Case No: CO/4846/2014

Neutral Citation Number: [2015] EWHC 1078 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2015

Before:

MR JUSTICE JAY

- -

Between:

CALVERTON PARISH COUNCIL	**Claimant**
- and -	
(1) NOTTINGHAM CITY COUNCIL	**Defendants**
(2) BROXTOWE BOROUGH COUNCIL	
(3) GEDLING BOROUGH COUNCIL	
-and-	
(1) PEVERIL SECURITIES LIMITED	**Interested Parties**
(2) UKPP (TOTON) LIMITED	

- -
- -

Richard Turney (instructed by **Public Access**) for the **Claimant**
Morag Ellis QC and Annabel Graham-Paul (instructed by **Nottingham, Broxtowe and Gedling Borough Councils**) for the **Defendants**
Richard Honey (instructed by **Walker Morris, Leeds)** for the **Interested Parties**

Hearing date: 24th March 2015

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Judgment

The Hon. Mr Justice Jay:

Introduction

1. This is an application brought under section 113 of the Planning and Compulsory Purchase Act 2004 ("the Act") to quash, in part, the Greater Nottingham - Broxtowe Borough, Gedling Borough and Nottingham City - Aligned Core Strategies ("the ACS"), adopted by the Defendants in September 2014. The ACS is part of the development plan for each of the three Council's areas.

2. Broxtowe Borough and Gedling Borough are contiguous with the outer boundary of the city of Nottingham, and substantially comprise Green Belt. The Claimant is a Parish Council within Gedling Borough and may be described as an enclave within Green Belt. Two Interested Parties have intervened in these proceedings: they own land at Toton, which is within Broxtowe Borough and technically, Green Belt. Although Toton is some distance away from the city boundary, it may fairly be characterised as within the main built-up area of Nottingham.

3. Development within Green Belt is never without controversy. It is clear from the "Chronology of Events", namely Appendix 1 to the witness statement of Alison Gibson dated 11th November 2014, that a strategic review of the Nottingham-Derby Green Belt has been on the table for some time. The precise concatenation of events is not relevant to this application. The ACS was subject to independent review by a planning Inspector, Ms Jill Kingaby, and examination hearings took place in 2013 and 2014. On 24th July 2014 the Inspector published her report, approving the ACS with modifications. The Claimant's advisors identified what were considered to be legal deficiencies in the report, but notwithstanding its contentions the ACS was adopted by the three Councils on various dates in September 2014.

4. The Inspector's report and the ACS will require more detailed exposition subsequently. At this stage, it is appropriate to turn to the relevant legislative framework. I will focus now on the legislative provisions relevant to Grounds 1 and 2; Ground 3 raises a discrete point, and will be addressed subsequently.

The Statutory Scheme

5. I was taken to all the relevant provisions of the Act. Some of these explain the status of the ACS as a local plan, included in the local development documents which form part of the development plan for each of the three Council's areas (see, in particular, sections 15, 17 and 38). I will concentrate on the statutory provisions which bear on the issues between the parties.

6. Section 19(2) of the Act 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;"

7. Section 20 provides for independent examination by the Secretary of State's Inspector. Pursuant to section 20(5):-

> "The purpose of an independent examination is to determine in respect of the development plan document –
>
> a) whether it satisfies the requirements of section 19...;
>
> b) whether it is sound;"

8. The definition of the adjective "sound" is not to be found in the Act itself but in national policy - the latter being "guidance issued by the Secretary of State" for the purposes of sections 19(2)(a) and 34, and to which regard must be paid.

9. Miss Morag Ellis QC for the Defendants placed particular weight on section 39 of the Act, which provides:-

> "**Sustainable Development**
>
> 1) This section applies to any person who or body which exercises any function –
>
> b) under Part 2 of this Act in relation to local development documents;
>
> …
>
> 2) The person or body must exercise the function with the objective of contributing to the achievement of sustainable development"

10. I agree that this confers a positive obligation on the Councils, but its limitations need to be understood. "Sustainable development" is not a concept which is defined in the Act, in which circumstances the enlightenment which is required may only be found in national policy.

11. Section 113 confers powers on this Court to intervene if satisfied "that a relevant document [including a development plan] is to any extent outside the appropriate power". It is common ground that the jurisdiction of this Court on this statutory appeal is akin to Judicial Review. The Court of Appeal has explained on a number of occasions (see, for example, Blythe Valley BC v Persimmon Homes (North East Limited) and another [2009] JPL 335) that whether a development plan complied with national policy guidance was largely a matter of planning judgment with which the

Court should be slow to interfere, subject always to that guidance being properly understood.

National Policy

12. Relevant national policy is located in the National Planning Policy Framework ("the NPPF"), published by the Department for Communities and Local Government in March 2012. I was taken to the National Planning Policy Guidance finalised in March 2014. This is referred to in the Inspector's report, but in my view does not significantly supplement the NPPF.

13. "Sustainable development" is not expressly defined in the NPPF, but light is nonetheless thrown on it. The effect of paragraph 6 of the NPPF is that the substantive policies set out elsewhere in this national policy, interpreted and applied compendiously, amount to the Government's view of what sustainable development means. On one view, it represents a balance between three factors – economic, social and environmental – which are admittedly not necessarily complementary (see paragraph 7). On another, if certain environmental factors are identified, then their weight must be assessed and these factors constitute a restriction or brake on what would otherwise be sustainable development. The NPPF is not worded with fine legal precision (it is a policy, not a commercial contract), but some further assistance is given by paragraph 14, which provides: -

> "At the heart of the NPPF 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 **plan-making** this means that:-
>
> - Local Planning Authorities should positively seek opportunities to meet the development needs of their areas;
>
> - Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, 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."

14. This last aspect is footnoted as follows:-

> "For example, those policies relating to sites protected under the Birds and Habitats Directive (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of

> Outstanding Natural Beauty, heritage coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."

