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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 27th November 2013

**Before** :

**MR JUSTICE LEWIS**

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**Between :**

| | |
|---|---|
| **Cotswold District Council** | **Applicant** |
| **- and -** | |
| **Secretary of State for Communities and Local Government** | **First Respondent** |
| **Fay and Son Limited** | |
| **~** | **Second Respondent** |
| **Cotswold District Council** | **Applicant** |
| **- and -** | |
| **Secretary of State for Communities and Local Government** | **First Respondent** |
| **Hannick Homes and Development Limited** | |
| **~** | |
| **The Queen on the application of Cotswold District Council** | **Second Respondent** |
| **- and-** | |
| | **Claimant** |
| **Secretary of State for Communities and Local Government** | **Defendant** |
| **Hannick Homes and Development Limited** | |
| | **Interested Party** |

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

**Ms S Sheikh and Mr G Mackenzie** (instructed by **Sharpe Pritchard**) for the **Claimant** (in all cases)
**Mr R Kimblin** (instructed by **The Treasury Solicitor**) for the **Secretary of State (First Defendant)** (in all cases)
**Miss M Cook** (instructed by **Coffin Mew LLP**) for the **Second Defendant in the first case**
**Mr Peter Goatley** (instructed by **Davies & Partners**) for the **Second Defendant in the second case**

## Judgment
## As Approved by the Court



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MR JUSTICE LEWIS

**Mr Justice Lewis :**

1. These are two applications to quash decisions of the Secretary of State for Communities and Local Government granting planning permission for development in the Tetbury area of Gloucestershire and one application for judicial review of a decision making a partial award of costs in one of the cases. By the first decision ("the Highfield decision") dated 13 February 2013, the Secretary of State allowed an appeal by Fay & Son Ltd. ("Fay") against the refusal by the Council, Cotswold District Council, of outline permission for a residential development for up to 250 units and related development on land at Highfield Farm, Tetbury, Gloucestershire. By the second decision ("the Berrells Road decision") dated 13 February 2013, the Secretary of State allowed an appeal by Hannick Homes and Development Ltd. ("Hannick") against the refusal by the Council of outline permission for a residential development of up to 39 units and related development on land at Berrells Road, on the edge of Tetbury, Gloucestershire. Both sites are within an Area of Outstanding National Beauty ("AONB").

2. Both decisions involved consideration of whether the Council had demonstrated that it had a supply of land sufficient to meet their housing requirements for the next five years. As part of the assessment of that requirement, the Secretary of State accepted the inspector's recommendation that the housing requirement should be based on the lower of two estimates of need, derived from figures produced as part of the preparation of a draft Regional Spatial Strategy for the South West ("the RSS") which indicated a need for 2,022 houses over the next five years. The Secretary of State considered that, applying the principles contained in the National Planning Policy Framework ("the Framework"), an additional buffer of 20% (rather than the 5% that would otherwise be added) should be added to the RSS figures as the Council had a record of persistent under delivery of housing. That resulted in an additional 402 houses being added to the figure of 2,022 to give a total requirement of 2,426. The Secretary of State accepted the inspector's recommendation that the Council did not have a five year supply of land capable of providing sufficient sites for that housing requirement.

3. One of the Council's principal grounds of challenge relates to another decision, given on 9 January 2013, of an inspector who allowed an appeal against a refusal of permission at another site at Top Farm, Kemble, Cirencester (the Kemble decision). That site is in a different town from the Highfield and the Berrells Road sites. The Kemble site is not in an AONB. In the Kemble decision, the inspector accepted that the number of houses proposed as part of the draft RSS process was the best minimum indication of the housing figure requirement for the next five years. He was not persuaded that it was necessary to apply the 20% buffer (rather than the 5%) in the circumstances of that case. He concluded that the Council could not demonstrate that it had a sufficient five year supply of sites even for that lower figure. He concluded that planning permission should therefore be granted. The inspector reached his conclusion that there had not been a persistent under delivery of housing solely by reference to the figures for housing requirements set out in the Gloucestershire Structure Plan Second Review ("the Structure Plan") for 1991 to 2011 although he made it clear that that conclusion was based on a Structure Plan that was now defunct and that those past figures were not a reliable guide to future need.

4. The inspector's decision on Kemble was not drawn to the Secretary of State's attention. The Council contends, however, that the inspector's reasoning in the Kemble decision in relation to the calculation of housing requirements, and in particular his decision not to add a 20% buffer because he was not satisfied that there had been a record of persistent under delivery, was a material consideration to which the Secretary of State should have had regard when reaching his decisions in relation to Highfield and Berrells Road. The Council contends that the Secretary of State acted unlawfully in reaching those decisions without having regard to the Kemble decision and without explaining why he was differing from the inspector in the Kemble decision. The Council also contends that the Secretary of State misinterpreted the relevant policy in paragraph 47 of the Framework in a variety of ways.

5. Finally, the Council seeks permission to apply for judicial review to challenge the decision of the Secretary of State to accept the recommendation of the inspector to make a partial award of costs in the Berrells Road appeal as the Council had acted unreasonably to the extent that it maintained that it could demonstrate a five year supply of housing. The Council relies on the fact that the inspector did not award costs in the Kemble decision. The Council submits that the decision of the Secretary of State that the conduct of the Council was unreasonable is itself irrational and that the Secretary of State failed to have regard to a material consideration, namely the decision on costs of the inspector in the Kemble decision.

## THE PLANNING FRAMEWORK

### The Legislation

6. Planning permission is required for development including, as here, residential development involving the building of residential homes and related building operations: see section 57 of the Town and Country Planning Act 1990 ("the 1990 Act"). Section 70 (2) of that Act provides that where an application for planning permission is made to a local planning authority, then:

> "(2) In dealing with such an application the authority shall have regard to
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."

7. The development plan is defined in section 38(3) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Further, section 38(6) of that Act provides that:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must

be made in accordance with the plan unless material considerations indicate otherwise".

8. In the present case, the development plan included the Regional Strategy for the South West, certain policies of the Structure Plan and certain policies of the Cotswold Local Plan. The Structure Plan covered the period 1991 to 2011. The relevant housing policies provided that 6,150 houses would need to be provided in the Cotswold District Council area between 1991 and 2011. That equated to the provision of 307.5 houses per annum.

9. The material considerations relevant to any planning application include the Framework. That document should be read in its entirety. Paragraph 2 provides that the Framework must be taken into account in the preparation of local and neighbourhood plans and is a material consideration in planning decision. Paragraph 6 explains that the purpose of the planning system is to contribute to sustainable development and the policies set out in paragraphs 18 to 219 of the Framework constitute the Government's view of what sustainable development in England means in practice for the planning system. Paragraph 7 explains that there are three dimensions to sustainable development: economic, social and environmental. The social dimension includes "supporting strong, vibrant healthy communities by providing the supply of housing required to meet the needs of present and future generations".

10. Section 6 of the Framework deals with delivering a wide choice of high quality homes. Paragraph 47 is of particular importance to these appeals and provides as follows:

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

- identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;

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

- set out their own approach to housing density to reflect local circumstances."

11. Paragraph 47 is directed towards the obligations of local planning authorities in preparing their development plans. However, the Structure Plan in the present case expired in 2011. The Council has not yet adopted a Local Plan identifying its housing requirements for the next local plan period or the next five years. In dealing with a planning application, however, the Council, and an inspector or the Secretary of State on an appeal, will have to address the question of what the Council's five-year housing requirement is likely to be and whether the Council has significant supply of housing land to meet that requirement as that will be a material consideration in considering whether planning permission should be granted.

12. Paragraph 49 of the framework provides 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 cannot demonstrate a five-year supply of deliverable housing sites."

