Neutral Citation Number: [2008] EWCA Civ 861

Case No: C1/2008/1319

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Collins
CO/7040/07

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2008

Before :

LORD JUSTICE KEENE
LORD JUSTICE LLOYD
and
LORD JUSTICE HUGHES

- -

Between :

Blyth Valley Borough Council	**Appellant**
- and -	
1. Persimmon Homes (North East) Limited	**Respondents**
2. Barratt Homes Limited	
3. Millhouse Developments Limited	
Secretary of State for Communities and Local Government	**Interested Party**

- -
- -

Anthony Porten QC & Nicola Allan (instructed by **Messrs Sharpe Pritchard**) for the **Appellant**
Peter Village QC & Andrew Fraser-Urquhart (instructed by **Macfarlanes**) for the **Respondents**
Lisa Busch (instructed by **Treasury Solicitor**) for the **Interested Party**

- -

Hearing dates: Tuesday 8th July & Wednesday 9th July 2008

Judgment

Lord Justice Keene:

Introduction:

1. This is an appeal against the quashing by Collins J of a policy in part of the development plan for the borough of Blyth Valley in North-East England. The quashing resulted from an application made under section 113(3) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") by three housing developers, the respondents to this appeal. The appellant is the local planning authority for the area. It had adopted in July 2007 a document called the Core Strategy, within which was a policy, H4, dealing with affordable housing, and it was this policy which was successfully challenged by the respondents.

The Statutory Plan Framework:

2. The system of development plans provided for by the 2004 Act is still relatively new and differs markedly from earlier development plan systems produced by the town and country planning legislation. Under the 2004 Act a two-tier system of plans is created, with the upper tier being a Regional Spatial Strategy. Below that come local development plans for each local planning authority's area. These local development plans consist of a number of documents. A Core Strategy is a development plan document by virtue of regulation 7 of the Town and Country Planning (Local Development) (England) Regulations 2004. Once finally adopted by the local planning authority, a development plan document becomes part of the development plan for the area for development control purposes: see section 38(3) and (6). The latter subsection provides:

> "(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."

3. This is of significance, because one of the main categories of determination there referred to are decisions on applications for planning permission. A local planning authority, when dealing with an application for planning permission, is required by section 70(2) of the Town and Country Planning Act 1990 to

> "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Consequently as a result of that provision and section 38(6) of the 2004 Act the decision on an application for planning permission must be made in accordance with the development plan for the area, unless material considerations indicate otherwise. This has been described as a "plan-led system" of development control.

4. The processes leading up to the adoption of a development plan document under the 2004 Act are set out in Part 2 of that Act. In preparing a local development document such as a Core Strategy, the local planning authority is required by section 19(2) to have regard to various matters. Those include:

"(a) national policies and advice contained in guidance issued by the Secretary of State;

(b) the RSS for the region in which the area of the authority is situated, if the area is outside Greater London;

...

(f) the community strategy prepared by the authority;

...

(i) the resources likely to be available for implementing the proposals in the document"

The RSS is the regional spatial strategy. The authority is also required in such preparatory work to comply with its "statement of community involvement" (section 19(3)), a statement of its policy as to the involvement in the process of those who appear to it to have an interest in matters relating to development in the area: see section 18(1) and (2). By section 19(5), the authority must also carry out an appraisal of the sustainability of the proposals in any local development document and prepare a report on the appraisal's findings.

5. When a document which is to be part of the development plan is thought by the authority to be ready for independent examination, it must be submitted to the Secretary of State for independent examination, which is then carried out by "a person appointed by the Secretary of State", that is to say, a planning inspector: see section 20(1) to (4). The purpose of the examination is set out in section 20(5) as follows:

"(5) The purpose of an independent examination is to determine in respect of the development plan document-

(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound. "

6. What is meant by "sound" in paragraph (b) of section 20(5) has been the subject of guidance by the Secretary of State in a policy document dealing with local plans and known as Planning Policy Statement 12 ("PPS 12"). The version current at the time of the events with which this appeal is concerned was one produced in 2004. At paragrapH4.24 it set out nine tests to be met if a development plan document were to be adjudged "sound", those tests being introduced by the following passage:

"The presumption will be that the development plan document is sound unless it is shown to be otherwise as a result of evidence considered at the examination. The criteria for assessing whether a development plan document is sound will apply individually and collectively to policies in the

development plan document. A development plan document will be sound if it meets the following tests:"

As Collins J said in his judgment, paragraph 15, the two tests most material for present purposes are (iv) and (vii). They read:

> "(iv) it is a spatial plan which is consistent with national planning policy and in general conformity with the regional spatial strategy for the region or, in London the special development strategy and it has properly had regard to any other relevant plans, policies and strategies relating to the area or to adjoining areas;
>
> ....
>
> (vii) the strategies/policies/allocations represent the most appropriate in all the circumstances, having considered the relevant alternatives, and they are founded on a robust and credible evidence base;"

It is evident that test (iv) reflects but goes somewhat further than section 19(1)(a), in that the latter merely requires the local planning authority in preparing a local development document to "have regard to" national policies and the Secretary of State's guidance, whereas test (iv) requires a development plan document to be "consistent" with national planning policies, and to be so (on the face of the test's wording) at the time of the examination.