15. I agree with Miss Ellis that development which meets objectively assessed needs is presumptively sustainable, but I would add that the preposition "unless" is drawing attention to a policy constraint. That approach is reinforced by the footnote.

16. The parties are agreed that paragraph 47 of the NPPF is another important provision. It provides:-

> "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 5 years' worth of housing against their housing requirements with an additional buffer of 5%...
>
> - Identify a supply of specific, developable sites for broad locations for growth, for years 6-10 and, where possible, for years 11-15;
>
> …"

17. The subordinate clause, "as far as is consistent with the policies set out in this framework", is arguably slightly more generous (in terms of favouring sustainable development) than the "unless" in paragraph 14 of the NPPF, but ultimately nothing turns on this. It should be emphasised, though, that paragraph 47 does not create a statutory duty (c.f. section 39(2) of the Act); it constitutes policy to which regard must be had.

18. Section 9 of the NPPF deals with "Protecting Green Belt Land". A fundamental aim of Green Belt policy is to prevent urban sprawl. Under paragraph 80 of the NPPF, the Green Belt serves five purposes, one of which is explicitly environmental – "to assist in safeguarding the countryside from encroachment". Paragraphs 83 and 84 are particularly relevant, and provide:-

> "83. Local Planning Authorities with Green Belts in their areas should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. Once established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review

> of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period.
>
> 84. When drawing up or reviewing Green Belt boundaries Local Planning Authorities should take account of the need to promote sustainable patterns of development. They should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt or towards locations beyond the outer Green Belt boundary."

19. Paragraphs 83 and 84 are, clearly, complementary provisions. Mr Richard Turney for the Claimant is entitled to emphasise the second sentence of paragraph 83. The review process referred to in paragraph 84 cannot ignore that sentence. On the other hand, I agree with Miss Ellis that the review process must consider "sustainable patterns of development" – e.g. the desirability of an integrated transport network. During any review process, the *consequences* for sustainable development must be carefully considered. The second sentence of paragraph 84 is not altogether clear. On the face of things, it might well be argued that it appears to reinforce the need to protect the Green Belt, but in my view it is capable of being interpreted slightly more broadly. The *consequences* for sustainable development may require revision of the Green Belt. Nonetheless, I do not readily agree with Miss Ellis that paragraph 84 throws any light on the meaning of "exceptional circumstances" within paragraph 83, or should be taken as somehow diluting this aspect. Sustainable development embraces environmental factors, and such factors are likely to be negatively in play where release of Green Belt is being considered. The second sentence of paragraph 83 supplies a fetter or brake on development which would, were it not for the Green Belt, otherwise be sustainable; but in deciding whether exceptional circumstances pertain regard must be had to the whole picture, including as I have said the *consequences*.

20. "Exceptional circumstances" remains undefined. The Department has made a deliberate policy decision to do this, entrusting decision-makers with the obligation of reaching sound planning judgments on whether exceptionality exists in the circumstances of the individual case.

21. Paragraph 150ff of the NPPF deal with "Local Plans". Paragraph 151 reflects section 39(2) of the Act. Paragraph 152 is material and provides:-

> "Local Planning Authorities should seek opportunities to achieve each of the economic, social and environmental dimensions of sustainable development, and net gains across all three. Significant adverse impacts on any of these dimensions should be avoided and, wherever possible, alternative options which reduce or eliminate such impacts should be pursued. Where adverse impacts are unavoidable, measures to mitigate the impact should be considered. Where adequate mitigation

> measures are not possible, compensatory measures may be appropriate."

22. I read this provision as making clear that the identification of "exceptional circumstances" (although not expressly mentioned) is a planning judgment for the Local Planning Authority. However, net gains across all three of the dimensions of sustainable development may not always be possible. In these circumstances, the impingement on environmental factors will require the identification of exceptional circumstances in order to be justified ("significant adverse impacts on any of these dimensions should be avoided"), and - to the extent that this cannot be achieved - must be ameliorated to the extent possible.

23. I appreciate that section 39(2) of the Act imposes a positive obligation to achieve sustainable development, and that if such development is not carried out then there would be harm to the economic and social dimensions which form part of this concept. However, I do not accept Miss Ellis' submission that the issue boils down to the balancing of three *desiderata*. Review of Green Belt in the face of sustainable development requires exceptional circumstances. Refraining from carrying out sustainable development, and thereby causing social and economic damage by omission, does not.

24. Paragraph 182 of the NPPF explains the meaning of "sound":-

> "The local plan will be examined by an independent Inspector whose role is to assess whether the plan has been prepared in accordance with the duty to co-operate, legal and procedural requirements, and whether it is sound. A Local Planning Authority should submit a plan for examination which it considers is "sound" – namely that it is:
>
> - **Positively Prepared** – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable developments;
>
> - **Justified** – the plan should be the most appropriate strategy, when considered against a reasonable alternative, based on proportionate evidence;
>
> - **Effective** – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priority; and
>
> - **Consistent with National Policy** – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework."

25. The phrases "consistent with national policy" and "in accordance with the policies in the Framework" reflect earlier language; and, ultimately, sections 19 and 34 of the Act.

The ACS

26. Within the ACS, aspects of Policy 2, "The Spatial Strategy", and Policy 3 "The Green Belt", are under challenge. As I have said, the Inspector approved the ACS with modifications, and the version in the bundle contains the Inspector's input. I will examine the ACS in its final, modified form.

27. Policy 2 states that a minimum of 30,550 new homes will be provided for between 2011 and 2028, with the majority in the main built-up area of Nottingham. Paragraph 2 of Policy 2 refers to a "settlement hierarchy" of growth, with the main built-up area of Nottingham being at the top of the tree, and "Key Settlements" at the third tier. Calverton is specified as a "Key Settlement", with up to 1,055 new homes. It is common ground that the building of these homes will require a revision of the existing Green Belt boundary. These "Key Settlements", and other "Strategic Locations" which are marked on the ACS with an asterisk, "will be allocated through Part 2 Local Plans". On the other hand, "Strategic Allocations", including the Interested Parties' land at Toton, and land at Field Farm, are available for development from the date of adoption.