13. The presumption referred to in the first sentence of that paragraph does not apply to the applications for planning permission in Highfield and Berrells Road as they are in an AONB (see paragraph 14 and footnote 9 of the Framework). The second sentence is applicable.

14. As both Highfield and Berrells Road are within an AONB paragraph 115 of the Framework is applicable. That provides that:

> "Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty. The conservation of wildlife and cultural heritage are important considerations in all these areas, and should be given great weight in National Parks and the Broads."

15. Paragraph 116 of the Framework applies to the application for planning permission in Highfield (but not Berrells Road) as the Highfields application involves major development. That paragraph provides that:

> "Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:
>
> - the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> - the cost of, and scope for developing elsewhere outside the designated area, or meeting the need for it in some other way; and
>
> - any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated. "

16. The other material policy for present purposes is Policy 19 of the Local Plan. That restricted development, including housing development, outside existing development boundaries.

THE FACTS

17. The Highfield application for outline planning permission for residential development of up to 250 units was made on 8 March 2011 and refused by the Council on 23 November 2011. Fay appealed. The Secretary of State decided to determine the appeal himself. He appointed an inspector to conduct an inquiry and report. The Berrells Road application for outline planning permission for 39 units was made on 16 January 2012 and refused on 26 March 2012. Hannick appealed. The Secretary of State again decided to determine the appeal himself and appointed an inspector (the same inspector that was appointed in the Highfield appeal) to hold an inquiry and report.

18. Inquiries were held in both appeals and the inspector, Jessica Graham, submitted reports on the Highfield application and the Berrells Road application to the Secretary of State on 9 November 2102. Both reports are careful, detailed examinations of the issues and should be read in their entirety.

19. In the Highfield report, the inspector dealt with procedural matters, the site and surroundings, the planning history and the proposal. The inspector then correctly identified the relevant planning policies and dealt with other matters. At section 8, the inspector dealt with the case for the Council and at section 9 of her report she dealt with the case for Fay. At sections 10 and 11 of her report, the inspector dealt with oral and written representations made by others. Sections 12 and 13 deal with planning obligations and conditions. The inspector's conclusions come at section 14.

20. At paragraph 14.2, the inspector said this:

> "The proposed development would fundamentally conflict with adopted Development Plan policies aimed at restricting residential development on land which, like the appeal site, lies outside any settlement boundary and inside an AONB. However, Paragraph 49 of the National Planning Policy Framework states that relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites. This involves firstly establishing the housing requirement for the next five years, and then going on to assess whether sufficient deliverable sites are available to meet that need."

21. The inspector set out the Council's proposed approach to the issue of establishing its housing requirements for five years. The Council proposed projecting forward the requirements set out in the (now expired) 1991-2011 Structure Plan of 307.5 houses a year for five years. In addition, the Council recognised that, over the period of the Structure Plan, there had been a shortfall of 89 houses provided (the Structure Plan had contemplated a figure of 6,150 houses being provided but 6,061 had been provided). The Council proposed adding a figure of 89 houses over five years (17.8 houses a year) to the total required. That would, on the Council's case, have established a housing requirement of 1,626.5 over the next five years or 325.3 annually for each of the next five years. The Council then considered whether it could demonstrate a five year supply of land to meet its suggested housing requirement in order to assess whether or not planning permission for the proposed development would be required to meet any housing need.

22. The inspector did not accept that approach. She noted at paragraph 14.7 that the Structure Plan was only intended to cover the period 1991 to 2011 and was based on household projections dating from 1996. The inspector considered that other, more recent projections of housing need should be considered in assessing the Council's housing requirements for the next five years.

23. The inspector considered that the evidence used for the preparation of a new draft regional strategy had been considered and tested at an examination in public. While the draft strategy itself was unlikely to proceed to adoption for other reasons, and so should be given little weight, the evidence upon which it had been based had been thoroughly tested and carried considerable weight. That indicated a five year housing requirement for the period 2012 to 2017 of 2,022 houses. The inspector considered in addition the 2010 Department of Communities and Local Government household projections. These indicated a requirement of 3,199 houses over the next five years. The inspector's conclusion and reasoning on these issues are set out at paragraphs 14.15 to 14.18 of the Highfield Report (and are not challenged in these proceedings). Those paragraphs say:

> "14.15 Nevertheless, for the purpose of reporting on this appeal, I am obliged to arrive at a conclusion on the Council's current ability to demonstrate a five year supply of housing land. For the reasons set out above I hold the housing

> requirement figure contained in the Structure Plan to be so out of date as to be unfit for that purpose, and while I recognise the local GCC projections will have a valuable role to play as part of the overall evidence base for the district's emerging Local Plan, I consider that it would be premature to rely upon them at this early stage in that process.
>
> 14.16 I conclude that the District's five year housing requirement figure is likely to lie somewhere between the 2,022 dwellings derived from draft RSSW Proposed Changes, and the 3,199 dwellings derived from the most recently published DCLG national household projections. Since I have insufficient evidence to inform any attempt at assessing whereabouts within that range the actual requirement might lie, I will use the figure at the lowest end of the spectrum.
>
> 14.17 I need to make it absolutely clear that this conclusion should not be confused with an endorsement of that figure as representing the objectively assessed housing need for the district. My decision to use the draft RSSW figure is made on the premise that if a five year housing supply cannot even be demonstrated against the lowest credible housing requirement, then it clearly does not exist. That is the same premise that informed my findings in the Moreton in Marsh appeal: the Council was unable to demonstrate a five year supply against the Structure Plan housing requirement, and since the evidence of the more recently published projections suggested that the housing requirement was likely to increase rather than decrease, that could only worsen the shortfall in housing provision.
>
> 14.18 I can understand local residents' frustration with the amount of time taken up at the inquiry (and consequently in this report) in dealing with complex considerations of housing supply. The approach I am here obliged to adopt is a product of the wholly unsatisfactory circumstances that arise when a local planning authority fails to keep its Development Plan up to date, such that its housing requirement must instead be deduced from the best of the evidence made available to the decision maker."

24. Before considering whether the Council could demonstrate an adequate supply of land, the inspector noted, correctly, that it was necessary to have regard to the second bullet point of paragraph 47 which is set out at paragraph 10 above.

25. The inspector noted that the phrase "persistent under delivery" is not defined. A number of methods of testing whether there had been persistent under delivery were considered. The inspector noted a decision in a different local planning authority appeal which considered that completions over the past five years were the most relevant to an assessment of the planning authority's delivery record. The inspector agreed that, as the Framework was looking forward five years at future housing needs,

it was reasonable to look back five years in assessing whether there had been a record of persistent under delivery. The Council, in its evidence, had in fact invited the inspector to consider the figures over a four year period. The inspector noted that at a different inquiry within the Council's area, an inspector had considered the position over the last 10 years. On that basis, there had been a shortfall in 7 out of 10 years using one measure ( the number of permissions granted against the annual targets for those years) and in 8 out of 10 years using a second measure (housing completions in those years against the annualised figure of houses required). The inspector in that other inquiry noted that on those two measures, the Council's record was one of under delivery (although the inspector in that case did not characterise the situation as one of "persistent" under delivery). The inspector in the present case also noted that, in the 1991 to 2011 Structure Plan period, there had been a shortfall of 89 houses as against the identified requirements for that 20 year period.