7. I revert to the topic of the independent examination of development plan documents. By section 20(6) any one who makes representations seeking to change such a document has the right to appear before and be heard by the independent inspector. The inspector in due course must make recommendations and give reasons for them and, in effect, those recommendations are binding on the local planning authority. That is the result of a combination of section 23(2), (3) and (4). The authority may only adopt a development plan document with the modifications recommended by the inspector or with none if that is his recommendation. Once adopted, it forms part of the development plan. The 2004 Act also makes provision for the revision of such documents (section 26), just as earlier types of development plans were periodically reviewed.

8. The ability to challenge the legal validity of an adopted development plan document such as a Core Strategy is governed by section 113 of the 2004 Act, a provision which follows lines familiar from earlier legislation in this field. A challenge may only be brought under this section, which by subsection (3) provides that:

> "(3) A person aggrieved by a relevant document may make an application to the High Court on the ground that-
>
> (a) the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with."

Ground (a) in effect amounts to an assertion that the adoption of the document in question was ultra vires, and it brings into play the normal principles of administrative law. Section 113(7) then empowers the High Court, if satisfied that the document is "outside the appropriate power", to quash it in whole or in part. It was on this basis that Collins J quashed policy H4 in the Core Strategy.

The Blyth Valley Core Strategy and national policy:

9. The appellant submitted its Core Strategy document to the Secretary of State on 28 April 2006, which was followed by a consultation period. The text in the section dealing with affordable housing referred to a Housing Needs Study commissioned by the authority and published in late 2004, which had highlighted a high level of need in the borough for affordable housing. That study, carried out by a firm called Fordhams, had found that so high was the need that it would equate to 83 per cent of the borough's annual housing land requirement. That, however, was regarded as not viable on new housing sites and the study had recommended a proportion of 40 per cent affordable housing "on the basis of best practice across the country." According to the Core Strategy text, that percentage had been reduced to 30 after consultation on an interim policy "in recognition of site viability issues." In fact, a witness statement filed in these proceedings by Caroline Anne Wilson, the applicant's Planning Policy Manager and the lead officer on the Core Strategy, states that the applicant authority lowered the figure to 30 per cent to be consistent with the percentage which had been adopted by a neighbouring district, Wansbeck, with which it formed a single housing market (paragraph 3.6).

10. Policy H4 in the submitted version of the Core Strategy was entitled "Affordable Housing Target" and began:

> "At least 30% affordable housing will be provided as a proportion of all new housing development in the borough."

There was then a reference to future allocations of land in other development plan documents, and then a statement that all new housing developments above a 10 dwelling size would be required to provide at least 30% affordable housing. A minor change to this policy was made by the authority in December 2006, and the independent examination in public was fixed to begin on 13 February 2007.

11. However, on 29 November 2006 national planning policy on housing was revised with the publication of Planning Policy Statement 3 ("PPS 3"), which replaced Planning Policy Guidance 3 of 2000 and Circular 6/98 on Affordable Housing, as well as some other housing policy documents. PPS 3 did not come out of the blue, since there had been a consultation version published in 2005, but until the final version in late November 2006 no-one could have been confident about what the new guidance statement would contain.

12. The new PPS 3 referred to the government's commitment to improving the affordability and supply of housing in all communities, and it contained a section dealing specifically with Affordable Housing. Paragraph 29 in that section, insofar as relevant to the present appeal, stated that, in local development documents, local planning authorities should:

"Set an overall (i.e. plan-wide) **target** for the amount of affordable housing to be provided. The target should reflect the new definition of affordable housing in this PPS. It should also reflect an assessment of the likely economic viability of land for housing within the area, taking account of risks to delivery and drawing on informed assessments of the likely levels of finance available for affordable housing, including public subsidy and the level of developer contribution that can reasonably be secured. Local Planning Authorities should aim to ensure that provision of affordable housing meets the needs of both current and future occupiers, into account information from the Strategic Housing Market Assessment.

...

Set out the range of circumstances in which affordable housing will be required. The national indicative minimum site size threshold is 15 dwellings. However, Local Planning Authorities can set lower minimum thresholds, where viable and practicable, including in rural areas. This could include setting different proportions of affordable housing to be sought for a series of site-size thresholds over the plan area. Local Planning Authorities will need to undertake an informed assessment of the economic viability of any thresholds and proportions of affordable housing proposed, including their likely impact upon overall levels of housing delivery and creating mixed communities. In particular, as the new definition of affordable housing excludes low-cost market housing, in deciding proportions of affordable housing to be sought in different circumstances, Local Planning Authorities should take account of the need to deliver low cost market housing as part of the overall housing mix."

