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**Claim Numbers: CO/4686/2013 and CO/5546/2013**

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT SITTING AT MANCHESTER**

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

**Judgment Date**: 5th September 2013
**Draft Judgment Circulation Date**: 12th August 2013

**IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990**

**AND IN THE MATTER OF AN APPLICATION FOR PERMISSION TO CLAIM JUDICIAL REVIEW**

**Before**:

**HIS HONOUR JUDGE PELLING QC**
**SITTING AS A JUDGE OF THE HIGH COURT**

**BETWEEN:**

**HUNSTON PROPERTIES LTD**

**Claimant**

**-and-**

**(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**
**(2) ST ALBANS CITY AND DISTRICT COUNCIL**

**Defendants**

**Mr. Paul Stinchcombe QC and Mr. Ned Helme** (instructed by **Photiades Solicitors**) for the **Claimant**
**Mr. Stephen Whale** (instructed by **the Treasury Solicitor**) for the **First Defendant**
**Mr. Matthew Reed** (instructed by **Head of Legal Democratic and Regulatory Services, St Albans City and District Council**) for the **Second Defendant**

Hearing dates: 1 and 2 August 2013

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# Approved Judgment

**I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

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**HH Judge Pelling QC:**

## Introduction

1. This is the hearing of:

   i) An application by the Claimant ("HPL") under s.288 of the Town and Country Planning Act 1990 ("TCPA") for an order quashing a decision of a planning inspector ("the Inspector") appointed by the First Defendant ("SoS") by which the Inspector dismissed an appeal under s.78 TCPA by HPL against a refusal of the Second Defendant ("the Council") to grant outline planning permission for the construction of 116 dwellings, a 72 bed care home, a new road access, two tennis courts and open space ('The Scheme") at a site at consisting of land to the rear of 112-156B Harpenden Road, Sewell Park, St Albans ('the Site"); and

   ii) The rolled up hearing of an application for permission and (if permission be granted) a claim for judicial review of a decision by the Inspector by which she ordered HPL to pay 20% of the Council's costs of the planning inquiry held by the Inspector ("the Inquiry") that led to the dismissal of HPL's appeal.

   The hearing took place in Manchester on the 1 and 2 August 2013 pursuant to an order of Deputy Master Knapman by which she had directed transfer of the proceedings to Manchester and that the judicial review proceedings should proceed as a rolled up hearing. At the conclusion of the hearing the parties asked me to delay handing down judgment until the beginning of September in order to facilitate the holiday arrangements of the parties and their advisors. I agreed to this proposal. I also agreed to determine all post judgment issues in writing providing all parties signified their consent to this course prior to the date fixed for the hand down of this judgment.

## Background

2. The factual background to these proceedings was described in HPL's written opening submissions as "extensive" and is described in great detail in both that document and the evidence filed in these proceedings. The background that is actually relevant to the disposal of these claims is limited.

3. The Site consists of 5 Hectares of open agricultural land that abuts the eastern rear boundaries of 112-156B Harpenden Road. The northern boundary of the Site abuts various sports ground pitches. The eastern boundary is marked by a hedgerow described by the Inspector in her report as "*sporadic*". The southern boundary is bordered by residential property save for the southeast corner where there is an access way. St Albans Girls School is to the south of this way, with its playing fields being opposite the Site. A sketch plan of the Site is at [3/1031]. The key point for present purposes is that the Site is an open green field site located almost entirely within the Metropolitan Green Belt.

4. HPL have made two applications for permission to the Council concerning the Site. The first was made in July 2011, was refused by the Council and a s.78 appeal against that refusal was dismissed by a planning inspector ("Mr. Papworth") in July 2012.

There was no appeal from that decision although there was a formal complaint by HPL's planning consultants to the Planning Inspectorate concerning the quality of part of Mr. Papworth's reasoning. This resulted in a letter from the Inspectorate by which it was concluded that the complaint should be upheld. These events are primarily relevant to the judicial review proceedings to which I turn at the end of this judgment.

5. On 18 November 2011, HPL made the application that is the subject of the s.288 appeal before me. The Council refused the application in February 2012 on three grounds, only two of which were relied on by the Council at the s.78 appeal that followed the refusal. The two grounds that remained material by the time the appeal came to be heard were first that the proposed development and its scale represented inappropriate development within the Metropolitan Green Belt in respect of which HPL had failed to demonstrate the existence of "*very special circumstances*" necessary to warrant development in the Green Belt and secondly that the proposed development would represent a built form of undue prominence.

