date by virtue of footnote 7.

32. It is common ground that whether the tilted balance is engaged because of a shortfall in the supply of deliverable sites for housing is a binary question, to be answered yes or no. Either there is a 5 year supply of housing land, or there is not. If there is a 5 year supply then the tilted balance is not engaged on that basis. It does not matter, for this purpose, whether the supply exceeds 5 years by a little or a lot.

33. But the lack of a 5 year supply of housing land is not exhaustive of policies that may be out of date. Other policies which bear on the decision may also be out of date, with the consequence that the tilted balance is triggered on a different basis: *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865 at [58]. A policy may be out of date because of a change in national policy or because of things that have happened on the ground, or for some other reason: *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), [2017] PTSR 1283 at [45]. Whether a policy is out of date is a matter of planning judgment: *Hopkins Homes* at [55].

34. It is necessary, then, to decide why the report came to the view that the tilted balance was engaged. The approach to reports of planning officers is well-settled. In *R (Watermead Parish Council) v Aylesbury Vale DC* [2017] EWCA Civ 152, [2018] PTSR 43 Lindblom LJ put it as follows at [22]:

> "The law that applies to planning officers' reports to committee is well established and clear. Such reports ought not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge… The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way - for example, by failing to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy - that the court will be able to conclude that their decision was rendered unlawful by the advice they were given… Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave…"

35. It is, in my judgment, clear enough that the planning officer's advice did not proceed on the basis that Harrogate could not demonstrate a 5 year supply of housing land. On the contrary, paragraph 9.10 of her report made it clear that Harrogate *could* demonstrate a 5 year supply, with the consequence that the tilted balance was:

> "not automatically triggered on that particular basis."

36. Mr Hunter submitted (and the judge accepted) that the reason why Harrogate took the view that the tilted balance was engaged was because policies SG1, SG2 and SG 3 were out of date. Mr Wald QC disputed this. He pointed out that neither the summary at the beginning of the officer's report, nor her conclusions in section 10 of the report referred to policies being out of date.

37. He also pointed to the concluding sentence of paragraph 9.11 of the officer's report. Having said that policies SG1, SG2 and SG3 were out of date, she said:

> "By virtue of this paragraph 11 of the NPPF is once again engaged."

38. Mr Wald seized on the words "once again" and said that they demonstrated that the officer meant that paragraph 11 of the NPPF was engaged for a second time. If it was engaged for a second time, then it must (in the officer's view) have been engaged for the first time on the basis of a lack of housing supply. But that submission necessarily entails that the officer contradicted herself within two adjacent paragraphs of her report. I do not consider that that is a fair reading of the thrust of the report. While the use of the phrase "once again" is unfortunate, in my judgment paragraph 9.10 makes it clear that Harrogate did have a 5 year supply of deliverable housing sites; and that the officer's advice was given on that basis. Paragraph 9.11 gives two reasons for giving limited weight to policies SG1, SG2 and SG3; and the more natural reading of "once again" is that both the first reason and the second reason engage the tilted balance.

39. On the other hand, in paragraph 9.11 the officer considered that development limits *were* out of date. She gave two reasons for that view. First, in order to maintain the supply of housing land, greenfield sites were needed; and that meant that settlement boundaries were out of date. Second, policies SG1, SG2 and SG3 were themselves based on a housing target that was out of date. That meant that those policies could only be given limited weight. It follows that the basis on which the tilted balance was triggered was on the basis that relevant policies were out of date.

40. It is, I acknowledge, possible that some committee members could have read the officer's report, read overall, as advising that the tilted balance was engaged both because the 5 year supply of housing land was marginal and also because relevant policies were out of date. But if two reasons were given for the engagement of the tilted balance, one of which was good, and one of which was bad, I do not consider that it can be said that overall the advice misdirected the committee in a serious way. Because (a) the latter basis is one of the bases on which the tilted balance is triggered, and (b) whether a policy is out of date is a matter of planning judgment, the court can only interfere if the latter judgment is itself vitiated by an error of law.

Was there an error of law in the planning judgment?

