Case No: C1/2015/0851

Neutral Citation Number: [2016] EWCA Civ 414
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE DOVE
[2015] EWHC 793 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 April 2016

Before:

Lord Justice Jackson
Lord Justice Patten
and
Lord Justice Lindblom

- -

Between:

Oxted Residential Limited	**Appellant**
- and -	
Tandridge District Council	**Respondent**

- -

Mr Jonathan Clay (instructed by **DMH Stallard**) for the **Appellant**
Mr Rhodri Price Lewis Q.C. (instructed by **Mr Clive Moore, Assistant Chief Executive (Legal) to Tandridge District Council**) for the **Respondent**

Hearing dates: 3 and 4 February 2016

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Judgment

Lord Justice Lindblom:

Introduction

1. Was it lawful for a local planning authority to adopt a development plan document and a Community Infrastructure Levy ("CIL") charging schedule to support a core strategy prepared under national planning policy for housing land supply that had been superseded by the National Planning Policy Framework ("the NPPF") upon its publication in March 2012? That is the question at the heart of these two appeals.

2. The appellant, Oxted Residential Ltd., is a developer. By an application under section 113 of the Planning and Compulsory Purchase Act 2004 it challenged the adoption by the respondent, Tandridge District Council, of the Tandridge Local Plan Part 2: Detailed Policies in July 2014, and by a claim for judicial review it challenged the council's adoption, at the same time, of the Tandridge District Community Infrastructure Levy Charging Schedule. It had objected both to the local plan part 2 and to the CIL charging schedule as they emerged. Both challenges came before Dove J. at a hearing on 20 February 2015 and were dismissed by him in an order dated 4 March 2015. Oxted Residential now appeals against that order with the permission of Sullivan L.J..

The issues in the appeals

3. The issues for this court are largely the same as those before the judge. The main ground of the challenge to the adoption of the local plan part 2 is that the inspector who conducted the examination of it, and in turn the council in adopting it, did not, indeed could not, lawfully find it to be sound under the relevant statutory requirements, because it was not informed by the "objectively assessed" housing needs of the district as government policy in the NPPF requires. The challenge to the CIL charging schedule is based on the argument that it reflects the development requirements provided for in the council's Tandridge District Core Strategy, adopted in October 2008, which are, it is said, out of date, and that this was contrary to requirements of the statutory scheme for CIL and relevant guidance issued by the Government.

The statutory scheme for plan-making

4. Section 17 of the 2004 Act provides:

> "…
> (3) The local planning authority's local development documents must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of the land in their area.
> …
> (6) The authority must keep under review their local development documents having regard to the results of any review carried out under section 13 or 14.
> … ."

Section 19(2) provides:

> "In preparing a development plan document or any other local development document the local planning authority must have regard to –
>
> (a) national policies and advice contained in guidance issued by the Secretary of State;
>
> …
>
> (h) any other local development document which has been adopted by the authority;
>
> … ."

Section 20 requires the authority to submit every development plan document to the Secretary of State for independent examination by a person appointed by him. Section 20(5) provides that the purpose of an independent examination is to determine:

> "(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b) whether it is sound; and
>
> (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation".

Section 20(7) provides that if the person appointed to carry out the examination considers that, in all the circumstances, the document satisfies the requirements of subsection (5)(a) and is "sound", and that the authority has complied with its duty to co-operate, he must recommend its adoption. If he is not required by subsection (7) to recommend adoption, he must recommend that the plan is not adopted (section 20(7A)). But provision is made under sections 20(7B) and (7C) and 23(2A) and (3) for the plan to be adopted with "main modifications" making it compliant with subsection (5)(a) and "sound" (see *Performance Retail Limited Partnership v Eastbourne Borough Council* [2014] EWHC 102 (Admin)).

The core strategy

5. The core strategy was adopted on 15 October 2008, when national planning policy for housing development was set out in Planning Policy Statement 3 – "Housing" ("PPS3"), published in November 2006. Its period ran to 2026. It was prepared to be in general accordance with the then emerging South East Plan, which was adopted in May 2009 but revoked in March 2013. The South East Plan allocated to Tandridge district 2,500 dwellings over the period from 2006 to 2026, an annual average of 125 dwellings.

6. Policy CSP1 of the core strategy, "Location of Development", sets a settlement hierarchy. It says that "development will take place within the existing built up areas of the District (the Category 1 settlements listed below) and be located where there is a choice of mode of transport available and where the distance to travel to services is minimised subject to the third paragraph of this policy"; that there will be "no village expansion by amending the boundaries of either the Larger Rural Settlements or Green Belt Settlements"; that "[all] the settlement boundaries will be reviewed in the Site Allocations DPD and the accompanying Proposals Map"; that "[development] appropriate to the needs of rural communities will be permitted in the Larger Rural Settlements and Green Belt Settlements (the Category 2 settlements listed below) through infilling and on sites allocated for affordable housing";

that "[there] will be no expansion of Woldingham (also a Category 2 settlement)"; and that "[there] will be no change in the Green Belt boundaries, unless it is not possible to find sufficient land within the existing built up areas and other settlements to deliver current and future housing allocations". The Category 1 settlements are Caterham, Oxted (including Hurst Green and Limpsfield), Warlingham and Whyteleafe. The Category 2 settlements are Woldingham, the two Larger Rural Settlements of Lingfield and Smallfield and the Green Belt Settlements, which were to be identified and their boundaries defined "in the Site Allocations DPD and its accompanying Proposals Map". In the text supporting this policy paragraph 6.17 says that "[the] Green Belt settlements are washed over by the Green Belt but have a defined boundary within which infilling and small scale redevelopment can be permitted"; that "[the] settlements to be included within this classification and their exact boundaries will be decided in the Site Allocations DPD"; and that "[housing] to meet local needs may be proposed".

7. Policy CSP2, "Housing Provision", says that "[provision] will be made for a net increase of at least 2,500 dwellings in the period 2006 to 2026"; that the council "has identified sufficient specific deliverable sites to meet the first five years of the Housing Trajectory and will identify a further supply of specific developable sites for years 6-10 of the Housing Trajectory"; that it "will identify sufficient specific developable sites for years 11-15 of the Housing Trajectory", but if this is not possible "future growth will be directed to the urban areas and to land in sustainable locations immediately adjoining the built up areas as shown on the Key Diagram"; that it "will undertake a Strategic Housing Land Availability Assessment to identify deliverable and developable sites to inform the Site Allocations DPD"; that it "will apply the "Plan, Monitor and Manage" approach to housing delivery and will review the delivery of housing through the "Housing Trajectory" set out in the Annual Monitoring Report, and will phase the supply of land where necessary"; and that "[in] order to ensure that a supply of land can be maintained the Council will identify reserve sites in a Site Allocations DPD …".

8. Policy CSP3, "Managing the delivery of housing", states:

> "In accordance with Policy CSP2 and in order to manage the delivery of housing, should the District's rolling five year housing supply figure be exceeded by more than 20%, the Council will not permit the development of unidentified residential garden land sites of 5 units and above or larger than 0.2ha (or smaller sites where these form part of a potentially larger development proposal). Similarly where there is inadequate infrastructure or services to support a development the Council will not permit the development of unidentified sites of 5 units and above or larger than 0.2ha.
> … ."

9. The council did not produce a "Site Allocations DPD". Instead, it embarked on the preparation of the local plan part 2.

NPPF policy for plan-making

10. Government policy in the NPPF firmly espouses the "plan-led" system. One of the "core land-use planning principles" set out in paragraph 17 is that planning should "be genuinely plan-led". There are numerous passages in the NPPF indicating, in various contexts, the importance of local planning authorities having in place an "up-to-date" development plan.

