Neutral Citation Number: [2018] EWHC 33 (Admin)

Case No: CO/452/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2018

Before :

MR JUSTICE DOVE

- -

Between :

	(1) RICHBOROUGH ESTATES LIMITED **(2) REDROW HOMES LIMITED** **(3) LINDEN LIMITED** **(4) WAINHOMES LIMITED** **(5) WILLIAM DAVIS LIMITED** **(6) MARTIN GRANT HOMES LIMITED** **(7) ACORN PROPERTY GROUP** **(8) HOPKINS HOMES LIMITED** **(9) CROUDACE LIMITED** **(10) NORTH OAK HOMES LIMITED** **(11) BARGATE HOMES LIMITED** **(12) LARKFLEET LIMITED** **(13) WEALDEN HOMES** **(14) DBA HOMES LIMITED** **(15) F W JOHNSONS LIMITED** **(16) ROBERT HITCHINS LIMITED** **(17) CATESBY ESTATES LIMITED** **(18) WELBECK STRATEGIC LAND II LIMITED** **(19) SOUTH WEST STRATEGIC DEVELOPMENT LIMITED** **(20) TEM LIMITED** **(21) HIMOR GROUP LIMITED** **(22) MAXIMUS LIMITED** **(23) GREVAYNE PROPERTIES LIMITED** **(24) BEECHCROFT LIMITED** **(25) ALLASTON DEVELOPMENTS LIMITED**	**Claimants**

	- and –	
	SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**

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Christopher Young, James Corbet Burcher, Nina Pindham and Hashmi Mohamed (instructed by **Eversheds Sutherland Limited LLP**) for the **Claimants**
Nathalie Lieven QC and Richard Moules (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 7th – 8th November 2017
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Judgment Approved

MR JUSTICE DOVE :

Factual background

1. In this case the claimants challenge the defendant's decision to issue a Written Ministerial Statement ("WMS") in relation to national planning policy concerned with housing and neighbourhood planning on 12th December 2016, together with a subsequent associated change to the National Planning Practice Guidance ("the PPG") on 10th August 2017. The factual background in relation to this case is as follows.

2. In the Localism Act 2011 a new tier of the development plan was created by the extensive amendment of the Town and Country Planning Act 1990. Once made, a neighbourhood development plan ("NDP") forms part of the development plan for the purposes of section 38(6) of the Planning and Compulsory Purchase Act 2004, which provides that determinations shall be "in accordance with the plan unless material considerations indicate otherwise". The neighbourhood area, for which the plan is made, will be far smaller than the administrative area of the relevant local planning authority ("LPA"), and therefore the plan will be more locally focussed. Two features should, however, be noted at this stage. Firstly, it is now well settled that the NDP can allocate land for development including housing and contain a policy determining a volume of development (such as houses) to be developed during the plan period. Secondly, specific provision is made for NDPs within the National Planning Policy Framework ("the Framework"), in particular for present purposes paragraphs 183-185 and 198 (see below).

3. Since the introduction of NDPs it is clear from the evidence before the court that there are differing opinions as to whether they are a constructive part of the planning system. It is also clear that in introducing them the defendant has been of the view that they enable local communities to have a stronger and more effective say in the future development of their areas. A significant number of communities have taken the opportunity to make

a NDP for the area in which they live and work. By contrast the extensive evidence from members of the housebuilding industry and their planning advisors which is before the court contends that NDPs are being used to frustrate development and are not an effective mechanism for planning to meet housing requirements. That is not a debate which the court can resolve, and nor do the claimants suggest that it should. It is, however, the backdrop to the disputed policy which is the subject of this litigation.

4.It seems that during 2016 the defendant and his ministerial colleagues were becoming increasingly concerned about the impact upon an NDP of the fact that the LPA could not demonstrate that it had a 5 year supply of housing as required by paragraph 47 of the Framework. Where this is the case paragraph 49 of the Framework is relevant. That provides as follows:

> "49 Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant polices 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."

5. The finding that policies for the supply of housing are not up-to-date has consequences in terms of the approach to be adopted in decision-taking as a result of paragraph 14 of the Framework, which provides as follows:

> "14…where the development plan is absent, silent or relevant polices are out-of-date, granting planning permission unless:
>
> -any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole…"

6. In short, when considering a housing proposal in circumstances where the LPA cannot demonstrate a 5 year supply of housing then, as a consequence of policies for the supply of housing being out-of-date, a tilted balance, which favours the grant of permission, derived from paragraph 14 would have to be deployed. In due course as a consequence of the policies needing to be applied to make decisions in housing applications the question then arose as to what was within the purview of the phrase "[r]elevant policies for the supply of housing". That question, having been considered on several occasions by this court, fell for determination by the Court of Appeal in Hopkins Homes v SSCLG [2016] EWCA Civ 168; [2017] 1 All ER 1011. Giving the judgment of the court, Lindblom LJ observed that for the purposes of the Framework the phrases up-to-date and out-of-date were opposites sides of the same coin (see paragraph 30). He went on to consider the correct interpretation of "[r]elevant policies for the supply of housing" and concluded as follows:

> "32 The contentious words are "[relevant] policies for the supply of housing". In our view the meaning of those words, construed objectively in their proper context, is "relevant policies affecting the supply of housing". This corresponds to the "wider" interpretation, which was advocated on behalf of the Secretary of State in these appeals. Not only is this a literal interpretation of the policy in paragraph 49; it is, we believe, the only

interpretation consistent with the obvious purpose of the policy when read in its context. A "relevant" policy here is simply a policy relevant to the application for planning permission before the decision-maker – relevant either because it is a policy relating specifically to the provision of new housing in the local planning authority's area or because it bears upon the principle of the site in question being developed for housing. The meaning of the phrase "for the supply" is also, we think, quite clear. The word "for" is one of the more versatile prepositions in the English language. It has a large number of common meanings. These include, according to the Oxford Dictionary of English, 2nd edition (revised), "affecting, with regard to, or in respect of". A "supply" is simply a "stock or amount of something supplied or available for use" – again, the relevant definition in the Oxford Dictionary of English. The "supply" with which the policy is concerned, as the policy in paragraph 49 says, is a demonstrable "five-year supply of deliverable housing sites". Interpreting the policy in this way does not strain the natural and ordinary meaning of the words its draftsman has used. It does no violence at all to the language. On the contrary, it is to construe the policy exactly as it is written.

33 Our interpretation of the policy does not confine the concept of "policies for the supply of housing" merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognizes that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed – including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another by preventing or limiting development. It reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it – that policies of both kinds make the supply what it is.

34 The "narrow" interpretation of the policy, in which the words "[relevant] policies for the supply of housing" are construed as meaning "[relevant] policies providing for the amount and distribution of new housing development and the allocation of sites for such development", or something like that, is in our view plainly wrong. It is both unrealistic and inconsistent with the context in which the policy takes its place. It ignores the fact that in every development plan there will be policies that complement or support each other. Some will promote development of one type or another in a particular location, or by allocating sites for particular land uses, including the development of housing.

> Others will reinforce the policies of promotion or the site allocations by restricting development in parts of the plan area, either in a general way – for example, by preventing development in the countryside or outside defined settlement boundaries – or with a more specific planning purpose – such as protecting the character of the landscape or maintaining the separation between settlements.
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> 35 Restrictive policies, whether broadly framed or designed for some more specific purpose, may – we stress "may" – have the effect of constraining the supply of housing land. If they do have that effect, they may – again, we emphasize "may" – act against the Government's policy of boosting significantly the supply of housing land. If a local planning authority is unable to demonstrate the requisite five-year supply of housing land, both the policies of its local plan that identify sites for housing development and policies restrictive of such development are liable to be regarded as not "up-to-date" under paragraph 49 of the NPPF – and "out-of-date" under paragraph 14. Otherwise, government policy for the delivery of housing might be undermined by decisions in which development plan policies that impede a five-year supply of housing land are treated as "up-to-date"."

7. Lindblom LJ went on to observe in paragraph 45 that whether a particular policy was, measured against the "wider" interpretation, a policy for the supply of housing would be a question for the decision-maker in the particular context of the case in point and not a matter for the court. It would be a question of planning judgment. He also noted, in paragraph 47, that whilst it might be inferred from paragraph 49 that less weight was to be given to policies which were out-of-date, ultimately the question of weight was a matter for the decision-maker and not dictated by the policy of the Framework, and would vary according to the circumstances of the decision.

8. The concern which was raised in the light of this interpretation of policy was that restrictive policies in a recently made NDP could find themselves being given significantly less weight as a result of being deemed to be out-of-date as a consequence of the LPA not having a 5 year supply of housing. The defendant received representations that the effect of this suite of policies and the "wider" interpretation could be that a community, having gone to the trouble of preparing and making an NDP containing allocations of land for housing and complementary restrictive policies, for instance in the form of a settlement boundary or definition of open countryside, could find itself in difficulties resisting a windfall or unplanned housing application on an unfavoured site on the basis that there was no 5 year supply of housing and therefore the NDP policies were out-of-date and carried materially less weight in the tilted balance.

9. Shortly prior to the hearing of this matter Gilbart J ordered disclosure in relation to documentation held by the defendant relating to the lead up to the decision to make the policy. The disclosure related in particular to the question of the need for consultation about the policy which is the subject of this litigation. In addition to the receipt of

representations expressing the concern which has been set out above, the disclosure material establishes the following. Firstly, the defendant had it in mind to include a change of policy in relation to the treatment of NDPs in circumstances where there was not an LPA-wide 5 year supply of housing alongside proposals for how to establish a neighbourhood objectively assessed need for housing in a White Paper for Housing planned for the near future. He received submissions from his advisors as to how policy could be changed to address the concern.

