Neutral Citation Number: [2013] EWHC 286 (Admin)
Case Nos: CO/8962/2012 & CO/10438/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2013

Before :

THE HON. MR JUSTICE MALES

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Between :

TEWKESBURY BOROUGH COUNCIL **Applicant**
- and –
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) COMPARO LIMITED
(3) WELBECK STRATEGIC LAND LLP
Respondents

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Mr Kevin Leigh (instructed by **Tewkesbury Borough Council**) for the **Applicant**
Mr James Maurici (instructed by **the Treasury Solicitor**) for the **First Respondent**
Mr Jeremy Cahill QC and **Miss Celina Colquhoun** (instructed by **Brabner Chaffe Street LLP**) for the **Second Respondent**
Mr Ian Dove QC and **Mr Satnam Choongh** (instructed by **Osborne Clarke**) for the **Third Respondent**

Hearing dates: 12th-13th February 2013

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Judgment

See: Costs Judgment at foot of this judgment.

Mr Justice Males :

1. The village of Bishop's Cleeve in Gloucestershire lies within the Central Severn Vale. Currently its population is about 10,700. To the north and north-west is open farmland. That farmland includes a total of 87.9 hectares with which this application is concerned. The Secretary of State for Communities and Local Government has granted planning permission for the development of the land in accordance with proposals that include provision for 1,000 new dwellings. He takes the view that such development is necessary in order to provide much needed local housing. But the local council, which is the planning authority for the area, objects to this grant of permission, saying that it undermines the democratic process whereby it is for the

council to determine the provision of housing as part of its responsibility for establishing a local development plan arrived at by a process of consultation with the local community. As Mr Kevin Leigh for the council put it in his skeleton argument, there is a "fundamental requirement for the Council, post the Localism Act 2011, to be in the driving seat of spatial planning for its area, including housing land provision" which the Secretary of State has ignored. It is the council's case that the 2011 Act and the policy which it embodies have brought about a sea change in the proper approach to planning decisions which require much greater priority than hitherto to be given to the views of local planning authorities.

2. The Secretary of State acknowledges that recent changes to the planning system are intended to give local communities more say over the scale, location and timing of developments in their areas, but he insists that this carries with it the responsibility to ensure that local plans are prepared expeditiously to make provision for the future needs, including housing needs, of their areas, and that at least until such plans are at a reasonably advanced stage of preparation, which was not the case here, it will remain appropriate to consider development proposals through the planning application process, applying long standing principles and policies, even though this may result in the grant of permission in the face of local opposition.

3. So the essential question raised by the present case is, whose view should prevail as to whether these developments can go ahead, the local council's or the Secretary of State's? This question arises on an application by the local council ("Tewkesbury") under section 288 of the Town and Country Planning Act 1990 ("the TCPA 1990") challenging the lawfulness of the grant by the Secretary of State of planning permission in decisions on two appeals under section 78 of the Act (referred to as Appeals A and B). The appeals were made by the developers when Tewkesbury failed to make a decision on their applications within the prescribed time limit. The Secretary of State's decisions are contained in two decisions letters, dated 16 July 2012 and 24 August 2012.

4. Both appeals were the subject of a report of an inspector, Mr David Nicholson, appointed by the Secretary of State, who held a public inquiry that sat for a total of 13 days between 20 September and 13 December 2011.

5. Appeal B was made by Welbeck Strategic Land LLP and concerned land at Deans Farm. An application for planning permission was sought for up to 550 dwellings, including 30 units for retired people; a high street comprising four retail units with a gross retail floor space of 475 sq.m, plus ancillary accommodation of 475 sq.m; 15 units with a floor space of 3,750 sq.m and 16 live/work units; a community facility with a hall; extension to allotments; open space provision; and provision for drainage and access.

6. Appeal A was made by Comparo Ltd and concerned land at Homelands Farm. An application for planning permission was sought for up to 450 dwellings; 500 sq.m of other accommodation; provision of a local centre comprising a total of 1,650 sq.m including a community hall and health, leisure and nursery accommodation; strategic parkland (including allotments and orchards), public open space facilities and ancillary landscaping, vehicular access and infrastructure for foul and surface water.

7. Both sites are located in the Central Severn Vale, but not in the Green Belt.

8. The inspector recommended that both appeals be allowed and the Secretary of State accepted that recommendation, adopting the inspector's reasoning and conclusions. Meanwhile Tewkesbury formally resolved that it would have refused planning permission in both cases, had it been in a position to do so.

9. The decision letter dated 16 July 2012 originally contained the decisions of the Secretary of State on both appeals. However, it contained an error which required correction and the Secretary of State therefore issued the second decision letter, dated 24 August 2012. Consequently, there are two sets of proceedings challenging these decisions: Claim CO/8962/2012 for the challenge to Appeal B contained in the first decision letter and claim CO10438/2012 for the challenge to Appeal A contained in the second decision letter read together with the first. However, nothing now turns on this and it was common ground before me that for the purpose of these applications it is sufficient to focus on the first decision letter.

The legislative and policy framework

10. Subject to the question whether the Localism Act 2011 has brought about a fundamental change in the approach to be followed, there was little if any dispute about the applicable legal framework. So far as relevant to this case, and leaving on one side for the moment the impact of the Localism Act, that framework is as follows.

