

OBJECTIVELY ASSESSED NEEDS: A MATTER OF JUDGEMENT OR A SIMPLE CALCULATION

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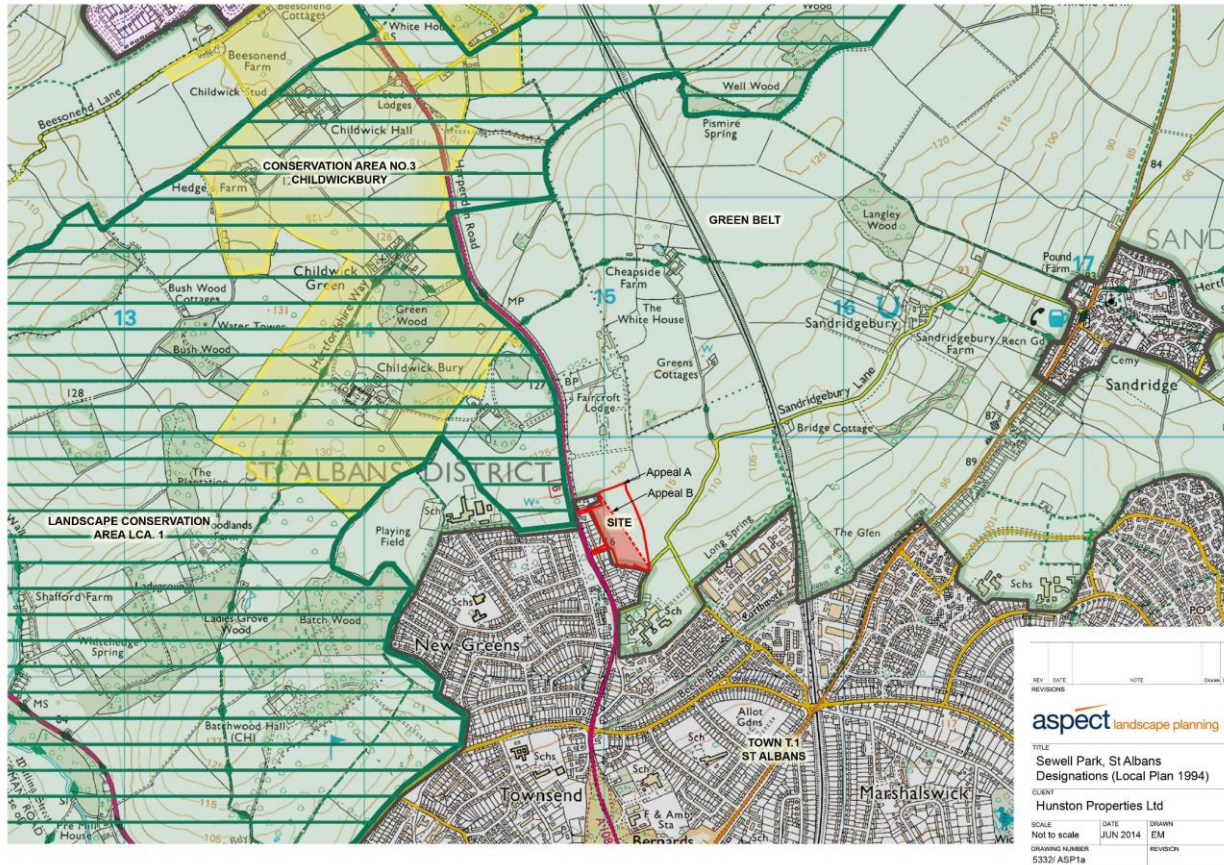
- **Local Plans Expert Group Report (16 March 2016)**

“The production of SHMA has become ... an industry in itself for consultants, whilst being one of the largest costs for authorities and the source of greatest concern, risk and uncertainty...Accordingly, we recommend adoption of a simplified, standard common methodology within the NPPG for the preparation of concise SHMAs with a clear stipulation that this is the approach government expects to be followed...”