6. HPL appealed and following an Inquiry held on 5-8 and 12-13 February 2013, the Inspector dismissed the appeal for the reasons that are set out in her Decision Letter dated 12 March 2013 ("DL"). Under the heading "*Main Issues*" the Inspector recorded that it was "*... agreed by the parties* [that] *both the proposed residential development and the proposed care home would be inappropriate development in the Green Belt for the purposes of National and Local Policy ..."* and in consequence the main issues to be resolved were three in number of which that relevant to the proceedings before me was:

> " - in the case of the proposed housing development, whether the harm by reason of inappropriateness and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development …"

7. Before the Inspector, HPL's case had been that there was independent and objective evidence of annual and projected housing need for St Albans of 688 households per annum for the period 2011-2028; that this produced an adjusted requirement for 3600 dwellings to be constructed over the next 5 years and that the total dwellings that could be accommodated on the sites identified by the Council as deliverable amounted to 2183 dwellings so that there was a shortfall that corresponded to unmet housing need of 1417 dwellings. This was said to constitute an element of the "*very special circumstances"* that justified permitting what would otherwise be inappropriate development. The Inspector rejected this submission and concluded that the appropriate housing target was 360 dwellings per annum. Since that could be accommodated on the sites identified by the Council it followed that there was no identified unmet need. Since the substantial harm to the Green Belt that would result from the proposed development was not clearly outweighed by the other material considerations that the Inspector summarises in Paragraph 71 of the DL it followed that there were no very special circumstances and the appeal was dismissed.

8. HPL's case is that the Inspector fell into error by adopting the 360 figure rather than the 688 figure because in arriving at that conclusion she had misconstrued and misapplied the relevant parts of the National Planning Policy Framework ("NPPF").

The Defendants each deny that was so and maintain that in truth the appeal is nothing more than an attempt to re-run the arguments that had been deployed before the Inspector "*... dressed up as points of law*" – see the SoS's skeleton submissions at Paragraph 13. In the end it was expressly or impliedly accepted by all parties that unless HPL succeeded on this argument, this claim was bound to fail even though an alternative ground had been identified.

**Policy Framework**

9. Down to 3 January 2013, the Regional Spatial Strategy for the East of England [known colloquially as the "East of England Plan"] ("EEP") formed part of the development plan for the East of England. It, together with Planning Policy Statement 3 ("PPS3"), carried into effect a regionalism policy. It sought to address housing shortages by focussing on 21 locations where it was considered that new development should be concentrated. A consequence was that other areas underwent less development. Provision for housing was based on a strategy for the region. It provided for a minimum annual average development between 2001 and 2021 for St Albans of 360 dwellings.

10. The figures set by the EEP were minimum figures because, as was acknowledged by Paragraph 5.5 of the supporting text to Policy H1, the total of minimum figures for the region "… *falls significantly short of what is needed based on evidence about housing pressure, affordability and household projections*." The housing target fixed pursuant to the EEP was a figure that took account of various constraints to development that did not and did not purport to identify an objective need requirement. The figure was described by the Inspector in Paragraph 26 of the DL in these terms, which it is common ground were accurate:

> "The level of provision required in RSS policy H1 was justified by the specific circumstances of the District, having regard to previous Government advice in Planning Policy Guidance and Planning Policy Statements and did not simply apply Government population and household projection figures. RSS policy H1 requirement took account of the constraints to development in the District striking a balance of the social, economic and environmental objectives with the aim of achieving sustainable development. The balance was evidence based, consulted upon, subject to a sustainability appraisal, justified and publically examined. In reaching the housing requirement, the supporting text made it clear that full provision is not made for all needs irrespective of constraint."

11. As I have said the EEP was revoked on 3 January 2013, and PPS3 was revoked on 27 March 2012. It was replaced by the NPPF. The NPPF adopts an approach that is entirely different from the regional strategy that previously applied. It focuses on the concept of localism and distinguishes very clearly throughout between plan making by the relevant local authorities – that is the formulation of an up to date strategic local plan that carries into effect the policies contained in the NPPF - and decision making by LPAs and planning inspectors. This case is concerned with the latter rather than the former.

12. The key purpose of the NPPF is identified in Paragraph 6 as being " … *to contribute to the achievement of sustainable development.*" This concept is further defined in Paragraph 7 in these terms:

> "There are three dimensions to sustainable development: economic, social and environmental. These dimensions give rise to the need for the planning system to perform a number of roles:
>
> • **an economic role** – contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;
>
> • **a social role** – supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community's needs and support its health, social and cultural well-being; and
>
> • **an environmental role** – contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and adapt to climate change including moving to a low carbon economy."

The need to focus on all of these requirements rather than one at the expense of another is emphasised by Paragraph 8 and at Paragraph 10 the need to take local circumstances into account is emphasised. The presumption in favour of sustainable development is described at Paragraph 14 as a "*golden thread"* which in relation to decision-making is said to mean:

> "For decision-making this means:[FN10]approving development proposals that accord with the development plan without delay; and where the development plan is absent, silent or relevant policies are out of date, granting permission unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted.[FN9],,

Footnotes 9 and 10 state:

> "9. For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion. [Emphasis supplied]
>
> 10. Unless material considerations indicate otherwise."

The housing specific element of the NPPF is at Paragraph 47, which is to the following effect:

> "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[FN11] 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[FN12] 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."

Footnotes 11 and 12 state:

> "11. 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.
>
> 12. To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged."