28. Policy 2 also sets out the justification for the approach taken. I have had regard to paragraph 3.2.10, but will focus for the purposes of this Judgment on the Inspector's Report.

29. Policy 3 deals with the Green Belt. Save for the "Strategic Allocations" already considered, the policy contemplates that the detailed review of Green Belt boundaries, to the extent necessary to deliver the distributions in Policy 2, will be undertaken in what is described as "Part 2 Local Plans". A sequential approach will then be deployed, prioritising the use of land which is not currently within Green Belt. To the extent that adjustment of any Green Belt boundary is required, regard will be had in particular to its statutory purposes.

30. Paragraph 3.3.1 is clearly germane:-

> "The Nottingham-Derby Green Belt is a long established and successful planning policy tool and is very tightly drawn around the built-up areas. Non-Green Belt opportunities to expand the area's settlements are extremely limited and therefore exceptional circumstances require the boundaries of the Green Belt to be reviewed in order to meet the development requirements of the Aligned Core Strategies in Part 2 Local Plans."

31. It is clear from this that the Defendants appear to have had regard to the criterion of "exceptional circumstances". The issue raised by Mr Turney's submissions is whether the approach taken properly engaged with it.

The Inspector's Report

32. The proceedings before the Inspector were lengthy and complex, and a mass of evidence – only some of which is before the Court in these proceedings – was supplied. It is unnecessary to dwell on the proceedings, save to pause to consider a number of points advanced by Mr Turney during his oral argument.

33. Before and during the course of the proceedings, the Inspector appears to have formulated, with the assistance of the parties, the main issues arising in relation to each of the elements of the ACS policy. Thus, as regards "the Spatial Strategy and Housing Policy":-

> "The main issues are:
>
> i. whether the local context, vision and spatial objectives set out in Chapter 2 of the ACS objectives are appropriate, locally distinctive and provide a sound basis for planning the area over the next 15 years; whether Policy 2, the spatial strategy, follows logically from the local context, visual, and spatial objectives, and is sound (i.e. positive, justified, consistent with national policy and capable of delivery); and
>
> ii. whether appropriate provision is made for new housing in the three Local Authority areas, having regard for the requirements of the NPPF and taking account of the proposed numbers, the phasing and distribution of housing, affordable housing, and provision for gypsies and travellers, and other groups."

A number of specific questions were then posed, which I have borne in mind.

34. As for "Green Belt":

> "The main issue is: whether the spatial strategy and Policy 3 of the ACS are consistent with the fundamental aim and purposes of Green Belts as set out in the NPPF, and whether the proposals for alterations to Green Belt boundaries are underpinned by the quick review processes and justified by exceptional circumstances.
>
> **Questions**
>
> The Councils contend that, having objectively assessed the full need for housing across their areas and reviewed their strategic housing land availability assessments, some alteration to Green Belt boundaries is required to accommodate the growth in housing and associated development. Is there substantive evidence to counter this argument?

> The ACS is founded on a two-stage review of Green Belt boundaries: (i) strategic assessment to find the most sustainable locations for large scale development around Greater Nottingham and define a limited number of strategic allocations for growth, and (ii) a detailed examination of individual sites and settlements suitable for sustainable growth with precise boundaries being established in subsequent development plan documents. Given the commitment of the Local Authorities to produce core strategies and consequent, more detailed development plan documents, what precisely is wrong with this two-step approach reviewing the Green Belt? Will it delay the development process unreasonably as some suggest?"

Mr Turney criticised both the formulation of these questions and the Defendants responses to them, and I have had regard to both.

35. On 23rd October 2013 the Inspector sent a note to the parties which said, amongst other things: -

> "Having reviewed all the evidence in respect of housing requirements for the full plan area, I consider the Policy 2: the Spatial Strategy which states that "a minimum of 30,550 new homes will be provided for" is sound."

36. Mr Turney made much of this, in support of a submission that the Inspector came to a conclusion on the issue of soundness before addressing the Green Belt and environmental considerations which were plainly relevant to that issue. I will revert to this alleged criticism in due course.

37. The Inspector's report is quite lengthy, and it would unnecessarily overburden this Judgment if I were to set out every single relevant passage. I will therefore focus on what is key, reassuring the parties that I have borne in mind the entire document.

38. The key passages in the Inspector's report include the following:-

> "29. Local Plans should meet the full, objectively assessed needs for market and affordable housing in their HMA, as far as is consistent with other policies set out in the NPPF. This requires an initial assessment of "need" based on likely demographic change over the plan period…
>
> 40. …I consider that the significant boost in housing supply, to which paragraph 47 of the NPPF refers, is absolutely necessary to reverse the long-term, upward trend in real house prices associated with undersupply and the growing numbers of people, notably young adults and families, who find suitable housing unaffordable.
>
> 41. Even though a boost in Greater Nottingham's housing provision as envisaged may not on its own reduce higher house prices significantly, it should make a positive contribution to

balancing the mismatch between supply and demand/need … a failure to encourage overall house building would only restrict further the availability of affordable, as well as new market, housing …

45. I have taken account of the Court of Appeal judgment for "Hunston". I have noted the Councils' observation that, whilst the judgment pronounced on the interpretation of the first two bullet points in paragraph 47 of the NPPF, the planning decision did not directly consider the question of the soundness or otherwise of a development plan. The issue in dispute was whether, in advance of the area-wide balancing of the many facets of sustainable development which are needed to secure a sound local plan, a Section 78 Inspector could or should take account of policy constraints when deciding what was the relevant figure for "full, objectively assessed needs".