26. The inspector's conclusions on this issue were, effectively, summarised at paragraphs 14.19 to 14.24 in the following terms:

> "14.19 Before moving on to consider housing supply, it is necessary to have regard to the second bullet point at paragraph 47 of the Framework. This explains that local planning authorities should not only be able to identify sufficient sites to provide five years worth of housing against their housing requirements, but also an additional buffer of 5%, to ensure choice and competition in the market for land. It goes on to state that where there has been a record of persistant under delivery of housing, this buffer should be increased to 20%.
>
> 14.20 "Persistent under delivery" is not further defined in the Framework, or elsewhere. In an appeal decision concerning Sellars Farm in Stroud, the Inspector held that completions over the past five years were the most relevant to a consideration of the Council's delivery record. On the basis that the Framework requires the assessment of future housing delivery to look forward five years, looking back five years to assess the record of past delivery, seems to me a reasonable approach. The Inspector in that case concluded that a total shortfall of around 360 dwellings, during a period affected by recession, did not amount to a record of persistent under delivery. I note CDC's contention that it has a better performance record than that, in terms of its shortfall over the past five years.
>
> 14.21 My attention was also drawn to an appeal decision at Siddington, of particular relevance since it is within the Cotswold District. The Inspector noted that there was under delivery in 7 out of the last 10 years, with an identified shortfall of 89 dwellings over the period 1991-2012; and that in terms of housing completions, the target has not been met for eight out of the past ten years. She went on to state that the difficulties with housing delivery in the District have extended to the period well before the current economic downturn, and that on two measures looking back over the past 10 years, the

> Council's record is one of under delivery. The Council has not here put forward any evidence that contradicts those findings, and I have no reason to doubt their accuracy.
>
> 14.22 Turning to the evidence presented in this current case, the Council and the appellant have both adopted the approach of measuring past completions against the annualised Structure Plan requirement. Last year saw 538 housing completions, which provided some compensation for the fact that in each of the four preceding years delivery had fallen short of the requirement. It was short by a very wide margin in 2009/2010, which saw only 177 completions. Since the Structure Plan requirement is itself an average annual target, I consider it reasonable to allow for some fluctuations above and below that figure, by looking at the average annual completions over the last five years. On that basis the Council's completions rate, at 291 dwellings per year, also falls short of its own housing requirement.
>
> 14.23 A further consideration is that it would not be fair, in the context of assessing the Council's record of delivering housing, simply to ignore the fact that delivery here is being measured against a housing requirement that was artificially low; being based (as I have discussed at length above) on projections that were out of date. That being the case, the resulting shortfall in housing delivery will in real terms have been considerably greater than that calculated by measuring completions against the Structure Plan requirement.
>
> 14.24 Taking all of this into account, I conclude that there has been persistent under-delivery of housing in the Cotswold district, and so an additional buffer of 20% should be added. This increases the five year housing requirement figure derived from the draft RSSW to 2,426 dwellings over the next five years."

27. Put shortly, the inspector looked at a variety of time frames in considering if there had been a record of under delivery. She considered delivery against the figures provided for in the Structure Plan. On a 5 year basis, there was under delivery in 4 out of the 5 years. On a 10 year basis, there was a shortfall in 7 out of 10 years using one measure and 8 out of 10 years using a second measure. Looking at the plan period as a whole, there was a short fall on the Structure Plan figure of 89. Furthermore, the inspector considered that the under delivery against the Structure Plan figures underestimated the extent to which there had been a shortfall in meeting the real requirements for housing during the Structure Plan period as that Plan itself understated the need. The inspector had already noted that the Structure Plan figures were based on 1996 projections whereas the figures in the draft regional strategy had been published in 2008 and the other projections were the 2010 projections.

28. In the circumstances, therefore, the inspector took the lowest likely figure of housing requirements of 2,022 houses and added 20% (rather than the 5% otherwise provided

for in paragraph 49 of the Framework). That provided a housing requirement for the next five years of 2,426 houses.

29. The inspector then considered the supply of housing sites that the Council could demonstrate existed. On the evidence in the Highfield inquiry, the Council had sufficient sites to deliver 1,711 houses over the next five years. That amounted to a very serious shortfall. The inspector noted that the evidence in the Berrells Road inquiry was that the Council could provide sites for 1,828 houses (rather than 1,711) but the Inspector did not consider that that difference materially altered the conclusion that there would be a very serious shortfall.

30. The inspector then worked through the consequences of her conclusion that there was not a five year supply of housing land. Paragraph 49 of the Framework meant that policies relevant to the supply of housing should not be considered up to date. Thus Policy 19 of the Local Plan, so far as it sought to restrict housing outside existing development boundaries, was to be considered out of date. Further, the serious shortfall in the supply of housing land was a material consideration that weighed heavily in favour of allowing the proposed development (see paragraphs 14.43 and 14.46 of the inspector's report). The inspector then considered a number of other matters, including the effect of the proposed development of the AONB and paragraphs 115 and 116 of the Framework (which are set out in paragraphs 14 and 15 above). The inspector noted that there was a pressing need for the houses proposed and there was very limited scope to provide residential development on sites not within the AONB. The inspector concluded at paragraph 14.69:

> "While I consider that the proposed development would not harm the setting of the historic town of Tetbury, I find that it would detract from the significance of Highfield Farmhouse, a designated heritage asset. It would also harm the AONB through replacing open fields with built development, thereby resulting in the loss of some of the natural beauty of the landscape. But importantly, in terms of the harm that would be caused to the AONB, I have not been provided with any evidence to suggest that there is anything other than very limited scope indeed to provide housing within the District on sites that are not part of the AONB. Moreover, there is a clear and pressing need for more housing; locally, in terms of the severe shortfall that currently exists in the Cotswold District, and nationally, in terms of the need to get the economy growing. In my view, these amount to exceptional circumstances, where permitting the proposed development can reasonably be considered to meet the wider "public interest", in the terms of the framework."

31. The inspector recommended that the appeal be allowed and that outline planning permission be granted subject to certain specified conditions.

32. On 9 November 2012, the same inspector submitted a report on the Berrells Road application. That, too, is a thorough, careful consideration of the evidence in that appeal. The analysis of the five year housing requirement and the available supply of housing land is in materially identical terms to the Highfield report (save for one

paragraph dealing with the relevance of the fact that there was an economic recession during part of the period of the Structure Plan, a point which I deal with below). The inspector considered the impact on the AONB and paragraph 115 of the Framework (paragraph 116 was not applicable as the Berrells Road appeal does not involve major development within the meaning of that paragraph). Again, the inspector recommended allowing the appeal and the grant of outline planning permission subject to certain specified conditions.

33. The two reports were then considered by the Secretary of State. By letters dated 13 February 2013, the Secretary of State in each case accepted the reasoning and the recommendations of the inspector. He allowed the appeals and granted outline planning permission subject to conditions.

34. After the inspector had submitted her reports in the Highfield and Berrells Road appeals, but before the Secretary of State had issued his decision, another inspector made a decision allowing an appeal in relation to another refusal of planning permission. That appeal concerned a refusal by the Council to grant permission to Kemble Farms Ltd. for residential development comprising up to 50 dwellings. That related to a site in Cirencester, not Tetbury (as was the case in Highfield and Berrells Road). The Kemble site was not in an AONB. Under paragraph 1 of Schedule 6 of the 1990 Act, regulations may be made prescribing classes of appeals under section 78 of the 1990 Act which may be determined by a person appointed by the Secretary of State. This appeal was one such case. The inspector in the Kemble appeal was therefore appointed to determine the appeal, not merely to report and make recommendations to the Secretary of State.