In relation to Green Belt and its relationship with development, Paragraphs 87 and 88 state:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances."
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

13. Notwithstanding the requirement of the NPPF that local authorities develop a strategic local plan for the purpose of giving effect to the policies set out within the NPPF, the Council has not done so. There was an emerging strategic local plan being developed by the Council but it was suspended by a series of resolutions passed by the Council on 28 November 2012. It was and is common ground that the effect of these steps is that the contents of the emerging strategic local plan carried no weight for the purpose of making planning decisions. It is common ground between the parties that the effect of (a) the revocation of the EEP and (b) the suspension of the emerging strategic local plan was that there was what has been called in this case and in the DL a "*policy vacuum*". The Council's cabinet sought to fill this vacuum by passing a resolution on 17 January 2013 agreeing *" … the use of the East of England Plan housing target of 360 dwellings per annum from 2001 to 2021 as the most appropriate interim housing target/requirement to use for housing land supply purposes"*. It is not suggested that this resolution filled the policy vacuum to which I have referred. If and to the extent that was suggested I reject it as untenable because it satisfies none of the requirements of a strategic local plan that complies with the NPPF and in any event was not passed by the Council.

## HPL's Case Before The Inspector

14. HPL's case before the Inspector in relation to the issue that arises in these proceedings was that there were very special circumstances that clearly outweighed the harm that would be caused by the development. That claim was advanced by reference to the policy vacuum to which I have referred in detail already, what was contended to be a failure on the part of the Council to provide for a five year supply of deliverable housing sites sufficient to accommodate what was contended to be the objectively identified housing need for the locality within that time frame – that is the shortfall in housing supply - and the suitability and sustainability of the Site coupled with what were submitted to be the wider benefits of the proposal, which included the provision of a significant amount of affordable housing, improvements to the local highways network and the provision of improved facilities for St Albans Girls School.

15. It was submitted that the best evidence of actual need was that contained in the projections published by the Department for Communities and Local Government which was to be regarded as the current best evidence of need in the absence of a strategic local plan. It was submitted that because the NPPF required consideration of full housing need, the only permissible starting point was the best evidence of actual need, consideration of a planning application using a constraint adjusted figure as a starting point was plainly wrong in law and thus that the decision based on an annual housing target of 360 dwellings was fatally flawed.

## The Decision Letter

16. Having identified the main issues that arose between the parties in Paragraph 8 of the DL, the Inspector turned first in her reasons to the Green Belt issues. She summarised Paragraph 87 of the NPPF, described the Site and the effect of the Scheme before concluding that "*...the proposed development would erode the openness of the area, conflict with two of the purposes the Green Belt serves and cause irrevocable harm to the character and appearance of the area.*" As I have explained, this conclusion is not in dispute between the parties in the proceedings before me.

17. The Inspector then turned to the issues that are central to these proceedings. The Inspector started by summarising the effect of Paragraph 47 of the NPPF as requiring

> " … local planning authorities to meet the full objectively assessed needs for market and affordable housing as far as is consistent with the other policies in the Framework. Sites should be identified and updated annually to provide a supply of specific and deliverable sites sufficient to provide five years worth of housing against their housing requirements. There should be a 5% additional buffer to ensure choice and competition although, if there is a persistent under delivery of housing, the buffer should be increased to 20%."

She then noticed the planning history culminating in the revocation of the EEP Policy to which I have referred in summary above in these terms:

> "23. The District Local Plan Review 1994 had a housing target in policy 3 for the delivery of 480 dwellings per annum between 1986 and 2001. The LP requirement was superseded from 2001 by the

> Hertfordshire Structure Plan Review 1991-2011 adopted in 1998 (SP). SP policy 9 had a housing target for St Albans District of 315 dwellings per year. The SP was superseded by the RSS 2008 that in policy H1 had a housing target for St Albans District of 360 dwellings per year between April 2000 and March 2021. Since the revocation of the RSS and in the absence of a more up to date development plan there is a policy vacuum in terms of the housing delivery target."

She then recorded the fact that the absence of an up to date or emerging plan and definitive housing development delivery requirement weighed significantly in favour of HPL. The Inspector then summarized the effect of Paragraph 14 of the NPPF before turning to the resolution passed by the Council's Cabinet on 17 January 2013, which she described in these terms:

> "26. The Council meeting of 17 January 2013 resolved that the RSS target of 360 dwellings per annum from 2001 to 2021 was the most appropriate interim housing target/requirement for housing land supply purposes. This figure was found sound by the Panel which considered the RSS on an evidence base that included significantly higher populations and household projections. The level of provision required in RSS policy H1 was justified by the specific circumstances of the District, having regard to previous Government advice in Planning Policy Guidance and Planning Policy Statements and did not simply apply Government population and household projection figures. RSS policy H1 requirement took account of the constraints to development in the District striking a balance of the social, economic and environmental objectives with the aim of achieving sustainable development. The balance was evidence based, consulted upon, subject to a sustainability appraisal, justified and publically examined. In reaching the housing requirement, the supporting text made it clear that full provision is not made for all needs irrespective of constraint."

18. A number of important points emerge from this paragraph. Firstly the Inspector referred to the decision of the Cabinet as being a decision of the Council. The Claimant maintains that this was a material error because there was a profound difference between a resolution passed by the Cabinet and one passed by the Council in a formal meeting, particularly where that resolution in part at least contradicted a resolution that had been passed by the full Council. The Defendants maintain that this was a mere error of nomenclature that is entirely immaterial particularly when occurring in the context of a planning inspector's report.