The development plan

11. In determining an appeal under section 78 of the TCPA 1990 the Secretary of State must follow the decision making process indicated in section 70(2) of the Act (as amended by section 143 of the Localism Act 2011 from 15 January 2012) which provides:

> "(2) In dealing with such an application the authority shall have regard to
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> (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."

12. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 ("the PCPA 2004") provides as follows:

> "(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."

13. Thus the starting point for consideration of any application must be the development plan. There is a presumption that any decision to grant or refuse permission should be in accordance with the plan, but that presumption can be rebutted if "material

considerations" so indicate. The weight to be given to a development plan will depend on the extent to which it is up to date. A plan which is based on outdated information, or which has expired without being replaced, is likely to command relatively little weight.

Material considerations

14. The expression "material considerations" is defined widely. It includes various statements of policy contained in documents such as Government Circulars, Planning Policy Guidance Notes ("PPGs"), Planning Policy Statements ("PPSs"), Ministerial Statements and advice issued on behalf of the Minister by the Chief Planning Officer. Since March 2012 it has also included the National Planning Policy Framework ("the NPPF") which replaced many of the previous policy statements. The NPPF did not apply at the time of the inspector's report, but it did apply by the time of the Secretary of State's decisions.

15. Two aspects of the applicable policy statements are particularly relevant in the present case.

Housing land supply

16. The first, which has been a long-standing policy of central government going back many years, is the requirement for local authorities to maintain a five year supply of housing land. At the time of the public inquiry in this case, the relevant policy provision was contained in paragraph 71 of PPS 3 dated June 2011. This provided that:

> "Where Local Planning Authorities cannot demonstrate an up-to-date five year supply of deliverable sites, for example, where Local Development Documents have not been reviewed to take into account policies in this PPS or there is less than five years supply of deliverable sites, they should consider favourably planning applications for housing, having regard to the policies in this PPS including the considerations in paragraph 69."

17. The considerations in paragraph 69 include the need to ensure that proposed developments reflect "the need and demand for housing in, and the spatial vision for, the area".

18. PPS 3 was replaced upon the introduction of the NPPF in March 2012. Paragraphs 47 and 49 of the NPPF provide:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> - use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are

> critical to the delivery of the housing strategy over the plan period;
>
> - identify and update annually, a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements …"

> "49. 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."

19. These paragraphs have to be read with the "decision taking" section of paragraph 14 of the NPPF, which provides what is to be done when an existing plan is "out of date":

> "At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan making and decision taking. …
>
> For decision-taking this means:
>
> • approving development proposals that accord with the development plan without delay; and
>
> • where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted."

20. Accordingly, both before and after the issue of the NPPF, the need to ensure a five year supply of housing land was of significant importance. Before the NPPF the absence of such a supply would result in favourable consideration of planning applications, albeit taking account also of other matters such as the spatial vision for the area concerned. After the NPPF, if such a supply could not be demonstrated, relevant policies would be regarded as out of date, and therefore of little weight, and there would be a rebuttable presumption in favour of the grant of planning permission. All of this would have been well understood by local planning authorities. An authority which was not in a position to demonstrate a five year supply of housing land would have recognised, or ought to have recognised, that on any appeal to the

Secretary of State from a refusal of permission there would be at least a real risk that an appeal would succeed and permission would be granted.

21. That is not to say, however, that the absence of a five year housing land supply would be conclusive in favour of the grant of planning permission. It may be that the NPPF, with its emphasis in paragraph 47 to the need "to boost significantly the supply of housing", placed even more importance on this factor than PPS 3 had done, but whether or not that is so, in both regimes the absence of such a supply was merely one consideration required to be taken into account, albeit an important one.

Prematurity

22. The second policy of importance in this case is the principle of prematurity. The PCPA 2004 required planning authorities to produce Local Development Documents. Inevitably, however, the process of agreeing a development plan takes time. In the meanwhile, applications for planning permission will continue to be made. The question therefore arises how such applications should be dealt with when a development plan is in the process of being established. On the one hand, the mere fact that no plan has yet been adopted cannot be allowed to prevent any new development. On the other, planning permission should not be granted in circumstances (or, in the jargon, such permission would be "premature") where that would pre-empt or prejudice an emerging development plan. This tension is addressed in paragraphs 17 to 19 of a 2005 policy document, "The Planning System: General Principles" ("PS:GP") which sets out the applicable government policy:

> "17. It may be justifiable to refuse planning permission on grounds of prematurity where a DPD [development plan document] is being prepared or is under review, but it has not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by pre-determining decisions about the scale, location or phasing of new developments which are being addressed in the policy in the DPD.
>
> 18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. … The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example:
>
> Where a DPD is at consultation stage, with no early prospect of submission for examination, then a refusal on prematurity grounds would seldom be justified because of the delay which this would pose in determining the future use of the land in question.
>
> 19. Where planning permission is refused on grounds of

> prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process."

23. This policy remains in force but further guidance on the issue of prematurity is contained within the NPPF. This provides at paragraph 216:

> "From the day of publication, decision-takers may also give weight (footnote 40: unless other material considerations indicate otherwise) to relevant policies in emerging plans according to:
>
> - the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
>
> - the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
>
> - the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

24. The important role of local planning authorities in formulating a development plan for an area is therefore recognised, but this long-standing and well established principle of prematurity regulates the weight to be given to that role when considering any individual planning application in circumstances where a development plan does not yet exist.

