



Neutral Citation Number: [2018] EWHC 3400 (Admin)

Claim No: CO/5916/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2018

Before:

SIR ROSS CRANSTON
(sitting as a High Court Judge)

Between:

EAST BERGHOLT PARISH COUNCIL

Claimant

- and -

BABERGH DISTRICT COUNCIL

Defendant

(1) MR AND MRS P AGGETT

(2) COUNTRYSIDE PROPERTIES PLC

(3) MR MICHAEL GEORGE HARRIS AND MR JAMES GEORGE HARRIS

(4) HILLS RESIDENTIAL CONSTRUCTION LTD

Interested Parties

Sasha Blackmore and Hannah Gibbs (instructed by **Teacher Stern LLP**) for the **Claimant**
Michael Bedford QC (instructed by **Shared Legal Services, Babergh District Council**) for
the **Defendant**

Anjoli Foster (instructed by **Birketts LLP**) for **Second Interested Party**

Richard Wald and Rosie Scott (instructed by **Holmes & Hills LLP**) for **Fourth Interested Party**

Hearing dates: 31st October and 1st November 2018

Approved Judgment

Sir Ross Cranston:

Introduction

1. The claimant is the Parish Council for the village of East Bergholt in Suffolk. It challenges a planning decision of the local planning authority, Babergh District Council (“the Council”). The Council and Mid Suffolk District Council share services.
2. The decision under challenge is to grant three planning permissions for a total of 229 new homes to be built around East Bergholt. At the Moores Lane site there are to be 144 dwellings, including a single storey courtyard development with four business units; at the Heath Road site, a mixed use development, including up to 75 dwellings; and at the Hadleigh Road site, 10 dwellings for the over 55s. The second interested party, Countryside Properties, is the developer for the Moores Lane site; the fourth interested party, Hills Residential Construction Ltd, is the developer for the land south of Heath Road. The other interested parties did not participate in the proceedings.
3. The three applications for planning permission were not in accordance with the local Development Plan and planning permission was granted as a result of the application of what has been called the tilted balance under the National Planning Policy Framework (“NPPF”). This means, in broad terms, that if a local planning authority cannot demonstrate a 5 year housing land supply (“5YHLS”) the balance tilts in favour of sustainable development justifying the grant of planning permission, notwithstanding the local plan. The local Development Plan for this Council included the Core Strategy adopted in February 2014 and the East Bergholt Neighbourhood Plan made on 20 September 2016.”
4. In these proceedings the claimant’s challenge revolves around the 5YHLS, although it advances its case in various ways. Since there are references to it in some of the documents, it seems appropriate at this early point to mention that the claimant was successful in earlier proceedings, *R(East Bergholt Parish Council v Babergh DC* [2016] EWHC 3400 (Admin). That was a case where this court quashed the grant of planning permission for some dwellings where the Council had failed to apply the relevant core strategy policy.

The 5 year housing land supply target (5YHLS)

5. Under section 35 of the Planning and Compulsory Purchase Act 2004 local planning authorities must produce an annual monitoring report (“AMR”). The AMR must contain the information required by part 8 of the Town and Country Planning (Local Planning) (England) Regulations 2012, SI 2012 No 767. As the name suggests the AMR monitors the implementation of a local authority’s planning policies and the extent to which the relevant targets are met.
6. The target used for the new homes expected to be built is the 5YHLS. Paragraph 47 of the March 2012 version of the National Planning Policy Framework (“NPPF”) stated as follows:

“47. To boost significantly the supply of housing, local planning authorities should...identify and update annually a supply of specific deliverable sites sufficient to provide five years’ worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land...”

7. Footnote 11 to that paragraph explained “deliverable” as follows:

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

8. With development control decision-making, paragraph 49 of the NPPF stated that 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 could not demonstrate a five-year supply of deliverable housing sites.
9. The Planning Practice Guidance (“the PPG”), March 2014, referred to up-to-date adopted Local Plans as the starting point for the 5 year supply of deliverable sites. Deliverable sites, it said at paragraph 31,

“could include those that are allocated for housing in the development plan and sites with planning permission (outline or full that have not been implemented) unless there is clear evidence that schemes will not be implemented within five years.

However, planning permission or allocation in a development plan is not a prerequisite for a site being deliverable in terms of the five-year supply. Local planning authorities will need to provide robust, up to date evidence to support the deliverability of sites, ensuring that their judgements on deliverability are clearly and transparently set out.”

10. As regards updating evidence on the supply of specific deliverable sites sufficient to provide five years’ worth of housing against housing requirements, the PPG stated at paragraph 33 that applications for planning permission had to be determined in accordance with the development plan, unless material considerations indicated otherwise. Paragraph 33 added that the NPPF:

“requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide five years’ worth of housing. As part of this, local planning authorities should consider both the delivery of sites against the forecast trajectory and also the deliverability of all the sites in the five-year supply.