19. The other key points that emerge from this paragraph are:

    i) That the 360 figure adopted by the Cabinet was derived from the old and revoked EEP;

    ii) The figure could only be regarded as "sound" applying the policies contained in or which applied to the EEP;

iii) Policy H1 led to a requirement figure that took account of and therefore was net of the effect of various constraints as required by Policy H1 of the Regional Spatial Strategy; and

iv) In consequence, the EEP housing requirement figure was one where "… *full provision is not made for all needs irrespective of constraint*".

The Claimant maintains that this is a critical conclusion because it submits that in consequence of adopting the 360 figure the Inspector simply failed to give effect to the process that is mandated by the NPPF for the determination of planning applications where there is no, or no emerging, strategic local plan. The Inspector appears to acknowledge that this point is at least potentially correct in Paragraph 28 of the DL where she says: "*The DCLG 2008 household projections are the most up to date figures and will be used in the Green Belt and housing need studies to be undertaken; to do otherwise would start from a position of constraint."* The DCLG figures are those relied on by the Claimant and are set out in summary in Paragraph 27 of the DL, which states:

> "27. From the Department for Communities and Local Government (DCLG) projections to 2028 there would be 688 new households per year in the District. The Appellant considers that the need for dwellings should be 5% higher to take account of vacancies, second homes and the like. This would make an annual requirement for 720 units to which the Appellant considers an additional 20% should be added having regard to paragraph 47 of the Framework. The overall requirement would therefore be for 864 dwellings that would reduce to 756 units if a 5% buffer were applied."

20. Notwithstanding this analysis, the Inspector considered it appropriate to adopt the EEP figure rather than the DCLG figure. Her reasoning that led to this conclusion is set out in Paragraphs 29 and 30 of the DL which are to following effect:

> "29. The RSS figure provided housing requirements for the period to 2021 and took account of the severe constraints in the District. It provides the only figure that has been scrutinised through the independent examination process. Government policy aims for localism rather than top down set targets but there was nothing to indicate that the constraints identified in the RSS process are reduced because the RSS is no longer extant or that any unmet need in St Albans District was distributed into other Districts in RSS policy H1. Paragraph 5.5 of the supporting text to RSS policy H1 advises that the overall regional identified provision falls significantly short of what is needed based on evidence about housing pressure, affordability and household projections."
>
> 30. At this time and in the absence of an identified need that takes account of any constraints to development and acknowledging the age of the RSS data, and the fact that the RSS has now been revoked, I consider it is reasonable that the annual housing target should have regard to constraints in the

> district and be that which takes them into account. As resolved by the Council on 17 January 2013, provision should be made for a minimum of 360 residential units per annum on specific deliverable sites."

This led inexorably to the conclusion that the appeal ought to be dismissed notwithstanding various other factors that were relied on in support of the application for as the Inspector put it in Paragraph 71 of the DL:

> "71. Overall, the policy vacuum is afforded significant weight, the affordable housing provision great weight, the improvements to the Ancient Briton junction some weight and limited weight to the proposed tennis courts that would be transferred to SAGS. However, in the absence of an identified need for the release of a greenfield Green Belt site, the substantial harm to the Green Belt and significant harm to the character and appearance of the countryside are not clearly outweighed by the other material considerations either individually or as a whole. Therefore the very special circumstances necessary to justify the inappropriate residential development in the Green Belt do not exist. The development would be contrary to LP policies 1 and 69(i) as well as Government policy in the Framework."

**Relevant Legal Principles**

21. Not surprisingly the relevant legal principles were not in dispute between the parties. Although the parties identified a large number of principles that apply to hearings of this sort, those that actually matter are the following:

    i) The NPPF "… *is a material consideration in planning decisions* …" – see NPPF, Paragraph 2;

    ii) The interpretation of planning policy is a matter of law but the application of planning policy is a matter of planning judgment – see Tesco Stores v. Dundee [2012] PTSR 983;

    iii) A s.288 challenge is an opportunity to correct a failure to take into account material considerations or the taking into account of immaterial considerations or errors of law, not an opportunity to challenge an outcome on the planning merits of an appeal other than on rationality grounds – see R (Newsmith Stainless Steel) v. SSETR [2001] EWHC 74 (Admin) at Paragraph 6;

    iv) In the absence of a rationality challenge, the weight to be given to a material consideration is a matter for the Inspector not the Court – see Tesco Stores v. SSE [1995] 1 WLR 759 *per* Lord Hoffmann at 780;

    v) Points not made to an inspector will generally not be permitted to be raised on a s.288 challenge – see Humphris v. SSCLG [2012] EWHC 1237 (Admin) *per* Ouseley J at [23]. The position is not an absolute one however. Ouseley J was not attempting in that paragraph to set out comprehensively the circumstances

in which a point of law not deployed before an inspector could not be deployed on a s.288 challenge. He was prepared to recognise that a "*...pure point of law…"* was one that might be permitted whereas points which might require an examination of fact or a judgment as to fact and degree would usually not be permitted to be raised for the first time on a s.288 challenge;

vi) Decision letters are to be read in a straightforward manner – see South Bucks CC v. Porter (No.2) [2004] 1 WLR 1953 *per* Lord Brown at [36] – and thus without excessive legalism;

vii) The general rule is that if an Inspector fails to take account of a material consideration or makes an error of law then the decision will be quashed unless the point would not have made a difference to the outcome or there was not a real possibility that it would have made a difference – see Bolton MBC v. SSE (1991) 61 P & CR 343. This point does not in the end arise in this case for it is common ground that if I conclude that HPL is correct in its submission that the Inspector misconstrued and misapplied the NPPF then the proper course is to quash the decision.