Regional Strategies

25. Part 5 of the Local Democracy, Economic Development & Construction Act 2009 provided for the establishment of Regional Strategies setting out policies in relation to both "sustainable economic growth" and "the development and use of land" in the region. Such strategies were to form part of the development plan for any area. They have been described as a form of "top down" planning whereby (among other things) housing targets based on regional strategies were imposed on local authorities from above. This approach was not new in 2009. Such strategies were previously known as Regional Spatial Strategies and had formed part of the development plan for their region. After the change of government in 2010 the Secretary of State decided to revoke Regional Strategies and to return decisions on housing supply previously taken at a regional level to local planning authorities. This decision was announced in a letter to local planning authorities dated 27 May 2010 and in a statement to Parliament on 6 July 2010. However, this non-statutory revocation without carrying out environmental assessments and consultations was held to be unlawful (*R (Cala Homes (South) Ltd) v. Secretary of State for Communities & Local Government* [2010] EWHC 2866 (Admin)).

26. The Secretary of State did not appeal against this judgment. Instead the Chief Planning Officer wrote to all local planning authorities acknowledging that Regional Strategies had been re-established as part of development plans, but reiterating that it was the government's intention to abolish them and stating that the Secretary of State expected local authorities to have regard to this intention as a material consideration in planning decisions. This approach was challenged in further proceedings, but the Court of Appeal held that the government's intention to abolish Regional Strategies was capable in principle of being such a material consideration and that the weight to be given to that consideration was a matter of planning judgment, which would depend upon the progress made in implementing their proposed abolition (*R (Cala Homes (South) Ltd) v. Secretary of State for Communities & Local Government* [2011] EWCA Civ 639, [2011] 2 EGLR 75).

27. Section 109(3) of the Localism Act 2011 authorised the Secretary of State to revoke regional strategies. That power has been exercised in relation to some areas but the draft Regional Strategy applicable to Tewkesbury has not yet been revoked. It is unlikely, however, that it will ever be implemented.

The Tewkesbury development plan

28. Despite the statutory requirement, which has existed since 2004, to produce a Local Development Document, Tewkesbury has not yet produced such a document. In March 2005 it produced a proposed timetable which, if it had been followed, would have led to the adoption of a development plan in December 2007. However, over the years there have been a series of delays and postponements. The latest position as at the date of the public inquiry in this case was that it was proposed to publish a preferred option in 2013, with final adoption some time later.

29. In these circumstances the current development plan for Tewkesbury consists of, or is contained in, a number of outdated documents which it is unnecessary to list, these having been produced pursuant to the pre-PCPA 2004 regime, as well as the draft Regional Strategy which will not now be implemented. The operative period for this existing plan expired in 2011. One result of the existing plan being so far out of date and of the failure to adopt a development plan in accordance with the PCPA 2004 is that the existing plan is entitled to very little weight when planning applications are being considered or, to put it the other way round, the presumption in favour of the existing development plan is very easily rebutted. Another is that Tewkesbury cannot benefit from the transitional provision in paragraph 214 of the NPPF. This provides that:

> "For 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004 [footnote 39: In development plan documents adopted in accordance with the Planning & Compulsory Purchase Act 2004 …] even if there is a limited degree of conflict with this Framework."

30. The current position is that Tewkesbury is working with other local authorities, Gloucester City Council and Cheltenham Borough Council, to prepare a Joint Core Strategy ("JCS") which will act as a spatial planning strategy for the area covering the 20 year period up to 2031. That JCS is supported by an extensive evidence base which

analyses among other things the anticipated rise in population during the period to be covered by the JCS and the development required to support that rise in population. This is more up-to-date than the evidence produced for the Regional Strategy, although the housing need figures in the JCS have not been finalised and are projected over a longer period than five years. Four scenarios for future development are identified in the JCS, and a draft consultation document indicates which of these scenarios is contemplated to be the preferred option. However, as at the date of the public inquiry in this case there remained some differences in approach between the three authorities concerned as a result of which the preferred option had not been finally agreed, and the consultation had not yet taken place.

The inspector's report

31. Having described the proposed development sites, identified the relevant planning policies and set out the arguments of (among others) Tewkesbury and the two developers, the inspector set out his reasoning and conclusions in section 14 of his report. He identified four principal issues, namely:

> "i) whether or not the proposals would comply with the development plan and, if not, whether there are material considerations which could outweigh any conflict;
>
> ii) whether the release of either or both sites for housing would be premature in advance of the emerging joint core strategy (JCS);
>
> iii) the effects of the proposals on the character and appearance of the area, including the adjacent Area of Outstanding Natural Beauty (AONB), with particular regard to landscaping;
>
> iv) the extent to which the proposals would comprise sustainable development, with particular regard to design principles and promoting sustainable transport choices."

32. It has not been suggested that this was a wrong statement of the issues which the inspector had to decide.

Compliance with the development plan/material considerations

33. The inspector's answer to the first of these issues was that because both appeal sites were located in countryside beyond any defined residential development boundary, they were contrary to the existing development plan. That conclusion was inevitable. However, because the existing plan had an end date of 2011, the weight to be given to this conflict was significantly reduced.