35. By a decision dated 9 January 2013, the inspector allowed the appeal in the Kemble appeal and granted planning permission. As the appeal involved an application for planning permission for residential permission, the Framework was a material consideration and questions of housing requirement for the next five years and the available supply of housing land were considered. The Council adopted the same approach as it had adopted in the Highfield and Berrells Road inquiries, namely that the Structure Plan figures for 1991 to 2011, together with the shortfall during that period, should be used as the basis for calculating present housing requirements. The inspector in Kemble did not have available to him the reports in Highfield or Berrells Road as they had been submitted to the Secretary of State but not published. Nevertheless, his conclusions and reasoning on all bar one relevant issue relating to housing was broadly similar to the inspector is in those cases. He considered that the evidence showed that housing need in the Council's district was likely to be significantly higher than had been historically catered for by the Structure Plan. He considered that "any realistic needs based requirement is certainly going to be higher than the structure plan figure and likely to be at least at or above the draft revised RSS figure of 345 dwellings per annum". He was not persuaded that it was necessary to add a 20% buffer and therefore added the 5% buffer referred to in the second bullet point of paragraph 47 of the Framework. On that basis, the inspector considered that the Council still could not demonstrate that there was a five-year supply of housing land to meet that housing requirement. The inspector therefore allowed the appeal and granted planning permission. The inspector's reasoning on whether it was necessary to add a 20%, rather than a 5%, buffer is at paragraphs 104 to 106 which are in the following terms:

"104. A residual requirement left over from the structure period demonstrates that the lesser figure of 307.5 which took on board the principle of exporting housing need was not met, albeit the annual average delivery over the last four years was 312. That figure has been distorted by an exceptional delivery of 538 completions in 2011/2012 notwithstanding the economic downturn but in 2008/2009 the number of completions was 303. Following the general approach of the Inspector in the Sellars Farm case, I would be reluctant in the circumstances to conclude persistent under-delivery on those most recent figures, bearing in mind those economic difficulties. Moreover, while I note from the council's housing trajectory that although there were only 209 completions in 2007/2008, the equivalent figure for 2006/07 was 316 and in that year the monitoring of the trajectory indicated 8.5 dwellings above the cumulative requirement to have been achieved. Excluding the most recent and exceptional delivery figure, the annual average for the period would be 247 completions per annum (1,235 dwellings over 5 years). However, the council's 5 year supply calculation in CD 11 and the evidence of Mr Lewis, at paragraph 2.20, indicates that over the structure plan period as a whole (1991-2011) the accumulated shortfall would be only 89 dwellings.

105. In considering whether there has been a record of persistent under delivery, it seems to me appropriate to consider adopted policy applying at the time (i.e. the structure plan requirement up to 2011), rather than speculations about future policy requirements, and to consider also the broader outcome rather than to focus on particular years where the annualised requirement has either not been met or has been exceeded. It seems to me that, notwithstanding the recent economic difficulties, the overall delivery has been sufficiently close to the structure plan requirement to avoid categorisation as a record of persistent under-delivery, as the appellant would have me conclude. The Council's *Residential Land Monitoring Statistics* (CD12) show graphically the degree of annual fluctuation over the long run. I am not persuaded that it is necessary to apply the 20% buffer that the Framework requires in circumstances of persistent under-delivery.

106. That conclusion, however, is based on a policy requirement that should, for the reasons I have given, now be regarded as defunct. I am not persuaded that the past is a reliable guide to the future. In the absence of a definitive current policy requirement, figure based on projected needs are more pertinent. It is clear that some of the projection bases used in the discussions on this matter would result in very significant shortfalls against the requirement to demonstrate a five year supply of deliverable sites and therefore the overall policy requirement in the context of objectively assessed needs must

> be resolved at the earliest opportunity if repeated disagreements at appeals over which figures to use are to be avoided."

36. In other words, the inspector focussed on the figures in the Structure Plan figures as that was the policy in force until 2011. He focussed on overall outcome and considered that the overall delivery (with a shortfall of 89 over the structure plan period as a whole) was "sufficiently close" to the Structure Plan requirement to "avoid categorisation as a record of persistent under-delivery". In the event, however, that conclusion did not prove determinative or critical to his reasoning as, taking the realistic likely housing requirement for the next five years (and adding 5% as a buffer), the Council were still well short of demonstrating that it had a five year supply of housing land and permission should be granted. Further, it is clear that he regarded the Structure Plan requirement as no longer a suitable indication of future needs. He also noted that, given that the requirements contained in certain of the projections would result in very significant shortfalls of available housing land, there would be repeated disagreements at appeals over which figures to use unless the policy requirement were resolved on the basis of objectively assessed needs

37. There were applications for costs by Hannick in the Berrells Road appeal and by the developer in the Kemble appeal. There was no application for costs in the Highfield appeal. The relevant ground of the application for present purposes was that the Council acted unreasonably, within the meaning of paragraph A12 of the annex to the Department for Communities and Local Government Circular 03/2009 on Costs Awards in Appeals and Other Planning Proceedings, by relying on the Structure Plan figures for calculating its five year housing requirement. In her report of 9 November 2012 on costs, the inspector in the Berrell Fields report recommended a partial award of costs. The inspector considered in detail the reasons why she considered that the Council had erred in seeking to use those figures rather than considering more up to date evidence. She concluded at paragraphs 56 and 57 that:

> "56. In summary, I consider that in the continued absence of any more recent Development Plan document setting out an updated figure, the housing requirement contained in the Structure Plan here remains, as it did in the Moreton in Marsh appeal, a useful starting point for considering the district's housing supply position. But it is not reasonable to rely on that requirement alone, updated solely to incorporate previous shortfall in provision. As explained in the Framework, in its predecessor PPS 3, and in my report on the Moreton in Marsh appeal, it is necessary also to take account of up-to-date evidence provided by recent forecasts and projections. The evidence of all of the more recent forecasts and projections suggests that the districts housing requirement is higher than that derived by projecting forward the Structure Plan requirement. When assessed against the requirement figures derived from each of these more recent projections, the Council does not have a sufficient supply of sites to provide five years worth of housing.

> 57. I therefore conclude that it was unreasonable for the Council to maintain that it could demonstrate a five year supply of deliverable housing sites. ”

38. The inspector considered that a considerable amount of the evidence prepared by Hannick, and of the time spent at the inquiry, was directly related to the Council's contentions about the supply of housing land. To that extent Hannick had incurred unnecessary expense and a partial award of costs was therefore justified. The Secretary of State accepted that recommendation in a decision letter of 25 March 2013 dealing with costs.

39. On 9 January 2013, the inspector in the Kemble appeal gave his decision on costs. The basis of the application was, again, in part that the Council acted unreasonably in persisting in relying on out of date figures in the Structure Plan in calculating its housing requirement. At paragraph 36, the inspector said:

> "The choice of one figure rather than another by the Cotswold District Council is not so much "defiance" of the Secretary of State as recognition that, at present, there is no figure being imposed pending the Council's resolution of an adequately tested policy figure upon which to base the necessary calculation of five year supply. Councils have the facility to decide for themselves, albeit on the expectation of deploying a defensible basis. Using the structure plan as a starting point is not wholly indefensible, notwithstanding the recent appeal decisions, and I have therefore concluded that it is misguided rather than inherently unreasonable. I am not obliged to follow other Inspectors if the evidence is sufficiently persuasive not to, but in this case it was not."

40. At paragraphs 45 and 46, he concluded that:

> "45. In view of all the above considerations, the circumstances of the appeal and having regard to the intentions of the Circular taken as a whole, I consider the balance to be marginally in favour, on this occasion, of the council's conduct in relation to this matter in these appeal proceedings being considered not unreasonable in the sense intended by the advice contained within it.
>
> 46. For the above reasons, I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has not been demonstrated and I therefore conclude that an award of costs is not justified."

## THE ISSUES

41. Although the issues have been formulated differently in the grounds of claim in the two applications, and in the claim for judicial review in the costs decision and the skeleton argument for the Council, the following issues arise:

(1) Did the inspector, and therefore the Secretary of State, misconstrue paragraph 47 of the Framework and, in particular the meaning of "persistent under delivery of housing " in the Highfields and Berrells Road appeals?

