Stratford on Avon DC v Secretary of State for Communities and Local Government, J S Bloor (Tewksbury) Ltd, Hallam Land Management Ltd and RASE (Residents Against Shottery Expansion) (Queen's Bench Division, Administrative Court, Hickinbottom J., July 18, 2013) [2013] EWHC 2074 (Admin)

Mr P. Cairns and Mr G. Wignall (Principal Solicitor, Stratford on Avon DC) for the claimant.
Mr J. Maurici QC and Mr R. Turney (Treasury Solicitors) for the defendant.
Mr T. Hill QC and Mr P. Jackson (Squire Sanders (UK) LLP) for the first and second interested parties.
The third interested party was not represented and did not appear.

Development plans; Housing supply; National Planning Policy Framework; Outline planning permission; Public participation; Residential development

National Planning Policy Framework—emerging local plan—housing requirement—Aarhus Convention

In October 2009, the first and second interested parties ("the Developers") made an application to Stratford on Avon DC ("the Council") for outline planning permission for up to 800 dwellings at land west of Shottery (the Site), a village west of Stratford-upon-Avon which had a number of historic sites. The application was refused and the Developers appealed. The appeal was recovered by the Secretary of State for his own determination and after a public inquiry the Inspector appointed by the Secretary of State produced a report ("the Inspector's Report") recommending that permission should be granted. The Secretary of State granted planning permission on the basis of that recommendation. The Council appealed under s.288 of the Town and Country Planning Act 1990 ("the Act"). The relevant regional strategy for Stratford-upon-Avon was the West Midlands Regional Spatial Strategy, published in 2004. When the Local Plan Review took place in 2006, the inquiry inspector identified three green field sites (including the Site) as suitable for development. The three sites were included as Strategic Reserve Sites appropriate to ensure that there was a continuous land supply to meet longer-term housing requirements (Policy STR 2A). No need for any housing provision on green field sites was expected before the end of the plan period. The Site was also the subject of Policy SUA.W of the Local Plan Review, which indicated that the proposed development of the Site had been identified following "comprehensive assessment of a range of sites on the edge of Stratford-upon-Avon". Both Policy STR2A and Policy SUA.W were expressly saved by a Secretary of State's Direction in 2009.

The Council began considering a new Core Strategy in 2007. The First Draft contained a housing requirement of 5600 additional dwellings between 2006 and 2026. It included the Site as a strategic allocation, to be developed after 2016. A Second Draft was issued for consultation in 2010. The Site was again included as a strategic allocation, to be developed after 2011. In 2011, with the revocation of the regional strategy imminent, the Council resolved to prepare a Third Draft Core Strategy, which took fully into account the new localism agenda. It instructed planning consultants ("Hearn") to prepare a report on projections for future housing requirements. Hearn considered a number of models and developed three. Option 1, based upon long-term population trends produced a housing requirement for the relevant period 2006–2026 of 10,300. Option 2, based on economic-led projection produced a housing requirement of 13,000. Option 3 assumed a net reduction in in-migration of 25 per cent and produced a housing requirement of 8,200. In the Third Draft Core Strategy, the Council opted for a housing requirement of 8,000. The choice was premised on the Council's concern to preserve the special character of the district and the key role that it played in the economic well-being of the area because of the importance of income from tourism which the Council considered Hearn had not properly addressed. The draft omitted the Site as a housing development site, on the basis that, under the new proposed local policy, the maximum size of any estate

would be 100 homes. It was in the light of the Third Draft Core Strategy that the Council refused the application for the Site.

The Inspector found that the figure of 11,000–12,000 dwellings for the period 2008–2028 accorded more closely with the full, objectively assessed needs for market and affordable housing required to be met under the National Planning Policy Framework ("NPPF") than the Council's figure of 8,000 dwellings. He found that there was a significant unmet need for housing land in the district and that this warranted a role for the Site as anticipated in the Local Plan Review. The proposal thus accorded with the development plan in this respect.

The Council submitted that the Secretary of State, by adopting the relevant parts of the Inspector's report, fell into legal error in that the Inspector unlawfully: (1) determined a housing requirement for the district that failed to comply with national policy as contained within the NPPF. The Inspector effectively usurped the role of the Council by determining the housing requirement for the relevant period. His finding meant that there was a presumption in favour of permitting the development, against which he weighed the adverse environmental and economic impacts which the Council regarded so highly. In the result, the housing requirement finding effectively determined the application and the Council had no alternative but to accept that it could not demonstrate a five year housing supply in subsequent applications and appeals and to adopt the figure found by the Inspector as the housing requirement for the purposes of its own future plan; and (2) failed to take into account the United Kingdom's obligations pursuant to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention") to ensure effective public participation in the plan making process and failed properly to apply national guidance in relation to emerging plans.

Held, dismissing the application:

1. The Council's first submission confused the plan-making and decision-making functions within the planning system. Each required consideration of housing requirements, but in different contexts. An assessment of future housing requirements was essential for the purposes of the development plan, but equally, the housing requirement position had to be considered when a planning application was made for housing development. In the exercise of considering the issues for the purposes of the inquiry, the Inspector had to determine the housing supply issue. In coming to that necessary assessment in the context of a specific planning application/appeal, the Inspector was not binding the Council as to the relevant housing requirement so far as the development plan (now in the form of the Council's Core Strategy) was concerned. The Inspector made it clear that he understood the Council's role in considering housing supply in the context of the Core Strategy, and was not seeking to assume that role. The Inspector made it clear that he came to his assessment of housing need on the basis of the evidence before him. In deciding on the housing requirement for the district on the evidence before him and for the purposes of the particular planning application he was considering, the Inspector was not seeking to bind the Council, or another Inspector or the Secretary of State as to the housing requirement figure in other applications or appeals.
2. Having rightly, taken the view that he had to assess the housing requirement to enable him properly to determine the appeal in accordance with the NPPF and the development plan (which still included the saved parts of the Local Plan Review) the Inspector's approach to determining that figure was unimpeachable. The determination of the housing supply involved planning judgment, and the discretion of the Inspector in exercising that judgment was wide. The Inspector dealt with the Council's figure of 8,000. He also dealt with the Council's particular reasons for adopting the lower figure. Having dealt with the Council's figure, and why he was not persuaded to adopt that figure, the Inspector went on to give reasons for using the figure of 11,000–12,000. He concluded that the figure of 8000 was not sufficiently evidence based and that, on all the evidence before him, the

requirement for the period 2008–2028 was 11,000–12,000. He had at least adequate reasons for that assessment and his analysis and conclusion were unimpeachable as a matter of law.

3. The Planning GPs and the Aarhus Convention required the decision maker and the Inspector on his inquiry in this case, to make an assessment on the application, taking into account the emerging plan in accordance with the guidance. The Inspector fully appreciated that task. He considered the potential harm to the emerging plan that might be caused by this proposal. Having referred to the Localism Act 2011 and the Council's Third Core Strategy the Inspector recognised that the development proposal was inconsistent with the Draft Core Strategy as it then stood. However, a finding of substantial potential prejudice to the emerging plan was not conclusive. The Inspector had to give that consideration the weight he considered appropriate, in the light of the guidance. That he did. It was only after taking all the factors into account that the Inspector concluded, as a matter of planning judgment, that the weight to be given to the emerging plan was only "relatively little". The Inspector's analysis, his approach to the NPPF and the Planning GPs and his conclusion were unimpeachable as a matter of law.
4. Interested members of the public had every opportunity to participate in all aspects of the development plan and changes to it, and in the decision-making process for all specific decisions, including in respect of the Site. They had every opportunity to participate in the decision-making process that led to the Inspector determining that the weight he should give to the emerging plan was relatively little, and to his determination that other factors outweighed the potential harm to the emerging local plan. The Aarhus Convention did not require a blanket stop to be put on development that, potentially, might adversely impact on future policy; nor could it be used as a weapon by those who wished to inhibit development in the hope that planning policy would change in the future. The Aarhus Convention and the relevant national guidance required the decision-maker in any specific planning application to balance emerging policy with other material considerations. The Inspector and the Secretary of State conducted that analysis properly and lawfully.