34. Having identified the very limited weight to be given to the existing development plan, the inspector turned to consider material considerations which might outweigh it. His first conclusion here was set out in paragraph 14.8:

> "The most important material consideration is Housing Land Supply (HLS). TBC cannot demonstrate a 5 year HLS, against

> the SP or draft RSS, and has accepted that the presumption in favour of housing development in these circumstances (paragraph 71 of PPS3) applies. In principle, the pressing need for a 5 year HLS is capable of outweighing the conflict with housing policies in the development plan. TBC has argued that the emerging Joint Core Strategy (JCS) would provide over 10 years HLS. To understand the HLS position, and the weight to be given to this material consideration, I have therefore first looked at emerging policy."

35. I would make four observations on this paragraph. First, it is clear that it was common ground that Tewkesbury could not demonstrate a five year housing land supply by reference to the need for housing identified in the existing plan, including the Regional Strategy. Second, it does not appear to have been argued by Tewkesbury that this was immaterial on the ground that the Regional Strategy would not now be implemented, or that its analysis of housing need over a five year period was fundamentally flawed. Nor did Tewkesbury contend that there was any better source of information as to housing need, its position being that this should be left to be determined in the JCS process. Third, in the light of the failure to demonstrate a five year housing land supply against the only figures which were available, it was clearly open to the inspector to conclude that the application for planning permission should be considered favourably in accordance with paragraph 71 of PPS 3. Indeed, it appears that Tewkesbury accepted this. Fourth, however, the inspector did not treat this as the end of the matter. Rather, his conclusion was merely that the pressing need for a five year housing land supply was capable of outweighing the conflict with the development plan, but that in order to determine whether it did in fact do so it was necessary to consider Tewkesbury's arguments by reference to the emerging JCS.

Prematurity

36. That is what the inspector then went on to do under the heading of "prematurity". He did so by reference to three topics. The first of these was housing need, as to which he observed that the parties were in approximate agreement as to population projections, and the number of new homes required as a result. He commended in this connection the evidence base acquired for the purpose of the JCS.

37. Next he considered whether or to what extent the identified need for new housing could be met by the scenarios proposed in the JCS. Here there was a difference of opinion between Tewkesbury on the one hand and the developers on the other. Bearing in mind in particular that Tewkesbury's projections included significant development on Green Belt sites, which was likely to encounter substantial local opposition and therefore delay, the inspector concluded that it would be January 2014 at the earliest before such sites could be adopted as part of the JCS, and that it was unlikely that any significant number of new homes would be built on Green Belt sites within the next five years. Likewise, he considered it unlikely that the new housing in rural areas not forming part of the Green Belt contemplated by the JCS would make any worthwhile contribution to meeting housing needs within the next five years.

38. This led the inspector to four important conclusions. The first was that if the developers' appeals were rejected, it would be impossible for Tewkesbury to meet the identified need for housing within the next five years. The second was that even if the

appeals were allowed and the developments took place, there would still be a shortfall against projected need. The third was that, because allowing the appeals would still leave a shortfall, this could not prejudice the other choices to be made in the JCS exercise. As he put it, other than allowing the appeals there was "no other credible way of providing a 5 year HLS". The fourth conclusion was that it was Tewkesbury's own delay, with the consultation draft development plan option only having been issued in December 2011, after the expiry of the existing pre-PCPA 2004 plan, which had created "the current policy vacuum".

39. The effect of these conclusions was that even if full weight was given to the emerging JCS, in the inspector's view the JCS proposals were not capable of meeting the identified housing need, and therefore could not rebut the presumption in favour of development as a result of the absence of a five year housing land supply. However, he went on to consider the effect of the Localism Act 2011 on the approach to be adopted, concluding that there was nothing in the Act to alter the long established requirement for a five year housing land supply and recognising that "the tension in policy between the desire for decisions to be taken locally and the requirement for a 5 year HLS remains unaltered".

40. On the basis of this analysis the inspector's conclusions on prematurity were as follows. First, applying paragraph 18 of PS:GP, the JCS was only just at the consultation stage, without an agreed option to take it forward, and in such circumstances refusal on the ground of prematurity would only seldom be justified. Second, it was very unlikely on any basis that Tewkesbury's proposed trajectory for housing development could deliver a five year housing land supply, whichever figures were used. Third, allowing the appeals would not predetermine future decisions on the scale, location or timing for any of the other proposed development sites which would be required under the JCS. Accordingly, Tewkesbury's evidence failed the test indicated in paragraph 19 of PS:GP of showing clearly how allowing the appeal would prejudice the outcome of the JCS process. Thus the inspector cannot be said to have disregarded the JCS. Rather he engaged with it but concluded that it did not bear the weight which Tewkesbury sought to put upon it.

Character and appearance/sustainable development

41. That dealt with the first two of the issues referred to at [31] above. The inspector went on to acknowledge that the developers' proposals would cause some harm to the landscape, but considered that this factor was capable of being outweighed by other material considerations, and in any event some such harm was likely to occur somewhere in the Central Severn Vale if adequate housing was to be provided. As to the final issue, he concluded that the proposals would constitute sustainable development.