- **East Staffordshire BC v SSCLG [2017] EWCA Civ 893 (30 June 2017)**

“Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment ...”

Hunston Properties

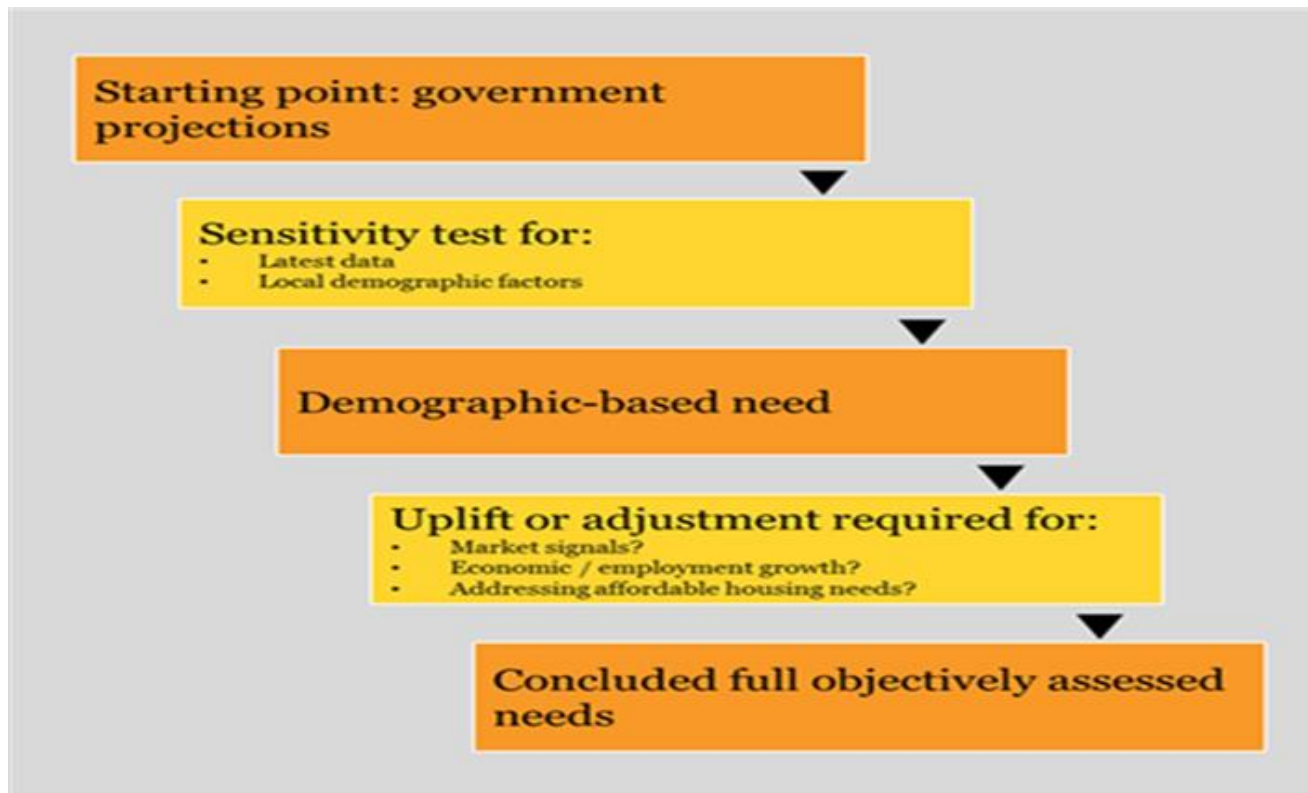


The CA Judgment in Hunston

- ***Hunston Properties Ltd v (1) SSCLG and (2) St Albans City and District Council*** [2013] EWCA Civ 1610
- Sir David Keene Judgment para 26:

“... I accept Mr Stinchcombe QC's submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal.”