41. Mr Wald argued that it was an error of law for Harrogate not to have taken into account the projections based on the ONS 2016 statistics. They were a mandatory consideration in the planning decision. There is nothing in the statutory framework which explicitly requires the ONS statistics to be taken into account. But Mr Wald submitted that it was implicit that they must be. The chain of reasoning was this:

    i) Paragraph 2 of the NPPF states that it "must be taken into account in preparing the development plan and is a material consideration in planning decisions." This is repeated in paragraph 212.

    ii) That imperative takes the reader to paragraph 60 of the NPPF and its requirement of the use of the standard method to determine minimum housing need, taking the most recent ONS projections as the starting point.

    iii) Therefore, the ONS statistics were a mandatory consideration in taking the decision to grant or refuse planning permission.

42. Mr Wald's argument entails the proposition that the ONS projections were the mandatory starting point for the calculation of objectively assessed housing need. But in my judgment that proposition is itself erroneous. Government policy states quite clearly (a) that the standard method is not mandatory; (b) that the purpose of the standard method is to determine the *minimum* starting point in deciding the number of homes needed in an area; and (c) that higher housing targets than those produced by the standard method will be considered sound. (I add that we were told by Mr Hunter that the position has now changed).

43. Second, the housing target in policy SG1 was well over five years old. In the course of formulating the new development plan, Harrogate had considered the housing target and took the view that it did need updating. Thus, in accordance with NPPF paragraph 73, it was required to assess "local housing need" as defined by the glossary. That assessment permitted an assessment either by the standard method or by a justified alternative approach. In my judgment, therefore, Harrogate was not required to use the standard method in calculating local housing need. Having used a different method, which produced a target figure much higher than the figure in policy SG1, Harrogate was entitled to conclude that that policy was out of date.

44. Third, the target figure for housing that the officer fed through into her advice was the target figure that Harrogate had adopted in the draft development plan. The development plan was sent for examination on 31 August 2018. Its target housing figure would therefore fall to be assessed in accordance with the 2012 version of the NPPF: NPPF paragraph 214. The 2012 version of the NPPF did not require the use of the standard method, even as a starting point. In accordance with NPPF paragraph 48 Harrogate was entitled to give weight to the housing policies in its emerging development plan. In addition, the government explanation of the standard method said in terms that plans that adopted higher housing targets than the minimum produced by the standard method would be considered "sound".

45. Mr Wald's second proposition is that it is necessary to calculate correctly the local planning authority's objectively assessed housing need. That way of formulating the

point seems to suggest that mathematical precision is required. But that is not so. As Lindblom LJ explained in *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808, [2019] JPL 63 at [52]:

> "… the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker."

46. The underlying premise of this submission is that objectively assessed housing need is only calculated correctly if the standard method is used. But for the reasons I have given, I do not consider that that is correct. Moreover, as Mr Hunter pointed out, whichever method was used to calculate the 5 year supply of housing land, the conclusion would have been that Harrogate could demonstrate such a supply. That was the basis on which the committee took its decision.

47. For these reasons I do not accept that the ONS statistics were a mandatory consideration. Accordingly, the next question is whether they were so fundamental to the decision that it was irrational for Harrogate not to have considered them.

48. On this point, Mr Wald submitted, in effect, that a symmetrical approach had to be taken to housing supply. Just as lesser weight should be given to a contravention of policies in the development plan where there was a shortfall in the 5 year supply, so greater weight had to be given to those policies in a case in which there was a surplus in supply. The tilted balance was still a balance. The extent of the housing surplus was critical to striking that balance. The ONS statistics are a necessary input to determining the extent of the surplus of housing land. The construction of new homes in the countryside may have adverse effects (such as, for example, the loss of green space or open countryside, or increased demands on infrastructure) and the extent of the benefit of creating more homes must be balanced against those adverse effects.

49. In the present case, he said, there was a clear link between the extent of the surplus of housing land and the officer's advice that policies SG1, SG2 and SG 3 were out of date. The statement in paragraph 9.10 that the surplus of housing land was "marginal" was the lynch-pin for the conclusion in paragraph 9.11 that new greenfield sites were needed and that development limits were out of date. Although her statement about the "marginal" supply of land was correct when written, it was falsified by the ONS statistics published after the report was compiled. Accordingly, if it turned out that the surplus was not marginal, the officer's advice would have been seriously undermined.

50. He referred us to *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808, [2019] JPL 63 in which Lindblom LJ said at [47]:

> "The NPPF does not state that the decision-maker must reduce the weight to be given to restrictive policies according to some notional scale derived from the extent of the shortfall against the five-year supply of housing land. The policy in paragraph 14 of the NPPF requires the appropriate balance to be struck, and a balance can only be struck if the considerations on either side of it are given due weight. But in a case where the local

> planning authority is unable to demonstrate five years' supply of housing land, the policy leaves to the decision-maker's planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth."