The following judgment was given.

Mr Justice Hickinbottom:

Introduction

1. This claim concerns a proposed development of up to 800 dwellings, a mixed use local centre, highway and green infrastructure, and various associated works at land west of Shottery ("the Site"). Shottery is a village lying between the Alcester Road and the Evesham Road, to the west of Stratford-upon-Avon, which has a number of historic buildings including Anne Hathaway's Cottage with its garden which is registered as a Garden of Special Historic Significance.

2. On October 26, 2009, an application for outline planning permission was made by the first and second interested parties ("the Developers") to the claimant local planning authority ("the Council"). The application was refused on September 22, 2011. The Developers appealed, and the appeal was recovered by the Secretary of State for his own determination. In April and May 2012, an Inspector appointed by the Secretary of State, Mr Terry G. Phillimore, MA, MCD, MRTPI ("the Inspector"), held a public inquiry; and, on July 12, 2012, he produced a report ("the Inspector's Report"), recommending that permission should be granted. On October 24, 2012, the Secretary of State granted planning permission subject to conditions, on the basis of that recommendation.

3. In this application under s.288 of the Town and Country Planning Act 1990 ("the 1990 Act"), the Council seeks to quash that decision.

The legal background

4. The relevant legal background is uncontroversial. In relation to planning decisions, the following propositions, relevant to this claim, are well-established.

(i) A planning decision-maker must take into account all material considerations (s.70 of the 1990 Act). Equally, he must not take into account anything that is irrelevant.

(ii) However, the weight to be given to material considerations is exclusively a matter of planning judgment for the decision-maker, who is entitled to give a material consideration whatever weight, if any, he considers appropriate. That discretion is subject only to (a) express statutory provision (such as s.38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), referred to in sub-para.(vi) below) and guidance which might inform the exercise of the discretion, and (b) the decision not being irrational in the sense of Wednesbury unreasonable, i.e. a decision to which no person in the position of the decision-maker and on the evidence before him could reasonably come (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759 at 780F-G). Because the exercise of discretion involves a series of planning judgments, in respect of which an inspector or other planning decision-maker has particular experience and expertise, anyone who challenges a planning decision on Wednesbury grounds, faces "a particularly daunting task" (*R. (on the application of Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 at [8] per Sullivan J., as he then was).

(iii) "Material considerations" in this context include statements of central government policy set out in Planning Guidance Notes and Statements and, since March 2012, the National Planning Policy Framework ("the NPPF") which replaced many earlier policy documents. The NPPF became effective shortly before the Inspector's public inquiry in this case, and of course before his report and the Secretary of State's decision challenged in this claim. The parties made their representations to the Inspector and he prepared his report, rightly, on the basis of the NPPF. Any local guidance is also a material consideration.

(iv) A decision-maker must interpret policy documents properly, the true interpretation of such policy being a matter of law for the court (*Tesco Stores Ltd v Dundee CC* [2012] UKSC 13). Where a decision-maker has misunderstood or misapplied a plan or policy, that may found a challenge to his decision, if it is material, i.e. if his decision would or might have been different if he had properly understood and applied the guidance.

(v) Section 70(2) of the 1990 Act expressly provides that "the development plan" is a material consideration. The content of the development plan is defined in section 38 of the 2004 Act to include "development plan documents" for the relevant area. Such documents are required to go through a rigorous process, including public consultation and thereafter independent examination to determine (amongst other things) whether they satisfy identified statutory provisions and regulations, and whether they are "sound" (s.20(4) and (5)), i.e. are positively prepared, justified, effective and consistent with national policy (see para.182 of the NPPF). The examiner must make a recommendation as to any development plan documents he has examined (s.20(7)). Before doing so, he must consider any representations or objections made (reg.20 and 23 of the Town and County Planning (Local Planning) (England) Regulations 2012 (SI 2012/767)).

(vi) The development plan is not simply a material consideration, because s/38(6) of the 2004 Act gives it a particular status. It provides that:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

5. That requires any proposed development to be in accordance with the development plan looked at as a whole, rather than with every policy in the plan, which may well pull in different directions and some of which may be more relevant to a particular application than others (*R. v Rochdale MBC Ex p. Milne (No.2)* [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27at [44]-[50]). Therefore, s.38(6) raises a presumption that planning decisions will be taken in accordance with the development plan, looked at as a whole; but that presumption is rebuttable by other material considerations:

- In a town and country planning context, plans and strategies are necessarily the subject of regular review and alteration, as policy and other variables change. Where a plan is going through the rigorous and often lengthy process I have described, that emerging plan is also a material consideration. As ever, the weight to be given to it is a matter for the decision-maker, but that discretion is informed by policy guidance (see [49]-[50] below).
- Similarly, where the Government has indicated an intention to abolish certain policies, plans or strategies, that intention is capable of being a material consideration in planning decisions, but again the weight to be given to it is a matter of planning judgment, taking account of the progress that has been made in implementing the abolition (*R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639).
- Rule 18 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) ("the Inquiries Rules") requires the Secretary of State to give reasons for his decision after a planning inquiry which can, of course, be by way of reference to the inspector's report and recommendations. However, a decision letter of the Secretary of State, or an inspector's report upon which it might be based, cannot be subjected to the exegesis that might be appropriate for a statute or a deed. It must be read as a whole and in a practical and common sense way, in the knowledge that it is addressed to the parties who will be well aware of the issues and the arguments deployed at the inspector's inquiry, so that it is not necessary to rehearse every argument but only the principal controversial issues. Reasons for a decision must be sufficient to enable a party to understand how any such issue, of fact or law, has been resolved. In any event, a reasons challenge will only succeed if the aggrieved party has been substantially prejudiced by the failure to provide an adequately reasoned decision (see *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P. & C.R. 26 at 28 per Forbes J.; *South Somerset DC v Secretary of State for the Environment* (1993) 66 P. & C.R. 83; [1993] 1 P.L.R. 80at 82H, 83F-G per Hoffmann L.J.); and *South Buckinghamshire DC v Porter (No.2)* [2004] UKHL 33 at [36] per Lord Brown).
- Although a claim under s.288 is in the form of a statutory application to quash, it is determined on traditional judicial review grounds.

The grounds of challenge

6. In this case, the Secretary of State's decision letter generally accepted the reasoning, findings, conclusions and recommendations of the Inspector's Report. This challenge therefore focuses upon that report.

7. Of the proper approach, in the *South Somerset* case, Hoffmann L.J. said this (at 83F–H):

> "The [inspector's decision] letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy ..."

8. In this case, it is common ground that, in para.476 of his report, the Inspector did correctly identify the 12 main considerations in the inquiry that required determination by the Secretary of State. Three are relevant to this claim—the first three listed by the Inspector—namely:

- whether the proposal was in accordance with the development plan;
- whether and to what degree the proposal supported the housing land supply situation in the district; and
- whether allowing the development now would be premature in relation to the emerging development plan.