Paragraph 12 says "[it] is highly desirable that local planning authorities should have an up-to-date plan in place". Other references to similar effect are to be found, for example, in paragraphs 14, 17, 24, 26, 49, 73, 157 and 209.

11. Paragraph 182 of the NPPF, under the heading "Examining Local Plans", refers to four attributes of a plan that is "sound". First, it should be "Positively prepared" – which means "based on a strategy which seeks to meet objectively assessed development … requirements …"; secondly, "Justified"; thirdly, "Effective"; and fourthly, "Consistent with national policy". The definition of "Local Plan" for the purposes of the NPPF is in the "Glossary" in Annex 2:

> "The plan for the future development of the local area, drawn up by the local planning authority in consultation with the community. In law this is described as the development plan documents adopted under the Planning and Compulsory Purchase Act 2004. Current core strategies … form part of the Local Plan. … ."

NPPF policy for housing development

12. The policies of the NPPF for housing development mark a significant shift in national planning policy for the assessment and meeting of housing need, which this court has acknowledged as a "radical change" from the approach in PPS3 (see the judgment of Laws L.J., with whom Patten and Floyd L.JJ. agreed, in *Solihull Metropolitan Borough Council v Gallagher Estates Ltd.* [2014] EWCA Civ 1610, at paragraph 16). In the section headed "Delivering a wide choice of high quality homes", paragraph 47 of the NPPF states:

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

This policy is amplified in the part of the NPPF dealing with "Plan-making", in the section headed "Using a proportionate evidence base". Under the sub-heading "Housing", paragraph 159 says authorities should "have a clear understanding of housing needs in their area", should prepare "a Strategic Housing Market Assessment to assess their full housing needs …", and "a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period". The court has recognized the

policy imperative that local planning authorities identify and seek to meet the "full, objectively assessed needs" for housing in their area (see the judgment of Sir David Keene, with whom Maurice Kay and Ryder L.JJ. agreed, in *Hunston Properties Ltd. v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1610, at paragraph 6). There are consequences to an authority's inability to demonstrate a five-year supply of housing land. Paragraph 49 of the NPPF states:

> "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."

The meaning and implications of that policy have recently been considered by this court in the appeals in *Suffolk Coastal District Council v Hopkins Homes Ltd. and the Secretary of State for Communities and Local Government* and *Richborough Estates Partnership LLP v Cheshire East Borough Council and the Secretary of State for Communities and Local Government* [2016] EWCA Civ 168 (see, in particular, paragraphs 32 to 37 of the judgment of the court). I shall come back to that case shortly. Paragraph 53 of the NPPF states:

> "Local planning authorities should consider the case for setting out policies to resist inappropriate development of residential gardens, for example where development would cause harm to the local area."

NPPF policy for "good design"

13. The NPPF contains a section headed "Requiring good design". Paragraph 59 in that section says that "design policies … should concentrate on guiding the overall scale, density, massing, height, landscape, layout, materials and access of new development in relation to neighbouring buildings and the local area more generally". Paragraph 60 says, among other things, that it is "proper to seek to promote or reinforce local distinctiveness".

NPPF policy for the Green Belt

14. Paragraph 83 of the NPPF says that "[local] planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy", and that "[once] established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan". Paragraph 86 deals with development in villages in the Green Belt:

> "If it is necessary to prevent development in a village primarily because of the important contribution which the open character of the village makes to the openness of the Green Belt, the village should be included in the Green Belt. If, however, the character of the village needs to be protected for other reasons, other means should be used, such as conservation area or normal development management policies, and the village should be excluded from the Green Belt."

Paragraph 89 says that a local planning authority "should regard the construction of new buildings as inappropriate development in the Green Belt". It then identifies six exceptions

to that principle, the fifth being "limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan". The others are "buildings for agriculture and forestry", and, subject to certain provisos and qualifications, the "provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries …", "the extension or alteration of a building …", "the replacement of a building …", and "limited infilling or the partial or complete redevelopment of previously developed sites …". Paragraph 90 says that "[certain] other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and not conflict with the purposes of including land in Green Belt".

The local plan part 2

15. The local plan part 2 was submitted to the Secretary of State, for examination, on 25 September 2013. Oxted Residential, and others, objected on the grounds that it was not based either on an up to date core strategy or on the Tandridge Local Plan Part 1: Strategic Policies, whose statutory process had yet to be begun; that its policies were overly restrictive of development; and that it did not accord in various respects with government policy in the NPPF. The inspector appointed to conduct the examination, Mr David Hogger, held hearings on 7 and 8 January 2014. His report is dated 21 May 2014. In his "Overall Conclusion and Recommendation" (at paragraph 52) he recommended eight main modifications, "to make [the local plan part 2] sound and/or legally compliant and capable of adoption", and concluded that, with those main modifications, it "satisfies the requirements of Section 20(5) of the 2004 Act and meets the criteria for soundness in [the NPPF]". The council consulted on the main modifications. At a meeting on 10 July 2014 its Planning Policy Committee considered an officer's report recommending adoption. The council adopted the local plan part 2 on 24 July 2014.

16. In the "Introduction", under the heading "What is this document?", paragraph 1.4 states:

> "The [local plan part 2] has been prepared by the Council under the terms of the Planning and Compulsory Purchase Act 2004. It supports the adopted Core Strategy (Part 1 of the Tandridge Local Plan) by containing a set of detailed planning policies to be applied locally in the assessment and determination of planning applications over the plan period (2014-2029). The Plan will be monitored and can be reviewed in whole or in part to respond flexibly to changing circumstances over the plan period. These detailed policies replace the remaining 'saved' policies from the 2001 Tandridge District Local Plan … ."

Paragraph 1.8, under the heading "The Plan in Context", explains that "[at] a District level, the Tandridge Local Plan is formed of two key parts: Part 1 containing the strategic policies (Core Strategy) and Part 2 containing the detailed policies (Detailed Policies document)", and that "[together] these documents are considered to be the starting point for decision making on all proposals".

17. The five policies controversial in these proceedings are polices DP8, DP10, DP11, DP12 and DP13.

18. Policy DP8 relates to "Residential Garden Land Development". Part A of this policy says that, "[subject] to Core Strategy Policy CSP3, any other relevant Development Plan policies, adopted Supplementary Planning Guidance or Supplementary Planning

Documents, proposals involving infilling, back land or the complete or partial redevelopment of residential garden land will be permitted within the settlements of Caterham, Oxted (including Hurst Green and Limpsfield), Warlingham, Whyteleafe and Woldingham, only if the development scheme" complies with five requirements: first, that it "[is] appropriate to the surrounding area in terms of land use, size and scale"; secondly that it "[maintains], or where possible, enhances the character and appearance of the area, reflecting the variety of local dwelling types"; thirdly, that it "[does] not involve the inappropriate sub-division of existing curtilages to a size below that prevailing in the area [There is a footnote here, which states: "Within Woldingham, the further subdivision of part of an already subdivided curtilage will normally be considered inappropriate.]"; fourthly, that it "[presents] a frontage in keeping with the existing street scene or the prevailing layout of streets in the area, including frontage width, building orientation, visual separation between buildings and distance from the road"; and fifthly, that it "[does] not result in the loss of biodiversity or an essential green corridor or network". Part B of the policy says that within the settlements "proposals that would result in the piecemeal or 'tandem' development of residential garden land, or the formation of cul-de-sacs through the 'in-depth' development of residential garden land will normally be resisted …". Part C says that "[within] the Special Residential Character Areas of Harestone Valley and Woldingham … or in any other areas subsequently designated, the Council will use Design Guidance where it has been adopted as a Supplementary Planning Document in assessing development proposals and in determining planning applications".