(2) Did the Secretary of State in reaching his decisions in the Highfield and the Berrells Road appeals, fail to have regard to a material consideration, namely the reasoning of the inspector in the Kemble appeal?

(3) Did the Secretary of State err (a) in failing to have regard to the letter from the Chief Planning Officer dated 6 July 2012 which indicated that local planning authorities were entitled to use what was decribed as "option 1" figures or (b) in his approach to footnote 11 to the Framework in the assessment of deliverable sites or (c) in disregarding Local Plan Policy 19 or (d), in relation to Highfield, in his interpretation or application of paragraph 116 of the Framework?

(4) Was the decision of the Secretary of State to accept the recommendation of the inspector to make a partial award of costs in the Berrells Road appeal irrational?

(5) Did the Secretary of State in reaching his decision to make a partial award of costs in Berrells Road appeal, fail to have regard to a material consideration, namely the decision of the inspector on costs in the Kemble appeal?

**DISCUSSION**

The Proper Interpretation of Paragraph 47 of the Framework

42. The first question is whether the Defendant misdirected himself as to the meaning of "persistent under delivery of housing" in paragraph 47 of the Framework. Miss Sheikh, for the Council, developed this ground by reference to four points in her skeleton argument. First, she contended that the Secretary of State only had regard to the last 5 years rather than the 20 year period of the Structure Plan which was in force for the period 1991 to 2011. Secondly, he did not assess delivery against the Structure Plan targets for the period when it was in force but treated the targets as being out of date and artificially low. Thirdly, he disregarded the economic difficulties of the last 5 years. Fourthly, it is said that the Secretary of State took no account of the overall progress in delivering housing rather than looking at the average for the year. In oral submissions, Miss Sheikh emphasised that paragraph 47 of the Framework talks of "a record" of persistent under delivery of housing. That, Miss Sheikh submits, requires a measurement against some identifiable target, namely the Structure Plan figures, not against speculative figures for need. Further, it was submitted that persistent connoted a continued unbroken record.

43. It is now well established that the Secretary of State would be required to proceed upon a proper interpretation of the relevant planning policies and, for present purposes, the Framework. As the Supreme Court held at paragraph 18 in *Tesco Stores Ltd. v Dundee Council (Asda Stores Ltd. and another intervening)* [2012] UKSC 13 in relation to development plans:

> "….. policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context".

44. It is, however, correct to note that the Supreme Court recognised at paragraph 19 that:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse ( *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 , 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

45. In the present case, there is a need to interpret paragraph 47 of the Framework correctly. That will involve determining, the correct approach to identifying a record of persistent under delivery of housing. That will involve, for example, consideration of the meaning of "persistent". The paragraph will also involve questions of judgment for the decision-maker in applying the concepts to a given set of facts in order to determine whether or not a particular degree of under delivery of housing falls within paragraph 47 and so triggers the requirement to bring forward an extra amount of housing to meet past shortfalls.

46. Paragraph 47 is to be interpreted, and applied, having regard to its purpose and context. The purpose of the Framework is to set out the Government's view of what constitutes sustainable development in England. That includes providing the supply of housing required to meet the needs of present and future generations: see paragraphs 6 and 7 of the Framework. Section 6 of the Framework is concerned with the government's view of how local planning authorities should deliver appropriate housing. The immediate context of paragraph 47 of the Framework is therefore concerned with what local planning authorities should do to boost significantly the supply of housing, as appears from the opening words of paragraph 47. The first bullet point is concerned with ensuring that Local Plans meet the full, objectively assessed needs for market and affordable housing. That is, it is dealing with the assessment of need for the period after the end of the Structure Plan and during the currency of the next Local Plan (to cover an appropriate time scale, preferably a period of 15 years: see paragraph 157 of the Framework). The second bullet point is concerned to ensure that local planning authorities identify a "supply of specific deliverable sites sufficient to provide five years worth of housing" with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and

competition in the market. 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.

47. In the context of paragraph 47, the reference to "persistent" under delivery of housing is a reference to a state of affairs, under delivery of housing, which has continued over time. A decision-maker would need to have regard to a reasonable period of time measured over years rather than looking at one particular point, to ensure that the situation was one of persistent under delivery rather than a temporary or short lived fluctuation. The precise period of time would be a matter for the judgment of the decision-maker. There has to be a "record" of under delivery of housing. That points towards assessing previous performance (i.e. the performance in the period prior to the expiry of the Structure Plan and before the new Local Plan should have come into force). The need to establish a record of under delivery indicates there will need to be some measure of what the housing requirements were, and then a record of a failure to deliver that amount of housing persistently, i.e. a failure continuing over a relevant period of time. A decision-maker would be entitled to take the figures in the previous Structure Plan as a measurement of what the housing requirement was in order to assess whether there has been a record of persistent under delivery of housing. However, the requirement is that there has been a record of persistent under delivery of housing (not a failure to meet the targets set out in the Structure Plan). It would, in my judgment, be open to a decision maker to identify an appropriate measure of housing needs either separately from the Structure Plan or as a means of reinforcing conclusions drawn on the basis of the Structure Plan.

48. Against that background, I turn to the approach to paragraph 47 of the Framework taken by the inspector, and adopted by the Secretary of State, in the Highfield and the Berrells Road appeals and the criticism of that approach. The inspector considered the figures in the Structure Plan. The inspector considered that an assessment over five years was a reasonable period of time. As she pointed out, the Framework was looking forward for five years and, therefore, looking back at delivery over a period of five years was reasonable. As the inspector pointed out, the Structure Plan itself contemplated annual targets and it was reasonable to allow for some fluctuations above and below that figure. That approach is, in my judgment, consistent with the Framework. On that basis, and annualising the figures for 5 years, 291 dwellings a year had been completed and the annual target was 307.5 dwellings. There had been a shortfall in meeting the housing requirement. In any event, the inspector also considered the period over 10 years and noted that there had been a failure to meet the requirement in 7 out of 10, or 8 out of 10 years (using two different measures). The inspector also considered that that record was a record of under delivery. The inspector considered the position in relation to the entire 20 year period of the Structure Plan and there was a shortfall of 89 dwellings. In other words, by reference to a five year, 10 year and 20 year period, the number of houses provided fell short of the Council's housing requirements in those periods.

49. The inspector also bore in mind that measuring delivery against the Structure Plan requirements meant measuring delivery against a requirement that was already artificially low. That view was based on the fact that the Structure Plan was based on 1996 projections whereas more recent projections prepared during that period

indicated that the housing requirement exceeds the requirement provided for in the Structure Plan. In my judgment, the inspector was entitled to take that factor into account in deciding whether there had been a record of persistent under delivery of housing. The purpose underlying paragraph 47 is to ensure that there is adequate housing for the future. The second bullet point is dealing with the bringing forward of housing to an earlier period in the Local Plan if there has been a record of persistent under delivery in earlier periods. In assessing housing requirements, an inspector was entitled to bear in mind that there has been under delivery measured against a Structure Plan which itself understates the need for housing and to treat that fact as reinforcing her conclusion that there has been a record of persistent under delivery of housing, and that an additional 20% should be added, to be brought forward from later in the plan period. The approach taken by the inspector, and approved by the Secretary of State, was in my judgment based on a proper interpretation of paragraph 47 of the Framework.