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

...Demonstration of a 5 year supply is a key material consideration when determining housing applications and appeals”.

11. Paragraph 41 of the PPG stated that it should only be necessary to carry out a full survey of the sites when development plans have to be reviewed or other significant changes made. Paragraph 43 stated that the main information to be recorded when

monitoring included, inter alia, planning applications that had been submitted or approved on sites, and broad locations identified by the assessment.

12. In December 2014 the Minister of State for Housing and Planning had told the Planning Inspectorate that the outcome of a Strategic Housing Market Assessment (SHMA), which is an assessment of future housing requirements, was untested and should not automatically be seen as a proxy for a final housing requirement in local plans.

The St Modwen case and the amended NPPF

13. Paragraph 47 of the March 2012 NPPF was considered by the Court of Appeal in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746. There the inspector had said that, to be fact sensitive (in accordance with Stuart-Smith J’s decision in *Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government* [2013] JPL 1145), sites should not be discounted in the 5YHLS simply on the basis of a general characteristic such as their planning status, and that the absence of planning permission was not sufficient reason for a site to be categorised as undeliverable. The inspector had also said that the assessment of supply was distinct from that for delivery.
14. At first instance in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 968 (Admin), Ouseley J had held that the assessment of housing land supply did not require certainty that the housing sites would actually be developed within that period: [51]. On appeal *St Modwen* accepted that to be included in the 5YHLS a site did not have to have planning permission for housing development. In dismissing the appeal, Lindblom LJ (with whom Jackson and McCombe LJJ agreed) said that the case established no new principle. However, he said this:

“35...Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessarily will be. For various financial and commercial reasons, the landowner or housebuilder may choose to hold the site back. Local planning authorities do not control the housing market. NPPF policy recognises that...

37... Had the Government's intention been to frame the policy for the five-year supply of housing land in terms of a test more demanding than deliverability, this would have been done...

38 The first part of the definition in footnote 11—amplified in paras 3–029, 3–031 and 3–033 of the PPG—contains four elements: first, that the sites in question should be “available now”; second, that they should “offer a suitable location for development now”; third, that they should be “achievable with a realistic prospect that housing will be delivered on the site within five years”; and fourth, that “development of the site is viable” (my emphasis). Each of these considerations goes to a site's capability of being delivered within five years: not to the certainty, or—as Mr Young submitted—the probability that it actually will be. The second part of the definition refers to “[sites] with planning permission”. This clearly implies that, to be considered deliverable and included within the five-year supply, a site does not necessarily have to have planning permission already granted for housing development on it. The use of the words “realistic prospect” in the footnote 11 definition mirrors the use of the same words in the second bullet point in paragraph 47 in connection with the requirement for a 20% buffer to be added where there has been “a record of persistent under delivery of housing”. Sites may be included in the five-year supply if the likelihood of housing being delivered on them within the five-year

period is no greater than a “*realistic* prospect”—the third element of the definition in footnote 11 (my emphasis). This does not mean that for a site properly to be regarded as “deliverable” it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years.”

15. In July 2018 the NPPF was revised and the glossary now defines “deliverable” as follows:

“Deliverable: To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. Sites that are not major development, and sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (e.g. they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans). Sites with outline planning permission, permission in principle, allocated in the development plan or identified on a brownfield register should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.”

The Council’s interim 5YHLS 2016-2017

16. The Council’s published AMR for 5YHLS for 2013-2014 was 7.1 years, using a 5% buffer. For 2014-2015, it was 6.3 years, again using a 5% buffer. For 2015-2016, it was 5.7 years. That was using a 20% buffer on the basis of past cumulative under-delivery. The figure would have been 6.6 years with a 5% buffer. The Council publishes its AMR retrospectively, so the Council’s 5YHLS for 2016-2017 was to be published sometime mid-2017.
17. In March 2017 Bidwells, the property consultants, produced a document on the 5YHLS situation as regards the Council (“the Bidwells report”). They had been engaged by the second interested party in this litigation, Countryside Properties plc, in relation to the Moores Lane application. The report asserted that sites which did not have planning permission, including those subject to draft allocations within the emerging local plan and subject to objections as to their suitability, could not be relied on in calculating the 5 year supply of deliverable sites. The report’s table 3.1 showed a deficit for 2014-2015 and 2015-2016 in the actual housing delivery against the core strategy housing requirement. The report stated that the Council should adopt a 20% buffer. Table 5.3 of the report contained in tabular form details of sites where it, Bidwells, thought that there should be deductions made from the forecast housing delivery assumptions, for example with Chilton Woods, Hadleigh East and the former HMS Granges site at Shotley. That would produce a total reduction of 410 homes.
18. Subsequently, there was a meeting between Bidwells and the Council in March 2017. Bidwells wrote on 4 April 2017 recording that the Council had conceded that it did not have a 5YHLS based on its own assessment.
19. Later in April 2017 the Council published an interim 5YHLS statement setting out that the current 5YHLS with a 5% buffer was 3.4 years, and with a 20% buffer was three years (“the Interim Statement”). The reason for publication was said to be the emerging key evidence regarding objectively assessed need and a formal challenge to the current 5 year housing land supply. The interim position was based upon emerging evidence from the draft SHMA. The paper referred to a recent government White Paper, *Fixing our Broken Housing Market*, published in February 2017, which stated that a

standardised national approach “for calculating the objectively assessed requirements will be put in place.”

