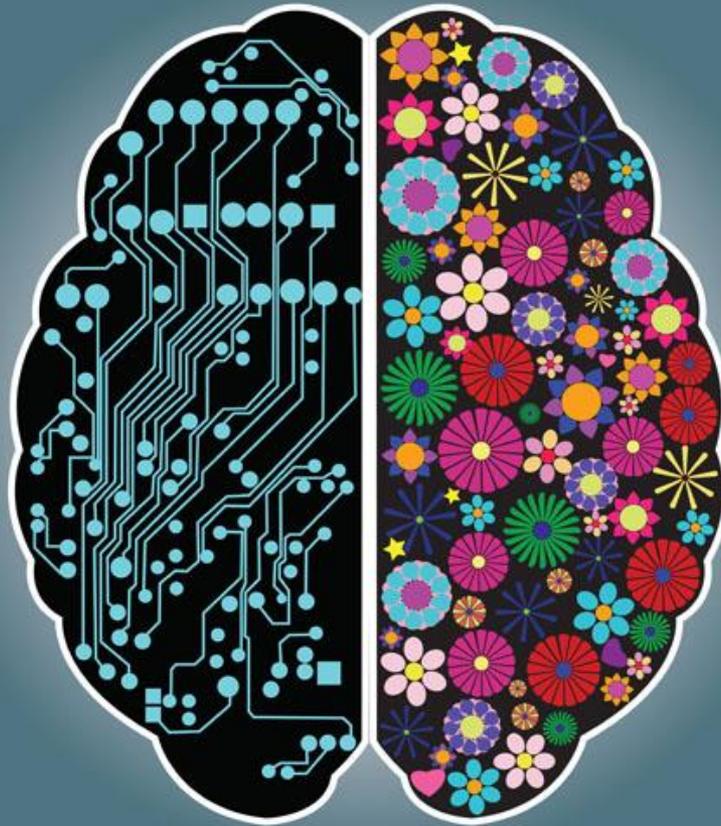


Judging housing land supply

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Art or science?



Richborough Estates v SSHCLG

- [2018] P.T.S.R. 1168, 12 January 2018
- Challenge to WMS on Neighbourhood Plans and 3 year HLS (and later incorporation in PPG)
- “a separate and free-standing calculation is not what is intended. The sophistry involved in these contentions is wholly inappropriate to a practical decision-making document”
- Not irrational to promote policy in face of para 47 objective to “boost significantly the supply of housing”: *“that is not an objective which exists on its own and isolated from the other interests addressed by the Framework. It is not a policy objective which is to be pursued at all costs and irrespective of the other objectives of the Framework”*

Jelson v SSCLG

- [2018] J.P.L. 790, 19 January 2018
- *“Did an inspector who dismissed an appeal against a local planning authority’s refusal of planning permission for housing development err in law when assessing the need for housing in the authority’s area?”*
- Issue turned on whether Inspector had adopted correct figure for “full objectively assessed needs”
- Appellant argued that she had wrongly adopted a “policy on” position in noting that full affordable housing needs did not need to be met, and in stating that “it is not my role in this decision to identify an alternative OAN”; and that “clarity and precision” is required

Jelson (2)

- Lindblom LJ held that the submissions *“collide with the most basic principle in the court’s jurisdiction to review planning decisions, which is that matters of planning judgment are not for the court, but for the decision-maker”*
- *“national policy and guidance does not dictate, for decision-making on applications for planning permission and appeals, exactly how a decision-maker is to go about identifying a realistic and reliable figure for housing need against which to test the relevant supply”* (see Oadby [2016] EWCA Civ 1040)
- *“government policy... is not prescriptive”*

Jelson (3)

“Responsibility for the assessment of housing need lies with the decision-maker, and is no part of the court’s role in reviewing the decision. Although the decision-maker is clearly expected to establish, at least to a reasonable level of accuracy and reliability, a level of housing need that represents the “full, objectively assessed needs” as a basis for determining whether a five year supply exists, this is not an “exact science”... It is an evaluation that involves the decision-maker’s exercise of planning judgment on the available material, which may not be perfect or complete... The scope for a reasonable and lawful planning judgment here is broad... Often there may be no single correct figure representing the “full, objectively assessed needs” for housing in the relevant area. More than one figure may be reasonable to use. It may well be sensible to adopt a range, rather than trying to identify a single figure. Unless relevant policy in the NPPF or guidance in the PPG has plainly been misunderstood or misapplied, the crucial question will always be whether planning judgment has been exercised lawfully, on the relevant material, in assessing housing need in the relevant area... A legalistic approach is more likely to obscure the answer to this question than reveal it...”