10. Secondly, as is also evidenced in the witness statement from Mr Steve Evison, the Deputy Director for Development Plans in the defendant's department, during the passage of the (then) Neighbourhood Planning Bill in the autumn of 2016, concerns were expressed in Parliament about the impact of the lack an LPA-wide 5 year housing supply on recently made NDPs. Amendments were being laid, and pressure was being brought to bear, to introduce into the bill a "neighbourhood right to be heard", the effect of which could have been to require the calling-in of applications for the defendant's determination when a neighbourhood planning group objected. This was not favoured by the defendant. As a means of resisting this proposal, and allaying the concerns which had been expressed, it was decided that in advance of the House of Commons stage of the Bill a policy change by way of a Written Ministerial Statement ("WMS") would be published to seek to address the issue.

11. Thirdly, in the course of the preparation of the policy, the defendant's attention was drawn by his advisors to some research papers which had been published by the defendant in relation to the effectiveness of NDPs in delivering housing requirements. The contents of these papers are discussed further below. Fourthly, the defendant was advised that there was a risk of a legal challenge to the decision to make the WMS in the absence of prior consultation upon it. It had clearly been originally intended to include a proposal for policy change of the kind which occurred in the proposed White Paper which would, of course, have been the subject of consultation with the public at large, including the claimants and their advisors. Fifthly, it seems clear that it was originally conceived that a policy initiative to provide protection to NDPs of this kind would be part of a package of measures including a methodology in relation to identifying a neighbourhood objectively assessed need for housing, and further research as to the effectiveness of NDPs in delivering housing, together with a range of amendments to the Framework.

12. On 12th December 2016 the WMS was made. So far as relevant to the present proceedings it provided as follows:

> "Neighbourhood Planning
>
> 1. Neighbourhood planning was introduced by the Localism Act 2011, and is an important part of the Government's manifesto commitment to let local people have more say on local planning. With over 230 neighbourhood plans in force and many more in preparation, they are already a well-established part of the English planning system. Recent analysis suggests that giving people more control over development in their area is helping to

boost housing supply – those plans in force that plan for a housing number have on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authority.

2. The Government confirms that where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted. However, communities who have been proactive and worked hard to bring forward neighbourhood plans are often frustrated that their plan is being undermined because their local planning authority cannot demonstrate a five-year land supply of deliverable housing sites.

3. This is because Paragraph 49 of the National Planning Policy Framework states that if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites relevant policies for the supply of housing should not be considered up-to-date, and housing applications should be considered in the context of the presumption in favour of sustainable development.

4. As more communities take up the opportunity to shape their area we need to make sure planning policy is suitable for a system with growing neighbourhood plan coverage. Building on proposals to further strengthen neighbourhood planning through the Neighbourhood Planning Bill, I am today making clear that where communities plan for housing in their area in a neighbourhood plan, those plans should not be deemed to be out-of-date unless there is a significant lack of land supply for housing in the wider local authority area. We are also offering those communities who brought forward their plans in advance of this statement time to review their plans.

5. This means that relevant policies for the supply of housing in a neighbourhood plan, that is part of the development plan, should not be deemed to be 'out-of-date' under paragraph 49 of the National Planning Policy Framework where all of the following circumstances arise at the time the decision is made:

- This written ministerial statement is less than 2 years old, or the neighbourhood plan has been part of the development plan for 2 years or less;
- the neighbourhood plan allocates sites for housing; and
- the local planning authority can demonstrate a three-year

supply of deliverable housing sites.

6. This statement applies to decisions made on planning applications and appeals from today. This statement should be read in conjunction with the National Planning Policy Framework and is a material consideration in relevant planning decisions.

7. My Department will be bringing forward a White Paper on Housing in due course. Following consultation, we anticipate the policy for neighbourhood planning set out in this statement will be revised to reflect policy brought forward to ensure new neighbourhood plans meet their fair share of local housing need and housing is being delivered across the wider local authority area. It is, however, right to take action now to protect communities who have worked hard to produce their neighbourhood plan and find the housing supply policies are deemed to be out-of-date through no fault of their own." *(paragraph numbers added for ease of reference)*

13. The "[r]ecent analysis" to which reference is made comprises two documents. The first, dated October 2015, was entitled "Neighbourhood Planning: progress on housing delivery" ("the 2015 research"). This document provided as follows:

"Background

This paper provides an update on housing delivery progress in areas where neighbourhood plans have allocated sites for new homes. During May and June 2015 the Department for Communities and Local Government gathered data from local authorities, qualifying bodies and other published sources on all the areas with a made neighbourhood plans that had both a) allocated housing sites and b) been in force for over six months. 20 plans fulfilled these criteria, but complete data (on Local Plan allocations, neighbourhood plan allocations and local planning permissions) was only available for the 16 areas covered in the case studies below…

The Local Plan Housing Number in the table below is the sum of all of the allocations made through adopted or emerging Local Plans for the neighbourhood areas in the sample. The over and above allocation figure is the difference between the housing numbers in the Local Plan and the neighbourhood plan in all but two cases (Thame and Winsford) where relevant additional commitments have been included, in accordance with the advice of the local authority.

Local Plan Housing Number	Neighbourhood Plan Housing Number	Number over and above allocation
8,185	9,076	891 (11%)

Across the 16 areas, there is an overall additional

neighbourhood plan housing allocation of 891, representing 11% more housing than allocated by the relevant Local Plans…

The figures appear to suggest that planning permissions are advancing rapidly. 68% of the aggregate Local Plan housing allocation have either been granted or were at live application stage, only 6-20 months into the lifetimes of the neighbourhood plans. However, we should also be mindful at this stage that:

- A large proportion of the 'number over and above allocations' total comes from three plans (Broughton Astley, Winsford and Winslow), although 10 of the 16 neighbourhood plans considered do appear to allocate more that the Local Plan.

- The baseline for comparison is the most recent Local Plan or Strategic Housing Land Availability Assessment, which in some cases is relatively old.

- Not all permissions will necessarily result in the construction of new homes."

14. The document then proceeds to set out in tabular form, as datasheets, information in relation to a number of neighbourhood development plans, providing a breakdown setting out the total number of permissions for housing granted expressed as a percentage of either a Local Plan derived figure, or the figure provided from the Strategic Housing Land Availability Assessment ("SHLAA"). In relation to neighbourhood development plans in Wolverhampton City Council's area at Tettenhall and Heathfield Park the document notes that there are no relevant housing numbers in the Black Country Core Strategy and so figures from the SHLAA have been used. In respect of the neighbourhood development plan at Winslow in Aylesbury Vale it notes that the housing figure used is based on a local plan which failed at examination. In relation to the neighbourhood development plans in Arun District the document notes that the "Local Plan housing number" used derives from the Arun District Plan 2003 and the consultation draft of the Arun District Local Plan 2013-2028. In respect of the neighbourhood development plan at Thame it was noted that an allocation relied upon over and above the allocation in the local plan and the neighbourhood development plan was a site not contained in the neighbourhood development plan as an allocation, but which had been granted permission under permitted development rights.

15. The second document was entitled (again) "Neighbourhood Planning: progress on housing delivery" and was dated October 2016 ("the 2016 research"). The introductory section of the document makes clear that it is an update to the 2015 research. The relevant parts of the 2016 research for the purposes of this matter were set out as follows:

> "2. During May and June 2016 the Department for Communities and Local Government gathered data from local authorities, qualifying bodies and other published sources on all the areas with a made neighbourhood plans that had both:

a) provided housing numbers; and

b) been in force for over three months.

3. The cumulative number of plans, including those assessed in October 2015 is 50, but complete data (on local authority provided number, neighbourhood plan housing number and local planning permissions) was only available for the 39 areas covered in the table and case studies below…

5. The number of homes in the sample of 39 neighbourhood plans has been compared to the closest available number to a Local Plan number for their area, at the time the neighbourhood plan was produced. The local authority provided number in the table below is derived from of all of the housing numbers made through adopted, emerging and draft Local Plans as well as the strategic housing land availability assessment and data directly from the local planning authority for the neighbourhood areas in the sample. All local authority data has been verified by the Local Planning Authority. The over and above allocation figure is the difference between the housing numbers in the local authority provided number and the neighbourhood plan.

Table 1 – Comparison of neighbourhood plan numbers and Local Authority Provided numbers in the sample of neighbourhood plan areas

Local Authority Provided Number	Neighbourhood Plan Housing Number	Number over and above Local Authority Provided Number
11,800	13,200	1,400 (11%)

6. In considering these numbers, the following should be noted:

- the numbers in neighbourhood plans are not always presented in a way that is consistent, for example, some neighbourhood plans include sites that already have planning permission;

- the local authorities were asked to provide the data in May and June 2016, rather than at the time the various neighbourhood plans were produced, though we understand that they are the numbers that were provided by the local planning authority to the neighbourhood planning group during the preparation of their plan; and

- the Local Authority Provided Numbers do not all relate to numbers in an adopted Local Plan. This is because in some cases there was no up to date Local Plan. In these cases neighbourhood plans were instead provided numbers in emerging Local Plans or strategic housing land availability assessment. These numbers have therefore not been subject to a Planning

> Inspectorate examination, which could potentially mean that the housing numbers change (including increasing) in the final Local Plan.
>
> 7. Overall this analysis gives further weight to early findings suggesting that neighbourhood plans that provided a housing number have on average planned for approximately 10% (rounded down) more homes than the Local Plan housing figure (or an expectation set out by the local planning authority) for those areas."