20. Meanwhile, at a meeting of the Parish Council on 13 April 2017 the loss of the 5YHLS was noted. The meeting agreed to seek professional advice on the Council’s figures to the value £2.5K from the consultants “Planning Direct”. The Parish Council also agreed to speak to Mr Newman then of the Council’s planning department about the matter. Mr Newman was at the time in charge of the Council’s planning department. At a meeting of the Parish Council on 11 May 2017 the Council’s 5YHLS was revisited, although it is unclear from the minutes what details were discussed.
21. There was a meeting on 22 May 2017 between representatives of the Parish Council and Mr Newman and Mr Matthew Deakin, his senior policy strategy planner. One of the Parish councillors attending the meeting, Cllr Joan Miller, kept a note. Later that day she sent an email to her colleagues summarising the meeting. The Council states that the note was not an agreed note of the meeting, nor was it comprehensive. At best it records no more than off-the-cuff remarks prior to finalisation of the figures rather than a detailed exposition of the assessment process. It does not provide a basis for rejecting the detailed explanation of the process provided by Mr Deakin, considered below.
22. In my view Cllr Miller’s was a near contemporaneous note of the meeting. It has the ring of authenticity and there is no reason for Cllr Miller to send to her Parish Council colleagues anything other than a genuine note of the meeting. In all material respects I regard it as an accurate record of what was said.
23. Cllr Miller’s note records a statement that the interim AMR was prepared because of a challenge by developers. Mr Newman is recorded as stating that housing and supply were like filler in a barrel, it ran dry if new permissions were not added. The remedy was to refill the barrel by new permissions. The Parish councillors were told that in early March 2017 a number of developers spoke about going to appeal, and the Council had at least two appeals using land supply deficit as an argument.
24. The note then records that when asked why with the interim 5YHLS a number of planning applications had been held back and not included in the figures, Mr Newman’s explained that this was because of a conflict with the JR decision. (That seems to be a reference to *East Bergholt Parish Council v Babergh DC* [2016] EWHC 3400 (Admin).) The note continues:

“T]hese have been omitted from [Council] fig[ures] because there was no certainty they would be built. [Mr Newman] had decided that what was in the list was absolute certainties rather than ones affected by JR”.
25. The note records that the Parish councillors were told that the Council’s methodology for calculating 5YHLS was the NPPF method. They should wait for the AMR to be published, which would “nail the AMR number”, after which they should actively take part in the consultation exercise with the Council and work through the consultation on the local plan in August.
26. In his witness statement, Cllr Rodney Moss of the Parish Council recalls that at the meeting the 5YHLS figure was presented as if it were a fixed, technical matter and that it was not explained that it involved specific judgments made on the deliverability of individual sites. No one in the Parish Council had any doubt when Mr Newman explained that the figures were certainties.
27. Local residents had been making freedom of information requests about the 5YHLS figures from mid-April. Mr Tony Brigden and Mr Martin Cave were particularly active. On 22 May 2017 Mr Cave asked in relation to the interim 5YHLS statement why 14

specific active planning applications, with a total number of 674 dwellings, were not included in the Council's housing trajectory. He had also asked how the 5YHLS would change if these 647 dwellings had been included. The Council responded:

“The sites listed have not been granted planning permission, nor are they sites allocated in the Local Plan. They would therefore fail to meet the tests of footnote 11 of the National Planning Policy Framework (NPPF) and have not been included within the Babergh Interim 5 year housing land supply assessment.”

28. A few days later Mr Cave replied that if any of the 14 applications did receive approval that would provide a basis for such applications to have been included in the interim 5YHLS calculation. Thus in the interests of transparency the Council should have provided a re-calculated 5YHLS with the 14 applications included. Eventually in mid-July 2017 (and I interpolate to say that I am surprised at the delay) the Council's chief executive replied to Mr Cave that the additional analysis did not currently exist. In any event “such a calculation would not be consistent with how we are required to establish 5 year land supply.”