48. Nevertheless, the Hunston judgment importantly sought "a definitive answer to the proper interpretation of paragraph 47" of the Framework. The judgment is clear that the full objectively assessed needs for housing in the area have to be the starting-point when assessing the adequacy of housing supply… The approach to housing need assessment which the judgment supports is not therefore different to that supported by the PPG, which as explained above, I have fully considered in examining in the ACS.

47. Policy 2 of the ACS states that "a minimum" of 30,550 new homes would be provided, which wording should encourage and not impede the provision of additional housing. In looking to meet the needs, the councils have assumed that fewer houses will be developed on windfall sites than in past, once an up to date local plan underpinned by regularly reviewed SHLAAs is in place. However, if windfalls continue to come forward at the same rate as in the past, this should not be perceived as a negative factor as the aim is to boost the supply of new housing. Proposed change **Mod 3,** reinforces the essential point that the councils will adopt a proactive and positive approach to the delivery of new housing.

48. Proposed new paragraph 3.2.6a, **Mod 6**, includes a commitment to review the ACS's future housing projections, based on the 2011 Census data and expected in 2014, show that the Councils' assumptions underpinning its planned housing provision are no longer appropriate. **Mod 17** sets out the process and timing for initiating such a review. The NPPF expects local plans to meet their full needs for housing, "as far as is consistent with the policy set out in the Framework". Subsequent sections of my report address policy for the distribution of housing across the authorities, policy for protecting the Green Belt, for environmental and infrastructure

planning, among other things. These confirm that delivery of the minimum housing numbers should be feasible. I agree with the Councils that there should be no insurmountable constraints to meeting the fully objectively assessed need for housing.

49. I conclude that the overall level of housing provision proposed by the ACS is justified and consistent with national planning policy. The proposed changes are necessary to reflect the Councils' commitment to keep the local plan under review and to ensure that the planned level of housing remains sound.

…

67. Understandably, there is considerable amount of local opposition to the prospect of development here in the Green Belt [in the context of Field Farm]. However the work which has been done to identify the site and will continue to take it forward has been undertaken by the Council as a democratically elected local planning authority. It considers that it has made its decision in the best interests of the Borough and its people, particularly those who now or in the future will need a home of their own. Having regard to the housing requirements and limited availability of alternative sustainable sites, the Councils' decision to allocate this site in the ACS meets the exceptional circumstances requirement as set out in the NPPF for the alteration of Green Belt boundaries. Field Farm's inclusion as a strategic allocation in the ACS is justified.

…

70. …I share the Councils' view that the potential for land at Toton to help meet the requirements for housing and mixed use development in Broxtowe Borough constitutes the exceptional circumstances needed to remove the land from the Green Belt. Its potential to maximise the economic benefits from the proposed HS2 station reinforces the Councils' case for changing the Green Belt boundary at Toton.

…

98. The NPPF seeks a significant boost in the supply of housing, and this is not required to occur only in the first five years of a plan. The first bullet of paragraph 47 expects local plans to meet their full, objectively assessed needs "as far as is consistent with the policies set out in this Framework". Although The Court of Appeal judgment (Hunston) quotes protection of the Green Belt and land in an area of outstanding natural beauty or national park as examples of such policies, I see no justification to look only at land-use designation policies. The NPPF includes a range of other policy matters

requiring local plans to be aspirational but realistic, to take account of relevant market and economic signals, and be effective and deliverable.

99. In this case, I am satisfied that the prospective build rates for each 5 year tranche do not represent an attempt to suppress house building in the early years or rely on past poor economic conditions to justify low housing targets. The proposed build rates are supported by convincing evidence on the operation of housing markets … As the Councils argued, however, significantly increasing the supply of sites in the early years would not necessarily speed delivery, would require the release of additional Green Belt land contrary to national policy, and could delay progress on some of the more challenging regeneration sites.

…

Issue 2 – Whether the Spatial Strategy and Policy 3: the Green Belt are consistent with the NPPF and whether the approach to making alterations to the Green Belt is justified.

110. …In order to meet the housing requirements of 30,550 new homes and achieve sustainable growth with supporting infrastructure, jobs and services, I accept the Councils' judgement that future development will have to extend beyond Nottingham's main built up area.

111. The NPPF continues the well-established planning policy of protecting Green Belt land. The Green Belt boundaries are drawn tightly around Nottingham, and to promote development beyond the Green Belt's outer edge would extend travel to work and for other purposes in an unsustainable fashion. Areas of safeguarded land exist in Gedling Borough, but these are unlikely to meet all the plan area's development requirements outside the main built up area. I agree with the Councils that the exceptional circumstances required for alterations to Green Belt boundaries exist.

…

113. The evidence base was criticised as being too dated, related to a different search for more substantial extensions, and not subject to adequate public consultation. However, I accept that the Green Belt and settlement pattern are largely unchanged since 2005/6 … Ashfield District Council I am advised, assessed all possible sites against the five purposes of including land in the Green Belt enabling the least valuable sites to be identified. Even if the assessment of the ACS area was more strategic, I consider that sufficient investigation of the characteristics of

potential sites for developments of differing sizes was carried out…

114. The ACS envisages a two-staged approach to altering Green Belt boundaries, with the precise boundaries for individual sites to be released from the Green Belt being established in the Part 2 Local Plans. The NPPF does not directly support this approach, probably because it expects a single local plan for each authority in contrast to the previous preference for a core strategy followed by more detailed development plan documents. Newark and Sherwood and South Staffordshire with adopted plans were cited as authorities which had used the two-stage approach taken by the Greater Nottingham Councils.