19. Policy DP10 is a policy for the "Green Belt". Part A says that "[the] extent of the Green Belt is shown on the Policies Map", and that "[only] in exceptional circumstances will the Green Belt boundaries be altered and this would be through a review of the Core Strategy and/or through a Site Allocations Development Plan Document". Part B states the familiar principles of policy for decision-making on proposals for development in the Green Belt: that "[within] the Green Belt, planning permission for any inappropriate development which is, by definition, harmful to the Green Belt, will normally be refused", and that "[proposals] involving inappropriate development in the Green Belt will only be permitted where very special circumstances exist, to the extent that other considerations clearly outweigh any potential harm to the Green Belt by reason of inappropriateness and any other harm".

20. Policy DP11 relates to "Development in Larger Rural Settlements" – the settlements of Smallfield and Lingfield, which are excluded from the Green Belt. The text introducing the policy says that the policy "is aimed at ensuring the continued protection of the character of the Larger Rural Settlements (in accordance with the second sentence of paragraph 86 of [the NPPF]) and that development is limited to that which is appropriate to the needs of the community". Part A of the policy says that "[development] within the Larger Rural Settlements of Smallfield and Lingfield will be permitted where the proposal comprises" any of five kinds of development; first, "[infilling] within an existing substantially developed frontage"; secondly, "[the] partial or complete redevelopment of previously developed land, even if this goes beyond the strict definition of infilling"; thirdly, "[the] development of sites within the settlement boundaries following allocation for affordable housing"; fourthly, "[extensions] or alterations to buildings and the erection of new ancillary domestic buildings within the curtilage of a dwelling"; and fifthly, "[development] that provides new, or assists in the retention of, community facilities". Part B of the policy says that "[in] all circumstances, infilling, redevelopment and other forms of development must be in character with the settlement, or that part of it, and will be subject to any other relevant Development Plan policies".

21. Policy DP12 is a policy for the "Development in Defined Villages in the Green Belt". Part A says that "[in] the Green Belt development within the Defined Villages of Bletchingley, Blindley Heath, Dormansland, Felbridge, Godstone, Old Oxted, South Godstone, South Nutfield and Tatsfield … will be permitted where the proposal comprises" any of six kinds of development; first, "[infilling] within an existing substantially developed frontage", which "does not include the inappropriate subdivision of existing curtilages to a size below that prevailing in the area"; secondly, "[the] partial or complete redevelopment of previously developed land, even if this goes beyond the strict definition of infilling"; thirdly, "[the] development of sites within the villages boundaries following allocation for affordable housing"; fourthly, "[extensions] or alterations to existing buildings and the erection of new ancillary domestic buildings within the curtilage of a dwelling"; fifthly, "[development] that provides new, or assists in the retention of, community facilities"; and sixthly, "[any] other form of development that is defined by [the NPPF] as not being inappropriate in the Green Belt". Part B says that "[in] all circumstances, infilling, redevelopment and other forms of development must be in character with the village, or that part of it, and will be subject to any other relevant Development Plan policies".

22. Introducing policy DP12, paragraph 12.5 in the supporting text refers to the council's "two-stage Sustainability Appraisal of the existing Green Belt Settlements", the first stage having been subject to public consultation in 2011, the second in January 2013. It emphasizes, in paragraph 12.6, a "noticeable difference" between policy DP12 and policy CSP1 of the core strategy, in that policy DP12 does not refer to "Green Belt Settlements" but to "Defined Villages in the Green Belt". It refers to the fifth category of exception in paragraph 89 of the NPPF – for "limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan". It goes on to say that policy DP12 "is a local approach suitable to the Tandridge context but also consistent with the NPPF in that the Defined Villages are included within the Green Belt but have been identified as suitable for limited infilling and limited affordable housing". The "sole purpose of drawing a line around these villages", it says, "is to make it clear precisely where infilling can take place and where Green Belt policy will apply".

23. Policy DP13 concerns "Buildings in the Green Belt". It is modelled on the policies in paragraphs 89 and 90 of the NPPF. It states that "[unless] very special circumstances can be clearly demonstrated, the Council will regard the construction of new buildings as inappropriate in the Green Belt", but identifies, "subject to other Development Plan policies", a number of exceptions to this principle: "New Buildings & Facilities", including "C. Limited infill development within the Defined Villages in accordance with policy DP12", and "D. Limited affordable housing to meet local community needs, either in accordance with policy DP12 (with the Defined Villages) or policy CSP5 (rural exceptions)"; "Extension & Alteration", where the proposal would "not result in disproportionate additions over and above the size of the original building …"; "Replacement", where the proposed new building is, among other things, "not materially larger than the building it is replacing"; "Infill, partial or complete redevelopment …" of "previously developed (brownfield) sites in the Green Belt (outside the Defined Villages), … where the proposal would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development"; "Re-use", where, among other things, "[the] proposal preserves the openness of the Green Belt and does not conflict with the purposes of including land within it"; and "[any] other form of development as listed under paragraph 90 of the NPPF".

Was the council's adoption of the local plan part 2 unlawful?

24. For Oxted Residential Mr Jonathan Clay submitted that the inspector and the council misdirected themselves as to the meaning and effect of policies DP8, DP10, DP11, DP12 and DP13 – and failed to take into account considerations relevant to the soundness of the local plan part 2. These policies were not, he submitted, "capable of providing a sound basis for development management decisions". The core strategy was out of date, adopted as it was some three and a half years before the publication of the NPPF and its policies based on housing requirements identified in the revoked South East Plan, which were demonstrably far below the "full, objectively assessed needs for market and affordable housing in the housing market area …". In a report prepared for the council by its consultants, G.L. Hearn, in 2013, an assessment of housing need in the district showed a five-year figure of 450-460, far more than is required under the core strategy. The council had relied on that out of date core strategy in preparing the local plan part 2. Thus the local plan part 2 did not, and could not, comply with the statutory requirements in the 2004 Act, nor was it consistent with national policy in the NPPF, in particular the objective to "boost significantly the supply of housing" in paragraph 47 and the policies serving that objective. The inspector and the council could not properly conclude that it was possible to adopt the local plan part 2 without considering the district's objectively assessed housing need. The controversial policies were all clearly "[relevant] policies for the supply of housing" under the policy in paragraph 49 of the NPPF. Their effect is severely to constrain the provision of new housing development in both urban and rural parts of the district – 94% of whose area is within the Green Belt.

25. In the circumstances, Mr Clay submitted, the council could not rationally adopt the local plan, because, in the absence of a five-year supply of housing land, its policies would be, upon adoption, immediately out of date. He sought to distinguish the local plan part 2 from the core strategy upheld by the court in *Grand Union Investments Ltd. v Dacorum Borough Council* [2014] EWHC 1894 (Admin) on the facts. In that case the local planning authority was demonstrably able to meet the "objectively assessed needs for market and affordable housing" in its area in the short to medium term, even though it was relying on an early review of its core strategy to meet the need in full, whereas in this case the council was "not remotely able" to meet relevant housing need.

26. I cannot accept that argument.

27. Challenges such as this to the adoption of a development plan document by a local planning authority will seldom succeed. That is largely because the task of testing the soundness of a development plan document is not a task for the court. It lies squarely within the realm of planning judgment, exercised within the relevant statutory scheme and in the light of relevant policy and guidance. Under section 113 of the 2004 Act the court's role is to review that exercise of judgment, on traditional public law grounds. The question here – as it was, for example, in *Grand Union Investments* – is whether the local planning authority's adoption of the plan under challenge, following the recommendation of the inspector who conducted the examination, was perverse – that is to say that the adoption of the plan was beyond the range of reasonable judgment. As Carnwath L.J., as he then was, said in *Barratt Developments Plc v City of Wakefield Council* [2010] EWCA Civ 897 (in paragraph 11 of his judgment), provided the inspector and the local planning authority reach a conclusion on soundness that is not "irrational" (meaning "perverse"), their decision cannot be questioned in the courts. Soundness, said Carnwath L.J. (at paragraph 33), was a "matter to be judged by the inspector and the Council, and raises no issue of

law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations, which were necessarily material in law".