9. Mr Cairnes for the claimant submits that, in approaching these questions, the Inspector erred in law, with the result that the Secretary of State, in effectively adopting the relevant parts of the Inspector's Report, also fell into legal error. The errors relied upon are two-fold, namely that the Inspector unlawfully:

- determined a housing requirement for the district that failed to comply with national policy as contained within the NPPF; and
- failed to take into account the United Kingdom's obligations pursuant to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention") to ensure effective public participation in the plan-making process; and failed properly to apply national guidance in relation to emerging plans.

Although the third interested party were not represented at the hearing before me, and indeed did not formally appear in this claim, they lodged written submissions dated July 1, 2013, supportive of the claim, which I have also considered.

10. There seems to me to be considerable interrelationship—indeed, overlap—between the two grounds; but they were relied upon as discrete grounds, and I will deal with them in turn.

Ground 1: The housing requirement ground

11. As its first ground, the claimant contends that the Secretary of State, effectively adopting the Inspector's relevant findings and conclusions, unlawfully determined a housing requirement for the district that failed to comply with national policy as contained in the NPPF.

12. The identification of sites for future housing provision is dealt with in paras 47–49 of the NPPF, which provide as follows:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> - use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
> - identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
> - identify a supply of specific, developable sites or broad locations for growth, for years 6–10 and, where possible, for years 11–15;

- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
- set out their own approach to housing density to reflect local circumstances.

48. Local planning authorities may make allowance for windfall sites in the five-year supply ...
49. Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

13. This guidance, which was published only shortly before the Inspector's inquiry and report in this case, informs the relevant housing requirement to be used for both the strategic plan-making function of a local planning authority when (e.g.) preparing a Local Plan Review, and the function of decision-making in respect of a particular planning application when it informs the approach of the decision-maker. In the latter case, it is particularly relevant in the absence of a demonstration of a particular level of supply of deliverable housing sites. If the authority cannot demonstrate a five-year plus buffer supply of housing land at the time of a planning application for housing development, then that weighs in favour of a grant of permission. In particular, in those circumstances: (i) relevant housing policies are to be regarded as out-of-date, and hence of potentially restricted weight; and (ii) there is a presumption of granting permission unless the adverse impacts of granting permission significantly and demonstrably outweigh the benefits, or other NPPF policies indicate that development should be restricted in any event. That presumption is, again, not irrebuttable: it may be rebutted by other material considerations.

14. The claimant's first ground also touches upon the recent shift from central government control of planning to more localised control, recently considered by Males J. in *Tewkesbury BC v Secretary of State for Communities and Local Government* [2013] EWHC 286 (Admin), and me in *R. (on the application of Cheshire East BC) v Secretary of State for the Environment* [2013] EWHC 892 (Admin) particularly at [20]-[22].

15. Prior to the Localism Act 2011, regional strategies were established in relation to "the development and use of land" and housing targets based on such strategies were imposed on local authorities, as it were, from above. Under the 2004 Act, these were termed "regional spatial strategies", re-named simply "regional strategies" by Pt 5 of the Local Democracy, Economic and Construction Act 2009. Except where the context requires, I shall refer to such strategies as "regional strategies", whenever they were formulated. Structure plans and local plans were required to conform to the relevant regional strategy.

16. The relevant regional strategy for Stratford-upon-Avon was the West Midlands Regional Spatial Strategy, published in June 2004, which included both housing levels and spatial strategy. That regional strategy informed both the Warwickshire Structure Plan 1996–2011, and the Stratford-upon-Avon Local Plan 1996–2011. Those three development plan documents—the regional strategy, the structure plan and the local plan—comprised the development plan for Stratford-upon-Avon.

17. The regional strategy was based on a number of principles, identified to guide development plans within the region, including the need for urban renaissance to counter outward movement of people and jobs which had been facilitated by earlier strategies, but which by 2004 was regarded as unsustainable. Policy GD.5 thus gave a hierarchy of locations for new housing development, the first preference being "within the existing built-up areas of towns of over 8,000 people (as at 1991), that lie within recognised transport corridors". Stratford-upon-Avon was the only such town in the district. The next priority category comprised possible sites adjacent to Stratford-upon-Avon, which, subject to other constraints such as being outside the Green Belt, could be integrated within the fabric of the town.

18. The 2004 regional strategy also dictated the housing requirements of the region to the end of the plan period (2011), 1,464 in the case of Stratford-upon-Avon. Given that the total identified housing provision to that date was 2,140, the Council was able to and did impose a moratorium on housing from November 2006 which was not lifted until March 2011.

19. The housing provision in the regional strategy covered the period to 2011. However, when the Local Plan Review took place in 2006, the inquiry inspector identified three greenfield sites (including the Site) as suitable for development. Cognisant of national guidance that local plans should make provision for at least ten years potential supply of housing from adoption and on the assumptions that there would be an on-going need for the district to accommodate development to meet local need and that Stratford-upon-Avon would continue to be a focus for that new development, those three sites were included in the Review as Strategic Reserve Sites "appropriate to ensure that there is a continuous land supply to meet longer-term housing requirements" (Policy STR.2A, quotation from para.2.4.13). No need for any housing provision on greenfield sites was expected before the end of the plan period in 2011; but, thereafter, of the Site, the Review said this:

> "2.4.14 The [Council] maintains that the development of [the Site] represents a long term sustainable development option with the potential to deliver a range of wider benefits for the town. When the need to release additional greenfield land is identified, priority is likely to be given to the release of [the Site] in a phased manner. However, the order of release will depend on the circumstances that prevail at such a time when it becomes clear that a greenfield site is required.
>
> 2.4.15 It is anticipated that during the current plan period to 2011, housing provision will be met through the development of brownfield sites. As greenfield sites, none of the Strategic Reserve sites will be released for development prior to 2011 unless a significant, and at this stage unexpected, shortfall in housing provision assessed against the [regional strategy] becomes evidence through the monitoring process."

20. The Site was also the subject of Policy SUA.W of the same Local Plan Review, which indicated that the proposed development of the Site had been identified following "comprehensive assessment of a range of sites on the edge of Stratford-upon-Avon" (para.7.15.43), and the timing of implementation would be in accordance with the mechanism set out in Policy STR.2A. Both Policy STR.2A and Policy SUA.W have been expressly saved by a Secretary of State's Direction dated July 9, 2009. The covering letter sent to the Council by the Sustainable Futures Directorate of the Government Office of the West Midlands explained:

> "The extension of saved policies listed in this Direction does not indicate that the Secretary of State would endorse these policies if presented as new policy. It is only intended to ensure continuity in the plan-led system and a stable planning framework locally, and, in particular, a continual supply of land for development.
>
> Following 13 July 2009 the saved policies should be read in context. Where policies were originally adopted some time ago, it is likely that material considerations, in particular the emergence of new national and regional policy and also new evidence, will be afforded considerable weight in decisions. In particular, we would draw your attention to the importance of reflecting policy in Planning Policy Statement 3: Housing ["PPS3"] and strategic Housing Land Availability Assessments in relevant decisions."

The saving of those two local policies essentially meant (submitted Mr Cairnes, correctly) that "the strategic sites [including the Site] were to continue to address unmet need for housing post-2011" (skeleton argument, para.4.2); but, of course, in the light of any new or emerging policy at national or local level.