16. There was an Annex to the 2016 research which set out in tabular form the figures relied upon for each of the 39 neighbourhood development plans included in the research. The same datasheets included in the 2015 research were again provided, but only three new datasheets were provided with the 2016 research. In short, therefore, datasheets were not provided for all of the neighbourhood development plans which were included within the research relied upon.

17. On 7th February 2017 the defendant published a Housing White Paper, consulting on a wide variety of issues, including proposed changes to housing policy and guidance. It contained a commitment to continue to provide for protection of neighbourhood development plans as set out in the WMS and sought views on how housing need could be met and delivery occur alongside this continuing protection. The consultation period ran until 2nd May 2017.

18. On 22nd and 23rd February 2017 the Supreme Court heard argument in the appeal from the Court of Appeal in Hopkins Homes. On 8th March 2017 Holgate J ordered a stay of these proceedings pending the outcome of the Supreme Court's decision (and also ordered that the Defendant provide a position statement as to the inter-relationship of paragraphs 14 and 49 of the Framework). In the event, when the Supreme Court's judgments were handed down in May 2017, the decision of the Court of Appeal was upheld but on different grounds. Lord Carnwath JSC, with whom all of the other justices agreed, addressed firstly the question of legal status of the Framework and its role in the decision-making process. He concluded as follows:

> "19. The court heard some discussion about the source of the Secretary of State's power to issue national policy guidance of this kind. The agreed Statement of Facts quoted without comment a statement by Laws LJ (*R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] 1 WLR 3923, para 12) that the Secretary of State's power to formulate and adopt national planning policy is not given by statute, but is "an exercise of the Crown's common law powers conferred by the royal prerogative." In the event, following a query from the court, this explanation was not supported by any of the parties at the hearing. Instead it was suggested that his powers derived, expressly or by implication, from the planning Acts which give

him overall responsibility for oversight of the planning system (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 140-143 per Lord Clyde). This is reflected both in specific requirements (such as in section 19(2) of the 2004 Act relating to plan-preparation) and more generally in his power to intervene in many aspects of the planning process, including (by way of call-in) the determination of appeals.

20. In my view this is clearly correct. The modern system of town and country planning is the creature of statute (see *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 140-141). Even if there had been a pre-existing prerogative power relating to the same subject-matter, it would have been superseded (see *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] 2 WLR 583, para 48). (It may be of interest to note that the great *Case of Proclamations* (1610) 12 Co Rep 74, which was one of the earliest judicial affirmations of the limits of the prerogative (see *Miller* para 44) was in one sense a planning case; the court rejected the proposition that "the King by his proclamation may prohibit new buildings in and about London …".)

21. Although planning inspectors, as persons appointed by the Secretary of State to determine appeals, are not acting as his delegates in any legal sense, but are required to exercise their own independent judgement, they are doing so within the framework of national policy as set by government. It is important, however, in assessing the effect of the Framework, not to overstate the scope of this policy-making role. The Framework itself makes clear that as respects the determination of planning applications (by contrast with plan-making in which it has statutory recognition), it is no more than "guidance" and as such a "material consideration" for the purposes of section 70(2) of the 1990 Act (see *R* (*Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWHC 97 (Admin); [2011] 1 P & CR 22, para 50 per Lindblom J). It cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme."

19. Lord Carnwath went on to consider the correct approach to the interpretation of planning policy in the context of the Supreme Court's earlier decision in Tesco Stores v Dundee City Council [2012] UKSC 37; [2012] PTSR 983. His analysis of the position was expressed in the following terms:

> "22. The correct approach to the interpretation of a statutory development plan was discussed by this court in *Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening)* [2012] UKSC 13; 2012 SLT 739. Lord Reed rejected a submission that

the meaning of the development plan was a matter to be determined solely by the planning authority, subject to rationality. He said:

"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. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context." (para 18)

He added, however, that such statements should not 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 759, 780 per Lord Hoffmann) …" (para 19)

23. In the present appeal these statements were rightly taken as the starting point for consideration of the issues in the case. It was also common ground that policies in the Framework should be approached in the same way as those in a development plan. However, some concerns were expressed by the experienced counsel before us about the over-legalisation of the planning process, as illustrated by the proliferation of case law on paragraph 49 itself (see paras 27ff below). This is particularly unfortunate for what was intended as a simplification of national policy guidance, designed for the lay-reader. Some further comment from this court may therefore be appropriate.

24. In the first place, it is important that the role of the court is not overstated. Lord Reed's application of the principles in the particular case (para 18) needs to be read in the context of the

relatively specific policy there under consideration. Policy 45 of the local plan provided that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any "suitable site" within or linked to the existing centres (para 5). The short point was the meaning of the word "suitable" (para 13): suitable for the development proposed by the applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed identified as one of textual interpretation, "logically prior" to the exercise of planning judgment (para 21). As he recognised (see para 19), some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis.

25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692; [2009] PTSR 19, para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence (see *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49; [2008] 1 AC 678, para 30 per Lady Hale.)

26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two."

20. As a result of the inter-relationship between paragraphs 14 and 49 of the Framework, Lord Carnwath dealt with the crux of the decision by addressing the interpretation and practical effect of paragraphs 14 and 49 of the Framework in the following terms,

starting with paragraph 14 before moving to paragraph 49:

> "54. The argument, here and below, has concentrated on the meaning of paragraph 49, rather than paragraph 14 and the interaction between the two. However, since the primary purpose of paragraph 49 is simply to act as a trigger to the operation of the "tilted balance" under paragraph 14, it is important to understand how that is intended to work in practice. The general effect is reasonably clear. In the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission, except where the benefits are "significantly and demonstrably" outweighed by the adverse effects, or where "specific policies" indicate otherwise. (See also the helpful discussion by Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), paras 42ff)
>
> 55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgement, unrelated of course to paragraph 49 which deals only with housing supply. This may in turn have an effect on other related policies, for example for transport. The pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgement, not dependent on issues of legal interpretation.
>
> 56. If that is the right reading of paragraph 14 in general, it should also apply to housing policies deemed "out-of-date" under paragraph 49, which must accordingly be read in that light. It also shows why it is not necessary to label other policies as "out-of-date" merely in order to determine the weight to be given to them under paragraph 14. As the Court of Appeal recognised, that will remain a matter of planning judgement for the decision-maker. Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the "tilted balance".
>
> *Paragraph 49*
>
> 57. Unaided by the legal arguments, I would have regarded the meaning of paragraph 49 itself, taken in context, as reasonably clear, and not susceptible to much legal analysis. It comes within a group of paragraphs dealing with delivery of housing. The context is given by paragraph 47 which sets the objective of

boosting the supply of housing. In that context the words "policies for the supply of housing" appear to do no more than indicate the category of policies with which we are concerned, in other words "housing supply policies". The word "for" simply indicates the purpose of the policies in question, so distinguishing them from other familiar categories, such as policies for the supply of employment land, or for the protection of the countryside. I do not see any justification for substituting the word "affecting", which has a different emphasis. It is true that other groups of policies, positive or restrictive, may interact with the housing policies, and so *affect* their operation. But that does not make them policies *for* the supply of housing in the ordinary sense of that expression.

58. In so far as the paragraph 47 objectives are not met by the housing supply policies as they stand, it is quite natural to describe those policies as "out-of-date" to that extent. As already discussed, other categories of policies, for example those for employment land or transport, may also be found to be out-of-date for other reasons, so as to trigger the paragraph 14 presumption. The only difference is that in those cases there is no equivalent test to that of the five-year supply for housing. In neither case is there any reason to treat the shortfall in the particular policies as rendering out-of-date other parts of the plan which serve a different purpose.

59. This may be regarded as adopting the "narrow" meaning, contrary to the conclusion of the Court of Appeal. However, this should not be seen as leading, as the lower courts seem to have thought, to the need for a legalistic exercise to decide whether individual policies do or do not come within the expression. The important question is not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47. If there is a failure in that respect, it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies. The shortfall is enough to trigger the operation of the second part of paragraph 14. As the Court of Appeal recognised, it is that paragraph, not paragraph 49, which provides the substantive advice by reference to which the development plan policies and other material considerations relevant to the application are expected to be assessed.

60. The Court of Appeal was therefore right to look for an approach which shifted the emphasis to the exercise of planning judgement under paragraph 14. However, it was wrong, with respect, to think that to do so it was necessary to adopt a reading

 of paragraph 49 which not only changes its language, but in doing so creates a form of non-statutory fiction. On that reading, a non-housing policy which may objectively be entirely

> up-to-date, in the sense of being recently adopted and in itself consistent with the Framework, may have to be treated as notionally "out-of-date" solely for the purpose of the operation of paragraph 14.
>
> 61. There is nothing in the statute which enables the Secretary of State to create such a fiction, nor to distort what would otherwise be the ordinary consideration of the policies in the statutory development plan; nor is there anything in the NPPF which suggests an intention to do so. Such an approach seems particularly inappropriate as applied to fundamental policies like those in relation to the Green Belt or Areas of Outstanding Natural Beauty. No-one would naturally describe a recently approved Green Belt policy in a local plan as "out of date", merely because the housing policies in another part of the plan fail to meet the NPPF objectives. Nor does it serve any purpose to do so, given that it is to be brought back into paragraph 14 as a specific policy under footnote 9. It is not "out of date", but the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles."