**Parties' Submissions**

22. In essence the submission made by HPL is that on a proper understanding of the NPPF read as a whole, a shortfall between objectively identifiable housing need and the housing that could be provided on identified deliverable housing sites identified by the LPA was capable of being a very special circumstance and that where such a contention was relied on by an applicant or appellant, the LPA and on an appeal the inspector was required to start by identifying the full housing needs of the relevant area on the basis of the best and most up to date evidence available. Once that exercise had been done, it was then for the decision maker to decide what weight should be given to any unmet need that had been identified, the weight to be given to any other circumstances relied on in support of the application and then to decide whether these factors in the aggregate clearly outweighed the harm caused to the Metropolitan Green Belt by reason of inappropriateness and any other harm. The Inspector in this case had failed to adopt this approach but instead started by reference to a housing need figure that was out of date, did not reflect actual need but was a figure arrived at taking account of the effect of various constraints including that imposed by the Green Belt and thus made an error of law. To the extent that the Inspector relied on the decision of the Cabinet she fell into error because she proceeded on the basis that it was a decision of the Council when it was not.

23. The SoS's case was that this challenge was nothing more than an impermissible attempt to rerun arguments on the planning merits. Notwithstanding his argument that the Claimant's closing submissions at the Inquiry before the Inspector bore "*... a striking resemblance to …"* HPL's skeleton argument in these proceedings, SoS's counsel submitted that the Claimant's case was based on propositions "*... diametrically the opposite of points conceded before the Inspector by its own Planning Consultant …"* and thus the challenge ought to be dismissed applying what the SoS's counsel characterised as "*... the principle in Humphris"*. It was submitted that this challenge was being advanced on a false premise namely that the Inspector adopted the 360 dpa figure "*... because it was a figure which reflected the Green Belt*

*constraints in St Albans …"* whereas in fact that figure had been adopted for a number of reasons, all of which are to be found in Paragraphs 23-30 of the DL.

24. In relation to the discrete point taken concerning the Inspector's reliance on the decision of the Council's cabinet it was submitted that this point ought to be rejected as obviously unsustainable applying the principles noted in Paragraph 21(vi) and (vii) above because notwithstanding the description given by the Inspector to the resolution, it was clear that she was aware that the decision was a Cabinet decision rather than a decision of the Council in general meeting from the material that had been placed before her. This material is the document included in the bundle at 3/1108. It states on its face in bold type that it is a report to Cabinet and under the heading "*Recommendations"* makes clear that it was being recommended to Cabinet that it should agree "*… the use of the East of England Plan housing target of 360 dwellings per annum from 2001 to 2021 as the most appropriate interim housing target/requirement to use for housing land supply purposes"*.

25. The Council adopted the arguments advanced on behalf of the SoS. In addition or in further support of those arguments, it was argued that before the Inspector HPL's case had been advanced exclusively by reference to Paragraph 47 of the NPPF. The argument advanced was that the supply of specific sites identified by the Council within the meaning of the second bullet point within Paragraph 47 did not satisfy the need defined by the first bullet point. However, that argument ignored the fact that if what was relevant was the need referred to in the first bullet point within Paragraph 47 then that did not involve identifying simply the "*… fully objectively assessed needs for market and affordable housing …"* but that need only "*… in so far as is consistent with the policies set out in this Framework …"* which inevitably meant that the constraints that applied in arriving at the figure contained in the EEP would apply with equal force in arriving at a figure for the purposes of Paragraph 47. It was submitted that the reasoning adopted in the proceedings before me was not that deployed before the Inspector and should not be permitted to form the basis of this s.288 challenge.

**Discussion**

26. *The Position in Principle*

I start by attempting to identify the correct approach to be adopted aside from the argument that HPL is precluded from arguing for this approach by reason of the position that was adopted by it before the Inspector. If the point now advanced is wrong in any event then it will not be necessary to consider the effect of what was argued before the Inspector further.

27. It is common ground that there was no up to date development plan against which the application could be assessed. It follows that the presumption in favour of sustainable development required that planning permission be granted unless the policy within the NPPF concerning the Green Belt indicates that development should be restricted – see NPPF, Para. 14. The Green Belt policy contained in the NPPF is that set out in Paragraphs 87 and 88. Inappropriate development within the Green Belt is in effect prohibited except in "*… very special circumstances …"*. It was common ground between the parties that the Scheme was "*… inappropriate development…"* which should not be approved unless HPL could satisfy the Inspector that very special

circumstances existed, which clearly outweighed the substantial weight that is required to be given to harm to the Green Belt. This required potentially at least two different exercises to be carried out – first a finding concerning the degree to which if at all HPL had established the existence of what it contended to be the very special circumstances that it relied on and then an assessment as to whether what had been established clearly outweighed the harm that would be caused to the Green Belt by what was proposed. This challenge is concerned exclusively with the first of those exercises.