28. As Mr Rhodri Price Lewis Q.C., for the council, submitted, the fatal misconception in Mr Clay's argument is the idea that the local plan part 2 was a development plan document in which the council was obliged by statute, or at least in the light of government policy in the NPPF, to rectify any shortcomings in the core strategy's approach to housing land supply, and, in particular, to undertake an assessment of the "objectively assessed needs" for housing. That was not so.

29. An issue similar to this arose in *Gladman Developments Ltd. v Wokingham Borough Council* [2014] EWHC 2320 (Admin). In that case the claimant challenged a development plan document in which the local planning authority had made allocations to address a housing requirement derived from the South East Plan, in a core strategy prepared under the policies in PPS3. It was argued that the inspector who conducted the examination could not find the plan sound because it was not based on a requirement derived from "objectively assessed needs" for the authority's area, as paragraph 47 of the NPPF now requires. That argument was rejected by Lewis J. in a comprehensive and, in my view, compelling analysis. Lewis J. was satisfied that the inspector did not have to determine whether the housing requirement in the core strategy represented the "objectively assessed needs", or to endorse the requirement itself. He gave five reasons for this conclusion in a passage of his judgment (paragraphs 60 to 69) quoted in full by Dove J. in his (in paragraph 38). He later adopted essentially the same approach in *R. (on the application of Gladman Developments Ltd.) v Aylesbury Vale District Council* [2014] EWHC 4323 (Admin) (at paragraphs 67 to 69).

30. The five reasons given by Lewis J., paraphrased and in summary, were these.

31. First, the statutory scheme does not require the approach contended for. A development plan may comprise several development plan documents. In preparing a development plan document the local planning authority must have regard to any other development plan document already adopted, such as a core strategy (section 19(2)(h) of the 2004 Act), and the inspector conducting the examination must ensure that this has been done (section 20(5)(a)). There is nothing in the statutory scheme to prevent the adoption, for example, of a development plan document that is making allocations consistent with an adopted core strategy, simply because the core strategy may require revision or amendment to bring it into line with national policy (paragraphs 61 and 62 of the judgment).

32. Secondly, the relevant policies in the NPPF, properly understood, do not require every development plan document within its broad definition of a "Local Plan" to fulfil all the requirements described in paragraph 47. Where one of the necessary purposes of a particular development plan document is to identify the level of housing need that requires to be met in the relevant area, "as far as is consistent with the policies set out in [the NPPF]", the provisions of the NPPF bearing on that purpose, including paragraphs 158 and 159 as well as paragraph 47, will be engaged. However, as Lewis J. aptly put it, "[properly] read, … [the NPPF] does not require a development plan document which is dealing with the allocation of sites for an amount of housing provision agreed to be necessary to address, also, the question of whether further housing provision will need to be made" (paragraphs 63 to 65).

33. Thirdly, it is difficult to reconcile with the NPPF's encouragement for the timely preparation and adoption of local plans the proposition that a local planning authority cannot prepare, and an inspector cannot consider the soundness of, "a development plan document dealing with the allocation of necessary housing until further steps are taken to identify whether additional housing is required" (paragraph 66).

34. Fourthly, the notion that the policy in paragraph 47 of the NPPF can be used as a means of compelling a full, objective assessment of housing need before a development plan document making allocations for "housing need already established" can be adopted is also unnecessary. An authority is under a statutory requirement, in section 17(6) of the 2004 Act, to keep its local development documents under review (paragraph 67).

35. And fifthly, this analysis was consistent with the first instance decision in *Solihull Metropolitan Council v Gallagher Estates* – later upheld on appeal – though here the circumstances were different. Here the inspector was "examining a plan which proposed site allocations for housing which, as a minimum, would contribute towards the agreed housing need of the area" (paragraph 68).

36. For those five reasons, Lewis J. concluded, the inspector was "not required by reason of [the NPPF] to consider an objective assessment of housing need in order to assess whether this development plan document was sound" (paragraph 69).

37. I think that analysis provides no less effective an answer to Mr Clay's argument in this case than it did to the claimant's submissions in *Gladman Developments v Wokingham Borough Council*. Mr Clay said that that case was very different from this, because there the development plan document was making allocations, and was "intrinsically, permissive rather than restrictive", and therefore consistent with government policy in the NPPF. However, Dove J. was entirely unconvinced that the facts of the two cases could be materially distinguished on that basis (paragraph 56 of his judgment).

38. I agree with Dove J.. He concentrated, rightly in my view, on the "scope or purpose" of the local plan part 2 (paragraphs 53 to 55 of his judgment). He acknowledged that "the legislation contemplates a modular structure to the Development Plan whereby it can be constructed from a series of individual elements which are to be read together for the purposes of conducting exercises in development control", and that "[these] individual parts may be developed at different times against the backdrop of different national policies for the purposes of Section 19(2)(a) of the 2004 Act" (paragraph 53). An inspector conducting an examination must establish the true scope of the development plan document he is dealing with, and what it is setting out to do. Only then will he be able properly to judge "whether or not, within that scope and within what it has set out to do", it is "sound" (section 20(5)(b)). His assessment will require him to ask himself, among other things, whether the local planning authority has had regard to national policy (section 19(2)(a)) and to "any other local development document which has been adopted by the authority" (section 19(2)(h)). The judge noted that in this case there was no complaint of "inconsistency or potential inconsistency with another local development document" (paragraph 54). He went to say this (in paragraph 55):

> "In my view the scope of TLP 2 is clear from paragraphs 1.4 and 1.5. It is clear that it did not include an examination of the OAN for the defendant. Considering the limited objectives of TLP 2, as set out in its introductory paragraphs, the Inspector was not in my view required to embark upon an inquiry as to what the OAN might

be or whether or not the defendant had a five-year supply of housing, and consequentially whether the policies which were being examined were relevant to the supply of housing. The establishment of a new housing requirement for the defendant's administrative area was not a task which TLP 2 had set itself."

39. As the judge recognized, the scope of the local plan part 2 is plain from the text in its "Introduction", and from the policies it contains. It "supports" the core strategy. It does not substitute for the policies of the core strategy an amended or new strategy. That is not what it had to do, nor what it could have done. Its explicit purpose is to provide what it describes as "a set of detailed planning policies to be applied locally in the assessment and determination of planning applications over the plan period", to replace the remaining saved policies of the 2001 local plan (paragraph 1.4), and to provide the "detailed policies" to complement the "strategic policies" in the core strategy (paragraph 1.8). In preparing it, the council was not undertaking the work indicated by paragraphs 47 and 159 of the NPPF. It did not have to carry out an assessment of the housing needs that would have to be met in its area to satisfy the requirements of national policy, as they now are, in paragraph 47 of the NPPF. It was not obliged in this particular plan-making process to "use [its] evidence base to ensure that [its] 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 [the NPPF]". Equally, the inspector who conducted the examination was not required to scrutinize the council's performance in discharging those requirements of national planning policy. The suggestion that such an exercise was called for in this process is misconceived.