21. Thus, in 2012, the trigger for the release of the Site was significant unmet need for housing land, as informed by national policy as to housing requirements, now paras 47–49 of the NPPF, and the emerging local plan. In the regional plan, that was expressly the trigger prior to 2011, and implicitly so after that date. However, although it was understood that it would be necessary to keep the position under review, it was envisaged that the need to release any of the sites identified as reserve would probably not have to be addressed until after 2011; and after the proposed partial review of the regional strategy had taken place, and the Council had prepared a new Local Development Framework including a new Core Strategy on the basis of that revision (para.2.4.16).

22. In the light of that emerging revised regional strategy, the Council began considering that new Core Strategy in 2007. The First Draft was issued for consultation in the context of a proposed published revision to the regional strategy, which had been sent out for examination. It contained a housing requirement of 5,600 additional dwellings between 2006 and 2026. The draft included the Site as a strategic allocation, to be developed after 2016.

23. A Second Draft was issued for consultation in February 2010, prepared in the context of a report of the Regional Spatial Strategy Panel, which recommended that the level of housing in the district should be 7,500 between 2006 and 2026. The Site was again included as a strategic allocation, to be developed potentially sooner, i.e. after 2011.

24. Those two drafts were prepared and published in the context of the regional strategies, including emerging amendments to those strategies. However, in a statement to Parliament on July 6, 2010, the Coalition Government announced an intention to revoke regional strategies, and return decisions relating to housing supply to local planning authorities. This was a change of direction, at national level. Section 109(3) of the Localism Act 2011 authorised the Secretary of State to revoke regional strategies; and the West Midlands Regional Spatial Strategy and the Warwickshire Structure Plan were both duly revoked on May 20, 2013.

25. In 2011, in the light of this development in national policy and with the revocation of the regional strategy imminent, the Council Cabinet resolved to prepare a Third Draft Core Strategy, which took fully into account the new localism agenda. It instructed planning consultants, G L Hearn ("Hearn"), to research and prepare a report on projections for future housing requirements in the district. In accordance with PPS3, the report noted that:

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

In determining the level of housing provision, the guidance said that authorities should take into account (amongst other things) "evidence of current and future levels of need and demand for housing....", and "the sustainability appraisal of the environmental, social and economic implications, including costs, benefits and risks of development..." (all quotes being from para.2.1).

26. In its 95-page report, Hearn considered projections for future housing demand based on ten different models, and particularly developed three. Although called "options" in the report—and I will continue to use that term in this judgment—they were not options in the sense that the Council would be obliged to choose one or another: they were projections based on different variables, with a view to informing the judgment which the Council had to make in relation to future housing requirements in the district. That decision of course is not the product of a mathematical exercise alone; it involves a series of planning judgments weighing a complex of material factors on the basis of all available evidence, including (where available) projections from different models. As Harrison J. put it in *R. (on the application of Spelthorne BC) v Secretary of State for the Environment, Transport and the Regions* (2001) 82 P. & C.R. 10 at [39]:

"Predictions for the future necessarily involve assumptions which are made as the result of judgment and experience."

27. The three options set out in the Hearn report were as follows:

Option 1:
Main Trend-Based Projection: This was based upon long-term population trends, on a net district in-migration of 960 persons per year. It produced a housing requirement for the relevant 20-year period (2006–2026) of 10,300. Hearn considered that the impact of this option on the environment was hard to gauge, but potentially greater than Option 3 (para.9.44).
Option 2:
Economic-led projection: The option was aligned to planning for a more positive economic future for the district, informed by calculated employment growth forecasts which assumed a relatively strong labour market in the district. It produced a housing requirement of 13,000 homes. Hearn considered that this option was strongly positive in economic and social terms, but the environmental impact was expected to be higher (para.9.49).
Option 3:
This option assumed a net reduction in in-migration of 25 per cent, producing a housing requirement of 8,200. The option was considered to have the least environmental impact, but potentially having a higher cost in economic and social terms (para.9.54).

28. Hearn concluded as follows:

"9.61 The analysis above has clearly identified that there are a set of trade-offs which need to be considered. It would be possible to conclude that any of the above options [was] the most advantageous based on ascribing different weight to the environmental, economic and social considerations. This is a matter for the … Council to consider.

9.62 We consider that the housing requirement should fall within the range set out within the three options. We foresee risk factors associated with progressing with Option 3 in the absence of a regional planning mechanism, in that the … Council might have to identify how the underprovision against need/demand would be met elsewhere within the region. This could prove difficult to achieve in practice.

9.63 Our view is that a robust yet positive framework for development in the district should plan on the basis of housing in the 11,000-12,000 range over the 20 year plan period, 2008–2028 …"

29. The caution in para.9.62 requires a word of explanation. The assumption of a 25 per cent reduction in net migration into the district did not reflect an expected fall in the demand for housing, because it did not equate future housing requirement with demand: it was not demand-driven, but policy-driven. Indeed, Hearn makes clear that: "This option … falls well short of assessed housing need and demand…" (para.9.53). Rather, it relied upon the proposition that part of that demand would be displaced into, and met by, other areas nearby. Although the Localism Act 2011 removed regional strategies (through which these issues would have been dealt in the past), it instigated a new mechanism whereby such displacement could be agreed: s.110 requires local planning authorities to cooperate with one another.

30. However, Hearn stressed in the body of its report that an approach that relied upon other areas taking up demand displaced from Stratford-upon-Avon would likely require justification and evidence in support:

"9.51 If the Council wishes to adopt this approach it would need to develop a clear justification, and to explain where 'displaced demand' could be accommodated. This could be justified as part of a sub-regional strategy to support regeneration of the metropolitan urban areas, but

would need to be supported by the wider approach adopted at this level. It is likely that this would need to be taken forward by the Local Enterprise Partnership and need the support of neighbouring authorities. In the absence of a formal regional or sub-regional planning mechanism there are clear risks to this.

9.52 In preparing this report we have sought to consider how other Councils within the region ... are responding to the evolving policy context. As at May 2011, the picture is varied. Looking at locations from which people are moving to Stratford-upon-Avon, Birmingham is moving forward with a housing target notably below that proposed in the [Regional Spatial Strategy] Phase 2 Panel Report. It is looking like Solihull and Rugby figures will be similar to the Panel Report. It is not currently clear what policies Warwick District or Coventry might adopt. Looking into the South East Region it seems most likely that planned delivery of housing will fall. Overall it seems unlikely that development proposals elsewhere will provide a driver to reduce in-migration to Stratford-upon-Avon District. To take this option forward the Council would likely need to demonstrate where displaced demand would be accommodated."

In short, if the Council was going to rely upon demand in its district being met by adjacent areas, it would have to provide evidence that that would occur—and, in Hearn's professional view, obtaining such evidence would be a challenging exercise, because it was unclear to where that demand could in fact be displaced.

31. Despite Hearn's recommendation (and the recommendation if its own Planning Officers, who did not support such a low figure), in the Third Draft Core Strategy, the Council opted for a housing requirement of 8,000, effectively preferring Option 3. The choice was premised on the Council's concern to preserve the special character of the district and the key role that that character plays in the economic well-being of the area because of the importance of income from tourism, a factor which the Council considered Hearn had not properly addressed. The Council considered it could demonstrate a five-year plus five per cent housing requirement on that basis. The draft omitted the Site as a housing development site, on the basis that, under the new proposed local policy, the maximum size of any estate would be 100 homes, the aim being to disperse the housing in small developments especially in rural settlements. Of the two spatial strategy options in the Third Draft, one proposed 840 new homes in Stratford-upon-Avon in the 20 year period, and the other (preferred) option just 560.