Method for assessing OAN post *Hunston*



Gallagher Homes

- ***Gallagher Homes Ltd and Lioncourt Homes Ltd v Solihull Metropolitan Borough Council*** [2014] EWHC 1283
- Key concepts:
 - Household projections: The demographic, trend-based, projections which were published by the then Department for Communities and Local Government (now the Ministry), indicating the likely number and type of future households if the underlying trends and demographic assumptions were realised.
 - Objectively assessed needs: The objectively assessed need for housing in an area, leaving aside policy considerations (so-called ‘policy off’), assessed from the starting-point of the household projection for that area, but also looking at local household formation rates (and other local demographic data); market signals; economic growth; and affordable housing.
 - Housing requirement: The figure which reflects not only the OAN but any policy considerations that might require that figure to be manipulated to determine the actual housing target for an area (so-called ‘policy on’) - for example policy constraints such as Green Belt or Areas of Outstanding Natural Beauty.

Drake Park

APP/K3605/W/17/3172429



The Local Plans Expert Group: March 2016 Report

- 3.19: The production of SHMA has ... become an industry in itself for consultants, whilst being one of the largest costs for authorities and the source of greatest concern, risk and uncertainty. ...
- 3.20: Accordingly, we recommend adoption of a simplified, standard common methodology within the NPPG for the preparation of concise SHMAs with a clear stipulation that this is the approach government expects to be followed...”

The Standard Method under the 2018 NPPF and PPG

- Step 1: set the baseline using the most recent national household growth projections for the area
- Step 2: apply an adjustment to take account of affordability
- Step 3: cap the level of any increase

The Standard Method under the 2018 NPPF and PPG (2)

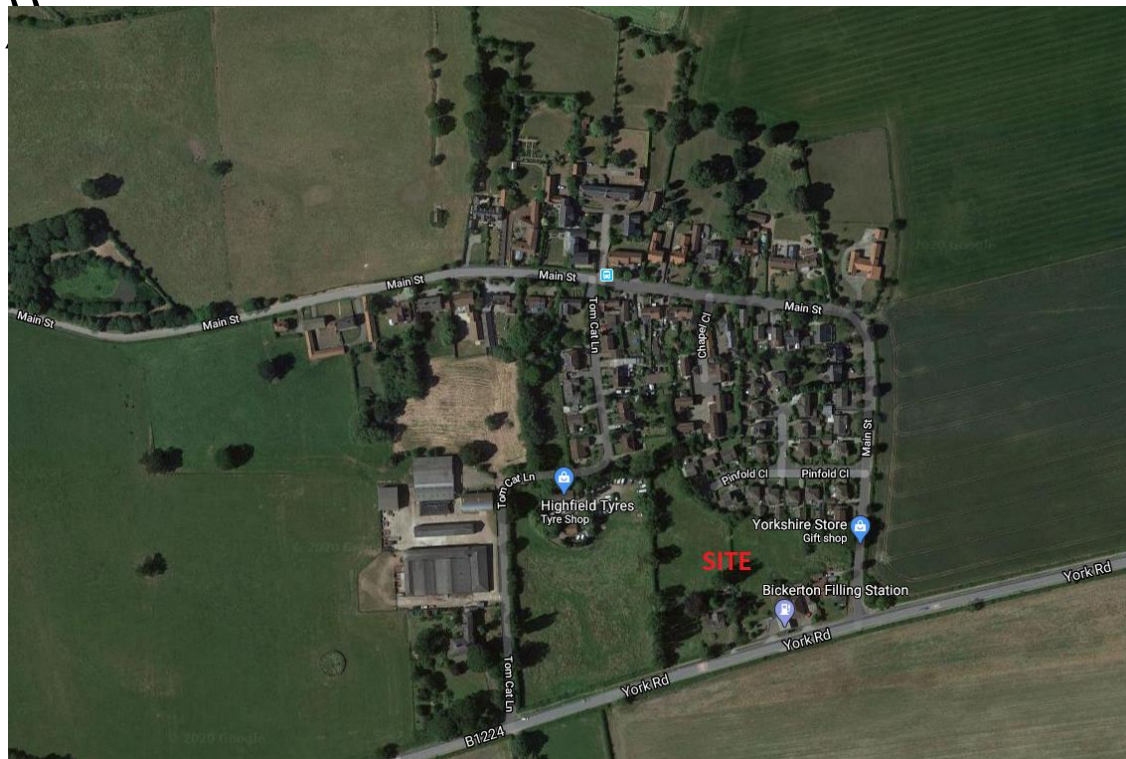
- Paragraph 60 of the 2018 version of the NPPF
“To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – ***unless exceptional circumstances justify an alternative approach*** which also reflects current and future demographic trends and market signals.” (Emphasis added)
- Paragraph 004 Ref ID: 2a-003-20180913 of the PPG:
“Is the use of the standard method for strategic policy making purposes mandatory?”
No, if it is felt that circumstances warrant an alternative approach councils can expect this to be scrutinised more closely at examination. There is an ***expectation that the standard method will be used and that any other method will be used only in exceptional circumstances.***” (Emphasis added)