The Council's 5YHLS 2016-2017 and its application

29. The Council published its AMR on 13 June 2017. Appendix 1 contained the 5YHLS at the base date of 31 March 2017. If the Core Strategy was used to set the housing requirement, it said, the 5YHLS was 4.1 years; if the SHMA was used, it was 3.1 years. The Appendix then contained two tables, a summary of Core Strategy based land supply and a SMHA based summary of land supply. There followed in tabular form a trajectory table listing various sites and the number of units to be built and in which time periods.
30. Mr Deakin is the Council's planner responsible for the AMR. In his witness statement, he explains how he went about the task of calculation. One aspect was to commission consultants in September 2016 to prepare a new SHMA covering the Council's and other neighbouring areas, to provide an objective assessment of housing need (OAHN). About that time, the Government had published new household projections for English local authority areas. In February 2017, the Council was provided with a draft version of the emerging SHMA which suggested a higher OAHN than the housing requirement of the Core Strategy. Consequently, the 2016-17 5YHLS was assessed on the basis of the new emerging OAHM. Since the SHMA was still emerging, the Council also presented a five YHLS assessment using the housing requirement in the Core Strategy.
31. Mr Deakin also explains in his witness statement the use of the 5% and 20% buffers. Since the completions in 2014-15 and 2015-16 had been below the housing requirement figure for those years, the 20% buffer was considered appropriate, albeit that completions for 2016-17 were slightly in excess of the requirement figure. For completeness, however, the 5YHLS calculation was also carried out using a 5% buffer. Commenting on the implications of the NPPF and the scrutiny to which a 5YHLS assessment is subject in the determination of planning applications, Mr Deakin states that since

“decisions to refuse planning permission can be appealed.... and appeals are resource-intensive both financially and with regard to officer time, and there is a risk of a cost award if the [Council] is found to have acted unreasonably, the [Council] like many other planning authorities, seeks to ensure that its five YHLS assessment is robust and able to withstand scrutiny.”

32. Mr Deakin explains how he understood the concept of deliverable in the context of preparing the 5YHLS assessment for 2017. As to the suitability aspect, he took the view that there should be some confirmation of this from some prior decision of the Council or from a planning inspector. Where a site was the subject of a planning application for residential development, and there was no resolution or decision of the planning committee, he considered that suitability had not been established.
33. Having identified “suitable sites” Mr Deakin explains that he went on to assess availability and achievability by contacting in April 2017 landowners, agents and developers of sites above a threshold of 10 units. There was a low response rate. He then carried out the assessment using that information. He discussed the matter with colleagues where appropriate. The results were included in Appendix 1 of the AMR.
34. Once the 5YHLS figures were available in the 2017 AMR, the witness evidence of the Council explains that it began to inform the officer’s reports placed before the Planning Committee. In particular the figures were used on 5 July 2017 in relation to two planning applications at Capel St Mary and Long Melford, unrelated to those in the present proceedings. In both cases the officer’s advice was that the Council did not have a 5YHLS. The minutes record the explanation by the planning officers to the committee of the 5YHLS, the implications of the NPPF and the weight to be given to the material considerations to boost housing supply.
35. That meeting of the planning committee also had before it a question from a member of the public, Mr David Watts, and a reply from its chair, Cllr Nick Ridley. (Under this procedure the questions and replies are read out.) Mr Watts had asked about the change in the 5YHLS from 2016 to 2017 and what had changed which meant that the supply had dropped from over 5 years to just 3 or 4 years. The reply stated that the supply position was: “4.1 years, when judged against the Core Strategy. However, if the new Strategic Housing Market Assessment based target is considered [there is] a figure of 3.1 years housing land supply.”
The main factors for the difference, Cllr Ridley continued, were (1) a change to the relevant housing target and (2) the review of site delivery. He explained both of these. The first was mainly the new SHMA target, the second the site by site judgment of expected delivery dates when delivery of new dwellings in the district had not met the adopted annual target for the last 3 years consecutively.
36. There was a meeting of the Parish Council on 13 July 2017 with their planning consultant in attendance. He was asked about the three applications the Council were soon to consider, including questions about the 5YHLS, about site allocations and about updating the Neighbourhood Plan.
37. Full Council met on 18 July 2017. All but two members of the planning committee who made the decisions on 2 August attended. Under the Council’s procedural rules Mr Martin Cave had asked a question as to how the Council justified excluding the 14 validated applications from the 5YHLS assessment when taking account of NPPF footnote 11. Cllr Lee Parker, the cabinet member for Planning, replied:

“The key difference in the sites identified in the assessments is principally a result of the delivery status of each site i.e. whether a site has now been fully built out, is under construction, or has recently gained planning permission. For sites with the benefit of planning permission and/or allocations whilst these sites have the greater certainty of delivery, they are only included in the 5 year land supply if it is considered that there is a realistic prospect that housing will be delivered within 5 years.

Sites without planning permission or allocation are less certain in their suitability, availability and achievability. Their suitability and achievability is appropriately considered through the planning application process including the full extent of infrastructure provision required to make them acceptable. For this reason, the Council considers it robust to consider sites without planning permission in the 5 year land supply assessment only where the Planning Committee has given a resolution to grant planning permission, subject to a Section 106 legal agreement for planning obligations”.