…

116. I have considered the arguments that a more rigorous assessment could have been carried out of the inner urban edge of the Green Belt, before sites which would only result in long-distance commuting were selected …

117. Regarding the risk of coalescence of Kimberley, Whatnall and Nuthall, I consider it appropriate that the Part 2 Local Plan should assess the impact of any new development at this more detailed level, having regard for the aim and purposes of the Green Belt…

118. I strongly support the view that, with a two-stage review process, the ACS should give more direction to Part 2 Local Plans to emphasise that Non-Green Belt sites have first preference, and that sites to be released from the Green Belt must have good sustainability credentials. A sequential approach should secure an effective policy consistent with national policy, and this would be achieved with main modification **Mod 18**…"

Relevant Jurisprudence

39. The Court of Appeal in St Albans CC v Hunston Properties Limited and another [2014] JPL 599 endorsed a two-staged approach to the application of paragraph 47 of the NPPF. The first stage is to reach a conclusion as to the "full objectively assessed needs for market and affordable housing". This is a purely quantitative exercise. The second stage involves an exercise of planning judgement (in relation to development control or the formation of a local plan, as the case may be) as to whether the policy constraints in the NPPF carry the consequence that the objectively assessed needs should not be met. The issue in Hunston was whether "very special circumstances" existed (see paragraphs 87 and 88 of the NPPF), but in my judgment the position must be the same in a case involving a local plan.

40. At paragraph 10 of his judgment, Sir David Keene said this:-

> "The Framework does not seek to define further what "other considerations" might outweigh the damage to the Green Belt, but in principle there seems no reason why in certain circumstances a shortfall in housing land supply might not do so."

41. The two-stage approach underwent further examination in Solihull Metropolitan Borough Council v Gallagher Estates Limited and another [2014] EWCA Civ 1610. In that case, Laws LJ endorsed the conclusion of Hickinbottom J that:-

> "Paragraph 47 requires full housing needs to be objectively assessed, and then a distinct assessment made as to whether (and, if so, to what extent) other policies dictate or justify constraint."

Mr Turney placed particular reliance on paragraph 36 of the judgment of Laws LJ. There, he said:-

> "The fact that a particular site within a Council's area happens not to be suitable for housing development cannot be said without more to constitute an exceptional circumstance, justifying an alteration of the Green Belt by the allocation to it of the site in question. Whether development would be permitted on the sites concerned in this case, were they to remain outside the Green Belt, would depend upon the Council's assessment of the merits of any planning application put forward."

42. Mr Turney sought to turn this through 180 degrees, and submitted that the fact that a particular site happens to be suitable for housing development cannot, without more, constitute an exceptional circumstance justifying an alteration of the Green Belt. I agree with Mr Turney insofar as this goes, but in my view there is not a precise symmetry here. The issue in Solihull was whether land could be allocated to Green Belt: in other words, the point was addition, not subtraction. The mere fact that a particular parcel of land happens to be unsuitable for housing development cannot be a Green Belt reason for expanding the boundary. In a case where the issue is the converse, i.e. subtraction, the fact that Green Belt reasons may continue to exist cannot preclude the existence of countervailing exceptional circumstances – otherwise, it would be close to impossible to revise the boundary. These circumstances, if found to exist, must be logically capable of trumping the purposes of the Green Belt; but whether they should not in any given case must depend on the correct identification of the circumstances said to be exceptional, and the strength of the Green Belt purposes. In the present context, one needs to continue to bear in mind paragraph 10 of Hunston (see paragraph 39 above), and to draw a distinction between, on the one hand, suitability without more, and on the other hand, suitability and availability. Suitability *simpliciter* cannot logically be envisaged as an exceptional circumstance (here, the second sentence of paragraph 36 of Solihull applies); suitability and availability may do, subject to the refinements discussed below.

43. Miss Ellis placed particular reliance on the decision of Patterson J in IM Properties Development Limited v Lichfield District Council [2014] EWHC 2440 (Admin). This case was decided after the first instance decision in Solihull and before the case reached the Court of Appeal. Patterson J observed that the only statutory duty was that contained in section 39(2) of the Act (see paragraph 97 of her judgment). At paragraphs 99 and 100 Patterson J said this:-

> "99. Here, the release from the Green Belt as proposed in Lichfield which is seen by the Defendant as consistent with the town-focused spatial strategy. The further releases have been the subject of a revised sustainability appraisal by the Defendant. That found that no more suitable alternatives existed for development.
>
> 100. The principal main modifications endorsed by the Defendant expressly referred to the Green Belt review and to the supplementary Green Belt review as informing the release of Green Belt sites. They contained advice as to the relevant test that members needed to apply. Both documents were available to the decision-making committees and were public documents. Ultimately, the matter was one of planning judgement where the members had to consider whether the release of Green Belt land was necessary and, in so determining, had to be guided by their statutory duty to achieve sustainable development."

44. "Necessary" may be seen as broadly synonymous with "the existence of exceptional circumstances". Mr Turney submitted that these passages are both *obiter* and inconsistent with Solihull. It is unnecessary for me to reach concluded views about this. My preference would be to express the point made in the final sentence of paragraph 100 slightly differently: the issue is whether, in the exercise of planning judgment and in the overall context of the positive statutory duty to achieve sustainable development, exceptional circumstances existed to justify the release of Green Belt.

The Claimant's Grounds

45. Mr Turney has advanced three grounds on behalf of the Claimant, namely:

(1) Failure to consider whether housing numbers should be reduced to prevent release of Green Belt land;

(2) Failure to apply national policy in considering the release of Green Belt land;

(3) Failure to comply with the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations").

The Claimant's Grounds Developed

46. As I indicated during oral argument, it seems to me that Ground 2 is logically prior to Ground 1. They are, in any event, inextricably intertwined. Accordingly, I will take these together. Although advanced under a different statutory regime, it also seems to me that Mr Turney's third Ground interacts with his earlier Grounds.