21. Following receipt of the judgments of the Supreme Court in Hopkins Homes, and bearing in mind the difference in the interpretation of the Framework from the decision of the Court of Appeal which had contributed to the perceived need to publish the WMS, the defendant published a change to the content of National Planning Practice Guidance ("the NPPG") addressing how the WMS was to be approached in the light of the Supreme Court decision in Hopkins Homes. The NPPG change was made on 10th August 2017, and provides as follows:

> "A written ministerial statement on 12 December 2016 set out how planning applications and appeals should be determined in circumstances where the local planning authority cannot demonstrate a 5-year supply of housing, but there is a neighbourhood plan in force where all of the following criteria apply:
>
> the written ministerial statement is less than 2 years old, or the neighbourhood plan been part of the development plan for 2 years or less;
>
> the neighbourhood plan allocates sites for housing; and
>
> the local planning authority can demonstrate a 3-year supply of deliverable housing sites against its 5 year housing requirement.
>
> The written ministerial statement stated that in such circumstances, relevant policies for the supply of housing in the neighbourhood plan should not be deemed to be 'out-of-date' under paragraph 49 of the National Planning Policy Framework.

> Subsequently, the Supreme Court in Suffolk Coastal District Council v Hopkins Homes Ltd and SSCLG; Richborough Estates Partnership LLP and SSCLG v Cheshire East Borough Council [2017] UKSC 37 has explained that it is not necessary to determine whether a policy is a "relevant policy for the supply of housing" in paragraph 49 of the National Planning Policy Framework, and deem it "out-of-date" in order to determine the weight that is attached to that policy. Weight is a matter of planning judgement for the decision maker. In circumstances where the development plan is absent, silent or relevant policies are out of date, paragraph 14 of the Framework states that permission should be granted unless the 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 restrictive policies in the Framework indicate development should be restricted.
>
> In this situation, when assessing the adverse impacts of the proposal against the policies in the Framework as a whole, decision makers should include within their assessment those policies in the Framework that deal with neighbourhood planning. This includes paragraphs 183-185 of the Framework; and paragraph 198.
>
> Paragraph 198 of the Framework states that where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted. In determining applications, decision-makers should take into account the impact of granting permission for an application that conflicts with a neighbourhood plan.
>
> Where the criteria in the written ministerial statement apply, decision makers should give significant weight to the neighbourhood plan notwithstanding the fact that the local planning authority cannot demonstrate a 5-year supply of deliverable housing sites.
>
> Paragraph: 083 Reference ID: 41-083-20170810"

22. The references in the NPPG to paragraphs 183-185 and 198 of the Framework are references to the following text which is to be found in those parts of the Framework:

> "Neighbourhood plans
>
> 183. Neighbourhood planning gives communities direct power to develop a shared vision for their neighbourhood and deliver the sustainable development they need. Parishes and neighbourhood forums can use neighbourhood planning to:
>
> • set planning policies through neighbourhood plans to determine decisions on planning applications; and

- grant planning permission through Neighbourhood Development Orders and Community Right to Build Orders for specific development which complies with the order.

184. Neighbourhood planning provides a powerful set of tools for local people to ensure that they get the right types of development for their community. The ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area. Neighbourhood plans must be in general conformity with the strategic policies of the Local Plan. To facilitate this, local planning authorities should set out clearly their strategic policies for the area and ensure that an up-to-date Local Plan is in place as quickly as possible. Neighbourhood plans should reflect these policies and neighbourhoods should plan positively to support them. Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies.

185. Outside these strategic elements, neighbourhood plans will be able to shape and direct sustainable development in their area. Once a neighbourhood plan has demonstrated its general conformity with the strategic policies of the Local Plan and is brought into force, the policies it contains take precedence over

existing non-strategic policies in the Local Plan for that neighbourhood, where they are in conflict. Local planning authorities should avoid duplicating planning processes for non-strategic policies where a neighbourhood plan is in preparation...

198. Where a Neighbourhood Development Order has been made, a planning application is not required for development that is within the terms of the order. Where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted."

The Claimants' Grounds in brief

23. The claimants' grounds have necessarily evolved in detail over the course of time as events have unfolded during the lifetime of these proceedings. The essential content and thrust of the grounds have remained similar and they are as follows (adopting the numbering and order of the grounds used at the hearing).

24. Ground 1 is the contention that in the light of the decision of the Supreme Court in Hopkins Homes the WMS is based on an error of law so far as the interpretation of paragraph 49 of the Framework is concerned and, further, promotes a policy which is inconsistent with paragraphs 14 and 49 and thereby has the effect of amending paragraph 49 without explicitly doing so: this represents an approach which is irrational and unlawful. Ground 2 is the contention that reliance on the 2015 and 2016 research was based upon errors of fact and, further, founded upon inadequate evidence which led to a conclusion which included taking account of irrelevant considerations and ignoring

relevant ones as well as acting irrationally. Ground 3 is the allegation that the WMS is invalid for uncertainty and confused, in that it relies on assessment of a three-year supply of land for housing when the basis for performing such a calculation is not clear: this is further evidence of the defendant acting irrationally. Ground 4 relates to the stated intention of the Framework to "boost significantly the supply of housing": it is contended that in the light of this clear policy requirement the issuing of the WMS was irrational and arose as consequence of a failure to have regard to material considerations or the taking into account of irrelevant ones. Finally, Ground 5 is based on the contention that in the light of past practice with respect to the publication of policy for housing there was a legitimate expectation that there would be public consultation before planning policy for housing was changed by the WMS and this was breached by the failure to do so in this case.

25. Since each of these Grounds raises distinct questions of fact and (to some extent) law, it is convenient to deal with them separately and in turn.

Ground 1

26. The essence of Ground 1 has been set out above. The claimants observe that a key part of the rationale for the issuing of the WMS was the concern that the absence of a five-year land supply for housing would render a recently adopted neighbourhood development plan "out-of-date". This is the way in which the WMS is expressed in its paragraphs 3 and 4. It for this reason that the WMS is expressed in the manner in which it is at paragraph 5, providing that the NDP "should not be deemed to be 'out-of-date'" where there is a three-year supply of housing, and either the WMS or the NDP is less than two years old and the NDP provides allocations for housing. That approach was clearly based on the interpretation of paragraphs 49 and 14 from the decision of the Court of Appeal in Hopkins Homes. It is an approach which is wrong in law following the Supreme Court's decision. The policy is therefore predicated on a misunderstanding of the law.

27. Furthermore, it is submitted that the policy creates a contradiction. In circumstances where, for instance, there is a four-year supply of housing in the LPA area, and an application for housing is made on an unallocated site in the area of an NDP which is less than 2 years old and which contains allocations for housing, the application of paragraph 49 of the Framework and the WMS will give contradictory answers as to whether policies for the supply of housing are out-of-date. Paragraph 49 of the Framework would provide the answer that the four-year housing supply means that the policies are out-of-date; the answer provided by applying the WMS is that they are not out-of-date. This confused position, it is contended, demonstrates that the policy is irrational. In truth, it was necessary for the defendant to amend the Framework policies, and in particular paragraph 49, if he wished to address the perceived problem for NDPs that he had identified, and his failure to do so has created an unlawful policy. It is both illogical and irrational to promulgate a policy which creates contradictory answers as to whether policies for the supply of housing are out-of-date.

28. Reliant to some extent upon the material provided by way of disclosure, and also based upon the WMS itself, the claimants contend that the defendant failed to have regard to

material considerations in the form of issues such as the need for further research about the effectiveness of NDPs and the approach to be taken to identifying an objective need for housing within a neighbourhood area. The absence of these obviously material considerations rendered the defendant's decision to make the policy unlawful. In the event that the court concluded that these material considerations had been taken into account by the defendant, then there was an unlawful failure to provide reasons in relation to these matters, and explain why they had not prevented the defendant from deciding to publish the policy.

29. In addition, the claimants contend that it was unlawful and irrational for the WMS to be published without a minimum size of allocation to be specified for the NDP to be entitled to protection. An NDP could be made with just two allocations of two dwellings each and the WMS would apply so as to protect it. This, it is contended, is an absurdity.

30. The defendant has a preliminary and fundamental objection to this part of the claimants' case. The defendant submits that, subject to not making planning policy which is contrary to planning legislation (it being a creature of statute) and not introducing into planning policy matters which are not material considerations in planning terms at all, choices as to the content and form of national planning policy are a matter for the defendant alone and the court cannot interfere, save on the grounds of irrationality. In particular, unlike making a decision on a planning application, when the defendant is deciding to issue new national planning policy, that is not a decision which the court is entitled to scrutinise in relation to whether the defendant has taken account of the obviously material considerations or not.