The inspector's overall conclusion

42. The inspector's overall conclusion was set out in paragraph 14.64 of his report as follows:

> "The main weight against the schemes stems from conflict with countryside policies, which should be given greatly reduced emphasis as the development plan is rather dated, and a

> commitment to revoke regional housing targets, which should be given limited weight at this stage. In their favour are the need for housing, where the requirement for a 5 year HLS is not being met, and the need to boost the economy, which together warrant considerable weight. In short, the proposals require a difficult balance to be struck between giving priority to the development plan, and the moves towards planning at a local level, and the chance to rectify a substantial shortfall in HLS, with affordable housing and other benefits, which could also provide a significant boost to the economy. For all the above reasons, I find that the balance should fall in favour of both proposals."

43. It will be observed that here too the inspector did not simply treat the absence of a five year housing land supply as overriding all other considerations. Instead he considered that there was a difficult balance to be struck, with some factors pointing in favour of allowing the proposals and others pointing against.

The Secretary of State's decision

44. The Secretary of State pointed out that since the close of the inquiry the NPPF had been published, but he considered that the main issues identified by the inspector remained essentially the same. He too started from the existing development plan, noting that although the revocation of Regional Strategies had come a step closer with the enactment of the Localism Act, the Regional Strategy in this case had not yet been formally revoked. He therefore gave limited weight to its proposed revocation. Similarly, he gave little weight to the emerging JCS, on the ground that it was at an early stage of preparation.

45. Turning to the first issue, he acknowledged that the proposals were contrary to the development plan, but as the plan was outdated and based on housing requirements up to June 2011 he concluded that the weight to be given to conflict with the development plan should be significantly reduced.

46. He agreed with the inspector that the most significant material consideration was the national policy requirement for a five year housing land supply, which could not be demonstrated and for which there was a pressing need. He noted the proposed timescale for the JCS and the prospect of opposition to development on the Green Belt sites identified in the JCS and concluded, in accordance with Annex 1 of the NPPF, that little weight should be given to emerging policies for allocation of housing land. This was a reference to paragraph 216, set out at [23] above. He agreed with the inspector that other than allowing the appeals there was no other credible way of reducing the five year land supply shortfall. He agreed too with the inspector's reasoning and conclusions on prematurity, stating that:

> "… the JCS is at a very early stage and little weight can be attached to it. The appeal proposals are necessary now to meet immediate housing need and the presumption in favour of sustainable development in the Framework applies."

47. Finally the Secretary of State agreed with the inspector on the issues of character and appearance and sustainable development.

48. He stated his overall conclusion in paragraph 32 of the decision letter which also addressed the issue of localism:

> "The Secretary of State notes the Inspector's comments … that allowing these appeals may be seen by objectors as undermining the local democratic process and the planning system. However, he is clear that the changes to the planning system that give communities more say over the scale, location and timing of developments in their areas carry with them the responsibility to ensure that local plans are prepared expeditiously to make provision for the future needs of their areas. He agrees that these proposals would not be premature… Having weighed up all the relevant material considerations, the Secretary of State concludes that the factors in favour of the proposed developments outweigh the harms and that the balance should fall in favour of both proposals."

Provisional Conclusion

49. In my judgment, subject to the issue as to the effect of the Localism Act and the policy which it embodies, the inspector's report and the Secretary of State's decision accepting and adopting that report were the result of an entirely unexceptional application of the legal and policy principles set out above. In particular, the inspector and the Secretary of State were entitled to conclude that (1) the existing pre-PCPA 2004 development plan was outdated and therefore of very little weight; (2) the need for a five year housing supply was a material (and in fact the most important material) consideration; (3) Tewkesbury was unable to demonstrate such a supply in this case; (4) accordingly a presumption in favour of granting permission applied; (5) the emerging JCS was of little weight because it was at a very early stage; (6) in any event the proposals in the JCS were incapable of meeting the demand for housing during the next five years; (7) granting permission would not prejudice the JCS process; (8) there was therefore no basis to refuse permission on the ground of prematurity or otherwise because of the JCS; and (9) overall, the balance came down in favour of granting permission. Each of these conclusions was the result of applying well established principles and policies to the evidence before the inspector and was a legitimate exercise of planning judgment.

50. It is well established that a challenge to a planning decision in the Administrative Court under section 288 of the TCPA 1990 does not involve a review of the planning merits of the decision. So long as the decision maker's conclusions are not *Wednesbury* unreasonable, which these were not, the court will not interfere. Similarly, although the question whether something is a material consideration is a question of law for the court, the weight to be given to it (if it is a material consideration) is a matter of planning judgment, which is entirely a matter for the decision maker. As Lord Hoffmann put it in *Tesco Stores Limited v. Secretary of State for the Environment* [1995] 1 WLR 759 at 780:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

51. These principles were recently applied by HHJ Sycamore QC sitting as a judge of this court in *R (Save our Parkland Appeal Ltd) v. East Devon District Council* [2013] EWHC 22 (Admin). In that case the claimant contended that the grant of planning permission had pre-empted the process for establishing a Local Development Framework, but the judge applied the prematurity principle set out in paragraphs 17 to 19 of PS:GP and held that refusal of planning permission on the basis of prematurity would have been inconsistent with national planning policy and in breach of central government guidance. However, *Save our Parkland* did not give rise to issues as the effect of the Localism Act.

52. Accordingly, unless the landscape of planning decisions has been utterly transformed by the Localism Act, as Mr Leigh for Tewkesbury submits that it has, the Secretary of State's decision on these appeals cannot be challenged.