51. Mr Wald's point was that just as logic would suggest that the weight to be given to restrictive policies would be less if the shortfall in the housing land supply is large, and more if it is small, so in the case of a surplus one would expect the weight to be given to restrictive policies to be less if the surplus was small and greater if the surplus was large. But at [51] of the same judgment Lindblom LJ made it clear that:

> "… the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. *This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds*. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet." (Emphasis added)

52. I do not consider that Lindblom LJ was laying down a rule of law, but merely stating what he would expect. Weight is, as always, a matter for the decision maker. Lindblom LJ had already made this point in *Secretary of State for Communities and Local Government v Hopkins Homes Ltd* [2016] EWCA Civ 168, [2016] PTSR 1315 at [47]:

> "One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. *The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court.* It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy—such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission

> despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. *It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment*." (Emphasis added)

53. In *Eastleigh Borough Council v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1862 (Admin) Garnham J considered a submission to like effect as Mr Wald's. He said:

> "[49] However, as Mr Glenister put it, in the context of the NPPF, there is a 'one-way consideration' for 5YHLS. As Mr Boyle submits, there is nothing in statute or policy which expressly or impliedly required the Inspector to take into account the existence of a 5YHLS when deciding the weight to be attached to countryside policies. Accordingly, it was for the Inspector to determine the weight to be attached to the fact that there was more than 5YHLS, subject only to a *Wednesbury* challenge.
>
> [50] In my judgment, a failure to give weight to the fact that the Council could demonstrate more than a 5YHLS in determining the weight which should be accorded to development plan policies was not irrational. When the Inspector came to consider the overall planning balance, at DL47, he did consider the weight to be attached to the provision of housing. That was the proper place in the analysis for that consideration. I see no basis for saying he should have *increased* the weight, prior to conducting the balancing exercise because of the absence of a negative, namely that there was no shortage of housing land." (Original emphasis)

54. In my judgment the same applies here. Moreover, as I have said, questions of weight are for the decision-maker.

55. In addition, the underlying premise of this submission is that the only correct way to calculate the surplus is by using the ONS statistics. But for the reasons I have given, I do not consider that that is correct.

Was Harrogate required to give reasons for its decision?

56. It is now common ground that Harrogate had no statutory duty to give reasons for its decision to grant planning permission. But in some cases, the common law requires reasons to be given. The Supreme Court considered that duty in the context of planning in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108. It is important to note that in that case the committee that granted planning permission did not follow their officer's recommendation. At [52] and [54] Lord Carnwath approved the decision of this court in *R (Oakley) v South Cambridgeshire*

District Council [2017] EWCA Civ 71, [2017] 1 WLR 3765. That was a case in which the development would have a "significant and lasting impact on the local community", and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. As he put it at [57]:

> "Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision."

57. The key point here is that the committee disagreed with the officer's recommendation. Where the committee follow their officer's recommendation it is a fair inference, in the absence of other evidence, that they have accepted the reasoning in the officer's report: *R (Palmer) v Herefordshire County Council* [2016] EWCA Civ 1061, [2017] 1 WLR 411 at [7]. Where, on the other hand, they have rejected the officer's advice, it may be impossible to discern the reasons for the decision. In the present case the committee followed their officer's recommendation. Mr Vendy's intervention was directed to persuading the committee that there was no shortfall in the 5 year supply of housing land; and that was the basis on which the committee took its decision. The reason why the committee's decision departed from the development plan, and in particular from policies SG1, SG2 and SG3, was because they accepted the officer's advice that those policies were out of date.

58. As the judge said at [49]:

> "This is not a case where the Planning Committee departed from the officer's recommendation. I was taken to no evidence that established that the Application would have a "significant and lasting impact on the local community" (as Oxton Farm had suggested). There is no evidence that there was widespread public controversy about the Application. The Application did not relate to a major development (a football stadium) on greenbelt land as in *Oakley* or to a major development in an area of outstanding natural beauty as in *CPRE Kent*. The Decision could be accurately described as a run-of-the-mill planning decision."

59. I agree. In my judgment no further reasons were necessary.

Result

60. I would dismiss the appeal.

Lady Justice Carr:

61. For the reasons given by Lewison LJ I too would dismiss the appeal.

Lord Justice Underhill:

62. I also agree.