31. This submission is based upon the decision of the Court of Appeal in R(West Berkshire District Council and another) v Secretary of State for Communities and Local Government [2016] 1 WLR 3923. That was an application for judicial review in relation to changes to the NPPG with respect to the thresholds for the provision of affordable housing as a requirement of a proposal for residential development. One of the grounds upon which the claim was brought was the failure of the defendant to have regard to material considerations when making the policy. The submissions received by the Court of Appeal on this point, and the conclusions reached by Laws and Treacy LJJ upon it, are set out in paragraphs 34 to 37 of their judgment as follows:

> "34 Mr Drabble relies upon this reasoning for the proposition that in exercising his common law power to make planning policy the Secretary of State was not obliged to have regard to this or that consideration, as he would be if his power were derived from a statute which told him what to consider; if he chose to make new policy he was bound, of course, by the core values of reason, fairness and good faith, but beyond that his choice of policy content was very much for him to decide.
>
> 35 Mr Forsdick's response is to insist that while the source of the Secretary of State's power is the common law, the context in which it is being exercised is a carefully drawn statutory regime; so that, for proper planning purposes, the considerations which the judge held were left out of account were indeed "obviously

material".

> 36 We would certainly accept that the statutory planning context to some extent constrains the Secretary of State. It prohibits him from making policy which, as we have put it in dealing with the principal issue in the case, would countermand or frustrate the effective operation of section 38(6) or section 70(2) . It would also prevent him from introducing into planning policy matters which were not proper planning considerations at all. Subject to that, his policy choices are for him. He may decide to cover a small, or a larger, part of the territory potentially in question. He may address few or many issues. The planning legislation establishes a framework for the making of planning decisions; it does not lay down merits criteria for planning policy, or establish what the policy-maker should or should not regard as relevant to the exercise of policy-making.
>
> 37 In those circumstances the Secretary of State was not in our judgment obliged to go further than he did into the specifics described by the judge, and in consequence is not to be faulted for a failure to have regard to relevant considerations in formulating the policy set out in the WMS."

32. Thus, it is submitted by the defendant, the claimants cannot complain that obviously material considerations have been left out of account in deciding to publish the WMS. Further the defendant contends that the WMS was unquestionably lawful at the time when it was published, and the emergence of the Supreme Court decision in Hopkins Homes, overtaking the decision of the Court of Appeal, does not render the WMS unlawful. Nor, it was submitted, was it unlawful not to withdraw the WMS once the Supreme Court judgment was available. The WMS read together with the relevant element of the NPPG was clear and consistent with the Supreme Court's interpretation of paragraphs 14 and 49 of the Framework. There was therefore no legal error in the decision to publish the WMS, and thereafter to retain it alongside the change to the NPPG explaining how it was to be applied.

33. My conclusions in relation to these contentions under Ground 1 are as follows, Firstly, it is clear that the judgment in West Berkshire is both in point in relation to the issues raised by the claimants in relation to a failure to have regard to obviously material considerations, and is binding upon this court. As the court in that case observed, the legislative framework does not lay down criteria for assessing the merits of planning policy which has been made, nor does it lay down those matters which the defendant should or should not have regard to when making national policy. Provided, therefore, that the policy produced does not frustrate the operation of planning legislation, or introduce matters which are not properly planning considerations at all, and is not irrational, the matters which the defendant regards as material or immaterial to the determination of the policy being issued is a matter entirely for the defendant. Thus, the complaints raised by the claimants in relation to the failure to take account of material considerations such as the need for a package of measures including a range of changes to the Framework, a methodology for determining objectively assessed neighbourhood housing need and further research; the failure to take account of the impact of the WMS

on the operation of paragraph 14 of the Framework and the failure to take account of how neighbourhoods were going to meet their fair share of the housing needs of their area after the WMS was in force, are all matters caught by the principle set out in West Berkshire.

34. Even were I wrong about that, I am unconvinced that the claimants' complaints are sound. Almost all the matters relied upon as material considerations left out of account, and set out above, are matters which are in fact referred to in the recent disclosure. Thus, they were matters which were under consideration by the defendant at the time when the WMS was being forged. They were not therefore left out of account.

35. It was this point which led to the claimants' further submission that even if these matters were taken into account then, nonetheless, the decision to make the WMS was flawed as no reasons to explain how these points had been taken into account and why they had not dissuaded the defendant from making the WMS. However, this submission fails to take account of paragraph 7 of the WMS which explains that whilst a White Paper containing a package of measures in relation to further policy changes to ensure NDPs meet their fair share of local housing need would be forthcoming, it is considered that it is right to take action straightaway to protect communities who have produced a plan and who might "through no fault of their own" find that the housing supply policies were out-of-date. These observations in my view explain clearly why the defendant has taken the decision to take action and issue the WMS prior to the completion of the measures to be consulted upon in the White Paper. In so far as the material considerations relied upon relate to the operation of the policy and criticisms, for instance, of the failure to take account of how the WMS would interact with the provisions of paragraphs 14 and 49 of the Framework, these issues are in reality a question of the interpretation of the policy, and are dealt with below.

36. I am unable to accept the claimants' contention that because the WMS was prepared to be compliant with the Court of Appeal's decision in Hopkins Homes, it has been rendered unlawful by the change in the interpretation of paragraphs 14 and 49 and policies for the supply of housing in the decision of the Supreme Court in that case. It was accepted by the defendant, in my view correctly, that the WMS was drafted to reflect the interpretation of these aspects of the Framework given by the Court of Appeal, and in particular the "wider" interpretation of the phrase "policies for the supply of housing". The language of paragraph 4 of the WMS, when it observes "where communities plan for housing in their area in a neighbourhood plan, those plans should not be deemed to be out-of-date unless there is a significant lack of land supply for housing in the wider local authority area" reflects an approach related to the decision of the Court of Appeal. The fact that there was then a decision of the Supreme Court which adopted a different approach to interpreting the Framework does not in my view render the WMS unlawful as the claimants contend. The defendant can only publish policy which is consistent with the legal interpretation of the Framework at the time when that policy is published. He cannot be criticised for not anticipating that the interpretation would change, or for not second guessing, the outcome of the appeal to the Supreme Court in Hopkins Homes.

37. As a consequence I am satisfied that at the time when the WMS was made, it faithfully

reflected the interpretation of paragraphs 14 and 49 provided by the Court of Appeal in Hopkins Homes, and that the emergence of a different interpretation in the judgments of the Supreme Court did not render the policy unlawful and liable to be quashed. The question which then arises is as to whether, as contended by the claimants, the policy is inconsistent with the Supreme Court's decision and is incoherent and irrational, and that to have failed to cancel the WMS after that decision was unlawful.

38. In order to address this question it is necessary to engage with the issues of whether, in the light of the decision of the Supreme Court in Hopkins Homes, the WMS and the NPPG which was published after that decision and to address its implications, is capable of sensible interpretation, and if it is what that interpretation may be.

39. The legal principles when addressing a question of this kind are as follows:

i) The question of the interpretation of a planning policy is a question of law for the court: see Tesco Stores v Dundee City Council [2012] UKSC 13; [2012] PTSR 983.

ii) The task of interpretation should not be undertaken as if the planning policy were a statute or a contract; the approach must recognise that planning policies will contain broad statements of policy which may, superficially, conflict and require to be balanced in reaching a decision: see Tesco Stores at paragraph 19 and Hopkins Homes (in the Supreme Court) at paragraph 25. Planning policies are designed to shape practical decision making and they should be interpreted with that practical purpose clearly in mind. They have to applied by planning professionals and the public for whose benefit they exist, and are primarily addressed to that audience.

iii) It is important that the language of the policy is read in its proper context when textual interpretation is required: see Tesco Stores at paragraphs 18 and 21. That context will include the subject matter of the policy and its planning objectives. It will also include the wider policy framework within which the policy sits and to which it relates.

iv) Often policies will call for judgment to exercised as to how they apply in the particular factual circumstances of the case: see paragraphs 19 and 21 of Tesco Stores. It is important to distinguish between the interpretation of policy which requires judicial analysis, and the exercise of judgment in the application of policy which is a matter for the decision-maker: see Hopkins Homes (in the Supreme Court) at paragraph 26.

40. Reading the WMS together with the NPPG in my view the policy is clear. The NPPG sets out the change in understanding from when the WMS was published affected by the Supreme Court decision in Hopkins Homes. Whereas the WMS was drafted at a time when the "wider" interpretation prevailed, after the Supreme Court decision it was no longer "necessary to determine whether a policy is a 'relevant policy for the supply of housing' in paragraph 49…and deem it 'out-of-date' in order to determine the weight

that is attached to that policy". This text properly reflects the judgment of Lord Carnwath in paragraphs 56 to 59 of Hopkins Homes. It overtakes the approach taken by the WMS in paragraph 4, which was, as set out above framed against the decision of the Court of Appeal. So how is the policy to be interpreted and how does it apply?

41. It is sensible to start with an understanding of when the policy applies. In my view the criteria from paragraph 5 of the WMS, reiterated (but tweaked) in the NPPG are clear. There are three criteria and the first two were essentially uncontroversial in the case, namely that the WMS is less than two years old or the NDP has been made for two years or less, and that the NDP allocates sites for housing. There was debate about the third criterion, which forms the substance of Ground 3, namely what is meant by a three-year supply of housing. Again, I have no difficulty concluding that this means a three-year supply in terms of the exercise for assessing a five-year supply of housing required by paragraphs 47-49 of the Framework. There are a number of reasons for reaching that conclusion.

42. The first is that the WMS and NPPG exist within the context of the Framework, which clearly measures the adequacy of current housing land supply by reference to the demonstration of a five-year supply. Thus the sense of the text is that if, in undertaking that assessment, more than three years (but less than five) can be demonstrated then the NDP will have the benefit of the WMS and NPPG policy. Secondly, and related to this, the reference to protection applying "unless there is a significant lack of land supply" points to a land supply of less than three years measured against the five-year requirement, rather than some free-standing assessment.