53. Before turning to that question I should address two further preliminary points. First, Mr Leigh submits that paragraph 14.8 of the inspector's report (set out at [34] above) was wrong in law because the inspector treated the absence of a five year housing land supply as determinative in favour of the grant of permission, regardless of all other considerations. I would agree that if he had done so, that would have been an error of law, as paragraph 71 of PPS 3 (set out at [16] above) does not go that far. Nor do paragraphs 47 to 49 of the NPPF (see [18] above). However, as already explained, that is manifestly not what the inspector did. He was entitled to regard the lack of a five year housing supply as "the most important material consideration", which was a matter of weight and therefore a decision for his judgment, but he did not treat it as a trump card overriding and rendering irrelevant everything else. I would not accept that (as Mr Leigh put it) once the lack of a five year housing supply had been identified, the result was a foregone conclusion. That is certainly not how the report

reads, and the inspector's final paragraph (see [42] above) is inconsistent with any such approach.

54. The second and related point is that it was wrong to assess the five year housing need by reference to the figures in the draft Regional Strategy when that strategy is to all intents and purposes a dead letter. In my judgment, however, that cannot be regarded as an error of law, if indeed it was an error at all. First, the assessment of housing need was a matter for the inspector to determine based on the evidence before him. Second, the fact that the Regional Strategy will not be implemented does not necessarily invalidate what it has to say about the projected need for housing land. Third, this was the material that the parties put before the inspector, there being (on Tewkesbury's own case before the inspector) nothing better. Fourth, it appears that Tewkesbury accepted that it was unable to demonstrate a five year housing supply, so that paragraph 71 of PPS 3 applied. And fifth, the inspector concluded that it was very unlikely that Tewkesbury could deliver a five year housing land supply whichever figures were used.

A fundamental change?

55. I come now to the question whether the Localism Act 2011 has brought about a fundamental change in the approach to planning applications so as to vitiate the conclusions reached by the Secretary of State. Mr Leigh submits that it has, so that much greater weight must now be given to the views of the local planning authority. He identifies the change, not so much in the words of the Act (I invited him to draw to my attention the statutory provisions which had the effect contended for, but he made clear that this was not how he put his case) but in broad statements made by government ministers and others as to what the Act was intended to do, eliminating "top down" planning and transferring power to local communities. In particular he relies on the following statements.

56. First, there are passages in "A Plain English Guide to the Localism Act" published by the Department for Communities and Local Government in November 2011. These include an extract from the forward by the Minister of State, as follows:

> "For too long, central government has hoarded and concentrated power. Trying to improve people's lives by imposing decisions, setting targets and demanding inspections from Whitehall simply doesn't work. It creates bureaucracy. It leaves no room for adaptation to reflect local circumstances or innovation to deliver services more effectively and at lower cost. And it leaves people feeling 'done to' and imposed upon - the very opposite of the sense of participation and involvement on which a healthy democracy thrives."

57. Further, the Guide itself includes the following passage (Mr Leigh's underlining):

> "**Abolition of regional strategies**
>
> 'Regional strategies' were first required by law in 2004. These strategies set out where new development needs to take place in each part of the country. <u>They include housing targets for</u>

> different areas, set by central government. Local communities had relatively limited opportunities to influence the strategies.
>
> This centrally-driven approach to development is bureaucratic and undemocratic. Rather than helping get new houses built, it has had the effect of making people feel put upon and less likely to welcome new development.
>
> The Secretary of State wrote to local authorities in 2010 to tell them that the Government intended to abolish regional strategies. The Localism Act will enable us to do this."

58. Second, Mr Leigh relies on the first of what are described as 12 "Core planning principles" in paragraph 17 of the NPPF. This provides:

> "Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:
>
> - be genuinely plan-led, empowering local people to shape their surroundings with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency."

59. I would accept that the Localism Act 2011 made significant changes to the planning system, but I would not accept that the effect of those changes was to eliminate the role of the Secretary of State in determining planning applications opposed by local planning authorities or to abolish long-standing principles and policies such as the need for a five year housing land supply or the principle of prematurity as the means of resolving the tension between individual planning applications and the more extended timescale needed for the formulation and adoption of local development plans. Nor in my judgment do the statements of policy set out above suggest otherwise.

60. So far as relevant for present purposes, what the Localism Act actually did was to make provision for the abolition of Regional Strategies. It thereby abolished, or at any rate paved the way for the abolition of, one bureaucratic tier of the plan-making process. Instead of three tiers (national policies of the Secretary of State, Regional Strategies and local planning authorities), there would henceforth be only two. (I leave out of account as irrelevant for present purposes the proposed new neighbourhood plans). The functions previously carried out at regional level would either be abolished or, to the extent that they were not, would be transferred to local planning authorities. But there was nothing in the Act to suggest that relevant national policies would no longer apply, or that the Secretary of State would no longer perform his function in determining planning application appeals applying (so far as relevant

to this case) the same principles and policies as before. In particular, the policies relating to a five year housing land supply and the principle of prematurity were expressly reaffirmed in the NPPF. It cannot sensibly be suggested, therefore, that those policies were intended to be swept away.