40. In the "Introduction" of his report, in paragraph 1, the inspector reminded himself of the policy for the testing of a plan's soundness in paragraph 182 of the NPPF. In the section headed "Assessment of Soundness", dealing with "Issue 1 – The Basis for the Overall Approach of the Plan", the inspector grappled with the argument that the core strategy was not consistent with NPPF policy, and was therefore out of date. His conclusions were these:

> "9. A number of representors suggested that the Council's approach, both in terms of co-operation and the consideration of strategic matters, is flawed because the adopted Core Strategy (CS) is out-of-date (2008), particularly in terms of identifying objectively assessed housing need. It was argued that LP2 should be based on an up-to-date CS.
>
> 10. I accept, as do the Council, that some elements of the CS need up-dating and that is one reason why the Council has agreed to undertake a review. Indeed work has already started on what will be called the Tandridge Local Plan Part 1: Strategic Policies (LP1) and it is anticipated that Regulation 18 public consultation will be undertaken this October, with adoption of the Plan by Spring 2017.
>
> 11. The Introduction to LP2 makes it clear that its role is to support the adopted Core Strategy and that its function is to provide detailed planning policies which can be used in the determination of planning applications. It was suggested that the Council should have initiated co-operation with neighbouring local planning authorities with regard to the assessment of housing need and the formulation of policies and proposals to meet that need. Specific locations for housing development were suggested, for example at

Smallfield and in the locality of Domewood. However, it is not the role of LP2 to consider housing need in the District; to allocate sites; to propose the redevelopment of existing buildings (e.g. at Redhill Aerodrome); or to review the Green Belt boundary. These are matters to be tackled in the review of the CS, should circumstances so dictate and there is no reason to doubt that the Council will undertake the duty to co-operate in an appropriate way at that time and ensure that the CS review (LP1) includes policies and proposals which are up-to-date and in compliance with national policy.

12. It was argued that the Council should withdraw LP2 and concentrate on the preparation of LP1. However, I can see no benefit in that approach. LP2 is primarily a development management tool (not an allocations document) and although I cannot predict what the LP1 may contain, it is likely that many of the policies in LP2 will remain applicable, irrespective of any land use allocations or strategic policies that might be included in LP1. Whilst it is a desirable objective, it would be unreasonable in the current circumstances, to expect all the planning documents of the Council to provide a seamless, comprehensive and continuously up-to-date palette of planning policies and proposals. This will hopefully be achieved on adoption of LP1 in 2017. In the meantime the benefits of progressing with LP2 outweigh any disbenefits because the document will provide a clear suite of policies which the Council can use in the determination of planning applications.

13. Particular concern was raised regarding the revision of some settlement boundaries within the Green Belt without reviewing the District's overall housing requirements and I address that matter under Issue 5.

14. On this basis I am satisfied that the Council's overall approach to the preparation of LP2 is sound."

41. I see no error of law in the approach taken by the inspector there. His conclusions are cogent, his reasoning clear and complete. To hold that his analysis was in any way irrational or perverse would be quite impossible. It is composed of perfectly rational planning judgments. He plainly understood the role of the local plan part 2. He was right to reject the argument made to him that the council could not lawfully, or at least should not, adopt it without first undertaking the exercise prescribed in paragraph 47 of the NPPF. As he acknowledged (in paragraph 11), that was not an exercise necessary in, or appropriate to, this particular plan-making process. Nor was this a process in which allocations of sites for housing were to be made. Nor again was it a process in which the Green Belt boundary ought to have been reviewed. These were matters to be dealt with, in so far as they needed to be, in the review of the core strategy. In the meantime, though the role of the local plan part 2 was a limited one, its policies would still be useful. Dove J.'s conclusions to that effect (in paragraph 58 of his judgment) are, in my view, clearly correct.

42. Contrary to Mr Clay's submission, it was not necessary for the inspector to consider whether particular policies in the local plan part 2 were "policies for supply of housing" under the policy in paragraph 49 of the NPPF.

43. Paragraph 49 sits within the suite of policies, in paragraphs 47 to 55 of the NPPF, whose basic aim, declared in paragraph 47, is "[to] boost significantly the supply of housing". The fundamental policy in these paragraphs may fairly be described, in similar terms, as a

policy of boosting significantly the supply of housing land. The means by which this policy is to be put into effect involve both the business of preparing local plans and the making of decisions on applications for planning permission. Paragraph 49 is concerned with the taking of decisions on "[housing] applications". As this court has recently held in *Suffolk Coastal District Council v Hopkins Homes*, the words "[relevant] policies for the supply of housing" in that paragraph are to be understood, in their context, as meaning "relevant policies affecting the supply of housing", thus including restrictive policies that constrain the supply of housing land (see paragraphs 32 to 38 of the judgment of the court). However, in applying the policy in paragraph 49, the decision-maker must judge whether particular policies of the plan, properly understood, are "[relevant] policies for the supply of housing", and also the weight to be given to those policies in the decision (paragraphs 42 to 47). This exemplifies the distinction between the interpretation of policy and its application referred to by Lord Reed in his judgment in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13 (at paragraphs 18 and 19).

44. After the hearing of this appeal, which preceded the handing down of judgment in the appeals in *Suffolk Coastal District Council v Hopkins Homes*, we gave counsel the opportunity to make further written submissions in the light of the court's decision in that case. Both counsel relied on that decision, each contending that it supported the submissions he had originally made. Mr Clay submitted that in this case the inspector, and in turn the council, ought to have grasped that policies DP8, DP10, DP11, DP12 and DP13 are all capable of being regarded as "policies for the supply of housing" within the meaning of paragraph 49 of the NPPF, which is relevant to plan-making as well as to the determination of applications for planning permission. All of these policies, Mr Clay submitted, restrict the scale, density and location of housing development and are "contrary to the objectives of the NPPF …". In his written submissions of 13 April 2016 he said:

> "17. The effect of LP1 and LP2 together is that the Council has sought to plan to only make provision for housing requirement which is significantly less than the OAN of the District and to apply policies with full weight which restrict housing supply and limit the locations in both urban and rural areas. Such an approach fundamentally undermines the key strategic objectives of Government policy in the Framework as identified, analysed and described in the decision of the Court of Appeal in [*Suffolk Coastal District Council v Hopkins Homes*].
>
> 18. Seen in the light of the judgment in [*Suffolk Coastal District Council v Hopkins Homes*], the Local Plan runs directly contrary to the aims and requirements of national policy in the NPPF. It places substantial obstacles and constraints in the path of new housing development. It makes no serious attempt to [either] identify or meet the needs of its communities."

The "development management policies" of the local plan part 2 complement the "strategic polices" in the core strategy, which, Mr Clay submitted, "pre-date and do not (remotely) reflect either the radical and dramatic shift in policy in respect of the delivery of new housing and the approach to the assessment of its requirement, or the scale of any OAN based on that new and radical approach" (paragraph 5 of his written submissions in reply, dated 15 April 2016). Mr Price Lewis submitted that the decision in *Suffolk Coastal District Council v Hopkins Homes* does not assist Mr Clay's argument here. There was nothing irrational in the approach adopted by the inspector in paragraphs 10 to 12 of his report. And that approach is not rendered irrational by the policies in paragraphs 47 and 49 of the NPPF, as the judgment of the court in *Suffolk Coastal District Council v Hopkins*

Homes serves to confirm. As is clear in the light of that judgment, the question of whether particular policies in the local plan part 2 are "[relevant] policies for the supply of housing" will be for the planning judgment of the decision-maker determining an application for planning permission. If such a policy is not "up-to-date" in the sense of paragraph 49 of the NPPF, it will be for the decision-maker to judge what weight it should be given in the decision (see in particular paragraphs 44 to 47 of the judgment). The policies of the local plan part 2 will still serve "a useful and proper function", and, in the circumstances, it was not irrational of the council to adopt a development plan document containing such policies to guide the making of decisions on applications for planning permission (paragraphs 14 to 19 of Mr Price Lewis' written submissions of 12 April 2016).