43. Thirdly, once the suggestion of embarking on a free-standing assessment of a three-year supply is raised, with all of the additional questions of re-calculating the requirement, how existing shortfalls are to be included, how sites which deliver in years four and five are to be assessed, it becomes clear that a separate and free-standing calculation is not what is intended. The sophistry involved in these contentions is wholly inappropriate to a practical decision-making document. Indeed, as the claimants point out, there is a clear danger that a free-standing three-year assessment, in circumstances in which it is common experience that delivery may be more plentiful in years four and five of a five-year supply assessment (owing to the need for sites to be opened up and come on stream), may make it more difficult to demonstrate a three-year than a five-year supply if it is an entirely separate exercise. This point, which would potentially undermine part of the purpose for having the policy in the first place, also supports the view that the three-year supply is in the context of the assessment of whether there is a five-year supply of housing land. Finally, the tweaked wording of the NPPG makes clear that the criterion is that whether the LPA "can demonstrate a 3-year supply of deliverable housing sites against its 5 year housing requirement". This puts the matter, in my view, beyond argument. The criterion is a measure of at least three years supply when the LPA performs the five-year land supply exercise required by the Framework.

44. If the criteria are engaged, how does the policy apply. Against the background of the decision of the Court of Appeal decision in Hopkins Homes paragraphs 4 and 5 of the WMS explained that "relevant policies for the supply of housing in a neighbourhood plan, should not be deemed to be 'out-of-date' under paragraph 49". As set out above the

NPPG acknowledges that this approach has been superseded: it is no longer necessary to determine whether a policy is a relevant policy for the supply of housing and to deem it out-of-date to determine the weight to be attached to it. The weight to be attached to a planning policy is a matter for the planning judgment of the decision-maker. The effect of the NPPG, following the Supreme Court decision is to note the application of the tilted balance from paragraph 14 of the Framework applying when policies are out-of-date and the trigger for that conclusion (and therefore the need to use the tilted balance) when the LPA cannot demonstrate a five-year supply of housing. In the light of the policies in the Framework in respect of NDPs (at paragraphs 183-185 and 198 set out above) the NPPG's policy is that when appraising the tilted balance "decision makers should give significant weight to the neighbourhood plan notwithstanding the fact that the local planning authority cannot demonstrate a 5-year supply of deliverable housing sites".

45. On analysis I am satisfied that the policy of the WMS and NPPG under scrutiny in this case is quite capable of being understood and applied in practice. Much emphasis was placed by the claimants in the course of their submissions on the contention that there was confusion created as a consequence of the reality that what the WMS and the NPPG had done was to amend paragraph 49 without actually doing so. I am not satisfied that there is any substance in this concern. It is obvious that the purpose of the WMS, and the subsequent addition to the NPPG, was to change national policy in relation to housing applications in areas with a recently made NDP. I can see nothing in principle unlawful with changing policy. The reality is that, as set out above, paragraph 49 continues to apply as a trigger for the tilted balance in accordance with paragraph 59 of Hopkins Homes in the Supreme Court. The effect of the WMS and NPPG is that when assessing the tilted balance, significant weight should be given to the NDP if the three criteria contained in the WMS and NPPG apply. That is not an amendment to paragraph 49, or for that matter paragraph 14. In my judgment it is a clear policy which is not irrational and is grounded in the elements of the Framework engaged with housing delivery and neighbourhood planning.

46. Nor is it the case, as the claimants contended, that the policy is confusing because it provides two different answers to the question required by paragraph 49 as to whether policies are out of date depending upon whether there is a three or a five year supply. If the LPA cannot demonstrate a five-year supply then paragraph 49 applies. Under the WMS alone, if the five-year supply calculation demonstrated more than three years (but less than five years) then policies for the supply of housing were not to be deemed out-of-date as a consequence of the application of the WMS, if its criteria were met. Following the Supreme Court's decision, and applying the consequential addition to the NPPG along with the WMS, if the five-year supply calculation demonstrates a more than three but less than five-year supply (and the other criteria apply) then paragraph 49 requires the planning balance to be struck using the tilted balance from paragraph 14, and in striking the balance significant weight is to be given to the NDP. The requirements of the policy are in my view clear and do not contradict, but augment, the requirements of national policy for those cases where the criteria of the WMS and NPPG are not satisfied. The observation in the defendant's skeleton at paragraph 10 that "[t]he policy does not change NPPF 14, or 49", relied upon by the claimants in this respect, when read in context and in the light of the interpretation set out above, is not inappropriate.

47. The further point made by the claimants that the policy is irrational as it does not specify a minimum number of allocations for the policy to apply does not in my view have merit. First and foremost, the difficulty of establishing that the policy is one which no reasonable minister in the position of the defendant could promulgate is manifest: the proposition raises a very high hurdle for a claimant to surmount, given the breadth of the operational considerations for the defendant and the degree of respect which the court must afford the defendant in making policy to guide the exercise of his executive functions. Even leaving these considerations entirely to one side, the claimants have not made out a case that a policy without a minimum allocation size was irrational. Firstly, it must be borne in mind, and the policy is bound to be predicated upon the fact that, NDPs within the criteria will have recently undergone independent scrutiny through their examination process. Secondly, as observed by the defendant in the course of argument, if the NDP's allocations are unrealistically small, then that is a matter which can be taken account of as a matter of weight for the decision-maker: the WMS and the NPPG are policies not rules or laws, and there may be circumstances which require their application to be adapted or afforded less weight.

48. In summary, I am unpersuaded that there is merit in the claimants' Ground 1.

Ground 2

49. This Ground relates to criticisms of the evidential basis upon which the written ministerial statement was made. The detailed submissions made by the claimants start from the text of the WMS in which the Minister stated (as set out above):

> "Recent analysis suggests that giving people more control over development in their area is helping to boost housing supply – those plans in force that plan for a housing number have on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authorities."

50. The submissions then progress to a number of criticisms of the 2015 and 2016 research which, it is contended, do not bear out or support the observation contained within the WMS. Firstly, the claimants point out that the 2015 and 2016 research is not based upon "plans in force that plan for a housing number". Thus it is contended that the defendant must have misunderstood the gravamen of the 2015 and 2016 research, making an error of law in the form of a mistake of fact as to what the research was actually based upon and contained, or alternatively reached an irrational decision which was not soundly evidence based.

51. Furthermore, it is submitted on behalf of the claimants that the position is compounded by the fact that the material in the 2016 and 2015 research, far from being based upon local plans with allocations within them, was in fact based upon a variety of different sources for housing figures, including housing figures from plans which had been found to be unsound (such as the Aylesbury Vale Local Plan), plans that contained no housing allocation at all (such as the Black Country Core Strategy in respect of two of the NDPs relied upon) and housing figures which had been taken from Strategic Housing Land

Availability Assessments ("SHLAA's") which are not designed to provide any commitment in planning terms as to the delivery of housing. They are an exercise undertaken at a preliminary stage of planning for housing, and seek to identify potential capacity in settlements to absorb housing development by analysing all of the potential sites which might provide for housing development. The claimants are particularly critical of reliance upon SHLAA sites, which enjoy no planning status in terms of any commitment to development. Thus it is submitted by the claimants that far from being based upon research grounded upon "plans in force that plan for a housing number" the WMS was in fact based upon research which in large measure was based upon housing figures from a variety of sources some of which involved no commitment to development at all. Thus the basis of the WMS was unsound and the evidence upon which the defendant relied did not in fact support the reasons for publishing the WMS in this respect. An earlier allegation that the Neighbourhood Plans selected by the 2015 and 2016 research were "cherry-picked" was not pursued at the hearing.

52. In my view there is little substance in the claimants' complaints in relation to Ground 2. The observation of the defendant in paragraph 1 of the WMS has to be seen in context. Firstly, it is important to note that the defendant merely observes that the "recent analysis suggests" that NDPs are helping to boost housing supply. The use of that word indicates clearly that the defendant was not asserting that this was a hard and fast concluded view. True it is that the "recent analysis" is not based exclusively upon "plans in force that plan for a housing number", but in fact relies upon a variety of available sources of information as to planned figures for housing or estimates for potential housing capacity. However, it is a large leap from observing that mismatch to concluding (when the "recent analysis" was in the public domain and available in order to obtain further understanding of the reasoning underpinning the WMS) that the defendant was here making an irrational decision based upon mistakes of fact giving rise to an error of law.

53. It is critical when reading a document such as the WMS to bear in mind the principles which have been set out above and to read the document in its context. The clear context of the observations relied upon by the claimants in the WMS is the existence of the "recent analysis". Thus, if any further understanding is required as to the basis of this observation as part of the justification in issuing the WMS then regard has to be had to that "recent analysis", the source documents, in the form of the 2015 and 2016 research. Once regard is had to the 2015 and 2016 research the basis of the defendant's observation becomes patently clear. The use of a variety of sources beyond NDPs which have been prepared against the background of approved local plan allocations for housing is acknowledged. The necessity to rely upon this wider variety of sources given the limited number of NDPs which had been made by the time the research was conducted is evident from the text of the research itself.