47. The primary thrust of Mr Turney's submission, both in oral argument and in his written Reply, is that the Inspector adopted a circular approach. The evidence demonstrates that she considered the 30,550 figure for new housing, and concluded that it was sound, before paying any attention to the environmental and Green Belt constraints. This is borne out by the note the Inspector sent to the parties (see paragraph 35 above), and indeed her examination of Policy 2 in her report. At no stage, so the submission runs, did the Inspector properly consider whether the meeting of objectively assessed needs would be consistent with national policy; and, if so, to what extent. Furthermore, the formulation of the main issue assumed that objectively assessed needs should be met: hence the circularity. Put another way, the "exceptional circumstances" are defined as the requirement to meet the objectively assessed needs.

48. On Mr Turney's argument, the use of the term "insurmountable constraints" in paragraph 48 of the Inspector's report shows that proper regard was not paid to the question of "exceptional circumstances"; the two terms or concepts cannot be readily assimilated the one to the other. Accordingly, the Inspector's approach violated paragraph 47 of the NPPF and a proper application of the two-stage test stipulated by the Court of Appeal in Hunston.

49. Mr Turney advanced two further, specific submissions. First, he contended that the hierarchical approach underpinning both the Inspector's report and the ACS itself suggests there were no exceptional circumstances. Secondly, Mr Turney advanced a methodological attack on the two-stage process, namely Part 1 and Part 2 of the Local Plan. The application of this two-staged process meant that exceptional circumstances were ignored or sidelined: on the one hand, they were not properly considered within Part 1 (because the assumption was that the review of the Green Belt boundary would be left over to Part 2); on the other hand, when Part 2 is reached there would be no room for considering exceptional circumstances, because any later development plan document would have to accord weight to the ACS. The die has been cast. In support of this submission, Mr Turney drew on the Inspector's analysis of the position relating to Field Farm, where exceptional circumstances were considered. Without prejudice to his submission that this analysis was also flawed (and he made the same point as regards the Interested Parties' land, where exceptional circumstances were found), his contention was that a similar approach both could and should have been consistently applied throughout.

Analysis and Conclusions on Grounds 1 and 2

50. I agree with Mr Turney that it would be illogical, and circular, to conclude that the existence of an objectively assessed need could, without more, be sufficient to amount to "exceptional circumstances" within the meaning of paragraph 83 of the NPPF. No

recourse to what I called during oral argument the "mantra" of planning judgment could save a decision from a successful section 113 challenge in such circumstances.

51. In a case such as the present, it seems to me that, having undertaken the first-stage of the Hunston approach (sc. assessing objectively assessed need), the planning judgments involved in the ascertainment of exceptional circumstances in the context of both national policy and the positive obligation located in section 39(2) should, at least ideally, identify and then grapple with the following matters: (i) the acuteness/intensity of the objectively assessed need (matters of degree may be important); (ii) the inherent constraints on supply/availability of land *prima facie* suitable for sustainable development; (iii) (on the facts of this case) the consequent difficulties in achieving sustainable development without impinging on the Green Belt; (iv) the nature and extent of the harm to *this* Green Belt (or those parts of it which would be lost if the boundaries were reviewed); and (v) the extent to which the consequent impacts on the purposes of the Green Belt may be ameliorated or reduced to the lowest reasonably practicable extent.

52. Although it seems clear that what I have called an ideal approach has not been explicitly followed on a systematic basis in the instant case, it is a counsel of perfection. Planning Inspectors do not write court judgments. The issue which properly arises is whether the Inspector's more discursive and open-textured approach, which was clearly carried through into the ACS, was legally sufficient.

53. It is clear from (i) the formulation of the main issues; (ii) the frequent references in the Inspector's report to the need to protect the Green Belt; and (ii) the several references to "exceptional circumstances", that the Inspector had in mind the broad contours and content of paragraph 83 of the NPPF. It is indisputable that she had regard to Hunston and the need for a two-staged approach, with the ascertainment of the objectively assessed need being the "initial" stage (to adopt the epithet used by the Inspector). The main issues might have been expressed with slightly more focus and precision, but I do not accept that their formulation somehow dictated, or pre-judged, the outcome. Further, the Inspector's note dated 23rd October 2013 needs to be read in context: although her reference to the 30,550 housing figure being "sound" is somewhat ambiguous, the note read as a whole indicates that the Inspector had not yet reached a conclusion about Green Belt matters. I read the note as indicating that the Inspector had reached the provisional conclusion which we may now discern at paragraph 48 of her report.

54. Paragraphs 40 and 41 of her report indicate that the Inspector considered that the need for additional housing supply was acute, both generally and in this particular area. Paragraph 48 of the report indicates that in the Inspector's view the 30,550 figure was both feasible and deliverable, although at that stage she was stating in terms that consistency with other NPPF policies would be considered later in the report. Thus, *pace* Miss Ellis' skeleton argument and submissions, I do not read the last sentence of paragraph 48 of the report as containing any finding about exceptional circumstances. We see such a finding at paragraphs 67 and 70 (in relation, respectively, to Field Farm and the Interested Parties' land at Toton), and at paragraph 110ff. The "insurmountable obstacles", or their absence, relate to matters of feasibility and deliverability. Even if I am wrong about this, and paragraph 48 is to be read as a harbinger of paragraph 111, it seems clear that what the Inspector must be taken to

have meant is that the reason why the obstacles were surmountable was that exceptional circumstances existed.

55. Field Farm and Toton are separately addressed because these sites were allocated in the ACS as land suitable for immediate development. The Inspector was considering specific sites, not strategic areas the precise delineations of which would require subsequent analysis and review. The key sentence in paragraph 67, "having regard to the housing requirements and limited availability of alternative, sustainable sites", contains in these circumstances a logically coherent reason for holding that exceptional circumstances existed. Mr Turney sought to persuade me that the issue of limited availability could not sensibly add to the issue of objective assessment of need, but I cannot agree; this was a free-standing factor which was clearly capable of amounting to an exceptional circumstance. Additionally, an examination of all the reasoning contained within paragraphs 63-67 of the report reveals that the Inspector paid regard to the purposes of the Green Belt, the nature and quality of the proposed impingement, and the issue of sustainability. As for the latter, this Green Belt was drawn close to the City boundary and it would have been difficult to have undertaken sustainable development beyond the outer boundary of the Green Belt. This was an issue which, albeit hardly decisive, was properly taken into account – it is referred to specifically in paragraph 84 of the NPPF. All these factors were properly assessed in determining the existence of exceptional circumstances.