45. In my view Mr Price Lewis' submissions here are correct. Whether a particular policy of the core strategy, or of the local plan part 2, falls within the scope of the policy in paragraph 49 is a question that will arise in the making of a decision on an application for planning permission for housing development – when it is contended, perhaps rightly, that the council is unable to demonstrate a five-year supply of housing land so that its "[relevant] policies for the supply of housing should not be considered up-to-date" (see paragraph 47 of the judgment of the court in *Suffolk Coastal District Council v Hopkins Homes*). The status of the controversial policies in the local plan part 2 – either as "[relevant] policies for the supply of housing" under the policy in paragraph 49 of the NPPF or not – was not a matter for the inspector, or the council, to resolve in this plan-making process. It was not a question bearing on the soundness of local plan part 2, or otherwise within the ambit of the matters the inspector had to consider under section 20(5) of the 2004 Act. As Dove J. put it (in paragraph 57 of his judgment):

> "Since … the question of … setting an OAN … did not arise and nor were questions of the five-year land supply or whether paragraph 49 of the Framework (which is in any event a paragraph directed to applications) [is] in point, it follows that the Inspector did not need to decide whether the Core Strategy is out of date or the impugned policies are policies relevant to the supply of housing for the purposes of paragraph 49."

46. The inspector did not neglect the question, which was raised in objections to the local plan part 2, of whether particular policies would have an unduly restrictive effect on development. The relevant paragraphs of his report are these:

> "Issue 4 – Residential Garden Land … (with particular regard to protecting the character of Woldingham) and the Protection of Trees
>
> …
>
> *Other settlements* [i.e. other than Woldingham]
>
> 32. With regard to the wider application of policy DP8 it has been suggested that it may severely restrict development in other urban areas of the District. No evidence was submitted to substantiate that claim and in any event the NPPF confirms that great importance must be attached to the design of the built environment and that design should respond to the identity of local surroundings. The policy still contains an element of flexibility and I am satisfied that the Council's approach, as set out in MM4, is sound and recommend it accordingly.

…

Issue 5 – The Green Belt

34. The Council has reviewed the categorisation of settlements within the Green Belt and the parts of Green Belt settlements within which appropriate infilling would be acceptable. It was argued that such re-assessment was premature pending the preparation of LP1 because it may be that the Council will have to identify land in such locations for the provision of housing. It should be made clear, however, that the Council has not undertaken an assessment of the current Green Belt boundary. That would be a task that may be required as part of the preparation of LP1. The Council has only looked at the approach it takes towards infilling in a number of small settlements in the Green Belt.

35. Paragraph 86 of the NPPF relates to protecting the character of a village in the Green Belt if the character of that village makes an important contribution to the openness of the Green Belt. Paragraph 89 goes on to say that as an exception limited infilling in villages may not be inappropriate. The purpose of policy DP12 is to provide guidance on how infilling and small scale development could be satisfactorily accommodated in such villages in order to ensure that the character of those settlements, within the Green Belt context is protected.

36. In terms of the defined villages in the Green Belt, the Council has heeded the advice of the Inspector who undertook the 2008 Core Strategy Examination, and has undertaken a sustainability assessment of the 14 settlements (currently designated as Green Belt settlements in the CS); concluding that only 9 of them should be identified as a 'defined village'. This conclusion has the broad support of local residents.

37. As part of this process the Council re-considered the boundaries of the 'defined villages' and for example excluded from the settlement boundaries school playing fields and open space and included land which is already developed. I consider the Council's approach to be reasonable and justified …. "

…

39. The consistency between CS policy CSP 1 (location of development), policy DP13 (buildings in the Green Belt) and advice in the NPPF (for example paragraph 89) was challenged. However, although there has been a change in the terminology used, I am satisfied that the Council's Green Belt policies (and supporting text) are compatible with the aim of preventing urban sprawl by keeping land permanently open. The identification of 'defined villages' where limited infill may be appropriate provides clear guidance; without which there would be uncertainty and confusion.

…

41. Policy DP 13 does use a base date of 31st December 1968 for the definition of 'original building' in relation to dwellings (rather than 1st July 1948 as set out

in the Glossary to the NPPF). The Council has decided to use the well-established date as set out in saved policy RE8 of the 2001 Local Plan and for reasons of clarity and consistency I consider this to be a justified approach. … .

42. Some of the text within policy DP13, as submitted, was not fully in accordance with the advice in the NPPF and therefore the Council has proposed to up-date the wording. Although in other circumstances the up-dating may be considered to be minor in nature, in this instance the changes proposed by the Council are important to ensure that LP2 fully accords with national policy and therefore I recommend MM5."

47. Dove J. considered those conclusions legally secure (paragraphs 59 and 60 of his judgment). I agree. They show that the inspector understood relevant national policy in the NPPF and applied it lawfully to the policies of the local plan part 2. They also show that he was seeking to ensure those policies were properly related to the core strategy, which they were intended to support.

48. Policy DP8 (the policy for "Residential Garden Land Development") is clearly a policy of the kind contemplated in paragraph 53 of the NPPF, a policy "to resist inappropriate development of residential gardens, … where development would cause harm to the local area". As Mr Price Lewis submitted, the inspector clearly had in mind the policies for "good design" in paragraphs 59 and 60 of the NPPF. Policy DP10 (the policy for the "Green Belt"), mirrors government policy for the Green Belt in paragraph 83 of the NPPF. As the inspector recognized, it was not a function of the local plan part 2 to bring about any alteration to the Green Belt boundary. That was for the review of the core strategy (or "the preparation of LP1"). Policy DP11 (the policy for "Development in Larger Rural Settlements") and Policy DP12 (the policy for "Development in Defined Villages in the Green Belt") both reflect government policy in paragraph 86 of the NPPF. In accordance with policy in paragraph 89 of the NPPF, policy DP12 provides for "limited infilling" in the "Defined Villages in the Green Belt" as an exception to the general principle that the "construction of new buildings" is "inappropriate in the Green Belt". Policy DP13, as modified, reflects the policies in paragraphs 89 and 90 of the NPPF.

49. As Dove J. accepted, these policies of the local plan part 2 "may exclude some sites being considered to be suitable to accommodate residential development" (paragraph 59 of his judgment), and, as he went on to say, they are "a local interpretation of the Green Belt policies from [the NPPF] and in particular those contained in paragraphs 86 and 89" (paragraph 60). He was satisfied that the inspector had dealt with all of these matters as he should, reaching the "unimpeachable" conclusion, in the light of NPPF policy, that the policies in question were properly included in the local plan part 2 (also paragraph 60). In my view the judge was right.
50. In short, I see no error of law in the inspector's conclusion that, with the proposed main modifications, the local plan part 2 was sound. Neither his analysis and recommendation nor the council's decision to adopt the local plan part 2 was irrational or otherwise unlawful.

51. I would therefore dismiss the appeal against the judge's order upholding the council's adoption of the local plan part 2.

The statutory scheme for CIL

52. Part 11 of the Planning Act 2008, as amended by the Localism Act 2011, contains provisions for a charging authority to prepare a charging schedule for CIL. Section 211 provides:

> "(1) A charging authority which proposes to charge CIL must issue a document (a "charging schedule") setting rates, or other criteria, by reference to which the amount of CIL chargeable in respect of development in its area is to be determined.
> (2) A charging authority, in setting rates or other criteria, must have regard, to the extent and in the manner specified by CIL regulations, to –
> (a) actual and expected costs of infrastructure … ;
> (b) matters specified by CIL regulations relating to the economic viability of development … ;
> (c) other actual and expected sources of funding for infrastructure.
> …
> (7A) A charging authority must use appropriate available evidence to inform the charging authority's preparation of a charging schedule.
> …
> (9) A charging authority may revise a charging schedule.
> … ."