Gladman Developments v Scottish Ministers

- [2018] CSIH 17, 20 March 2018
- Judgment of Court of Session (Inner House) in respect of a challenge to the housing requirement in the “Clydeplan”
- Scottish policy requirement for “*compelling evidence*” for setting housing supply targets
- Examining reporter entitled to proceed without such evidence (noting danger in seeking “*spuriously precise, numerical justification for decisions which inevitably rely on a degree of professional judgment*”)
- Broad % uplift (“generosity factor”) in housing requirement to maintain supply did not have to be reasoned in detail

Hallam Land Management v SSCLG

- [2018] EWCA Civ 1808, 31 July 2018
- *“In deciding an appeal against the refusal of planning permission for housing development, how far does the decision-maker have to go in calculating the extent of any shortfall in the five-year supply of housing land?”*
- Shortfall is enough to trigger the presumption (Hopkins Homes)
- *“The NPPF does not state that the decision-maker must reduce the weight to be given to restrictive policies according to some notional scale derived from the extent of the shortfall against the five-year supply of housing land.”*

Hallam (2)

- *“But in a case where the local planning authority is unable to demonstrate five years’ supply of housing land, the policy leaves to the decision-maker’s planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth.”*
- However this will not *“always require an exact quantification of the shortfall in the supply of housing land. This is not surprising. If the court had ever said there was such a requirement, it would have been reading into the NPPF more than the Government has chosen to put there, and more than is necessarily implied in the policies it contains.”*

Hallam (3)

- The relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment
- The NPPF does not specify the weight to be given to the benefit of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land – planning judgment
- But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as (1) the broad magnitude of the shortfall; (2) how long it is likely to persist, (3) what the local planning authority is doing to reduce it, and (4) how much of it the development will meet

Hallam (4)

“the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined... Typically, however, the question for the decision-maker will not be simply whether or not a five-year supply of housing land has been demonstrated. If there is a shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule applies. But it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant “non-housing policies” in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in Hopkins Homes Ltd.. It is for this reason that he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land.”

Cheshire East Council v SSHCLG

- [2018] EWHC 2906 (Admin), 1 November 2018
- Inspector found, in reliance on other decisions, that would be “cautious and prudent” to engage tilted balance because of doubts over 5YHLS
- Precautionary approach challenged by LPA
- Held: lawful approach to the evidence; *“precautionary approach to the evidence... is not... an impermissible additional test but an application of his judgment to answer the central question of whether the Council had demonstrated a five year supply, within the context of a policy imperative to significantly boost the supply of housing... It was open to them to adopt a precautionary approach to the housing numbers before them given the policy stipulation to boost significantly the supply of housing.”*

CPRE & POW v Waverley BC

- [2018] EWHC 2969 (Admin), 5 November 2018
- Challenge to Waverley Local Plan Part 1
- Issue concerned Inspector's approach to addressing unmet need from Woking and in particular whether he had to establish a more accurate figure for unmet need than the 2015 SHMA
- LP Inspector *"placed in a difficult position.... he was not carrying out the Woking Local Plan examination and indeed Woking is very far off any such stage of its plan making process. He did not, and realistically could not have had, all the evidence which would have been necessary to determine whatever Local Plan housing requirement figure Woking will ultimately bring forward"*

CPRE (2)

- Although Inspector had to take into account the “best and most up to date evidence”, that had to be tested on the facts of the particular case, and the NPPF and PPG are clear that the Inspector “*had to carry out a proportionate exercise given his specific statutory task*”
- Updating Woking OAN “*was clearly outside his remit, as well as necessarily involving very significant delay in bringing forward the WBC Local Plan. He could have stopped the entire process and sought all the further information that the Claimants say he should have had. But in my view, there was no legal obligation upon him to do so*”
- “*The 50% allocation to Waverley does appear to be a crude one but cannot possibly be said to be outside a reasonable planning judgement... he had no choice but to take a fairly broad brush approach. There was no policy obligation to carry out the kind of arithmetical exercise that the Claimants require*”

CPRE (3)

- Reasons could be shortly given:

“To place a requirement on a Local Plan inspector to set out the level of detail which is normally in a s. 78 decision would be to impose an unreasonable, and ultimately unnecessary burden. The critical point is that the central justification or reasons for the Inspector's conclusions are clear on the level of housing requirement in the LPP1. In my view they are here – it is clear why he reached the figure he did on unmet need.”

Conclusions

- Definitely an art
- Broad planning judgment
- If uncertainties and imprecisions are acknowledged, difficult to sustain a legal challenge to Inspector's findings