Officer’s report and Planning Committee’s decision on the three sites

38. There were many representations objecting to the grant of planning permission for the three sites which form the base of the current proceedings. The Parish Council’s objection focused on the conflict with the Development Plan. This was in light of the advice it received from its consultant from Planning Direct about the application of what was then the recent Supreme Court decision, *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865. On its face the Parish Council’s submission seemed to accept the AMR figures.
39. The East Bergholt Society also made representations against the Council granting planning permission for the three sites. In a further submission, received by the Council on 22 June 2017, it stated that if other applications for planning permission then on hold were approved, the 5YHLS would be on target. It continued that the reduction of the 5YHLS number had apparently occurred as a result of a report commissioned by two, large scale developers. There was no data to reconcile the information on the Council’s website. The Council’s interim 5YHLS published in April 2017 did not include the 14 applications on hold. If the three proposals in this judicial review were to be taken into account and considered, and all 14 applications on hold, the shortfall would be substantially reduced and the 5YHLS would be on target and would substantially remove the buffering requirement. In other words, commented the Society, there was no shortfall.
40. Mr Brigden also made a number of submissions. Among them was a reference to the 5YHLS and to the exclusion in the Council’s assessment, without explanation, of a number of qualified sites. He also commented on dwelling completion targets and windfall assumptions.
41. There were officer’s reports for each of the three sites. As far as the 5YHLS is concerned, the one report for the Moores Lane site was used in the current proceedings as representative. It ran to over 100 pages. The reports were available on the Council’s website four working days before the planning committee meeting, five days in hard copy at the Council’s offices.
42. The summary at the outset of the officer’s report stated that the proposal had been assessed with regard to section 38(6) of the Planning and Compulsory Purchase Act 2004. The report recommended approval of the application:

“Whilst the proposal was contrary to development plan policies CS2, CS11 and CS15, the authority cannot currently demonstrate a [5YHLS] and the adverse impacts of the development, including those areas of non-conformity with the development plan policies referred to, are not considered to significantly and demonstrably outweigh the benefits of the development.”
43. There was harm identified to heritage assets but that was at the low end of the spectrum of less than substantial harm where the public benefits of the proposal outweighed this harm. The proposal was therefore considered to be sustainable development and there was a presumption in favour of the proposal in accordance with the NPPF.

44. The report then set out the history of the proposal and summarised the responses received. At paragraphs 35-39 there was an explanation of the NPPF and the NPPG. The SHMA in May 2017 was important new evidence for the emerging local plan. The report stated:

“For determining relevant planning applications, it will be for the decision-taker to consider appropriate weight to be given to the assessments and the relevant policies of the development plan.”

Paragraph 40 of the report set out the position of the Council’s 5YHLS (4.1 years or 3.1 years as explained earlier). The report then stated:

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

Subsequent parts of the report dealt with the landscape, highway and design objections which had been received.

45. The officer’s report itemised in Appendix 1 hundreds of specific objections, in bullet point form, over some 20 pages. One objection was that the Council had manipulated the land supply numbers in the Interim Report to distort the 5YHLS figure from 5.7 to three years and had connived with the developers. The representations from the East Bergholt Society, Mr Brigden and others were appendices to an updated report.
46. The minutes of the meeting of the Planning Committee on 2 August note that in relation to the three applications, a number of objectors were allocated five minutes each to address the committee. The Parish Council spoke on each of the applications and on the others the East Bergholt Society, Action East Bergholt and Mr Brigden made representations. The Planning Committee then considered each of the applications in turn. With the first application, in relation to the 144 dwellings at Moores Lane site, the members were referred to the recently received submissions and asked whether additional time was needed. The Committee confirmed that additional reading time was not necessary. A representation from Mr Mark Hargraves had been received after the addendum had been circulated, and made reference inter alia to the 5YHLS. The minutes record that the speakers were questioned “at length”.
47. As regards the application for the Heath Road site, there was a question about the 5YHLS. Mr Newman referred to the need for significant demonstrable and adverse effects to be identified if members were minded to refuse permission in the absence of a 5YHLS “for which no firm indication was available of when it would be met.”
48. The committee granted permission for the three sites.

After the Planning committee’s decision

49. At a meeting of the Parish Council on 10 August 2017 there was considerable disquiet about the decision of the planning committee. Members of the public in attendance stated that they were not impressed with the work of the consultants.
50. Decision notices were issued for the Hadleigh Road and Moores Lane developments in November 2017, and for the Heath Road site in early February 2018.
51. In a report on the 5YHLS to the Overview and Scrutiny Committee of the Council on 15 March 2018 the corporate manager for strategic planning stated that in undertaking the calculation, it was necessary to produce a robust assessment which could be applied in determining planning applications; not to do so “could result in costs against the Councils at a Planning Appeal”. That committee’s report was published in May 2018. At the meeting of Full Council on 22 May 2018 the Council’s Overview and Scrutiny Committee presented its annual report. It requested that it scrutinise the 5YHLS. The

scoping document for this had given as the rationale the mixed understanding among councillors and communities as to the way the 5YHLS was calculated and its implications. There was also a limited understanding as to how to influence it.