Section 212 requires a draft charging schedule to be formally examined by a person independent of the charging authority before it is approved. Section 221 provides:

> "The Secretary of State may give guidance to a charging authority or other public authority (including an examiner appointed under section 212) about any matter connected with CIL; and the authority must have regard to the guidance."

Regulation 14(1) of the Community Infrastructure Levy Regulations 2010, as amended, provides:

> "In setting rates … in a charging schedule, a charging authority must strike an appropriate balance between –
> (a) the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding;
> (b) the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area."

Government policy and guidance on CIL

53. Paragraph 175 of the NPPF says:

> "Where practical, [CIL] charges should be worked up and tested alongside the Local Plan. [CIL] should support and incentivise new development, particularly by placing control over a meaningful proportion of the funds raised with the neighbourhoods where development takes place."

54. In April 2013 the Department for Communities and Local Government issued a guidance document on CIL, in which it said, in paragraph 11, that "[the] Government expects that charging authorities will implement the levy where their 'appropriate evidence' includes an up-to-date relevant Plan for the area in which they propose to charge". That guidance document was superseded by guidance issued in February 2014, which in turn was superseded by guidance issued on the Planning Practice Guidance website in June 2014. In the June 2014 guidance the Government repeated (in paragraphs 010 and 011) what it had said in the February 2014 guidance:

> "Charging schedules should be consistent with, and support the implementation of, up-to-date relevant plans."

and:

> "Charging schedules are not formally part of the relevant Plan, but charging schedules and relevant Plans should inform and generally be consistent with each other. …"

Elsewhere in the guidance it is stated (in paragraph 009) that "[the] levy is expected to have a positive economic effect on development across a local plan area"; and (in paragraph 038) that an examiner should establish, among other things, that a draft charging schedule is "supported by background documents containing appropriate available evidence".

The council's CIL charging schedule

55. In November 2013 the council consulted on its draft CIL charging schedule. It proposed that, for the housing development still required to meet the core strategy, a charge of £120 per square metre should be levied. It also proposed a charge of £100 per square metre for convenience retail development, and a nil rate for all other development. It maintained that charges at the levels proposed were necessary to ensure that the required infrastructure would be funded. It obtained independent advice on viability, which confirmed that the adoption of the CIL charging schedule would not jeopardize the delivery of development. The draft CIL charging schedule was submitted to the Secretary of State for examination on 9 December 2013. Oxted Residential, and others, objected to it on the grounds that it was not based on an up to date core strategy and that some forms of development, particularly smaller developments of housing, would not be viable if the charge was set at the level proposed. The examiner, Mr Terrence Kemman-Lane J.P., held his hearing on 11 March 2014. His report is dated 19 June 2014. He recommended that, subject to a modification excluding "Sheltered/Retirement Housing and Extra Care accommodation", the CIL charging schedule be approved. At its meeting on 24 July 2014 the council accepted its officer's recommendation that the CIL charging schedule be adopted. The officer's report referred to the examiner's conclusion that, as the officer put it, "the council had sufficient evidence to support the charging schedule and could demonstrate that the levy would not present a risk to the overall development of the area". The CIL charging schedule came into effect on 1 December 2014.

Was the council's adoption of the CIL charging schedule unlawful?

56. Mr Clay's argument here was based on his contention, in the appeal against the local plan part 2, that the core strategy was materially out of date, and so too was the local plan part 2. An up to date local plan is a plan that properly identifies the scale and location of development in the local planning authority's area for the plan period. Mr Clay submitted that in the absence of an up to date local plan it is impossible for a charging authority to make a rational assessment of the need for infrastructure in its area. Any calculation of the contributions to be made by development in the form of CIL will depend on the amount of development properly planned for. If there is not an up to date local plan, with the requisite five-year supply of housing land, and the authority continues to rely, as the council does here, on an out of date plan, the CIL charging schedule will bear no reasonable relationship with either the infrastructure required or the source of contributions to that infrastructure. The evidence before the examiner was based on the requirements of the out of date core strategy. It is not possible in these circumstances to come to a rational conclusion on the "appropriate balance" required by regulation 14(1) of the CIL regulations. That was the situation here. The council's adoption of the CIL charging schedule was contrary to the guidance issued by the Government in June 2014 – to which neither the examiner nor the council had regard – and irrational. In his further written submissions Mr Clay relied on the emphasis in this court's decision in *Suffolk Coastal District Council v Hopkins Homes* on the "radical change" in government policy represented by the NPPF (see paragraph 28 of the judgment of the court). He submitted that the "provision of infrastructure to serve that change should have been reflected in the CIL schedule which only reflected the old South East Plan housing requirement of 750 units rather than the OAN of 9400" (paragraph 23 of his further written submissions of 13 April 2016).

57. Dove J. rejected Mr Clay's argument when it was advanced before him, and I think he was right to do so.

58. In the first place, as Mr Price Lewis submitted, it was not open to Mr Clay to press before Dove J. or before this court an argument on the substantive merits of the examiner's conclusions, or the council's consideration of them as charging authority. In a claim for judicial review of a charging authority's adoption of a CIL charging schedule a claimant may not argue afresh a case presented and rejected at the CIL examination, or invite the court to interfere with the examiner's judgment on matters of valuation or planning merit. The challenge may only be made on public law grounds. The charging authority is free to judge for itself what is "appropriate available evidence" under section 211(7A) of the 2008 Act. And regulation 14 of the CIL regulations requires it to exercise its own judgment in striking the "appropriate balance". The range of reasonable judgment here is wide (see the first instance judgment in *R. (on the application of Fox Strategic Land and Property Ltd.) v Chorley Borough Council* [2014] EWHC 1179 (Admin), in particular at paragraphs 5, 100, 101, 104 and 105).

59. Secondly, there is no statutory obstacle to the adoption of a CIL charging schedule when a relevant development plan document is, or may be considered, out of date in the light of subsequently issued national policy or guidance. As Dove J. observed (in paragraph 71 of his judgment), "there is no requirement in the legislative framework … which requires a recently adopted plan to be in place before a CIL Schedule can be adopted", and "there is no reason in law why a charging authority can only produce a CIL schedule if it has recently produced a plan". Far from it being necessarily unreasonable for a charging authority to adopt a CIL charging schedule in such circumstances, this will often be the

pragmatic course to take. An argument to the contrary was presented to the examiner, and he rejected it. He said, in the section of his report headed "Is the charging schedule supported by background documents containing appropriate available evidence?":

> "10. In addition, representations to the draft Schedule made submissions that the Council's Core Strategy is out of date in the sense that it does not comply with [the NPPF], does not address an objectively assessed housing need, has an out of date Strategic Housing Land Availability Assessment and will have to be replaced with a new Local Plan within two years. CIL should only be introduced in conjunction with a Local Plan: a plan which will have to provide for 9,000 new dwellings, rather than the maximum 750 that are likely to be provided under the existing one. This CIL should not be approved since it is not based on an up-to-date plan, would address infrastructure needs because no investment has been made and that result from existing development and would make, particularly smaller sites unviable which even now struggle to be economic.
>
> 11. In coming to my conclusions on these matters I will deal firstly with the arguments set out in paragraph 10 above. The Council has a Core Strategy adopted in October 2008, preceding the March 2012 publication of the NPPF by more than three years. It may be that some of its policies are capable of being considered out of date when judged against the policies of the NPPF, but until replaced it remains the principal document of the Development Plan for the district. The CIL charges proposed by the Council are based on infrastructure needs arising from the development required for the implementation of that plan. So long as there is a funding gap, and that funding is to provide for infrastructure needed to meet the costs of supporting development of the area, I see no legal basis to find that the submitted CIL Charging Schedule should not be approved just because it is based on a plan which, no doubt, will be reviewed in the near future."

and in his "Overall Conclusion":

> "37. … The Tandridge District Core Strategy was adopted in October 2008, preceding the March 2012 publication of the NPPF by more than three years. I am told that a new Local Plan may not be adopted for some time. It may be appropriate to review the effect and effectiveness of the charge after it has been in place for 12 months."