28. Where it is being contended that very special circumstances exist because of a shortfall caused by the difference between the full objectively assessed needs for market and affordable housing and that which can be provided from the supply of specific deliverable sites identified by the relevant planning authority, I do not see how it can be open to a LPA or Inspector to reach a conclusion as to whether that very special circumstance had been made out by reference to a figure that does not even purport to reflect the full objectively assessed needs for market and affordable housing applicable at the time the figure was arrived at. It is common ground that the EEP figure that the Inspector adopted was not such a figure for the reasons that I have explained in Paragraph 10 of this Judgment. As the Inspector entirely accurately observed of the EEP figure that she concluded it was appropriate to adopt: "*In reaching the housing requirement, the supporting text made it clear that full provision is not made for all needs irrespective of constraint*." A figure that takes account of constraints should not have any role to play in assessing an assertion by an applicant in the position of HPL that an actual housing requirement has not been met. Whilst the decisions of planning inspectors in relation to other planning appeals are not in any sense binding on planning inspectors in other cases, I consider the reasoning of the inspector in Planning Appeal X1165/A/11/2165846 to be entirely convincing. As the inspector in that appeal said in Paragraph 47 of that Decision "*… constraints do not bear upon the actual need for dwellings … the stage at which growth constraints should be taken into account is when assessing how the identified need can be addressed …they cannot reasonably be used … simply to reduce the number of dwellings calculated as necessary to meet housing need"*. In reality this is precisely the course adopted by the Inspector in this case. It was only this approach that enabled her to conclude as she does at Paragraph 67 of the DL that "*… the supply of additional housing on a greenfield Green Belt site is not afforded weight"*.

29. It was argued by the Defendants and principally on behalf of the Council that this approach did not give effect to the whole of the wording contained in Paragraph 47 of the NPPF. The essence of this submission was that the approach HPL advocated ignored the words "*… in so far as is consistent with the policies set out in this Framework …"*. I accept that proper construction of the NPPF requires the document to be read as a whole. However, I do not accept that the construction for which HPL contends fails to give effect to the words relied on by the Council and that in consequence the appropriate course was to adopt the housing needs figure identified in the EEP. First, given that it is necessary to take account of all the words used, that means that it is necessary to take account of the opening words of the paragraph – "*To boost significantly the supply of housing …"*. It is difficult to see how construing the whole of the first bullet point in the paragraph as meaning that the needs figure referred to is or could be a figure that expressly does not and does not purport to identify actual need could be said to give effect to those words. Secondly, had it been

intended that this approach should be adopted, the Policy could have encouraged the use of needs figures derived from the relevant RSS pending the adoption of a strategic local plan prepared in accordance with the NPPF. Not merely is there no such provision, but Paragraph 1 makes clear that the NPPF represents a new start with a large number of planning policies being revoked and replaced. PPS3 was expressly revoked by the NPPF and as I have explained the RSS was revoked on 3 January 2013. Thirdly, I do not see how a constraints adjusted figure arrived at having regard to the policy requirements as they applied at the time when the EEP took effect can be said to lead to the same conclusion applying the first bullet point in Paragraph 47 when that paragraph is read as a whole. The wording of the first bullet point emphasises what is emphasised elsewhere in the NPPF, namely that the NPPF creates a presumption in favour of sustainable development. Finally the suggestion that the words "*... in so far as is consistent with the policies set out in this Framework ...*" requires or permits a decision maker to adopt an old RSS figure is unsustainable as a matter of language. That language requires that the decision maker considers each application or appeal on its merits. Having identified the full objectively assessed needs figure the decision maker must then consider the impact of the other policies set out in the NPPF. The Green Belt policy as I have explained is not an outright prohibition on development in the Green Belt. Rather it is a prohibition on inappropriate development in the absence of very special circumstances. It is entirely circular to argue that there are no very special circumstances based on objectively assessed but unfulfilled need that can justify development in the Green Belt by reference to a figure that has been arrived at under a revoked policy which was arrived at taking account of the need to avoid development in the Green Belt.

30. For those short reasons, I consider that the approach adopted by the Inspector in this case was wrong in law. The proper course involved assessing need, then identifying the unfulfilled need having regard to the supply of specific deliverable sites over the relevant period. Once that had been done it was necessary next to decide whether fulfilling the need in fact demonstrated (in common with the other factors relied on in support of the development) together clearly outweighed the identified harm to the Green Belt that would be caused by the proposed development. Those of course are matters of planning judgment and are for an inspector not me. The contrary is not suggested by HPL.