56. A similar approach underpins the Inspector's broader consideration of the Spatial Strategy and Policy 3 within the ACS. The formulation of the issue, "whether the approach [in the ACS] to making alterations to the Green Belt is justified", is a reference to paragraphs 47, 83 and 86 of the NPPF. At paragraph 110, the Inspector accepts the Defendants' contention that the acuteness of the need is such that some intrusion into the Green Belt (and its consequent revision) will be required. Paragraph 111 may be quite brief but, read both in isolation and in conjunction with the remainder of the report, makes clear that the Inspector is continuing to ask herself the same sorts of questions that she posed, and answered, at paragraphs 63-67 of her report: viz. (i) limited availability; (ii) the location of the Green Belt in relation to the main built-up area of Nottingham; and (iii) sustainability (to which paragraph 86 of the NPPF relates, in particular). Footnote 26 to her report (relating to the first sentence of paragraph 111) is a legally accurate statement of the position under paragraphs 47, 83 and 86 of the NPPF. It follows that the core conclusion in the first sentence of paragraph 111 of the report – that exceptional circumstances exist – cannot be successfully impugned. Albeit with less than complete precision, I consider that the Inspector has, at least in legally sufficient terms, followed the sort of approach I have set out under paragraphs 19, 21, 22 and 43 above.

57. I agree with Miss Ellis that Mr Turney's submissions go too far, and tend to the very circularity he seeks to identify in the Inspector's report. Specifically, his submissions are in danger of according excessive weight to paragraph 83 of the NPPF, by stacking up a series of objections to sustainable development which came close to being insurmountable.

58. As for Mr Turney's separate point about the two-staged approach adopted by the ACS, I agree that, in principle, there is a danger of the issue of exceptional circumstances falling between two metaphorical stools. If, for example, exceptional circumstances were not properly considered at Stage 1, it would be difficult for the

issue properly to be addressed at Stage 2. Although section 19(2)(a) of the Act would no doubt continue to apply, the ACS would be a powerful dictator of subsequent policy, particularly in circumstances where Stage 2 is only concerned with the detail, and not with the principle.

59. The question arises of whether the flawed approach I have just outlined was, in fact, the approach adopted by the Inspector. In my judgment, it was not. As the Inspector correctly observed, a two-staged approach is not impermissible in principle although it is not expressly authorised by the NPPF. The Inspector recognised that there were some weaknesses inherent in such an approach (see paragraphs 116 and 117), but these were manageable. In my judgment, the key point is that the Inspector was able to reach an evidence-based conclusion as to the presence of exceptional circumstances at the first stage, and that she was not in some way adjourning the matter over for substantive consideration at Stage 2. Further, in modifying the ACS so as to achieve a sequential approach to site release (with Green Belt release occurring, as it were, last) the Inspector was achieving an overall state of affairs which, as she put it, "should secure an effective policy consistent with national policy" (paragraph 118). Not merely was this a legally tenable approach, it was in my judgment both sensible and appropriate in the circumstances of the instant case. I would not go so far as to hold that paragraph 118 of the report directly applied paragraph 83 of the NPPF, and somehow satisfied the touchstone of exceptional circumstances; but what it did was to bring about an outcome which has the strong tendency to protect the Green Belt and its purposes. For example, to the extent that release of Green Belt land would be required, the first candidate for release would be land nearer the inner boundary. The sequential approach was, therefore, a factor to be taken into account.

60. I agree with Miss Ellis that in relation to the Part 2 Local Plan exercise it would remain incumbent on the Defendants to act consistently with national policy, in line with sections 19(2)(a) and 34 of the Act.

61. I am far from convinced that Mr Turney's first ground really adds to his second. The complaint is that consideration was not given to a figure lower than 30,550, such that revision of the Green Belt might not be required. It is of course correct that the majority of the new housing will not be built on Green Belt land, from which it follows that removing several thousand homes from the aggregate figure could well lead to the consequence that no Green Belt release would be required. However, the issue for the Inspector was whether the release of some Green Belt land was justified, having regard to the objectively assessed need. The Inspector concluded that it was, applying paragraphs 47, 83 and 86 of the NPPF. If it was not justified, the Green Belt boundaries would have remained as before. It was not incumbent on the Inspector to "salami-slice" the objectively assessed need further, and to consider some hypothetical lower number. Such an obligation would only have arisen if meeting the whole of the objectively assessed need was not justified, because exceptional circumstances did not exist to amount to that justification.

62. Given these conclusions, the Interested Parties do not need to succeed on their separate submissions directed to the particular attributes of their land at Toton. However, I accept the submissions of Mr Richard Honey for the Interested Parties that his clients' land may be separately considered. First, the subject land is a co-ordinated, mixed-use site, and the Claimants in these proceedings are not challenging those aspects of the ACS which cover employment and transport. Secondly, detailed

consideration was given at paragraphs 68-76 of the report to whether exceptional circumstances existed to justify the revision of the Green Belt to accommodate this particular mixed-use site. Given that the Interested Parties' site was both highly sustainable and on built-up land, albeit within Green Belt, the robust conclusions appearing at paragraph 70 of the Report are hardly surprising.

63. It follows that, despite the clarity and force of Mr Turney's submissions on his primary grounds of appeal, I cannot accept them.