61. Mr Leigh suggests that if this was all that the abolition of Regional Strategies amounted to, the fanfare which (he says) accompanied the Act would not have been justified as the actual transfer of power to local authorities would be illusory. Whether or not that is so is not for me to say, although if it were, I do not suppose that it would be the first time that more has been claimed for a legislative reform than has actually been delivered. Be that as it may, however, this is not a consideration which can affect the true meaning of the Act. Moreover, even in a field of law such as planning where government policy statements play a larger role than in most other fields, it remains necessary to identify with some precision the policy statements relied upon in order to consider their true meaning. It is not sufficient to refer in general terms to essentially political statements as to the radical nature of any proposed change in law or policy.

62. In my judgment the statements relied upon by Mr Leigh and set out at [56] to [58] above are more limited in scope than he suggests. They deal with two matters. The first, in the Plain English Guide, is the proposed abolition of Regional Strategies and the benefits to be expected from and claimed for that abolition, but that does no more than indicate what the government hoped and expected would be the effect of the Act. The second, the core planning principle in paragraph 17 of the NPPF, describes the intended role of local authorities and local people in formulating local development plans without the involvement of or interference from Regional Strategies. However, the core principle in paragraph 17 must be read in the context of the NPPF as a whole. That context includes (1) the presumption in favour of sustainable development in paragraph 14; (2) the requirement to boost significantly the supply of housing in paragraph 47; (3) the need, also in paragraph 47, for a five-year supply of housing land and the corresponding injunction in paragraph 49 that policies for the supply of housing should not be considered up to date if a five-year supply cannot be demonstrated; (4) the one year transitional period for development plans adopted in accordance with the PCPA 2004 by paragraph 214; and (5) the confirmation of the principle of prematurity contained in paragraph 216.

63. The context includes also the emphasis on Local Plans as the key to delivering sustainable development, contained in paragraph 150 and the following paragraphs of the NPPF. These paragraphs make clear that Local Plans must be prepared with the objective of contributing to the achievement of sustainable development and must be consistent with the principles and policies set out in the NPPF. There is, therefore, no question of empowering local authorities to develop plans without regard to the national policies set out in the NPPF. Accordingly, while the NPPF was intended to be a material consideration in planning decisions, and says as much in paragraph 196, it must be read as a whole and in context.

64. In my judgment these matters are capable of being read together as a coherent whole. They demonstrate that, for the future, development plans prepared by local planning authorities in accordance with the national policy principles set out in the NPPF, including the provision of a five year housing land supply, will represent the starting point for consideration of planning applications, and that it may well be difficult to obtain permission for developments which are not in accordance with such plans.

However, they do not suggest that greater weight should be accorded to the views of local authorities who do not have such a development plan (or during the one year transitional period, a development plan produced in accordance with the PCPA 2004) over and above whatever weight would be appropriate pursuant to the long established prematurity principle. Nor do they cast any doubt on the fact that, pending the adoption of local development plans, individual planning applications will continue to be dealt with, where appropriate by the Secretary of State, applying existing principles.

65. I consider, therefore, that the Secretary of State was correct to say, in paragraph 32 of the decision letter set out at [48] above, not only that there have been changes to the planning system as a result of the Localism Act which will give local communities more say over the scale, location and timing of developments in their areas than was previously the case, but also that this greater say over such matters will depend upon the expeditious preparation of local plans which make provision (including in particular a five year supply of housing land) for the future needs of those areas. The Secretary of State's decision in this case is in accordance with and not in contradiction to that approach. I see, therefore, no valid basis on which it can be concluded that the Secretary of State's decision is unlawful as being contrary to his own policy, introduced as a result of or embodied in the Localism Act.

66. Indeed, it proved very difficult to pin down precisely what Tewkesbury's case was as to (1) the approach which ought now to be followed pursuant to the fundamentally different post Localism Act policy which it says now exists and (2) the error of law which the Secretary of State is said to have made. It is put this way in Mr Leigh's skeleton argument:

> "The errors in the [decision letter] arise from the [Secretary of State's] failure to take into account material considerations in the form of the emerging JCS (that is about more than a 5 year housing supply) and the Council's approach to spatial planning in its area, namely to consider the evidence base for housing land supply. The criticism is that instead of allowing the Council to approach the provision of housing land supply as part of its broader spatial strategy that engages the local community and up-to-date evidence, the [Secretary of State's decision letter] imposes upon the Council *ad hoc* locations for housing land supply thereby undermining the democratic process. This is contrary to the process of localism promoted by the [Secretary of State], the policies of government and the Localism Act 2011."

67. However, Mr Leigh accepts that the decision whether to allow an appeal is a decision for the Secretary of State, who is statutorily charged with making that decision by section 78 of the TCPA 1990. He does not suggest that the Secretary of State's function is merely to rubber stamp whatever may be the views of the local planning authority and accepts that there may be some cases where the views of the local authority should not prevail. Nor does he deny that the need for a five year housing land supply may be a "material consideration". He says only that "in the right circumstances" the Secretary of State should give more weight to the policy of

allowing local authorities to decide for themselves where new housing should go than to the requirement of a five year housing land supply.

68. All that, however, begs the question of what are "the right circumstances". If they are the circumstances in which the prematurity principle would apply, that principle is available to regulate the position. If they are different, they are wholly undefined. Moreover, as I have shown above, the inspector and the Secretary of State have in fact adopted an approach of considering what weight to give to the need for a five year housing land supply on the one hand and the view of the local authority as contained in the emerging JCS on the other. Their approach recognised that there was no currently valid development plan, treated the absence of a five year housing land supply as a material consideration, and applied the prematurity principle in order to determine whether the views of the local authority in the emerging plan should carry greater weight than the absence of a five year housing supply. Thus, contrary to the passage from the skeleton argument set out at [66] above, the inspector and the Secretary of State did take into account the emerging JCS, but considered that it was entitled to less weight than Tewkesbury would have wished.