31. *The Effect Of The Argument Before The Inspector*

Whilst it is true to say that the summary of HPL's case at Paragraph 3(b) of its written closing submissions referred to a failure on the part of the Council to provide for a five year supply of deliverable housing sites, that of itself was meaningless without regard being had to the full objectively assessed needs figure since it is impossible to arrive at a conclusion about the first without having first ascertained the second. Not surprisingly therefore, at Paragraph 29 and following there are set out lengthy submissions under the heading "*Assessing Full Housing Needs"*. At Paragraph 31 there is a clear submission to the effect that the best evidence of actual need is to be found in the projections published by the DCLG. The materiality of the EEP is considered at Paragraph 37 and following. Although the language used is to an extent more florid than that used in the submissions in these proceedings, the same essential points are made. This part of the submissions concludes with a submission that:

> "If you make a decision based on an annual housing target of 360 dwellings, I unhesitatingly submit, therefore, that you would be falling into legal error by reason of taking into account a wholly immaterial consideration. … pending the outcome of the Plan-making process, the only interim housing needs figure that one can reasonably work from, as the Council is now doing, is based on the most up to date projections from the Department for Communities and Local Government."

32. It is perfectly true to say that at Paragraph 43 and following there is a lengthy analysis of the various sites relied on by the Council as being the supply of specific deliverable sites over the relevant period. That is not to the point however. The point is that the issue argued by HPL in these proceedings concerning the identification of need is that which was argued before the Inspector. The point is not (as alleged by the SoS) a challenge to the outcome on the planning merits but a challenge to what in my judgment was an error of law by the Inspector that was not merely argued before her but was identified as being an error of law if adopted in the written closing submissions placed before her.

33. Counsel for HPL accepted that in the end the outcome might be the same. In my judgment that concession was rightly made but is immaterial. The error to which I have referred above was fundamental and, I am satisfied, was one that could realistically have made a difference to the outcome.

34. *The Cabinet Decision*

Given the conclusions that I have reached so far, it is probably unnecessary that I express any view on this minor and free standing point. It was accepted that the resolution was a material consideration but it was submitted that the apparent misunderstanding concerning who passed the relevant resolution may have led the Inspector into an error as to the weight to be given to the resolution. In my judgment this point should be resolved in favour of the Defendants. As I have explained already the document that was before the Inspector made clear what organisation was taking the relevant decision. Although lawyers might draw a distinction between the Cabinet and the full Council there is no reason for attributing such an approach to an Inspector for the purpose of then concluding that a material error had been made. Whilst the reference to the Council was an error it was not one that in my judgment was material. The real point that arises is that the decision does not eliminate the policy vacuum and appears to suffer from the same error of approach that I have identified in relation to the Inspector's decision. It may be that very little weight can in truth be given to it. That is however not an issue for me but is something that will have to be considered when the appeal is re-heard.

## The Judicial Review Claim

35. This is a challenge to the decision of the Inspector that HPL pay 20% of the Council's costs of and occasioned by the hearing of the appeal. The challenge is advanced on rationality grounds.

36. The power to award costs in planning inquiries is governed by section 250(5) of the Local Government Act 1972 ("LGA") as applied by section 320(2) of and Schedule 6 to the TCPA.

Guidance on exercising the power to award costs is provided by Circular 03/2009 Costs Awards in Appeals and other Planning Proceedings ("Costs Circular"). Paragraphs A11, A12, A19, A20 and B13 respectively provide:

> "A11. An award of costs does not necessarily follow the outcome of the appeal, as in litigation in the Courts. This is a well-established principle of the costs regime and remains so. An unsuccessful appellant is not expected to reimburse the planning authority for the costs incurred in defending the appeal. Equally, the costs of a successful appellant are not borne by the planning authority as a matter of course.
>
> A12. Costs will normally be awarded where the following conditions have been met:
>
> - a party has made a timely application for an award of costs
>
> - the party against whom the award is sought has acted unreasonably and
>
> - the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process — either the whole of the expense because it should not have been necessary for the matter to be determined by the Secretary of State or appointed Inspector, or part of the expense because of the manner in which a party has behaved in the process."
>
> ….
>
> A19. Some cases do not justify a full award of costs — for example, where the appeal is one of several joint appeals, or where the application for costs only relates to one ground of refusal, or only relates to the attendance of particular witnesses. In these circumstances, a partial award may be made. The partial award may also be limited to a part of the appeal process. Where an unnecessary adjournment is caused by the unreasonable conduct of one of the parties, the award of costs would be limited to the expense caused by the adjournment, for example, the abortive costs of attending the event on the day of the adjournment.
>
> A20. A partial award may be made where an application for a full award is being allowed in part or where a partial award is applied for in specific terms. An application for a partial award may be allowed in the terms of the application, refused, or allowed in part (that is, a smaller partial award is made). The expense of making an application for a partial award of costs is recoverable where the application is allowed. Where the application is for a full award and the application is allowed in part, or an application for a partial award is allowed in part, a

proportion of the expense of making the application will be recoverable accordingly.

….

B13. The right of appeal should be exercised in a reasonable manner. It should be used as a last resort, with the appellant being ready to proceed with the appeal once it is submitted. An appellant is at risk of an award of costs being made against them if, on the basis of the available evidence, the appeal or ground of appeal plainly had no reasonable prospect of succeeding on the basis of the application submitted to the planning authority."