32. It was in the light of that Third Draft Core Strategy, and its proposed housing requirement of 8,000 dwellings over a 20-year period, that the Council refused the developers' planning application for the Site.

33. In the appeal to the Inspector, he had reservations about the Council's allowance for windfalls, and considered that the backlog in housing provision should be front-loaded in the relevant period; although he accepted the Council's case on past record, and considered that a buffer of 5 per cent (rather than the 20 per cent pressed by the Developers) was appropriate. Contrary to the 8,000 figure preferred by the Council in the latest draft Core Strategy, for the purposes of this particular planning application and on the evidence before him, he found (at para.492 of his report):

"... that the figure of 11,000–12,000 dwellings for the period 2008-2028 accords more closely with the full, objectively assessed needs for market and affordable housing required to be met under the Framework than the Council's figure of 8,000 dwellings."

34. He concluded thus:

"499. I therefore conclude that a robust assessment of the 5 year housing land supply position in the district should be based on an 11,000–12,000 unit requirement for the whole Plan period, a 5% buffer, the land supply as identified by the Council but excluding the windfall allowance, and the backlog being added to the 5 year requirement. This gives a supply of around 2.0–2.2

> years. This would increase to around 2.4–2.6 years with the Council's windfall allowance and further to around 3.2–3.5 years if the backlog is spread over the whole Plan period. The degree of shortfall in the 5 year supply even with generous assumptions indicates the existence of a substantial requirement for land to meet objectively assessed housing needs in the district.
>
> ...
>
> 502. It is therefore found that there is a significant unmet need for housing land in the district, and this warrants a role for the appeal site as anticipated in the [Local Plan Review]. The proposal thus accords with the development plan in this respect."

35. The first ground of challenge is that the Inspector erred in law in finding that the housing land requirement for the district over the 20-year period 2008–2028 was 11,000–12,000 homes. As Mr Maurici QC for the Secretary of State submitted (see his skeleton argument, para.40), this was characterised in a variety of ways in the Claimant's skeleton argument; but, at the hearing before me, Mr Cairnes focused on the submission that the Inspector effectively usurped the role of the Council by determining the housing requirement for the relevant period. His finding that the requirement was 11,000–12,000, and the inevitable consequence that there was a shortfall against that figure, meant that there was a presumption in favour of permitting the development, against which he weighed the adverse environmental and economic impacts which the Council regarded so highly. In the result, the housing requirement finding effectively determined the application—and, worse, he submitted, the Council has had no alternative but: (a) to accept that it cannot demonstrate a five-year housing supply in subsequent applications and appeals ("to contend otherwise would inevitably result in an adverse award of costs on such an issue", he submitted: skeleton argument, fn.48); and (b) to adopt the figure found by the Inspector as the housing requirement for the purposes of its own future plan.

36. Eloquently as this submission was put, I am afraid that it does not withstand scrutiny.

37. First, the submission elides or confuses the plan-making and decision-making functions within the planning system. As I have explained, each requires consideration of housing requirements, but in different contexts.

38. Of course, an assessment of future housing requirements is essential for the purposes of the development plan. But, equally, the housing requirement position must be considered when a planning application is made for housing development. First, such consideration is required by NPPF paras 47–49, because, if the supply is less than five years plus buffer, then that favours grant for the reasons given above (see paras 11–12): there is a presumption in favour of granting permission. Secondly, in the case of Stratford-upon-Avon, at the relevant time the development plan required consideration of housing supply on an application for housing development because, under the Local Plan Review (which formed part of the development plan), release of greenfield land such as the Site was triggered by unmet need for housing land. Unmet housing need is a product of housing requirement and supply (see [18]-[20] above).

39. There is therefore no doubt that, in the exercise of considering the issues he identified for the purposes of the inquiry, the Inspector had to determine the housing supply issue. Unsurprisingly, it was the second issue in his list in para.476 of his report (see [7] above), and the parties addressed him on that issue at some length (those arguments being summarised by the Inspector in paras 80–90 and 191–192 respectively in his report). Indeed, Mr Cairnes accepts as much in his skeleton argument (at paras 4.4 and 4.6):

> "The first issue for determination was whether the circumstances had arisen whereby the release of the Site was justified pursuant to those saved development plan policies due to significant unmet need for housing within the district ... The question of unmet need is necessarily dependent upon an assessment of the Council's housing land supply against its requirement ..."

That necessarily meant determining what the housing requirements and supply were at the time of his report.

40. However, in coming to that necessary assessment in the context of a specific planning application/appeal, the Inspector was of course not binding the Council as to the relevant housing requirement so far as the development plan (now, in the form of the Council's Core Strategy) was concerned. Indeed, the Inspector made it clear that he understood the Council's role in considering housing supply in the context of the Core Strategy, and was not seeking to assume that role. He well-appreciated that:

> "Weighing the options with their differing environmental, economic and social implications for the District is a matter for the Council to consider through the emerging Local Plan."(Inspector's Report para.491)

41. On the part of the Inspector, these were not merely empty words; because he also made clear that he came to his assessment of housing need on the basis of the evidence before him—and, particularly, the absence of evidence before him as to if and where the displaced demand would be taken up (see para.43(iv) below). This was also stressed by the Secretary of State in his decision letter:

> "For the reasons given by the Inspector *on the information currently before him*, he considers that the figure of 11,000-12,000 dwellings for the period 2008–2028 more closely accords with the requirements of the [NPPF]." (At para.14; emphasis added.)

42. The Core Strategy was not so constrained. It would necessarily develop on the basis of evolving data and other evidence in respect of the future housing requirement, and any assessment of future housing requirement would necessarily be taken on evidence different from that before the Inspector in this case. As we shall see, that is exactly what happened (see para.46(iii) below).

43. Equally, in deciding on the housing requirement for the district on the evidence before him and for the purposes of the particular planning application he was considering, the Inspector was not seeking to (and did not in fact) bind the Council, or another inspector or the Secretary of State, as to the housing requirement figure in other applications or appeals. The relevant housing requirement figure in another case would depend upon a separate exercise of judgment on the basis of the evidence available in that other case, at the time of the relevant decision, including relevant policy documents such as the local Core Strategy at whatever stage that process had reached.

44. Having, rightly, taken the view that he had to assess the housing requirement to enable him properly to determine the appeal in accordance with both the NPPF and the development plan (which still included the saved parts of the Local Plan Review), the Inspector's approach to determining that figure is unimpeachable, for these reasons.

The determination of the housing supply involves planning judgment, and the discretion of the Inspector in exercising that judgment was wide.

Mr Cairnes criticises the Inspector for not grappling with the figure for housing supply which the Council favoured, namely 8,000. However, he did deal with that figure, in terms. In para.491 of his report, he said:

> "... [The] Hearn study is clear that the lower option is based on an approach of restraint and requires 'displaced demand', with implications for neighbouring authorities, to be addressed ... There is no apparent evidence base dealing with this in support of the Core Strategy. The 8,000 figure has yet to be tested through the Core Strategy examination process. The weight to be given to the emerging Plan is dealt with below... but at this stage the adoption of the restraint figure in itself carries limited weight."