52. In a Newsletter to constituents, a Babergh District Council councillor, Cllr Fenella Swan, explained that the scrutiny committee's request was:

“due to a mixed understanding regarding the way it was calculated, and how the lack of supply could be resolved...At the Overview and Scrutiny Committee officers explained in detail the complicated process for calculating [it]. The committee resolved [it] be reviewed half yearly and monitored regularly throughout the year.”

It seems at some point Cllr Swan was a member of the planning committee although she did not attend its meeting on 10 July or the meeting on 2 August 2017 when the decision under challenge was made.

53. The Council published its 2017-2018 AMR in July 2018. It reported that 331 new dwellings were built in the district over the year, representing 102% of the target. The 5YHLS figure based on the Core Strategy was 6.7 years, and based on the SHMA land supply, 5.0 years.
54. On 28 September 2018 a planning inspector, Mr Harold Stephens, allowed an appeal involving land in the district of Mid Suffolk District Council. It will be recalled that the Council and Mid Suffolk District Council share services, including the planning service. In the course of his decision he referred to the definition of “deliverable” in the 2018 edition of the NPPF and the revised PPG. He stated that sites with outline planning permission made up a very large proportion of the Council's claimed supply and the onus was on the Council to provide the clear evidence that each of those sites would start to provide housing completions within 5 years. There was no need for the Council to review the planning submissions for the purposes of the inquiry, since that was what the Council should have done for its AMR. A modification was necessary removing a site from supply.

The legal framework

55. Time and again the courts have emphasised that they will not generally interfere on the basis of “undue rigour”, “hypercritical scrutiny”, or “a legalistic analysis” of officer's reports. This is on the basis that they are written for democratically elected councillors with local knowledge. Further, it will generally be assumed that when councillors follow the advice in an officer's report they do so for the reasons given there. Baroness Hale put it this way in *R (Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268:

“[36]...Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.”

56. The courts will only interfere when there is what Lindblom LJ and the Chancellor of the High Court characterised in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2018] PL 176 as a distinct and material defect in the officer's advice set out in the report: at [42], [63]. As to identifying a distinct and material defect,

Lindblom LJ said that the question was whether, on a fair reading of the report as a whole, the officer had materially misled the members on a matter in a material way so that, but for the flawed advice, the committee's decision would or might have been different. In a helpful passage Lindblom LJ then synthesised the authorities as follows:

“42... Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R (on the application of Loader) v Rother DC* [2016] EWCA Civ 795; [2017] JPL 25), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *R (on the application of Watermead Parish Council) v Aylesbury Vale DC* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R (on the application of Williams) v Powys CC* [2017] EWCA Civ 427; [2017] JPL 1236).”

57. The standard required of reasons for planning decisions is contained in the oft quoted passage in Lord Brown's speech in *South Buckinghamshire DC v Porter* [2004] UKHL 33; [2004] 1 W.L.R. 1953, [36], that they must be intelligible and adequate; that the reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter; and that they need refer only to the main issues in the dispute, not to every material consideration. The link between reasons and fairness was underlined by the Supreme Court in the recent decision of *Dover DC v Campaign to Protect Rural England (Kent)* [2017] UKSC 79; [2018] 1 W.L.R. 108, [54]-[60], per Lord Carnwath with whom the others agreed. Reasons enable individuals to exercise their right to challenge the legality of a decision.

Ground 1: unlawful exercise of planning judgment which misled members

58. The claimant's key point with this ground was that the Council had not lawfully exercised its discretion when assessing deliverability and delivery in the context of 5YHLS. Whether or not a site is deliverable, and whether there will be delivery, are matters of planning judgment. But the distinction, and other matters pertinent to the calculation of 5YHLS, were not adequately drawn to the attention of the planning committee. Without that members could not properly exercise their planning judgment. Concerns about the Council's calculation of 5YHLS had been raised by various persons and organisations. The claimant contended that the officer's report did not serve to direct councillors as to whether the opponents had a point (which they did), and the error in the calculation of 5YHLS went uncorrected before the decision was made.
59. Ms Blackmore contended that whether the 5YHLS calculations were in accordance with the NPPF and the PPG were points which went fundamentally to the planning judgment being exercised on 2 August 2017. The failure of the officer's report in this case was in not drawing to members' attention a major controversial issue, the 5YHLS, which was fundamental to the planning judgment being exercised. It was not expressly set out for members as a key issue, either in an addendum or orally, or in any way assessed in a manner which would enable members to exercise their planning judgment. The contents of the officer's report itself were thus materially misleading and

inadequate to allow the public to assess whether the judgment has been lawfully exercised in calculating the housing trajectory.