50. Against that background, the claim that the Defendant erred in his interpretation of persistent under delivery is not, in my judgment, made out. First, the Defendant was entitled, in principle, to have regard to a five year period for assessing if there had been a record of persistent under delivery. But, in any event, the decision-maker had regard to the 20 year period of the Structure Plan and a 10 year period. On all measures, there had been under delivery and the decision-maker was entitled to characterise that as a record of persistent under delivery. Secondly, the Defendant did assess delivery against the Structure Plan requirements for the period when it was in force and was entitled to take into account that not only had there been under delivery as compared with the Structure Plan figures but that those figures understated the actual housing requirement. Thirdly, there is no basis for the claim that the Defendant took no account of what is described as the overall progress in delivering housing rather than looking at the average for each year. The decision-maker was seeking to identify whether there had been a record of persistent under delivery. In doing so, the decision-maker was entitled to test the figures over a reasonable period of time by annualising the figures for that period. But in any event, the decision-maker here considered the entire period of the Structure Plan.

51. Finally, in my judgment, there is no basis for concluding that the decision-maker disregarded the economic difficulties of the last five years. The basis for this criticism is primarily paragraph 13.25 of the inspector's report in the Berrells Road appeal. The inspector had set out her reasoning in paragraphs 13.20 to 13.24 in terms which are materially identical to paragraphs 14.21 to 14.24 in the Highfield appeal which are set out above at paragraph 26. Paragraphs 13.25 and 13.26 of the reporting Berrells Road then says this:

> "13.25 As to whether or not the difficulties of delivering housing during a period of recession should have any bearing on assessing whether a 20% buffer is needed, the appellant rightly points out that "economic circumstances" form no part of national policy, as set out in paragraph 47 of the framework. Similarly, while Councils have a responsibility to ensure that there is a sufficient supply of deliverable sites available, they have little control over actual delivery of the housing for which they have granted planning permission. It may therefore be

> perceived as somewhat unfair to require a 20% buffer in circumstances where a Council has done all it can to provide sufficient deliverable sites, and the under-delivery of housing in its area is demonstrably due to the state of the market, rather than an inadequate land supply.
>
> 13.26 Be that as it may, my interpretation of the evidence provided in the current case is that it provides a strong indication, for the reasons set out above, that there has been persistent under-delivery of housing in the Cotswold district. An additional buffer of 20% should therefore be added. This increases the five year housing requirement figure derived from the draft RSSW to 2,426 dwellings over the next five years."

52. In my judgment, the inspector was well aware of the argument that the economic difficulties in the five year period included a period of economic difficulties when it is to be expected that fewer houses might be built. However, the inspector considered that "Be that as it may" the other evidence amounted to a strong indication of a record of persistent under delivery. That record included, as the inspector noted, the 10 ten year period, which extended to a period well before the current economic down turn. In those circumstances, the inspector, and the Secretary of State were aware of the claims in relation to the economic downturn and did not, as the Council's skeleton argument contends at paragraph 47(c) disregard them. Rather, for the reasons given in the report, the inspector did not consider that that fact altered the position in any event and did not have to decide, ultimately, whether or not adjustments needed to be made to reflect the economic down turn.

The Duty to Have Regard to Material Considerations

53. After the inspector had submitted her reports in the Highfield, and the Berrells Road, appeal but before the Secretary of State gave his decision in those appeals, the inspector published his decision in the Kemble appeal. Miss Sheikh for the Council contends that the decision of the inspector in the Kemble appeal was a material consideration which the Secretary of State was obliged to take into account before reaching his decision. The inspector in the Kemble appeal was considering the meaning and application of paragraph 47 of the Framework in the context of this Council's requirement for housing and whether there had been a record of persistent under delivery of housing on its part. A previous decision of an inspector on that issue, it is said, is a material consideration. The Council, who were a party to the Kemble appeal did not draw the Secretary of State's attention to the Kemble decision. Their evidence to this court does not explain why, if they considered the reasoning of the inspector was material, they did not draw it to the Secretary of State's attention. Miss Sheikh, however, says that that does not matter as there is a public interest in ensuring consistency between decisions as is recognised, for example, in *London Borough of Hounslow v Secretary of State for Communities and Local Government and Kapoor* [2009] EWHC 1055.

54. In the present case, Miss Sheikh submitted that the decision of the inspector in the Kemble appeal was concerned with the interpretation of policy and, in particular, the assessment of housing need. It is submitted that the Secretary of State was disagreeing with a critical part of the reasoning of the inspector (the need to add a 20%, rather

than a 5%, buffer as there was a record of persistent under delivery of housing). Such a decision is, submits Miss Sheikh, a material consideration to which regard must be paid and, if the Secretary of State was to depart from it, he had to give his reasons for doing. Miss Sheikh relied on a number of authorities including, in particular, the decisions of the Court of Appeal in *North Wiltshire District Council v Secretary of State for the Environment and Clover* ( 1992) 5 P & C.R. 137 at page 145 and *The Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303. The Secretary of State's decisions in the Highfield and the Berrells Road appeals were, it is submitted, unlawful because of the unexplained inconsistency between those decisions and the earlier inspector's decision in the Kemble appeal.

55. As a matter of public law, a public body must have regard to material considerations. That duty arises, broadly, in two situations. First, there are those considerations which are so obviously material to a decision that the decision-maker must take them into account (whether or not any particular person draws them to the decision-maker's attention) in reaching a decision. These may be matters that statute expressly or impliedly requires a decision maker to consider. They also include, as Cooke J. expressed it in *CREEDNZ Inc v Governor General* [1981 1 N.Z.L.R. 172 at page 183:

> "matters so obviously material to a decision on a particular project that any thing short of direct consideration of them by the ministers … would not be in accordance with the Act."

56. The question of whether a consideration is a material consideration is a matter of law for the court to determine. The question of the weight, if any, to attach to a material consideration is a matter for the decision-maker: see *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759 at page 780E-H.

57. Secondly, there are considerations which may be potentially relevant to a decision and, if they are drawn to the attention of the decision-maker, the decision-maker will have to consider those matters and decide what weight, if any, to give to those considerations.

58. The general position is reflected, broadly, in the provisions of section 70 of the 1990 Act. In relation to the first group of considerations, some considerations are relevant considerations which must be taken into account because statute expressly provides for that. In the planning context, an example is the development plan as section 70(2)(a) of 1990 Act expressly provides that the planning authority shall have regard to that (and indeed, determinations must be made in accordance with the development plan unless material considerations indicate otherwise: section 38(6) of the 2004 Act). Furthermore, where considerations are so obviously relevant to planning decisions in England then a planning authority must have regard to them, whether specifically referred to or not. An example is a relevant provision of the Framework itself. That sets out the government's planning policies for England and is a material consideration.

59. In relation to the second group of considerations, a number of other matters are potentially material to a planning decision. If they are drawn to the attention of the decision-maker, and if as a matter of law, they are relevant considerations to the planning decision, the decision-maker will have to have regard to them (as a matter of

general public law, as reflected in the specific obligation imposed by section 70(2)(c) of the 1990 Act). The weight, if any, to be given to the consideration will be a matter for the decision-maker. If such considerations are not drawn to the decision-maker's attention, however, he will not have acted unlawfully if he does not have regard to them.

60. In general terms, previous decisions of inspectors may, depending on the particular circumstances, be capable of being a material planning consideration. If such a decision is drawn to the attention of the decision-maker, the decision-maker will have to have regard to such a decision (assuming that it is material). The decision-maker is entitled to depart from an earlier decision but before doing so the decision-maker should have regard to the importance of consistency and give the reasons for departure from that earlier decision: see *North Wiltshire District Council v the Secretary of State for the Environment and Clover* [(1992) 675 P & C.R. 138 at page 145 and see *Dunster Properties Limited v First Secretary of State* [2007] EWCA Civ 236.