He also dealt with the Council's particular reason for adopting the lower figure, namely that the maintenance of the environment was particularly important because the district relied upon tourism which

itself was dependent upon the environment. He dealt with tourism specifically in a section with that cross-heading at paras 544–547, finding that the contention that this housing scheme would detract from the attraction of the near-by Anne Hathaway's Cottage and park, and thus reduce the number of visitors, was "lacking in any tangible analysis" (para.546), the expert evidence showing that tourism in the district had "relative resilience" (para.547). He concluded (at para.638):

> "[T]here is no substantive evidence to indicate that the proposal would have any material adverse effect on visitor numbers, and the generalised assertion of consequent economic harm carries very little weight."

On the evidence, that was undoubtedly a conclusion which the Inspector could properly draw.

As Hearn stressed in its report, the absence of any evidence was a serious shortcoming in the 8,000 figure, especially as para.47 of the NPPF (quoted at [11] above) requires assessment of "the full, objectively assessed needs for market and affordable housing in the housing market area". The evidence before the Inspector included, for example, a response to the Council's Core Strategy from Wychavon DC (the authority for an adjacent district), which objected to the Council's Draft Core Strategy because the necessary displacement could put undue pressure on its housing supply (para.2.1.7 of its report dated March 29, 2012). That evidence was before the Inspector, and was specifically referred to by him in his report (see, e.g. paras 81 and 98). The Inspector therefore gave proper, evidence-based and, indeed, compelling reasons for not accepting the Option 3 figure, as the Council had done.

Having dealt with the Council's figure of 8,000, and why he was not persuaded to adopt that figure, the Inspector went on, in para.492 of his report, to give reasons for using the figure of 11,000–12,000, namely:

- The figure was based on a more up-to-date evidence base than the Regional Spatial Strategy figure of 7,500.
- The Hearn report recommended the figure of 11,000–12,000, and that recommendation was on the basis of a "properly prepared independent assessment".
- The figure was consistent with the separate analysis of Professor Dave King in respect of an appeal in relation to a different reserve site, namely land south of Kipling Road, Stratford upon Avon. That analysis used the well-established Chelmer Population and Housing Model, upon the basis of which a housing requirement for the period 2006–2026 of 12,125 was assessed. That evidence was before the Inspector, and was not the subject of any challenge.
- The figure had the support of the Council's own Planning Officers (who did not support the figure of 8,000).

45. Therefore, in summary, for the purposes of responding to the appeal, the Inspector was required to assess unmet housing need; that required him to assess housing requirements, on the basis of the evidence before him; he concluded that the figure of 8,000 preferred by the Council was not sufficiently evidence-based and that, on all the evidence before him, the requirement for the period 2008–2028 was 11,000–12,000; and he had at least adequate reason for that assessment. For the reasons I have given, that analysis and conclusion are unimpeachable as a matter of law.

46. As Mr Cairnes fairly and properly conceded, having reached that conclusion with regard to the housing requirement, and assessed the housing supply (which is not the subject of challenge), the Inspector's conclusion that there was "a significant unmet need for housing land" was inevitable.

47. That is sufficient to dispose of the first ground of challenge. However, the following are also perhaps worthy of note:

> "In the Claimant's grounds, it is suggested that the Inspector failed properly to take into account the economic and environmental dimensions of the national policy. However, again, I do not agree. The

Inspector referred to the Council's views of these factors at (e.g.) paragraphs 190 and 217–219 of his report. He expressly considered the suggestion that the development would adversely affect the environment and hence tourism and thus the economic well-being of the district at paragraphs 544–547; and whether the proposed development was sustainable at paragraphs 569–575. 'Sustainability' of a development includes its economic and environmental (as well as social) dimension (see paragraph 7 and following of the NPPF).

Even if the housing requirement were to have been assessed at just 8,000 dwellings, there was cogent evidence before the Inspector indicating that the Council would still have been unable to have demonstrated a five-year housing land supply plus 5% buffer, the evidence suggesting a housing supply of 3.86 years even with windfall supply counted in (Evidence of Owen Jones dated 23 April 2012: Mr Jones is a Chartered Town Planner, who was instructed by the Developers in the appeal before the Inspector).

Although of course after the event, the Council has in fact not felt constrained to adopt a housing requirement of 11,000-12,000 in its developing Core Strategy. At its meeting on 29 April 2013, the Council Cabinet adopted the figure of 9,500 for its 2008-2028 housing requirement which was adopted by the full Council at its meeting on 15 May 2013. It is clear that that figure was adopted as a result, not of the Inspector's determination, but further evidence (notably an update to an earlier Housing Provision Options Study)."

48. Therefore, the first ground upon which the claimant relies fails. Indeed, although partially disguised, the ground in substance sought merely to challenge the merits of the Inspector's finding that the housing requirement for the 20-year period was 11,000–12,000. In my judgment, there is no legal basis for challenging that finding.

The Aarhus ground

49. When an application for planning permission is made during the time when the relevant authority is travelling towards a new or revised development plan, the emerging plan is, as I have described, a material consideration in the application. All planning applications cannot be put on hold simply because the new plan has not been finalised. However, equally, the grant of permission in a particular application might have the potential for pre-empting or prejudicing the emerging development plan. In those circumstances, an application might be refused as being "premature".

50. This tension is addressed in the policy guidance document, "The Planning System General Principles" ("the Planning GPs"), issued by the Office of the Deputy Prime Minister in 2005. Paragraphs 17–19 read as follows:

"17. It may be justifiable to refuse planning permission on grounds of prematurity where a DPD [i.e. development plan document] is being prepared or is under review, but it has not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by pre-determining decisions about the scale, location or phasing of new developments which are being addressed in the policy in the DPD.

18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified ... The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example:

Where a DPD is at consultation stage, with no early prospect of submission for examination, then a refusal on prematurity grounds would seldom be justified because of the delay which this would pose in determining the future use of the land in question.

19. Where planning permission is refused on grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process."

51. That policy remains in force; but further guidance on the issue of prematurity is contained within the NPPF, which at para.216 provides:

"From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:

- the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
- the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
- the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

52. That national policy to an extent reflects the obligations imposed on the United Kingdom by the Aarhus Convention. There is no EU Directive specifically reproducing or incorporating all the terms of the Convention; and so the Convention is not incorporated into domestic law in the United Kingdom. Generally, therefore our national courts do not directly apply it (see, e.g. *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at [22] and [44] per Carnwath L.J., as he then was; and *Walton v Scottish Ministers* [2012] UKSC 44; [2113] P.T.S.R. 51 at [100] per Lord Carnwath). However, in this case, the Inspector proceeded on the basis that the Convention obligations were engaged (see paras 194 and 505 of his report), and, in those circumstances, Mr Maurici conceded that, for the purposes of this application, I should proceed on the basis that they are.

53. The recitals to the Aarhus Convention recognise:

"... that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations ..."(the Seventh Recital)

and:

"... to be able to assert this right and observe this duty, citizens must... be entitled to participate in decision-making ... in environmental matters ..."(the Eighth Recital)

54. Article 1 of the Convention thus requires each party State to guarantee the right of public participation in environmental decision-making. This applies both to decision-making in respect of specific applications for permission to develop, and to plan-making.

55. Article 6 concerns the rights of individuals to participate in decisions on "specific activities", which include specific decisions on whether to permit particular proposed activities listed in annex 1 to the Convention, which comprise mainly major projects including "any activity ... where public participation is provided under an environmental impact assessment procedure ..." (para.20). The proposed development of the Site fell within the ambit of art.6.