This may occur when:

- the proposal is clearly contrary to or flies in the face of national planning policy and no, or very limited, other material considerations are advanced with inadequate supporting evidence [see bullet point below for proposed development in the Green Belt]

- development is proposed which is obviously not in accordance with the statutory development plan and no, or very limited, other material considerations are advanced with inadequate supporting evidence to justify determining otherwise

- the appeal follows a recent appeal decision in respect of the same, or very similar, development on the same, or substantially the same, site where the Secretary of State or Inspector has decided that the proposal is unacceptable and circumstances have not materially changed in the intervening period

- the appellant is seeking planning permission for development in the Green Belt, which would be inappropriate according to PPG2: Green Belts. In this situation it will not be sufficient for the appellant to rely on a genuine belief that there are very special circumstances to justify overriding the Green Belt presumption stated in PPG2. It is for the appellant to show why permission should be granted by demonstrating what the very special circumstances are, and providing evidence to justify an exception to general Green Belt policy

- the appellant has refused to enter into or provide a planning obligation or fails to provide an obligation in appropriate terms, which the Secretary of State or Inspector considers is clearly necessary to make the proposed development acceptable."

37. The costs issue arises out of the decision of the planning inspectorate that part but not all of the decision of Mr Papworth referred to in Paragraph 4 above was flawed in its reasoning. Mr Papworth found that both the residential development and the care home elements of the Scheme would cause harm to the Green Belt. The complaint by HPL was in respect of Mr Papworth's conclusions concerning the annual housing target issue. The conclusion of the Inspectorate was that Mr Papworth had failed adequately to explain his conclusions on the housing land supply assessment issue or the balance to be reached between that issue and the Green Belt issue. Critically there was no challenge to the decision in relation to the Green Belt and character and appearance issues or his conclusion concerning the care home element of the Scheme.

38. The overarching conclusion of the Inspector was that the position in relation to the Green Belt issues had not changed materially from the position that had applied at the first appeal. In the Inspector's view, "*... the previous inspector's conclusion on the Green Belt and character and appearance could have been accepted ...*". The Inspector concluded that HPL had acted unreasonably by presenting evidence on a matter that had not materially changed since the first appeal decision had been promulgated.

39. In relation to the care home issues, the Inspector accepted that the position concerning unmet bed space need had altered from the position that had applied at the time the first appeal was being determined. She concluded that the increase relied on was not material Although there had been an increase in requirement from 55 to 80 bed spaces in 2012, the Inspector concluded that "*... as found by the previous inspector, it has not been shown that a greenfield Green Belt site is necessary or that any other sites would not have come forward by 2012. This is not a matter for judgement. Having regard to the projected need and in the absence of any additional evidence on the need to use a greenfield Green Belt site ... inquiry time should not have been used to address matters resolved by the previous inspector*. Although not apparent on the face of the decision, the point being made was well known to and understood by the parties to the appeal – although there had been an increase in bed requirements for 2012, this was not material because the overall requirement for the period 2010-2021 was 163 beds and 127 had in fact been provided.

40. In essence the challenge to the decision is that it was irrational because the decision of the first inspector was not binding on the Inspector and because the Inspector was required to weigh the competing factors for herself before coming to a conclusion. She could not simply accept some of the findings made by the previous inspector but had to form her own view of the character and significance of each material consideration on the evidence available to her and then to conduct her own weighing exercise. Absent agreement or concession that is no doubt correct but immaterial. It was the failure to partially concede that led the Inspector to decide as she did.

41. Whilst I consider it appropriate to grant permission to bring the judicial review proceedings I dismiss the claim. I do so for the following reasons. The challenge is one based on irrationality – that is that no Inspector in the position of the Inspector could have reached the decision that she reached. In my judgment that argument is one that should fail because the decision reached by the Inspector was one that she was entitled to reach in the circumstances. As was noted by HHJ Waksman QC in Golding v. SSCLG [2012] EWHC 1656 at Paragraph 42, citing with approval from the Encyclopaedia of Planning Law , *"the decision whether or not to make an award*

*of costs was pre-eminently a discretionary matter and the inspector who actually heard the evidence was in the best position to judge. Only very rarely would it be proper for the court to strike down such an exercise of discretion"*. The Judge added "*I wholly endorse those final comments"* as I do.

42. In relation to the care home issues, the Inspector was entitled to reach the conclusion she reached on the basis of her conclusions as to materiality. In relation to the arguments concerning landscape visual harm and Green Belt harm issues, there is a clear distinction to be drawn between the relevant primary facts and the judgment issues that follow on from that.

43. It is of course the case that the Inspector had to reach her own conclusions when balancing the material considerations and reaching a conclusion but that is different from having to consider evidence relevant to the primary facts. I have no reason to think that the Inspector is anything other than an experienced planning inspector, or that she could not rationally conclude that the previous conclusions on the primary facts could have formed part of her balancing exercise. Of course where there have been genuinely material changes this reasoning could not apply. That is not the position here.

## Conclusion

44. The appeal succeeds and the substantive decision of the Inspector to dismiss the s.78 appeal must be quashed. Permission is given to continue the judicial review proceedings but that claim is dismissed.