60. I see nothing legally wrong with those conclusions. It was not unreasonable for the examiner to accept the council's argument that, although a review of the core strategy was now in prospect, it would be logical and sensible in the meantime to have a CIL charging schedule in place to deal with the development planned in the core strategy as adopted, and to revise the CIL charging schedule in the light of the review, or sooner, under the statutory power to do so in section 211(9) of the 2008 Act.

61. Thirdly, there is, in my view, no force in Mr Clay's submission that the examiner, and the council, failed to heed the Government's guidance on CIL, including the guidance indicating that CIL charging schedules "should be consistent with and support the implementation of up-to-date relevant plans".

62. At the beginning of his report, in paragraph 1 in the "Introduction", the examiner expressly acknowledged the guidance, stating that the report "considers whether the [charging] schedule is compliant in legal terms and whether it is economically viable as well as reasonable, realistic and consistent with national guidance (Community Infrastructure Levy Guidance, DCLG, February 2014)" (my emphasis). I should say here that Mr Clay did not point to any significant difference between the February 2014 guidance, extant when the examiner prepared his report, and the June 2014 guidance, current when the council resolved to adopt its CIL charging schedule. In the body of the report the examiner grappled with the considerations to which the guidance issued in February 2014 referred, including the relationship between the new development proposed in the core strategy and the identified requirements for infrastructure, the suggested possibility of alternative sources of funding, and the size of the "funding gap" (paragraphs 4 to 16), the strength of the council's evidence on viability in the "CIL Viability Study" dated February 2013, which it had commissioned from BNP Paribas Real Estate (paragraphs 17 and 18), the justification put forward by the council for the proposed charging rates, including its consistency with the Government's guidance on CIL (paragraphs 19 to 35), and, as the final issue, "Does the evidence demonstrate that the proposed charge rates would not put the overall development of the area at serious risk?" (paragraph 36).

63. I think the examiner's reasons in paragraphs 11 and 37, read with the rest of the careful analysis to which I have referred, show very clearly why he did not think the guidance on achieving consistency with, and support for, "up-to-date relevant plans" should stand in the way of the council's CIL charging schedule being adopted. If this was a departure from the guidance, it was neither unexplained nor unlawful – nor even surprising.

64. Fourthly, Dove J. rightly rejected the argument that the examiner failed properly to strike the "appropriate balance" under regulation 14 of the CIL regulations. In fact, the examiner did this with conspicuous care. His relevant conclusions were these:

> "Economic viability evidence
>
> 17. The Council commissioned a CIL Viability Study (VS), dated February 2013. The VS uses a residual land value method, involving calculating the value of completed schemes and deducting development costs such as build costs, fees, finance, and CIL plus developer's profit. This is a standard method used by developers when determining how much to bid for land – the residual amount is the sum left after the costs have been deducted from the value of the development. Levels of CIL have been tested in combination with the Council's planning requirements, including the provision of affordable housing. Since the housing and commercial property markets are inherently cyclical, a sensitivity analysis has been run which decreases sales values by 5% to enable a view to be taken of the impact of any adverse movements in sales values in the short term. The commercial appraisals incorporate sensitivity analyses on rent levels and yields. Some additional viability testing was carried out at my request in respect of small residential development following the examination hearing … .
>
> Conclusion
>
> 18. The draft Charging Schedule is supported by evidence of community infrastructure needs and a funding gap has been identified. Accepted valuation

methodology has been used which was informed by reasonable assumptions about local sale values, rents and yields[.]

…

Is the level of CIL proposed for residential development in general justified?

Conclusion

24. My overall conclusion on these matters is that I prefer the consistent approach in the Council's evidence and its reliance on standard accepted methodology. My main concern about the case put forward by Representors relates to assumed land values or land prices that have apparently actually been paid in recent times. It is fundamental to the CIL regime that a reduction in development land value is inevitable to accommodate it as a cost of development. Reported land sales values before the imposition of CIL in an area will clearly not have had to take the Levy into account. It may also be the case that there will be a period when land owners will be reluctant to see their value expectations decrease, but I do not see that as being a significant inhibitor on land coming forward for development in anything other than the short term. In the same way, the cost of development finance is a cost of development, which must be taken into account in the calculation of the price of land.

…

26. In conclusion, the evidence before me is a clear indication that general residential development will remain viable across most of the District if the proposed CIL rate is applied.

…

Does the evidence demonstrate that the proposed charge rates would not put the overall development of the area at serious risk?

36. The Council's decision to set a rate of £120 psm for residential development and of £100 psm for convenience retail is based on reasonable assumptions about development values and likely costs. The evidence suggests that residential and commercial development will remain viable across most of the area if the charge is applied."

and in his "Overall Conclusion":

"37. In setting the CIL charging rate the Council has had regard to detailed evidence on infrastructure planning and the economic viability evidence of the development market in Tandridge District. The Council has tried to be realistic in terms of achieving a reasonable level of income to address a gap in infrastructure funding, while ensuring that a range of development remains viable across the authority's area.

… .

38. I conclude that, subject to the modification set out in Appendix A the Tandridge District Community Infrastructure Levy Charging Schedule satisfies the requirements of Section 212 of the 2008 Act and meets the criteria for viability in the 2010 Regulations (as amended). I therefore recommend that the Charging Schedule be approved."

65. On a fair reading of those passages of the examiner's report, it is quite plain that he understood the nature of the balance the charging authority had to strike under regulation 14(1), and that he reached a very clear conclusion on the way in which the balance had been and should be struck. He endorsed the council's approach and its evidence on viability. Mr Price Lewis submitted that viability testing in a process such as this can only sensibly be done by considering "a range of development types across a range of different market areas of a district", which was what BNP Paribas Real Estate did for the council. He also pointed out that Oxted Residential had taken the opportunity to submit to the examiner evidence of their own on the viability of development if the council's CIL charging rates were applied. It is not the court's task to explore that evidence. It is enough to conclude, as I do, that the examiner's analysis complies with the requirements of regulation 14(1), and is consistent with the Government's guidance. The council accepted that analysis, and it was entitled to do so.

66. The examiner's reference in paragraph 26 of his report to "general residential development" remaining viable across "most of the District" and his reference in paragraph 36 to "residential and commercial development" remaining viable across "most of the area" must be read with his conclusion in paragraph 37, where he referred to "a range of development" remaining viable "across the authority's area". That last conclusion, as I understand it, corresponds to the concept in paragraph (1)(b) of regulation 14 – "the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across [the charging authority's] area". Like Dove J. (in paragraphs 74 and 75 of his judgment), I regard as untenable the suggestion that these conclusions of the examiner can be read either as warranting "differential rates" of CIL for different parts of the district or as betraying a failure by the council to comply with its duty in regulation 14(1).

67. For those reasons I think the appeal against Dove J.'s order dismissing the claim for judicial review of the council's adoption of its CIL charging schedule must also fail.

Conclusion

68. I would therefore dismiss both appeals.

Patten L.J.

69. I agree.

Jackson L.J.

70. I also agree.