13. A number of features within that national policy guidance are important for the purposes of this appeal. It is not in dispute that PPS 3 requires a local planning authority's plan-wide target for the amount of affordable housing to reflect an informed assessment of the economic viability of any proportions of affordable housing indicated in a plan policy and of any thresholds of numbers of houses on a site at which the proportion(s) will apply. Secondly, the likely impact on the "delivery" of housing (i.e. house-building) of setting such figures of affordable housing is to be taken into account in arriving at them. Thirdly, the meaning of "affordable housing" has been changed: before PPS 3 it included low cost market housing, generally speaking small low-cost units such as starter homes made available at market prices; after PPS 3 it does not. The new concept appears to be limited to "social rented housing" owned by local authorities and registered social landlords or by others under equivalent arrangements and "intermediate affordable housing" available at below market price or rents, such as shared equity units: see PPS 3, Appendix B. Developers can therefore no longer achieve any part of a required proportion of affordable housing by building low cost market homes.

14. It is right to acknowledge that PPS 3 covered planning policy for housing generally and not just affordable housing. Nonetheless there can be no doubt that the latter formed an important aspect of the government's policies on planning for the provision of housing. When PPS 3 was published, it was accompanied by a letter dated 29 November 2006 from a senior officer in the Department of Communities and Local Government. The letter included the following passage:

> "PPS3, along with other Government housing policy and planning policy statements provides the context for plan preparation in relation to housing development.
>
> The Government wants to move as quickly as possible to a development plan policy framework which reflects this PPS. Local planning authorities and regional planning bodies should consider the extent to which emerging local development documents and regional spatial strategies can reasonably have regard to the policies in this statement, depending on their state of preparation. As far as is practicable, changes should be made to emerging spatial plans so that they reflect PPS3 policies, but this should not be done at the expense of putting in place an effective policy framework for housing as quickly as possible.
>
> Where it is not practicable for changes to emerging plans to be made, local planning authorities and regional planning bodies should set out the steps they will be taking to address any issues arising from this PPS through an early plan review."

15. That letter recognised that in certain instances there would be difficulty in modifying policies in development plan documents to make them consistent with PPS 3 because of the advanced stage which the statutory plan processes had reached. It would not have been surprising perhaps if the appellant authority had regarded itself as being in such a situation, given the limited period of time between the publication of PPS 3 on 29 November 2006 and the start of the independent examination of its Core Strategy on 13 February 2007. But it seems to have taken a different approach.

16. What it did was to submit to the inspector at the examination a document entitled "PPS 3 Compliance Statement" which, according to its introductory paragraphs, sought "to assess whether the Core Strategy is consistent with PPS 3." Section 7 of the Compliance Statement dealt with affordable housing. It referred to the Housing Needs Study produced by Fordhams in 2004 and to the adoption of a 30 per cent target of affordable housing on all residential development schemes above the site size threshold of 10 dwellings. It made no reference to the requirement in PPS 3 of an informed assessment of the economic viability of proportions of affordable housing but stated at paragraph 7.4:

> "The Core Strategy complies with PPS 3 in that it sets a Borough wide target for the provision of affordable housing based on an up to date assessment of need. (paragraphs 22 and 29)."

That Compliance Statement is also referred to in the witness statement by Caroline Anne Wilson, filed in these proceedings on behalf of the appellant. In it she states at paragraph 5.12 that the Compliance Statement

> "concluded that the Core Strategy was in compliance with PPS 3, subject to a series of minor changes. These were before the inspector and incorporated into his binding recommendations."

The Independent Examination and the Inspector's Report:

17. At the independent examination the inspector heard evidence from a number of house-building companies who objected to policy H4. Amongst others, a consortium including the respondent Barratt Homes Limited objected on the basis that the 30 percent figure "has been arbitrarily selected and is not derived from a robust and credible evidence base." That last phrase would appear to be taken from test (vii) of "soundness" to be found in the then current version of PPS 12 (see paragraph 6, ante). The objection went on to refer to the Secretary of State's conclusion on a planning appeal in the borough in March 2006 that the evidence before him did not include sufficient information to enable him to reach a view on the appropriate level of affordable housing on the appeal site (known as the Southern Development Area). Reference was then made by the consortium to PPS 3 and the lack of compliance with that.