61. In general terms, however, the Secretary of State (or an inspector) is not obliged to take into account previous planning decisions if they are not draw to his attention. The Secretary of State (or an inspector) is not required to make his own inquiries in order to establish if there is a previous decision which may be potentially relevant. The general position, in my judgment, is set out in *Granchester Retail Parks plc v Secretary of State for Transport, Local Government and the Regions and Luton Borough Council* [2003] EWHC 92 (Admin.) at paragraphs 26 to 28:

> "26. It is quite correct that the Matalan decision, if it had been brought to the inspector's attention, would have been a relevant consideration. It did not create any kind of binding precendent, but nevertheless the inspector would have taken it into account if he had known about it. The fatal flaw in this limb of the claimant's case, however, is that the Matalan decision was not drawn to the inspector's attention until after he had given his own decision. As a general principle a decision-maker does not err in law if he fails to take into account relevant matters which are not drawn to his attention and of which he is unaware. There is abundant authority for the proposition that a planning inspector's duty to take into account relevant decisions of his colleagues only extends to decisions drawn to his attention: see Rockhold ltd v Secretary of State for the Environment [1986] JPL 130 at 131; Barnet Meeting Room Trust v SOSE [1990] 3 PLR 21 at 28A to B; North Wiltshire DC v SOSE [1992] JPL 955 at 960; R v SOSE, Chiltern DC, ex parte David Baber [1996] JPL 1034 at 1037 to 1038, and 1040.
>
> 27. In my view the earlier decision of Hollis v Secretary of State for the Environment [1982] P&CR 351, upon which Mr Kolinsky relies, does not support the opposite conclusion. Mr Kolinsky submitted that the duty of planning officers to be consistent with one another was an onerous one. Accordingly it was their duty to take into account relevant decisions of colleagues, whether or not such decisions were cited in

> argument. This duty could be performed by carrying out a computer check of the database of all inspectors' decisions.
>
> 28. To my mind this is an unsound argument. It flies in the face of both principle and authority, as previously mentioned. Furthermore, if correct, the proposition of law advanced by Mr Kolinsky would impose a wholly intolerable burden upon the planning inspectorate. It should be borne in mind that there are some 400 planning inspectors, all engaged upon producing decisions. It is the duty of an inspector to decide cases, not to carry out extensive research on behalf of the parties."

That general approach is also reflected in the decision of *London Borough of Hounslow v Secretary of State for Communities and Local Government and Kapoor* [2009] EWHC 1055 at paragraph 18.

62. There may be cases where there is a dispute as to whether, in fact, the existence of a previous planning decision has been sufficiently drawn to the attention of the decision-maker. In the *North Wiltshire* case, for example, the issues concerned whether a particular site was outside the physical limits of the village of Notton in which certain planning policies applied. There was a decision on a planning appeal, taken in the early 1980s, that the site was outside the physical limits of the site. A later application was made for planning permission and was refused. In their response to the appeal, the Council referred to the earlier decision in their written submissions giving a description of the earlier planning history of the site and included a copy of the decision with its submissions. The Court of Appeal held that the inspector did have a duty to have regard to the earlier decision as it was before the inspector and was relevant as the earlier decision dealt with an identical proposal albeit for a slighter large site where the issue was the same. Similarly, in the *Hounslow* case, there was an appeal against an enforcement notice and one of the grounds was that planning permission should be granted. The appeal notice referred an earlier planning appeal decision of 2006. The Council had, erroneously, said there had been no previous appeal against the decision not to grant planning. It was the fact that there had been a reference to the earlier decision that made the "crucial difference" and caused the High Court in that case to take the view that the general position (that there was no obligation on an inspector to search for other decisions) did not apply: see *London Borough of Hounslow v Secretary of State for Communities and Local Government and Kapoor* [2009] EWHC 1055 at paragraph 19.

63. Here, the attention of the Secretary of State was not drawn to the earlier decision of the inspector in the Kemble decision. The general position therefore applied, and, in my judgment, the Secretary of State was not required to undertake inquiries to see if there had been any decision of an inspector indicating how paragraph 47 of the Framework should be interpreted or how housing requirements in the Council's area had been assessed.

64. Miss Sheikh relies heavily upon the decision in the *Bath Society* case as establishing a different approach, namely that where a previous decision is a material consideration, failure to have regard to that decision is unlawful. The only issue, thereafter, is the discretion of the court to refuse an application to quash. Whether a party had drawn a

previous decision to the attention of the decision-maker was only a factor relevant to that discretion.

65. The appeal site in the *Bath Society* case comprised a field that the local plan showed as allocated for residential use. There was an objection and the Bath Society said the field should be shown in the local plan as open space. In April 1988, there was an inquiry into that objection. The inspector reported in June 1988 and recommended the local plan should be amended to show the field as open space. In 1987 an application had been made for planning permission to build a block of flats and that was refused. There was an appeal and an inquiry was held in May 1988. The inspector reported in July 1988 and recommended allowing the appeal and granting permission for the erection of a block of flats. He referred to the fact that there had been an objection relating to the field but did not give the details. On 25 November 1988, the Secretary of State issued his decision allowing the appeal and granting planning permission for the erection of a block of flats. On 20 December 1988, the local authority resolved to accept the recommendations of the inspector on the local plan and modified the local plan to show the field as open space.

66. The Court of Appeal held that the recommendation that the field be included as open space in the local plan was a material consideration. It was a recommendation which, if accepted , would lead to the local plan containing an allocation for the site as open space and the proposed residential development would be totally inconsistent with that recommendation. Consequently, the Court of Appeal considered that the recommendation was a matter which was so obviously material that the Secretary of State had to have regard to it. In other words, the recommendation fell within the first category of considerations, those to which the decision-maker must have regard whether or not they are drawn to the decision-maker's attention: see [1991] 1 W.L.R. 1303 at page 1211B-E. However, quashing the decision was still a matter of discretion for the court. In that regard, the matter had not been drawn to the Secretary of State's attention but, on the other hand, it was referred to in the inspector's report on the appeal and the Secretary of State could easily have considered the local plan inspector's report. In those circumstances, and on balance, the Court of Appeal quashed the decision: see [1991] 1 W.L.R. 1303 at p. 1311F-G and 1313A- D.

67. The present case is different. The Secretary of State would only have a duty to have regard to the inspector's report in the Kemble appeal if it were drawn to his attention. It is not a consideration which is so obviously material that the Secretary of State is obliged to obtain it for the reasons given above. The Secretary of State did not act unlawfully in not having regard to the decision. In *The Bath Society* case, the local plan inspector's recommendation was so obviously material that it was a consideration which the Secretary of State had to consider (whether or not it was drawn to his attention). By failing to have regard to it, the Secretary of State acted unlawfully in that case and the question thereafter was whether the court should, as a matter of discretion decline to quash the unlawful decision.

68. For those reasons, in my judgment the Secretary of State did not act unlawfully in the Highfield or the Berrells Road appeal by not having regard to the report of the inspector in the Kemble appeal as it had not been drawn to his attention.