56. Although this obligation has not been directly incorporated into domestic law, a number of European Directives have effectively incorporated some of the obligations and rights of the Aarhus Convention; and these have been transposed into domestic law. Thus, the Inquiries Rules require notification of a planning inquiry and allows members of the public to make representations in writing or orally at the inquiry; the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) provides for the public to be consulted on planning applications; and the Town and Country

Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) provide for further public consultation on environmental information submitted where the proposed development requires an environmental impact assessment.

57. Article 7 of the Aarhus Convention provides for "Public participation concerning plans, programmes and policies relating to the environment", in the following terms:

> "Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6 paragraphs 3, 4 and 8 shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objective of this Convention. To the extent appropriate, each party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

58. The relevant paragraphs of art.6 provide:

> "3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above [which sets out details of the information to be provided] and for the public to prepare and participate effectively during the environmental decision-making.
> 4. Each Party shall provide for early participation, when all options are open and effective public participation can take place.
> ...
> 8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation."

59. Again, although not directly incorporated into domestic law, these obligations have been reflected in various European Directives, which have themselves been transposed, e.g. in the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) and the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824), both of which include participation rights and obligations.

60. The Inspector accepted that the proposed development would substantially prejudice the emerging plan, but gave that consideration little weight. In doing so, Mr Cairnes submitted that the Inspector erred in that: (i) he ignored the obligations under the Aarhus Convention to enable effective public participation in the plan process at a stage when all options are open, a matter specifically raised during the course of the inquiry; and (ii) he acted otherwise than in accordance with the Planning GPs.

61. However, again, whilst forcefully put, I am unpersuaded by these submissions.

62. The submissions were founded on the premise that, by finding on the evidence before him that the housing requirement for the district for the period 2008–2028 was 11,000–12,000, the Inspector effectively bound the Council as to the relevant housing requirement so far as the development plan was concerned. As such, it added little to the first ground—hence my suggestion of overlap between the two grounds ([9] above). But, as I have explained, that premise is false: the Council was bound neither in principle nor practice. So far as the Core Strategy is concerned, on a different evidence base than that before the Inspector, the Council has determined that the 20-year housing requirement is 9,500 dwellings (see [46](iii) above). However, of course that is not a complete answer to the point: the Inspector was still obliged to respect both the Planning GPs and Aarhus Convention rights and obligations.

63. As I have described, there is tension between two policy requirements: the need for the planning system not to be unduly inhibited by uncertainty as to future policy, and the need for planning decisions on individual planning applications not unduly to prejudice or pre-empt future development plans. Because

plans in this area change often and quickly—in an attempt to keep up with the fast-changing relevant variables, including national policy—a development plan is rarely stable, without any change in view, for very long. Most, for most of the time, are the subject of some prospective change. That means that the tension to which I have referred is often present to some degree.

64. The mere fact that a change is proposed to the development plan of course does not mean that all applications for development have to be put on hold. Given the propensity for change in policy and plans, that would bring the entire planning system to an effective halt. As the Inspector put it (in para.505 of his report), whilst acknowledging the consultation obligations in European law:

> "... it is important to avoid unreasonable holding up proposals on the basis of conflict with another process which has an uncertain outcome."

A planning decision is therefore still required; but one material consideration in determining the application is the emerging plan, and that has to be put into the balance with all other material considerations. That balancing exercise, so well-known in European law, is how the planning regime deals with the tension which I have described.

65. Paragraphs 17–19 of the NPPF, set out in [49] above, concern the proper approach to this task. As para.17 indicates, the emerging plan may be determinative where granting the application could prejudge or pre-empt the plan by pre-determining decisions that are being addressed as matters of policy in the plan. Mr Cairnes submitted that paras 17 and 18 when fairly read—particularly in view of the word, "Otherwise ...", that opens para.18—mean that, where granting permission could substantially prejudice the emerging plan by predetermining a decision about the scale, location of phasing of new developments which is being addressed as a matter of policy in the emerging plan, then the application must be refused on prematurity grounds; but that, with respect, is clearly not the case. Paragraph 17 makes it clear that such prejudice *may*, not *must*, result in the refusal of an application, "may" being used twice in the paragraph ("It *may* be justifiable to refuse planning permission ... This *may* be appropriate ..."). Where a proposal may result in potentially substantial prejudice to the emerging plan, then the decision-maker still has a decision to make, the weight to be given to the emerging plan still being a matter for him, taking into account the factors set out in para.216 of the Planning GPs, namely: (a) the stage the emerging plan has reached; (b) the extent to which there are unresolved objections to the plan; and (c) the consistency of the emerging plan policies with the policies of the NPPF itself.

66. This is entirely in accord with the Aarhus Convention. Article 7 of the Convention when read with art.6(3) (both set out in [56]–[57] above) imposes an obligation upon the state to provide for early participation in plan-making "when all options are open and effective public participation can take place". However, that does not mean that all applications for specific developments must be put on hold whilst an emerging development plan, at whatever stage, runs through its rigorous course which of course will include full participation. That, as I have said, would bring the planning system to a complete halt; and would defeat the other public interest involved, namely of getting applications for development determined promptly. Allowing a particular development in accordance with current policy inevitably has the potential for restricting policy choices in the future. Like the Planning GPs, the Convention too requires a judgment to be taken as to when an individual planning application decision can appropriately be taken, even if it has the potential for being contrary to some emerging plan that itself has not yet been subject to its full process including public participation in that process and thus the potential for limiting future policy choices. Depending on the circumstances of the particular case, it may require public participation in the decision that, in the light of proposed policy in the form of an emerging plan, granting a specific application is not premature.

67. In this case, no one suggests that the public were not fully engaged, with every opportunity to participate, in both the current development plan (including the saved parts of the Local Plan Review

which identified the Site as part of the housing land bank) and the application for planning permission for the Site, both at the initial, Council stage and the appeal stage before the Inspector. There was every opportunity for interested parties to participate in those decision-making processes, and, quite properly, they took that opportunity. The Inspector's Report makes clear the participation that there in fact was. That included participation in the process before the Inspector in which he considered and determined the weight to give to the emerging plan, which as a factor included, of course, the support and opposition that was being given to the relevant parts of the emerging plan and the argument that a decision to grant permission here might significantly prejudice the policy of the emerging plan; and his decision as to whether the conflict between the proposal and the emerging plan meant that the application should be refused. But that did not mean that the Inspector was bound to conclude that the application should be refused on the grounds of prematurity. If it did, it would mean, in effect, that permission could not be granted in respect of any development in respect of which there was any opposition, unless and until the development plan had been finalised. That contention is not made better by being put obliquely, as opposed to head on.

68. The Planning GPs and the Convention therefore require the decision-maker, and the Inspector on his inquiry in this case, to make a planning assessment on the application, taking into account the emerging plan in accordance with the guidance in the NPPF and Planning GPs to which I have referred.

69. There can be no doubt that the Inspector fully appreciated that task: in para.503 of his report, under the cross-heading "Prematurity", as Mr Cairnes accepted, he identified the appropriate provisions of the Planning GPs, and the obligations of the Aarhus Convention only applied because he identified them as being put before him and applicable to this case.