54. Thus, once the phrase, "plans in force that plan for a housing number" are read alongside and in the context of the research it is not possible to say that there was a mistake of fact giving rise to an error of law in this case as understood from the case of E v SSHD [2004] QB 1044. The text of the WMS is not in my judgment a mistake of fact, but rather an incomplete summary of the "recent analysis" contained in the 2015 and 2016 research to which it alludes. Properly understood and read in context the observation is shorthand for the somewhat more complex picture presented in the 2015 and 2016 research. In my view, however, there is no justification for divorcing the text of the

WMS from the more extensive texts of the 2015 and 2016 research (especially when that documentation is specifically referenced) in assessing the evidence being relied upon and moreover the defendant's understanding of that evidence. That kind of forensic dissection of a document of this nature is in my view wholly unnecessary and inappropriate. It follows that the error of fact jurisdiction is not engaged.

55. It also follows in my judgment that it is quite impossible to conclude that the decision which the defendant made was irrational on the basis contended for under Ground 2, namely that either the evidence was not understood by the defendant, or alternatively the evidence was wholly inadequate to substantiate the issuing of the policy. The criticisms raised in relation to the qualities of the evidence contained in the 2015 and 2016 research is based upon matters which are clear and specified in the research itself. Issues such as the fact that one of the NDPs' performance is appraised against a plan which was found unsound at examination (namely the Aylesbury Vale Local Plan) appears on the face of the documentation. The documentation also specifies where, as in the Black Country Core Strategy, a specific housing allocation for the NDP area cannot be identified from the higher tier plan. The use of figures from a SHLAA is again set out in terms in the documentation.

56. Of some importance in the light of the claimants' criticisms is the fact that both the 2015 and 2016 research documents identify limitations and qualifications to the use of these sources of data. Specifically, in the 2016 research, the authors note that the housing numbers used "do not all relate to numbers in an adopted Local Plan… in these cases Neighbourhood Plans are instead provided numbers in emerging Local Plans or strategic housing land availability assessment. These numbers have therefore not been subject to a Planning Inspectorate examination, which could potentially mean that the housing numbers change (including increasing) in the final Local Plan". Thus the research itself acknowledged the limitations in the evidence clearly undermining the claimants' arguments.

57. Beyond this, the claimants' contentions that it was irrational to rely upon a housing number derived from a SHLAA are in my view a clear attack upon the merits of the decision in this case. Even leaving aside Ms Lieven's submission that in the light of the West Berkshire case the material considerations to be deployed by the defendant were entirely a matter for him and not the subject of legitimate scrutiny by the court, the claimants' complaints as to the rationality of the defendant relying upon these potentially suboptimal sources of data (albeit arising on the basis that they were the best evidence available) become a clear and scantily disguised attack on the merits of the defendant's judgment. I am not in any way satisfied that the limits of rationality were breached in this case.

58. It follows that for the reasons which I have given in my view there is no substance in the claimants' arguments under Ground 2.

Ground 3

59. Ground 3, which is the allegation that the WMS is unlawful as being uncertain and

incapable of ascertainable meaning in respect of the three year land supply reference, has been dealt with above. For the reasons I have given I am satisfied that the reference to three year housing land supply is clear.

Ground 4

60. Ground 4 is a further allegation that the defendant has acted irrationally in publishing the WMS in circumstances where it is a key objective of the Framework, for instance specified in paragraph 47, to "boost significantly the supply of housing". It is submitted that the WMS will frustrate the delivery of housing and this objective of the Framework by affording significant weight to NDPs notwithstanding the absence of the five year housing land supply in the LPA area. This submission is pressed on the basis that it is clear from the authorities that the test for soundness (which applies in relation to a Local Plan in the context of its independent scrutiny process) differs from the more relaxed test applying to an NDP under the legislation, namely that it passes the basic conditions. Thus, the positive planning for the delivery of housing needs identified by paragraphs 157 and 159 of the Framework will be frustrated by the WMS providing significant weight to an NDP which will not have been prepared so as to be sound and so as to meet these clear imperatives from the Framework. Coupled with this Ground is also the submission made in relation to the irrationality of not setting minimum figures for allocations which has been dealt with above.

61. There is, in my judgment, a relatively short answer to this Ground. As Ms Lieven pointed out in the course of her submissions, whilst it is undoubted that the Framework clearly promotes as a key priority a significant increase in the supply of homes, and places a national priority on this objective as a key change in National Planning Policy, that is not an objective which exists on its own and isolated from the other interests addressed by the Framework. It is not a policy objective which is to be pursued at all costs and irrespective of the other objectives of the Framework. It is important to note that the Framework itself at paragraph 6 specifies that paragraphs 18-219 of the Framework taken as a whole constitutes the defendant's view of what sustainable development in England means in practice. Amongst the other concerns for which the Framework has specific policies is, of course, Neighbourhood Planning which it addresses in the paragraphs of the Framework set out above. As is far from uncommon in relation to the consideration of planning policies the objectives addressed in the Framework will, from time to time, pull in different directions. The decision-maker, or in this instance the defendant as policy maker, will have to balance the interests and objectives of the policy in reaching a view as to the appropriate decision or policy to adopt. This is precisely the process which was engaged in the publication of the WMS and I am unpersuaded that there was any irrationality in the defendant's decision in this connection.

Ground 5

62. The claimants' contentions under Ground 5 are crystallised in paragraph 243 of their skeleton argument in which they contend that, on the basis of regular past practice, there was a legitimate expectation that the defendant would consult the house building

industry in relation to:

> "a. any change to National Planning Policy for housing, or alternatively,
>
> b. any major change for National Policy for housing or, alternatively,
>
> c. any major change to the policy pertaining to five year housing supply in national policy."

63. It was common ground that there was no statutory basis for any requirement that consultation should occur in relation to national planning policy for housing of the kind that, for instance, underpinned the decision of the Supreme Court in R (Moseley) v Haringey London Borough Council [2014] UKSC 56; [2014] 1 WLR 3947. As Lord Wilson JSC observed at paragraph 23 of his judgment a duty to consult can arise in a variety of ways including where it is generated by statute. In this instance it is contended by the claimants that the duty to be consulted arises specifically as a consequence of the doctrine of legitimate expectation. This was a case in which the claimants did not contend that the duty to consult arose on the freestanding basis of the requirements of fairness divorced from the operation of the doctrine of legitimate expectation. The claimants' argument was firmly pinned to a requirement for consultation based upon legitimate expectation derived from prior practice. The question of whether the requirements of fairness might be infringed by a change to national planning policy or the NPPG (the latter being accepted in the course of argument by Ms Lieven as being in truth partly practical guidance and partly policy, as in the present case) without public consultation does not arise for decision in the present case.

64. The starting point for considering this Ground must be the requirements necessary to establish whether or not a legitimate expectation arises. The nature of a legitimate expectation was set out by Lord Fraser of Tullybelton in the case of CCSU v Minister for Civil Service [1985] 1 AC 374 at page 401A-F as follows:

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by Lord Diplock in O'Reilly v Mackman [1982] 3 All ER 1124, [1983] 2 AC 237 and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue… The test of that is whether the practice of prior consultation of the staff on significant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the government to depart from the practice in this case. Legitimate expectations such as are now under consideration will always relate to a benefit or privilege to which the claimant has no right

in private law, and it may even be to one which conflicts with his private law rights. In the present case the evidence shows that, ever since GCHQ began in 1947, prior consultation has been the invariable rule when conditions of service were to be significantly altered. Accordingly, in my opinion, if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before issuing the instruction of 22 December 1983. The next question, therefore, is whether it has been shown that consideration of national security supersedes the expectation."

65. The principles which govern the doctrine of legitimate expectation were further considered by the Court of Appeal in the case of Bhatt Murphy v Independent Assessor [2008] EWCA Civ 755. Following the decision in CCSU the Court of Appeal had given further consideration to the principles of legitimate expectation in other cases, and these authorities were referred to by Laws LJ in setting out the principles pertaining to legitimate expectation in his judgment in Bhatt Murphy. Laws LJ distilled the legal principles as follows:

> "27 Legitimate expectation is now a well-known public law headline. But its reach in practice is still being explored. In one of the leading cases, *Ex p Coughlan [2001] QB 213* , Lord Woolf MR as he then was, giving the judgment of the court, described it as "still a developing field of law" (paragraph 59). The cases show that put broadly (there are refinements) it encompasses two kinds. There is procedural legitimate expectation, and there is substantive legitimate expectation. But in certain types of case these terms are more elusive than they appear. These appeals therefore call for some account of the material principles, however well trodden the ground. I acknowledge that much of the ground is at the foothills. But the path falters a little further up.
>
> 28 Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power: see for example *Ex p Coughlan* paragraphs 67, *Ex p Begbie [2000] 1 WLR 1115*, 1129F-H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker's stance or perception: see in particular *Ex p Guinness Plc [1990] 1 QB 146* . Unfairness and abuse of power march together: see (in addition to *Coughlan* and *Begbie*) *Preston [1985] AC 835* , *Ex p Unilever [1996] STC 681* , 695 and *Rashid* [2005] INRL 550 paragraph 34. But these are ills expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case. The excoriation of these vices no doubt shows that the law's heart is in the right place, but it provides little guidance for the resolution of specific

instances.