Ground 3

64. By this Ground the Claimant seeks to challenge the Defendants' sustainability appraisal dated June 2012, which it is submitted failed to satisfy the requirements of the SEA Regulations. The general principles are not in dispute: the SEA Regulations provide the framework for development consent decisions to be subject to an assessment of their environmental effects, in line with the purposive interpretation mandated by the SEA Directive (2001/42/EC) (see, for a detailed exposition, Walton v Scottish Ministers [2013] PTSR 51).

65. Regulation 12 of the SEA Regulations provides:-

> "**Preparation of Environmental Report**
>
> 12.—(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this Regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of—
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme."

66. Schedule 2 to the SEA Regulations identifies the matters which, so far as may be relevant, ought to be included in the report.

67. The jurisprudence governing the application of Regulation 12 is not substantially in dispute. I am able to draw heavily on paragraphs 19 and 20 of Mr Turney's Skeleton Argument. The following propositions emerge from the decisions of this Court in Save Historic Newmarket v Forest Heath District Council [2011] JPL 1233 and Heard v Broadland DC [2012] Env LR 233:-

(1) It is necessary to consider reasonable alternatives, and to report on those alternatives and the reasons for their rejection;

(2) While options may be rejected as the Plan moves through various stages, and do not necessarily fall to be examined at each stage, a description of what alternatives were examined and why has to be available for consideration in the environmental report;

(3) It is permissible for the environmental report to refer back to earlier documents, so long as the reasons in the earlier documents remain sound;

(4) The earlier documents must be organised and presented in such a way that it may readily be ascertained, without any paper chase being required, what options were considered and why they had been rejected;

(5) The reasons for rejecting earlier options must be summarised in the final report to meet the requirements of the SEA Directive;

(6) Alternatives must be subjected to the same level of analysis as the preferred option.

68. In City and District of St Albans v SSCLG [2009] EWHC 1280 (Admin) Mitting J quashed the relevant policies because reasonable alternatives to them were not identified, described and evaluated before the choice was made.

69. Section 7 of the Sustainability Assessment, "Developing and Appraising Strategic Options", is at issue. This purported to consider reasonable alternatives in line with the SEA Directive and the SEA Regulations. Three options were specifically considered, namely (1) what was described as the "high growth" option, entailing 71,700 new homes, (2) the "medium growth" or ACS option (based on a figure of 52,050 homes – which differs from the eventual ACS figure substantially, although nothing appears to turn on this), and (3) a "low growth" option based on what was described as past house building rates (41,888 new homes). The sustainability assessment analysed each option. It concluded that the high growth option secured more housing than was necessary, and was unlikely to be achievable in any event. As for the medium growth option:-

> "[It] would provide housing in line with the Regional Plan. Its impacts would be similar to that of Option 1 without such positive and negative impacts on the corresponding SA objectives, given that less housing would be provided, but it would meet the needs of the local population, and would allow for more limited in-migration to the planned areas. This level of growth would have a positive impact on the housing and health SA objectives but a negative impact on heritage, environment, bio-diversity and GI, landscape, natural resources and flooding, waste, energy and climate change and transport SA objectives."

70. As for the low growth option:-

> "[It] proposes housing growth below that of the Regional Plan. This is only a minor positive impact on the housing SA objective, as less housing will be provided. All other SA

> objectives either have a negative, neutral or unknown score. Constraining housing supply would have a negative impact on health as this could exacerbate homelessness. This level of housing provision would not meet the needs of the local population (using the 2008 based housing projections); out-migration would also be unlikely. The impact on sensitive land or sites would be less, hence the lower negative scores for heritage, environment, bio-diversity and GI, landscape, natural resources and flooding, waste, energy and climate change and transport SA objectives. There would also be a negative impact on the employment SA objective as this scenario would constrain the labour force. No further mitigation is put forward and is set out for the first two appraisals."

71. On my understanding, Mr Turney advances two related submissions on the Sustainability Assessment. First, he submits that no consideration was given to an option which, in terms, entailed no impingement on existing Green Belt land (in which circumstances no Green Belt review would be required). Secondly, criticism is made of the manner in which the low growth option was examined, in particular in the context of the implications for the Green Belt. In regard to both submissions, Mr Turney took issue with paragraph 22 of Miss Gibson's witness statement, which provides:-

> "The quantum of development allowed for in this lower, below trend assessment of housing provisions was broadly equivalent to the level of housing provision possible without requiring development in the Green Belt, according to the Councils' strategic housing land availability assessments. (DDB8 demonstrates how this is worked out) and the sustainability consequences described would be the same."

72. Mr Turney submits that reaching down into Miss Gibson's witness statement entails an impermissible "paper chase", particularly when one factors in the need to bring into consideration the calculations contained within DDB8.

73. In his written submissions Mr Turney took issue with other passages in Miss Gibson's witness statement which indicate how the evidence base for the Sustainability Assessment was assembled. Mr Turney did not press these points in oral argument, and in my judgment they relate to matters of such minutiae that they cannot properly advance the gravamen of the Claimant's third ground.

74. I cannot accept Mr Turney's submissions on his third ground. Pages 116 and 117 of the Sustainability Assessment do expressly consider the consequences of not reviewing the boundaries to the Green Belt, and the consequent advantages and disadvantages. In my judgment, having regard to paragraph 22 of Miss Gibson's witness statement does not entail an impermissible paper chase: this is admissible, expert evidence which explains the context of the low-growth option within the Sustainability Assessment. This is the option which did not involve incursion into the Green Belt. Furthermore, I take Miss Ellis' point that there were district-specific sustainability assessments within the scope of the overall exercise: see for example, pages 82 and 87-142 in relation to Broxtowe Borough Council. Ultimately, it was for

the Defendants in the exercise of their collective planning judgement to identify which "reasonable alternatives" needed to be considered, and in my view the approach taken simply cannot be impugned in these proceedings for error of law.

Conclusion

75. This appeal brought under section 113 of the Planning and Compulsory Purchase Act 2004 must be dismissed.