60. The claimant also raised what it said were errors in the Council's calculation of the 5YHLS and the threshold used as to whether a site should form part of the trajectory. The contention was that neither the AMR 2017 nor the Interim Statement met the standards of the NPPF and NPPG. In his witness statement Dr Ireland, the chair of the Parish Council, had worked through a number of sites and explained why contrary to the Council's view they were capable of being delivered in the next five years.
61. For the claimant Ms Blackmore referred to what she characterised as the "golden hurdle" the Council had erected, for example concluding that it would only include a site with consent in the trajectory if it had a section 106 agreement. As acknowledged in the *St Modwen* case, she submitted, the standard of what was a realistic prospect might be applied in practice to a lower standard. The officer's report failed to explain that the Council was choosing to apply a "golden hurdle", which they did not have to apply. Ms Blackmore also referred to how other local authorities had assessed and published their 5YHLS in a manner different from the Council's.
62. In my view the difficulty the claimant faces is that its case is not about the planning decisions made on 2 August 2017 but in reality an attack on the assessment of the 5YHLS set out in the Council's AMR published on 13 June 2017, and foreshadowed in the Interim Statement. Its case is that there was a flawed interpretation of the NPPF and the PPG which led to the Council deciding in the 2017 AMR that it did not have a 5YHLS. Hence there were the claimant's arguments about the deliverable/delivery distinction and the "golden hurdle" which the Council was said to have set.
63. In fact what occurred on 2 August, as on the 5 July, was the planning committee's application of the 5YHLS already decided in light of planning judgment. At the outset I should also say that it is in my view it is not surprising that other local authorities should carry out the 5YHLS exercise in different ways given the broadly worded requirement in paragraph 47 of the NPPF and the absence of any prescribed method of assessment.
64. But if the AMR and 5YHLS assessments are reviewable, the planning judgments involved cannot in my view be regarded as flawed. As we have seen the NPPF 2012 test for deliverability included whether a site had realistic prospects of delivering housing within five years, and judgments as to whether a site was available, suitable and viable. In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, Lindblom LJ in the passages quoted earlier had not held that a site must be included in the 5YHLS if there is any realistic prospect of delivery since that is not the only element of the test. I accept Mr Wald's submission that when the claimant criticises the AMR for failing to take into account particular sites, it is assuming that they were not taken into account because the Council misapplied the realistic prospect criterion, rather than that other planning judgments were exercised that the site was not suitable, available or viable. Of course it is not the case that the Council had to identify sites not included in the 5YHLS or provide an explanation for this.
65. Assuming that the claimant's case is targeted on the 2 August 2017 decisions, I cannot accept that the officer's reports for the three sites were misleading, certainly not significantly misleading, in not directing councillors as to what is said was the error in the Council's 2017 5YHLS. On their face there was nothing in my view untoward in the officer's reports. There was an explanation of the NPPF and the PPG. The reports spelt out how paragraph 49 of the NPPF triggered the tilted balance. They stated that the SHMA of May 2017 was important new evidence for the emerging local plan. They

added that it would be for the committee to consider appropriate weight to be given to the assessments and the relevant policies of the development plan, in other words that it had discretion. They set out that the Council had assessed that if the Core Strategy was used to set the housing requirement the 5YHLS was 4.1 years, if the SMHA was used it was 3.1 years. With the reports were the written representations including those that the Council's 5YHLS was wrong.

66. So the complaint has to be that the planning committee was misled by omissions in the three reports and that its members needed more information and explanation about how the officers had interpreted the NPPF and the PPG and how they had concluded that the Council had fallen short of the target. Yet the report has to be read in context. Important in this regard is the planning committee meeting on 5 July 2017 on the separate developments at Capel St Mary and Long Melford. At the meeting a member of the public, Mr Watts, had asked what had changed which meant that the Council no longer had a 5YHLS. The minutes record that Cllr Nick Ridley as chair had explained to the committee that there had been the change with the SHMA, the relevant housing target, and the review of site delivery, that is the review which Mr Deakin explains in his witness statement.
67. There was then the meeting of Full Council on 18 July 2017. All but two members of the planning committee making the 2 August decisions were there. Under the Council's procedural rules Mr Cave had asked a question as to how in light of NPPF footnote 11 the Council justified excluding 14 validated applications from the 5YHLS. The cabinet member for Planning, Cllr Lee Parker, echoed the language of footnote 11 in explaining that the Council's approach was to include in the 5YHLS only sites with planning permission, with an allocation, or with a resolution to approve subject to a legal agreement.
68. In my view the members of the planning committee should have known by the time of the 2 August meeting that the Council's position was that it did not have a 5YHLS and should have been aware of the reasons for the officers including some sites but not others in the calculation. Ms Blackmore submitted that it could not be assumed that they understood the complexities of 5YHLS. That to my mind overstates the position (to put it no higher). It seems to me that if planning committee members had not understood by 2 August they would have inquired, especially since for some time the Council's approach had been generating discussion in the community as evidenced by the freedom of information inquiries of Messrs Brigden and Cave from earlier in the year. Thus I agree with Mr Bedford QC's submission that it was not necessary for the officer's reports for the 2 August decisions to set out the detailed reasoning which had led the Council to conclude that it could not demonstrate a 5YHLS. That reasoning was generally available to those who attended and in minutes of the 5 July planning committee meeting and the 18 July Full Council meeting. These meet the requisite standard.
69. Coming to the 2 August meeting of the planning committee, the first point of note is that those like the East Bergholt Society and Mr Brigden who questioned the 5YHLS calculation addressed the committee. (The representations from the claimant did not dispute the 5YHLS; as explained earlier it was focusing under advice on a different point.) Secondly, their written representations were with the officer's reports and although there was extra material the committee when asked did not want extra time to consider it. Thirdly, the minutes note that the 5YHLS featured in an officer's oral presentation, there was a member's question about the 5YHLS, and speakers were questioned at length.