Procedural Legitimate Expectation

29 There is a paradigm case of procedural legitimate expectation, and this at least is in my opinion clear enough, whatever the problems lurking not far away. The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy: see *CCSU [1985] AC 374* at 408G — H (Lord Diplock's category (b)(ii)), Ex p Baker [1995] 1 AER 73 at 89 (Simon Brown LJ's category 4, acknowledged by him to equate with Lord Diplock's category (b)(ii): see p. 90), *Ex p Coughlan* at paragraph 57, p.242A-C: Lord Woolf's category (b)). I need not for present purposes set out these taxonomies.

30 In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in *CCSU*). There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon any individual. It arises because good administration ("by which public bodies ought to deal straightforwardly and consistently with the public": paragraph 68 of my judgment in *Ex p Nadarajah [2005] EWCA Civ 1363*) generally requires that where a public authority has given a plain assurance, it should be held to it. This is an objective standard of public decision-making on which the courts insist. I note with respect the observations of Peter Gibson LJ on the importance of reliance in *Ex p Begbie* at 1124B-D; but that was a case (or a putative case) of substantive legitimate expectation, where different considerations may arise.

31 Aside from these possible refinements, the paradigm case of procedural legitimate expectations is as I have said clear enough."

66. As is evident from Laws LJ's decision it is necessary for there to be "an unequivocal assurance" either expressly or implicitly from practice upon which the legitimate expectation is then grounded. The claimants' contentions in the case of R (on the application of BAPIO Action Limited) and another v SSHD [2007] EWCA Civ 1139 foundered upon the inability of the claimant to establish that there was a practice in that case which justified the conclusion that there was a legitimate expectation that

consultation would occur prior to a change in the Immigration Rules. As Sedley LJ, giving the leading judgment of the Court of Appeal, observed at paragraph 39 of his judgment "while a practice does not have to be unbroken, it has to be sufficiently consistent to be regarded as more than an occasional voluntary act". He agreed with the conclusions of the judge at first instance, Stanley Burnton J, on what he characterised as "an evaluative question of fact" that there was not a practice evidenced in that case which justified the conclusion that a legitimate expectation of being consulted arose.

67. It is the claimants' contention that on every occasion when there have been changes to national planning policy in relation to housing in the past there has been consultation with the house building industry before that policy has been confirmed. Thus, they contend that as a consequence of that practice there was a legitimate expectation that they would be consulted about the written ministerial statement before it was issued by the defendant. They draw attention to the fact that the defendant was warned of a risk of legal action if he failed to consult, and further rely upon the discussions evidenced in the recent disclosure suggesting that there would be consultation on this policy change through the White Paper.

68. The starting point for evaluating the claimants' submissions must be the observation that the legitimate expectation which they rely upon and seek to frame is narrow in its scope. Firstly, as pleaded, it is restricted to consultation with the house building industry. It is in my view important to observe that the house building industry are not the only parties with an interest in the content of national planning policy for housing. LPAs, amenity groups and the public at large will all have a potential interest or concern in relation to any change in national planning policy for housing. In some respects they may have a different perspective from the house building industry, but that is no reason to exclude them from an entitlement to be consulted in relation to a change to national planning policy for housing. This observation is by no means fatal to the claimants' case. Perhaps more felicitously expressed the legitimate expectation for which they might contend would be for public consultation in relation to changes to national planning policy for housing which would include, amongst others interests, the house building industry. Alternatively, the legitimate expectation claimed might be formulated as a requirement for consultation with the public at large in relation to any change to national planning policy for housing.

69. The second observation in respect of the narrowness of the pleaded legitimate expectation is that it is limited to changes (or major changes) to national planning policy for <u>housing</u>. It is necessary for the claimants to limit the legitimate expectation in this way if they are to succeed. The necessity for that limitation arises because there is factual evidence before the court that there have been several occasions where national planning policy has been changed by the issuing of a WMS without there having been any consultation, whether with the house building industry or the public at large, at all. Instances of this include a WMS in respect of national retail planning policy related to the demonstration of need which was made on 11th February 1999. In more recent times, on 15th September 2015, a WMS adjusting national planning policy in relation to the approach to be taken to applications for exploratory apparatus for hydraulic fracturing was issued without any prior public consultation. Thus, there is no basis for the claimants to contend for a legitimate expectation that changes to national planning

policy would not occur without prior consultation. There is a history (including two further episodes which are particularly pertinent to the claimants' claim) of national policy being changed in specific respects from time to time though the issuing of a WMS.

70. This creates in my view further troubling consequences for the legitimate expectation for which the claimants contend. The question which the claimants' contention begs is why would a legitimate expectation of the kind they claim apply to national policy pertaining to housing but not to national policy pertaining to retail development or exploration for minerals and energy. The claimants' response was to point to the specific importance of housing development in terms of providing people with a home (including an affordable home for those who required one), together with the importance to the national economy of the house building industry. Whilst those points are undoubtedly correct, they do not in my view coherently distinguish housing development from other forms of developments of undoubted significance to the economy and national wellbeing, such as developments concerned with retail or mineral exploration. I can see little if any basis to distinguish housing from any other national planning policy so as to contend, against the backdrop that the claimants cannot sustain a legitimate expectation in respect of national policy as a whole, that there may be a legitimate expectation in relation to planning policy for housing.

71. However, it is not necessary to decide the case on this basis, albeit that it throws up significant evidential fragilities in relation to the claimants' pleaded legitimate expectation. The defendant's response to this part of the case draws attention to occasions when the defendant has issued a WMS concerning national housing policy without any prior consultation. The defendant thus contends that there is no evidential basis for the legitimate expectation contended for by the claimants.

72. The first is a WMS in relation to the removal of gardens from the definition of previously developed land in national planning policy so as to preclude the application of policy favourable to development on previously developed land from applying to housing proposals affecting garden areas. The purpose of this change was to address concern which existed at the time in relation to what was described as "garden grabbing", that is to say the redevelopment of large sites containing single or small numbers of dwellings and garden areas into far more dense residential development. Whilst the claimants sought to diffuse this point by pointing out that there had been a research report undertaken by Kingston University enquiring of 127 local authorities (by questionnaire or interview) as to whether or not "garden grabbing" was a problem in their area and contending that this amounted to consultation, in my view the defendant was correct to submit that it was nothing of the sort. It was in truth a research report or evidence informing the investigation as to whether or not the policy should be promulgated, and not a consultation process.

73. The second WMS on which the defendant relies is the issuing of the WMS "Planning for Growth". This was issued on 23rd March 2011 and followed on from the budget of that year. The claimants are correct to observe that this WMS had a broader remit than solely housing, since it amounted to a call to action for the planning system, requiring it to foster development and growth to help rebuild the economy. However, it is also clear

from the text of the policy that the WMS sought to affect to a change in the approach of national planning policy for housing. In particular, it provided as follows:

> "The government's top priority in reforming the planning system is to promote sustainable economic growth and jobs. Government's clear expectation is that the answer to development and growth should wherever possible be 'yes', except where this would compromise the key sustainable development principles set out in national planning policy…
>
> Local planning authorities should therefore press ahead without delay in preparing up-to-date development plans, and should use that opportunity to be proactive in driving and supporting the growth that this country needs. They should make every effort to identify and meet the housing, business and other development needs of their areas, and respond positively to wider opportunities for growth, taking full account of relevant economic signals such as land prices. Authorities should work together to ensure that needs and opportunities that extend beyond (or cannot be met within) their own boundaries are identified and accommodated in a sustainable way, such as housing market requirements that cover a number of areas, and the strategic infrastructure necessary to support growth.
>
> When deciding whether to grant planning permission, local planning authorities should support enterprise and facilitate housing, economic and other forms of sustainable development. Where relevant - and consistent with their statutory obligations - they should therefore:
>
> consider fully the importance of national planning policies aimed at fostering economic growth and employment, given the need to ensure a return to robust growth after the recent recession
>
> take into account the need to maintain a flexible and responsive supply of land for key sectors, including housing
>
> consider the range of likely economic, environmental and social benefits of proposals; including long term or indirect benefits such as increased consumer choice, more viable communities and more robust local economies (which may, where relevant, include matters such as job creation and business productivity)
>
> be sensitive to the fact that local economies are subject to change and so take a positive approach to development where new economic data suggest that prior assessments of needs are no longer up-to-date
>
> ensure that they do not impose unnecessary burdens on development."

74. As will be seen from this quote, housing development was specifically identified as

being part and parcel of the growth initiative which the WMS addressed, and which was subject to the Government's priority to promote sustainable growth accompanied with the "clear expectation…that the answer to development and growth should wherever possible be "yes"". It is, in my view, no answer to the defendant's case to suggest that this WMS can be distinguished on the basis that it adjusted national planning policy for housing alongside other forms of development. That suggestion has an air of unreality to it. The fact is that as a matter of substance the WMS affected national planning policy in relation to housing, and did so without there being any public consultation in relation to its content.

75. It follows that on the facts, even confining the enquiry to national planning policy in relation to housing (and ignoring the difficulty of justifying why housing should be isolated from other forms of development in this respect), in my view the evidence does not establish that there has been an unequivocal assurance on the basis of practice that a WMS in relation to national planning policy for housing would not be issued without prior consultation. It is clear that on at least two occasions the defendant has issued WMS without consultation affecting national planning policy for housing. Thus I am unconvinced on the evidence that the claimants have established a legitimate expectation that they would be consulted on the WMS. It follows that Ground 5 must be dismissed.

Conclusions

76. For all of the reasons which I have set out above I have reached the conclusion that the claimants' case on all five Grounds as advanced cannot be sustained. It follows that this claim must be dismissed.