Retreat from the most recent projections

- 20 September 2018: 2016-based household projections published
- 26 October 2018: Government consultation on (among other things) changes to the standard method
- 19 February 2019: NPPF 2019 published
- 20 February 2019: PPG amended to (among other things) base standard method on the 2014-based household projections

Oxton Farm

- ***Oxton Farm v Harrogate Borough Council*** [2020] EWCA Civ 805 (on appeal from [2019] EWHC 1370 (Admin))



Oxton Farm: the Central Issue

Under the NPPF 2018, must a Local Planning Authority, when determining an application for housing which is contrary to its Development Plan:

- a) Properly calculate and understand its OAN by reference to the standard method, using the latest demographic projections (quaere unless there are exceptional reasons for not doing so); and
- b) Properly understand the extent of surplus or shortfall in its 5-year housing land supply?

Oxton Farm: the facts

- Application for 21 new houses and a village shop.
- OR dated 28 August 2018 recommended approval. Relied on 5YHLS of 5.02 years.
- 5.02 year figure derived from 669 dpa requirement figure from Housing and Economic Development Needs Assessment from emerging Local Plan prepared under NPPF 2012 and using 2014-based household projections.
- 20 September 2018: 2016-based household projections published. On standard method and 2016 projections approach, 5YHLS would have been 7.48 years. But OR not updated.
- 25 September 2018: planning permission granted

Oxton Farm: C's Argument (1)

- C's key argument that two-fold significance to identifying the correct housing land supply figure:
 - First, it could determine that the tilted balance is engaged; and
 - Second, the quantum of any surplus or shortfall in housing land supply was, independently, vitally important to the assessment of the benefit of the proposed housing when the requisite planning balance was struck, whether tilted or un-tilted.

Oxton Farm: C's Argument (2)

- ***Jelson Ltd v SSCLG*** [2018] EWCA Civ 24 at para 25:

“... [T]he decision-maker is clearly expected to establish, at least to a reasonable level of accuracy and reliability, a level of housing need that represents the "full, objectively assessed needs"”

Oxton Farm: C's Argument (3)

- ***Suffolk Coastal District Council v Hopkins Homes & Anr*** [2016] EWCA Civ 168 at para 47:

“One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight ... will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land...”

Oxton Farm: C's Argument (4)

- ***Hallam Land Management v SSCLG and Eastleigh Borough Council*** [2018] EWCA Civ 1808 at para 47:

“The policy in paragraph 14 of the NPPF requires the appropriate balance to be struck, and a balance can only be struck if the considerations on either side of it are given due weight. But in a case where the local planning authority is unable to demonstrate five years' supply of housing land, the policy leaves to the decision-maker's planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small.”