70. He then considered the potential harm to the emerging plan that might be caused by this proposal. Having referred to the Localism Act 2011 and the Council's Third Draft Core Strategy which reflected the shift towards localism, the Inspector recognised that the development proposal was inconsistent with the Draft Core Strategy as it then stood:

> "... That current draft seeks to restrict the number of new dwellings in Stratford-upon-Avon to no more than 560–840 and limit the size of estates to 100 homes. The appeal proposal is for up to 800 dwellings. If granted permission, a wider dispersal of the remaining substantial proportion of the total number of dwellings that the Core Strategy seeks to provide for would still be possible. However, the scale and location of the appeal scheme, and a prospect of immediate development, would run strongly counter to the strategy that the emerging plan is seeking to deliver. This would be to a degree that a grant of permission would materially prejudice the outcome of that process. The conflict between the proposal and the current version of the Core Strategy is widely cited in local representations, which see local decision making through the development plan as a key element of localism."

71. But, as I have indicated, a finding of substantial potential prejudice to the emerging plan was not conclusive: he had to give that consideration the weight he considered appropriate, in the light of the guidance. That he did, in para.505 and following, by going through each of the factors identified in para.216 of the NPPF, in turn. In doing so, he had the benefit of representations on the issue from both the Council and interested members of the public including RASE (Residents against Shottery Expansion) which is an interested party in this claim. In particular:

> "The Inspector noted that the Core Strategy was at an early stage: it had not been submitted for approval, and, in April 2012, the Council's Planning Officers thought it unlikely that it would be submitted before November 2012. This appears to have been a matter that the Council's Planning Officers had particularly in mind, when they advised that the policy preferences of the emerging plan, which of course at this time had not been the subject of any public consultation process or

sustainability appraisal, should be given 'very little weight' or only 'limited weight' (pp.82–3 of the Planning Committee report dated 21 September 2011). In fact, we now know that caution concerning the date for submission was warranted: even now, in July 2013, it has still not yet been submitted. The Inspector also noted that the emerging Core Strategy did not include site allocations and consequently would not resolve land delivery issues.

He noted the significant number of unresolved objections to the emerging plan—in fact, I understand 1,600 were received—and they were still being assessed and remained unresolved at the time of the Inspector's Report. I have referred to one particular response to the draft Core Strategy, from a neighbouring authority, which objected on the basis of the proposed displacement (see [43](iv) above). Whilst he (again) acknowledged that 'the soundness of the emerging plan is not for determination through this appeal', he considered that, including as it did a housing requirement figure of only 8,000 dwellings, 'there do appear to be significant questions relating to the degree of consistency with the [NPPF].' (para.508)"

It was only after taking all of those factors into account that the Inspector concluded, as a matter of planning judgment, that the weight to be given to the emerging plan was only "relatively little".

72. The Inspector's analysis, his approach to the guidance in the NPPF and the Planning GPs, and his conclusion, are again unimpeachable as a matter of law.

73. Nor did the Aarhus Convention require more. As I have indicated, interested members of the public had every opportunity to participate in all aspects of the development plan and changes to it, and in the decision-making process for all specific decisions, including in respect of the Site. They had every opportunity to participate in the decision-making process that led to the Inspector determining that the weight he should give to the emerging plan was relatively little, and to his determination that other factors outweighed the potential harm to the emerging plan caused by this development.

74. As in the first ground, Mr Cairnes put his submissions on this ground in a sophisticated and forceful way. However, the Aarhus Convention does not require a blanket stop to be put on development that, potentially, might adversely impact on future policy; nor can it be used as a weapon for those who wish to inhibit development, in the hope that planning policy will change in the future to one which is more in line with their wishes. The Convention, and the relevant national guidance, require the decision-maker in any specific planning application to balance emerging policy with other material considerations. In this case, the Inspector, and the Secretary of State who adopted his analysis and conclusion on this point, conducted that analysis properly and lawfully.

75. For those reasons, the second ground also fails.

Conclusion

76. As I said at the outset, because the Secretary of State effectively adopted the Inspector's reasoning and conclusion, in this case the Inspector's Report bore a particular significance. Looking at the report as a whole—which, over 650 paragraphs and additional annexes, dealt with a great many issues, not the subject of challenge—in my view, it is to be commended as model. Certainly, for the reasons I have given, the criticisms levelled at it by the Council, in my judgment, are unwarranted.

77. I do not find any ground made good; and I consequently dismiss this application.

Comment. The Council raised the intriguing argument that the Aarhus Convention on Access to Environmental Justice was relevant to whether a planning application should be determined in advance of the Council adopting its plan. The Convention does contain rights in respect of consent for projects (art.6) and the preparation of plans and programmes (art.7). Unlike domestic law it does not, however, require there to be a plan or programme. The Convention did not add to the Inspector's consideration of prematurity which concerns the effect of a grant of planning permission

on the preparation of a plan which the local planning authority are required to adopt under the Planning and Compulsory Purchase Act 2004.

Readers might note that two document references have been transposed at para.[64] of the judgment. Paragraphs 17–19 are from the Planning General Principles advice and paragraph 216 is from the NPPF.

Commentary by Richard Harwood QC.

Williams v Secretary of State for Communities and Local Government and Chiltern DC
(Court of Appeal, Arden L.J., Patten L.J., Beatson L.J., July 26, 2013) [2013] EWCA Civ 958

Mr D. Kolinsky (The Treasury Solicitor) for the first appellant.
Ms C. Colquhoun (Chiltern DC) for the second appellant.
Ms H. Townsend (Field Fisher Waterhouse LLP) for the respondent.

Agricultural buildings; Barn conversions; Demolition; Enforcement notices; Green belt

Enforcement notice—alterations to existing building or construction of new building—construction of enforcement notice—extent of remedy required to remedy breach

Chiltern DC ("the Council") issued an enforcement notice under the Town and Country Planning Act 1990 ("the Act"). This was upheld by an inspector appointed by the Secretary of State. Planning permission had been granted in 2006 to convert a barn to provide 10 stables, tack room, a feed store and an office. The enforcement notice and the inspector's decision required the demolition of what the inspector found to be a new building. It was common ground before the inspector that the building work was not in accordance with the plans and did not implement the planning permission.

In 2009, the Council had refused the respondent's application for retrospective planning permission for the "retention and completion of building for livery and agricultural storage purposes and demolition of cattle building". Three days after the refusal the Council issued the enforcement notice. The breaches of planning control were stated to be "without planning permission, the erection of a new building ..." and the enforcement notice required the respondent to demolish the new building. The respondent appealed to the Secretary of State under s.78 of the Act against the refusal of planning permission and pursuant to s.174 against the enforcement notice. The inspector concluded that the matters alleged in the enforcement notice occurred as a matter of fact and that they constituted a breach of planning control. He therefore dismissed the respondent's appeal against the enforcement notice under grounds 174(2)(b) and (c) of the Act. The inspector also dismissed the appeal against the refusal of retrospective planning permission on the ground that the development would be an inappropriate development in the Green Belt.

H.H. Judge Thornton QC sitting as a Deputy Judge of the High Court allowed an appeal pursuant to s.289 of the Act, quashed the inspector's decision, and remitted the matter to the Secretary of State for re-determination. The Secretary of State and the Council appealed against the judge's order on the ground that he failed to respect the inspector's statutory role as the primary decision maker, wrongly became embroiled in questions of planning policy, and adopted an approach to the construction of an enforcement notice which risked undermining the certainty that was required in such notices. The respondent submitted that the inspector's decision erred in law because requiring demolition of the building exceeded what was necessary to remedy the breach of planning control and that the inspector failed to give adequate reasons for his decision. The respondent did not seek to defend the judge's approach and reasoning but contended that the order he made was justified because of the errors made by the inspector. The most that could be required by the Council and the inspector was the alteration of the existing building to make it conform