69. Since Mr Leigh does not contend for a bright line rule whereby in all circumstances the views of the local authority must prevail, it must follow that his essential case is (and can be no more than) that in some (undefined) circumstances the views of the local authority (albeit not yet embodied in an adopted local plan) are entitled to greater weight than other material considerations such as the need for a five-year housing supply (or, in effect, that the prematurity principle should now apply in circumstances where previously it would not have done). But quite apart from the fact that no such conclusion can be drawn from the generalised policy statements on which he relies, such a case would amount, apparently for the first time in English planning law, to laying down as a rule of law a requirement as to the weight to be given to the views of the local authority rather than leaving such matters to the planning judgement of the Secretary of State or his inspector. This would contradict what Lord Hoffmann described as a fundamental principle of planning law (see [50] above). The Localism Act contains nothing which could be regarded as enacting such a radical change and in my judgment it is inconceivable that any such change was intended to be brought about by the policy statements which accompanied the Act.

70. Finally, I would note that Mr Leigh urges consideration of the consequences which will follow if these challenges fail. As he put it in his skeleton argument:

> "The effect of the appeals being allowed in this case is to permit, and in practical terms, to encourage uncoordinated planning decisions being made on appeal by inspectors and not by elected local authorities. The monster that this creates is, it is submitted, 'Frankenstein planning' in the sense of a patchwork of decisions as opposed to a comprehensive strategy that local plans engender."

71. Whatever the position may be in other cases, I do not accept that this is the effect of the Secretary of State's decision in this case. This is a case where the inspector expressly found that the grant of permission would not prejudice the emerging JCS. It is not a case where permission was granted despite such prejudice.

Conclusion

72. For all these reasons I reject the submission that the Localism Act has brought about a fundamental change in the proper approach to planning applications so as to vitiate the conclusions reached by the Secretary of Sate in this case. I affirm the provisional conclusion reached at [49] to [52] above. These challenges to the Secretary of State's decisions fail and must be dismissed.

73. Although I have not acknowledged their individual contributions in the course of this judgment, I am grateful for the clear and economical submissions of all counsel in this case.

Tewkesbury costs judgment

1. For the reasons given in the judgment which I now hand down the challenges by the claimant, Tewkesbury Borough Council, made pursuant to section 288 of the Town and Country Planning Act 1990, to the decisions made by the Secretary of State are dismissed.

2. It is agreed, in the light of my judgment that the claimant must pay the Secretary of State's costs of both applications, which will be subject to detailed assessment. It is also agreed that there should be set against those costs the issue fee and consequential costs relating to the claim form and amendments to the proceedings necessitated by the correction of the error in the first decision letter, which is referred to at paragraph 9 of the judgment.

3. I have also to deal with applications by the developers, the second and third respondents, to be awarded their costs of the proceedings. I have received submissions about this in writing, and the parties have indicated that they are content for me to rule without hearing oral submissions on the point.

4. My decision is that the second and third respondents must each bear their own costs of the proceedings.

5. I reach this decision applying the established principles set out in Bolton Metropolitan District Council v. Secretary of State for the Environment [1995] 1 WLR 1176, in particular proposition 2 at 1178H:

"The developer … in every case."

6. Subject to one point, there was no separate issue on which the developers needed to be heard which was not covered by counsel for the Secretary of State, nor was there likely to be, and there was no distinct interest of the developers requiring them to be separately represented from the Secretary of State. That is not to say that the submissions of Mr Cahill QC and Mr Dove QC for the developers were not helpful and informative. On the contrary, they were. Moreover, I understand that these developments represent significant investments for the developers, and can understand that they would wish to have their own representatives at the hearing. However, for the

same reasons as in the Bolton case, it would not be right that their presence should be at the expense of the claimant council.

7. The one point on which there was potentially a separate issue, although even there I am not sure that the developers' interests were different from those of the Secretary of State, arose out of the correction of the first decision letter, there being at one time an issue whether this had been properly corrected. There is apparently some disagreement as to exactly when this issue fell away, which it had done by the time of the hearing before me. Be that as it may, the costs associated with that particular issue on its own must have been very minor, and it is apparent that even if that point had never existed, the developers would still have wished to be represented by leading and junior counsel and the solicitors instructing them. In my judgment, therefore, the existence of that relatively minor point, which, had it stood alone, would easily have been resolved without significant expense, does not justify a departure from the usual rule.

8. Nor would the fact that, as the developers say, the claimant had a weak case. Certainly I have rejected that case for the reasons in my judgment, but it does not follow that the case was so weak that it would have been capable of being struck out in some summary way. Even if that were so, however, that would not justify awarding the developers their costs. On the contrary, if the case was so weak that it was obviously bound to fail, it might be said that there was even less justification for the developers to incur substantial legal costs, over and above the costs to be incurred by the Secretary of State.

9. So the order will be that the claims are dismissed, the claimant must pay the Secretary of State's costs subject to the set off mentioned earlier, and the developers must bear their own costs.