70. There are two footnotes to this: first, as regards the meeting between the Council's officers and the claimant on 22 May, that took place before the AMR was finalised in June, which explains the language of "nailing" the figures. As for the language suggesting that the Council was working on certainties in calculating 5YHLS, I accept Mr Bedford's submission that that would not be impermissible as a matter of planning judgment and would not conflict with the legal principles in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746. Secondly, as regards the Oversight and Scrutiny Committee consideration of 5YHLS, not only did that come well after the 2 August meeting, it is not entirely clear which councillors had the "mixed understanding". In any event it seems to me that it says nothing about the understanding of the planning committee on 2 August 2017.

Ground 2: the impact of St Modwen

71. Ms Blackmore's submission is that although he may not have been deciding new principles of law, Lindblom LJ's judgment in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746 had a real, practical impact in moving local planning authorities away from a risk-averse approach in the assessment of their housing trajectories. In her submission that is what happened with this Council. It misdirected itself on the applicable test and failed to give adequate reasons for its approach to the 2017 5YHLS. When considering its trajectory the Council took into account developer pressure, as evidenced by the Bidwells report and the meeting following it, and the further irrelevant consideration that the developers might mount legal challenges.

72. To my mind this submission does not establish that the Council misinterpreted the guidance in the NPPF or the PPG as to what could constitute a deliverable site. I agree with Dove J, who originally refused permission on the papers, that Lindblom LJ gave no indication in his judgment that he thought he was altering the meaning of "deliverable" in footnote 11 of the NPPF or that he was establishing a lower bar. The Council's approach to whether sites were deliverable for the purposes of inclusion in the 5YHLS was in the AMR of June 2017, in particular in tabular form listing sites and the number of units to be built and in which time periods. There were also the explanations to the planning committee on 5 July 2017 and to Full Council on 18 July 2017. In any event I accept Mr Bedford's submission that it is not unlawful for a local planning authority to want to have confidence that it will be able to robustly defend the judgments it forms on the deliverability of housing sites. For that reason the concern about challenges from developers was lawfully taken into account as a factor in decision-making.

Ground 3: fairness

73. Unfairness is raised in relation to ground 1. The main point in the claimant's submission is that there was unfairly no proper guidance to members of the planning committee or the public about the assessment of 5YHLS and the Council's risk averse approach in its calculation. Additional points are that (1) the practice of the Council, along with other local planning authorities, is to give 5 days' notice – here the reports were only available on the website 4 days prior to the 2 August meeting, a meeting which fell in the school holidays; (2) the issue until the reports were available was whether the three applications were in accordance with the development plan, and the 5YHLS and the tilted balance were not in the claimant's mind; and (3) the lack of reasons for the trajectory in the AMR and the lack of assessment of the concerns raised by the public in the officer's reports materially deprived the claimant and others of the ability to make informed representations.

74. To a large extent the claimant's main point is going over old ground. As to the other points, there can be no legitimate expectation that 5 days' notice would be given. In any event the claimant's case cannot be that the one day difference would have assisted when its case is that the Council had changed tack on a complex matter which even after many months the members of the planning committee could not understand. Further, the claimant seemed to have some appreciation that 5YHLS had a role to play, as evidenced by its April 2017 and 8 June minutes. When the claimant met the Council officers on 22 May it was informed that 5YHLS featured in other appeals. What seems to have happened is under advice the claimant's attention was turned elsewhere. The Bergholt Society and Messrs Brigden and Cave pursued the 5YHLS point; that underlines the conclusion that there was no unfairness.

Conclusion

75. For the reasons given I dismiss this application for judicial review.