Oxton Farm: C's Argument (5)

- ***Phides Estates (Overseas) Ltd v SSCLG*** [2015] EWHC 827 (Admin) at para 60:

“Naturally, the weight given to a proposal's benefit in increasing the supply of housing will vary from case to case. It will depend, for example, on the extent of the shortfall, how long the deficit is likely to persist, what steps the authority could readily take to reduce it, and how much of it the development would meet. So the decision-maker must establish not only whether there is a shortfall but also how big it is, and how significant. This will not be possible unless the relevant policies are correctly understood.”

Oxton Farm: C's Argument (6)

- ***Eastleigh Borough Council v SSHCLG*** [2019] EWHC 1862 at para 50:

“...a failure to give weight to the fact that the Council could demonstrate more than a 5YHLS in determining the weight which should be accorded to development plan policies was not irrational.”

- ***DLA Delivery Ltd v Baroness Cumberlege*** [2018] PTSR 2063

Oxton Farm: CA Judgment (1)

- Lewison LJ gave the only substantive judgment
- Relied on ***CREEDNZ Inc v Governor General*** [1981] 1 NZLR 172
- Found that the 2016-based household projection for the area was not a mandatory consideration because:
 - NPPF and PPG said not mandatory
 - Target figure on which LPA relied was in emerging LP on which LPA was entitled to place weight
 - Mathematical precision was not required: see ***Hallam*** at para 52:
“... the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker.”

Oxton Farm: CA Judgment (2)

- 2016-based household projections were not so fundamental that it was irrational for the LPA not to have considered them.
- Lewison LJ acknowledged Lindblom LJ's finding in *Hallam* at para 47 that “one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small.”
- But he rejected Oxton Farm's argument that a symmetrical approach should be adopted where there was a housing surplus

Oxton Farm: CA Judgment (3)

- In rejecting a symmetrical approach in cases of housing surplus, Lewison LJ relied on:
 - ***Hallam*** at para 51

"... the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds."
 - ***Suffolk Coastal*** at para 47

"The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court... It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment."
 - ***Eastleigh Borough Council*** at para 49-50

Oxton Farm: CA Judgment (4)

- On the reasons challenge, Lewison LJ applied ***R (CPRE Kent) v Dover District Council*** [2017] UKSC 79, ***R (Oakley) v South Cambridgeshire District Council*** [2017] EWCA Civ 71 and ***R (Palmer) v Herefordshire County Council*** [2016] EWCA Civ 1061
- Lewison LJ found that the LPA's decision was a run-of-the-mill planning decision and no reasons were necessary

Undue deference? (1)

- ***Newsmith Stainless v SSETR*** [2001] EWHC (Admin) 74, at para 6:

“An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is ***Wednesbury*** perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a re-run of the arguments on the planning merits.”
- Scope of rationality challenges involving technical and objective matters?
- Other public law principles

Undue deference? (2)

- ***St Modwen Developments v SSCLG*** [2017] EWCA Civ 1643 at para 7:

“There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault ...”

Undue deference? (3)

- ***Mansell v Tonbridge and Malling BC*** [2017] EWCA Civ 1314 at para 41:

“The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court... The courts must keep in mind that the function of planning decision making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors.”

Undue deference? (4)

- ***East Staffordshire BC v SSCLG*** [2017] EWCA Civ 893 at para 50:

“Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over-complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgement ...”

The 2018 NPPF and PPG (again)

- Paragraph 60 of the 2018 version of the NPPF
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Local housing need 2018 vs 19

- **2018 NPPF definition of “local housing need”**

“The number of homes identified as being needed through the application of the standard method set out in national planning practice guidance, or a justified alternative approach”

- **2019 new definition**

“The number of homes identified as being needed through the application of the standard method set out in national planning guidance (or, in the context of preparing strategic policies only, this may be calculated using a justified alternative approach as provided for in paragraph 60 of this Framework)”

Conclusions

- The importance of effective judicial scrutiny of decisions
- Overlegalisation vs underlegalisation?
- The risks of judicial mantras

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