69. If, contrary to that conclusion, the Secretary of State had acted unlawfully by failing to have regard to the inspector report in the Kemble appeal, then, as a matter of

discretion, I would decline to quash the Highfield and the Berrells Road decisions for the following reasons. The inspector in the Kemble Road appeal decided that planning permission should be granted. He considered the housing requirement for the Council's district and considered that the Council had not demonstrated that it had a five year supply of housing land to meet those needs. In reaching that conclusion in relation to the Kemble appeal, it was not necessary for him to apply the 20% buffer. In the Highfield and Berrells Road appeals, the inspector did consider it appropriate to apply the 20%. Most significantly, all the facts and reasoning considered by the inspector in the Kemble appeals were known and considered by the inspector in the Highfield and Berrells Road appeals. The reports in those appeals make it clear why the inspector reached a different conclusion on those matters from the inspector in the Kemble appeal. She considered that looking back five years and considering the Structure Plan figures for that period was reasonable and demonstrated that there had been a shortfall. She considered the fact that there had been an economic downturn but noted that the under delivery had been occurring over the last 10 years and even before the down turn began. She considered the shortfall over the entirety of the Structure Plan period. Significantly, she considered that the Structure Plan itself understated the housing requirements. Where, therefore, there had been a consistent failure to meet the Structure Plan figures for housing, and where those figures in fact understated the housing need, she was satisfied for the reasons she gave that there had been a record of persistent under delivery of housing. One purpose of requiring one inspector in a planning appeal to consider earlier planning decisions is to ensure consistency so that like cases are treated alike but subject to the fact that an inspector is free to disagree with the judgment of another provided that the later inspector gives reasons for the difference in approach: see *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & C.R. 137 at page 145. In the present case, the reasons for the inspector taking a different approach in the Highfield and the Berrells Road appeals appear clearly from the inspector's reports. The reasons are lawful reasons. There is, in substance, no unexplained inconsistency between the approach taken in the Kemble appeal and that taken in the Highfield and Berrells Road appeals. In the circumstances, therefore, even if there had been an unlawful failure to have regard to the inspector's decision, it would not be appropriate to quash the Highfield or the Berrells Road decision. I would, therefore, have declined, in any event, as a matter of discretion to quash those decisions on this ground.

The Other Challenges to the Highfield and Berrells Road Decisions.

70. The other grounds of challenge to these two decisions can be dealt with shortly. Firstly, the Secretary of State did not err in failing to have regard to the letter of the Chief Planning Officer dated 6 July 2012. That letter is addressed to planning authorities and says that they may replace the regional strategy targets with what are referred to as "option 1 numbers" if "that is the right thing to do for your area" (see paragraph 12 of the letter). The inspector considered the Council's preference for the use of Option 1 figures but rejected that as the figures that emerged during the draft regional strategy process had been tested at an examination in public and those figures were likely to be a better reflection of the Council's housing requirements: see paragraph 14.9 of the report in the Highfield appeal.

71. Secondly, the inspector did not err in her interpretation and application of footnote 11 to paragraph 47 of the Framework. That deals with whether there is a supply of

specific deliverable sites sufficient to provide five years housing. The footnote says that sites with planning permission should be considered deliverable until permission expires unless there is clear evidence that schemes will not implemented. The inspector specifically referred to footnote 11. She noted that the Council had agreed that planning permissions would lapse before implementation in relation to small sites at a rate of 15 a year based on Council records. The inspector inferred that a lapse rate would apply in relation to large sites too. In the absence of other evidence, she concluded that the application of a 10% lapse rate was reasonable. That was essentially a matter for judgment of the inspector (whose reasoning the Secretary of State adopted). She directed herself to the terms of the footnote. She had evidence about the lapse rate for certain sites and drew reasonable conclusions from that evidence and the problems that arise in relation to construction and funding. See paragraph 14.25 of the Highfield decision.

72. Thirdly, the Secretary of State did not err in disregarding Local Plan Policy 19. The second sentence of paragraph 49 of the Framework says that relevant policies for the supply of housing should not be considered to be up to date if the local planning authority cannot demonstrate a five year supply. Miss Sheikh submits that Local Plan 19 restricts development, including housing development, and so is not a housing policy for the purposes of paragraph 49 of the Framework. The short answer is that Local Plan Policy 19 is a policy relating to the supply of housing (amongst other developments). It restricts development, including housing, development. As the inspector correctly held, applying the Framework, Local Plan Policy 19 should be disapplied "to the extent" that it "seeks to restrict the supply of housing": see paragraph 14.44 of the report in the Highfields appeal".

73. Finally, the Council contends, in relation to Highfield, that the inspector (and hence the Secretary of State erred) in the interpretation or application of paragraph 116 of the Framework. That provides that planning permission should be refused for major development in the AONB except in exceptional circumstances and where it can be considered to be in the public interest the paragraph refers to certain matters that should be considered. The inspector expressly considered and referred to the terms of paragraph 116 of the Framework (see paragraph 14.47 of the report in the Highfield appeal). She considered the matters referred to in paragraph 116 such as "the need for the development". Her conclusion (accepted by the Secretary of State) at paragraph 14.69 of her report was that:

> "there is a clear and pressing need for more housing; locally in terms of the severe shortfall that currently exists in the Cotswold District … and, nationally, in terms of the need to get the economy growing… In my view, these amount to exceptional circumstances, where permitting the proposed development can reasonably be considered to meet the wider "public interest", in the terms of the Framework.

74. In those circumstances, the inspector considered paragraph 116 of the Framework. She correctly interpreted the paragraph and applied it to the facts. Her judgment on those matters was accepted by the Secretary of State. There was no misinterpretation or unlawful application of paragraph 116 of the Framework.

<u>The Costs Decision</u>

75. The inspector in the Berrells Road decision decided that the Council acted unreasonably within the meaning of paragraph A.12 of the annex to Circular 03/2009 to the extent that it maintained that it could demonstrate that it had a five year supply of land. She set out her reasons for that conclusion in her report on costs. She considered that the use of the Structure Plan figures for housing was a reasonable starting point but it was not reasonable to rely on that requirement alone as it was necessary to take account of up to date evidence and recent forecasts and projections (as appeared from planning documents and her own earlier decision in an appeal relating to Moreton in Marsh). The inspector in the Kemble appeal took the view that using the Structure Plan as a starting point "is not wholly indefensible" and he considered it as misguided rather than unreasonable (see paragraph 36 of the report on costs in the Kemble appeal). He considered the balance "to be marginally in favour" of not regarding the Council's behaviour on this point as unreasonable (see paragraph 45 of the report).

76. Miss Sheikh submits it is irrational for two different inspectors to reach two different conclusions on the question of whether it was unreasonable to maintain that there was a five year plan. In my judgment, it is not irrational. The assessment of whether behaviour is unreasonable is a question of judgment on which different inspectors can, rationally, reach different conclusions. The inspector in Berrells Road clearly took the view that, in the circumstances, relying on the Structure Plan and not using updated evidence was unreasonable. The inspector in the Kemble appeal thought "on balance" it was misguided rather than irrational. The fact that two inspectors took different views of the Council's behaviour (albeit only marginally) does not render either decision an irrational one. As Lord Hailsham L.C. recognised in *Re W* [1970 1 A.C. 682 at page 700C-F, two reasonable persons "can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable".

77. The Council also contends that the Secretary of State failed to have regard to a material consideration, namely the inspector's reports on costs in the Kemble Appeal. For the reasons given above, the Secretary of State was not, in my judgment, required to investigate whether there were other potentially relevant decisions about costs before reaching his judgment. The Council did not draw the report in the Kemble appeal to his attention. The Secretary of State did not therefore fail to have regard to a relevant consideration.

Conclusion

78. The decisions of the Secretary of State in the Highfield and the Berrells Road appeals are lawful. The inspector, and hence the Secretary of State who adopted her reasoning, correctly interpreted the relevant policy and reached conclusions that were open on the material available. The Secretary of State did not fail to have regard to a material consideration. The two applications to quash made pursuant to section 288 of the 1990 Act will therefore be dismissed. In relation to the decision on costs in Berrells road, I recognise that the points raised were arguable and grant permission to apply for judicial review. The decision of the Secretary of State to make a partial award of costs in that case is, however, lawful and the Secretary of State did not fail to have regard to a relevant consideration. The claim for judicial review is therefore dismissed.