18. That last point was also made on behalf of another of the respondents, Millhouse Developments Limited, who noted that the plan target in H4 of 30 per cent failed to reflect an assessment of the likely economic viability of land for housing within the area. Towards the end of the examination, indeed in what proved to be the closing session, a joint submission in the form of a briefing note was put in on behalf of the present respondents, together with other house-builders, on the topic of affordable housing and policy H4. It criticised using Fordhams' study as the basis for the policy and drew attention to another recent public inquiry decision on land known as South West Sector, Cramlington. Amongst other things, it referred to evidence from Fordhams that on that site a 30 percent affordable housing requirement would render the scheme unviable, resulting in a negative land value. That joint submission proposed that policy H4 should be modified so as to set an overall strategic target of 10 per cent affordable housing, to provide the context for decisions on sites above a threshold of 15 dwellings.

19. The appellant authority put in evidence at the examination to support policy H4. It did not produce evidence to show that the South West Sector site at Cramlington was unusually expensive to develop. It did put in evidence from Dr Richard Fordham, whose firm had carried out the 2004 Housing Needs Study. Much of his statement was directed to the issue of the *need* for affordable housing within the borough, but he did refer to percentage targets, stating that in practice such targets had been set by custom and practice and referring to targets set elsewhere. He also criticised the conclusions reached by the inspector who had dealt with the Southern Development Area inquiry.

20. It was not suggested on behalf of the appellant at the examination that there had not been adequate time to carry out the sort of informed economic viability study required

by PPS 3. Instead, reliance was placed on a witness from the Government Office for the North East ("GONE"), who stated that the Core Strategy complied with PPS 3.

21. The inspector's report on the examination began by referring to PPS 12 and stating that the starting point for the Core Strategy

> "is that it is sound unless evidence considered at the examination indicates otherwise." (paragraph 1).

He repeated that statement of his approach at paragrapH4 of the Introduction and, as will be seen, he returned to that same theme when dealing with the affordable housing policy.

22. In dealing with test (iv) of whether the Core Strategy was sound, i.e. consistent with national planning policies, the inspector referred to PPS 3 and to the fact that it had been published after the submission of the draft Core Strategy. But he said at paragrapH4.5:

> "Changes have therefore been proposed to the CS to ensure that it conforms with PPS 3. These are considered in section 7 of this report."

23. Section 7 dealt, amongst other things, with the affordable housing policy. Here the inspector referred to the 2004 Housing Needs Survey (sic) and its conclusion that there was a need for 83% of housing to be affordable housing. He noted evidence that since 2004 a reconsideration of this survey had indicated that the need had probably increased, which added "to a conclusion that the 2004 HNS remains a credible and robust evidence base." He added that:

> "the reconsidered HNS is not undermined by the adoption of PPS 3."

At paragraph 7.30, he stated that:

> "Policy H4 has been proposed to be amended, *to accord with PPS 3*, to seek a 'target' of 30% affordable housing." (emphasis added).

As for the conclusions reached at public inquiries into housing development in the borough, the inspector noted that those inspectors were not dealing with a borough wide target and that, if on future applications material considerations "dictate" that the 30% required by policy H4 was not achievable, then a lesser percentage should be sought.

24. Paragraph 7.33 of his report was the crucial one on the soundness of the figure of 30 per cent. It stated:

> "7.33 A target of 30% affordable housing would only satisfy part of the significant affordable housing need in the Borough as demonstrated in the HNS. However, the proposed 30% target is consistent with that in a neighbouring authority, which is within the same housing market area as identified in a

> Northumberland Housing Market Assessment. The Council has considered alternatives ranging from 10% to 40%. A 40% target would not be viable and a 10% target would not adequately address the significant need. In these circumstances a 30% target is the most appropriate option. There is no evidence to suggest that committed sites will not be brought forward with a target of 30% affordable housing or that such a target will risk the delivery of sites identified in the UCS. At no time has the Council suggested that failing to achieve 30% affordable housing on sites early in the plan period would result in them seeking a higher percentage on sites in the latter part of the plan period. The policy would be applied on a site by site basis."

25. In the context of another government publication, "Delivering Affordable Housing", the inspector noted that it required authorities to develop a strategic approach to housing by undertaking Strategic Housing Market Assessments (SHMA). He added:

> "With the guidance and advice now in place the Council should move swiftly to implement government initiatives on delivering affordable housing by undertaking viability studies on UCS sites and by commissioning an SHMA for the Borough." (paragraph 7.37).

"UCS" stands for Urban Capacity Study.

26. I observe amongst "minor changes" which he recommended and which were set out in an appendix to his report was the new meaning of "affordable housing" to be found in PPS 3, thus excluding low cost market housing.

27. The revised version of Policy H4 which emerged from this process read as follows:

> "A target of 30% of affordable housing will be sought as a proportion of all new housing development in the Borough. This policy will apply to all new housing developments capable of providing 10 dwellings or more."

The Decision of the Administrative Court:

28. Collins J set out the origins and history of Policy H4, observing accurately that it was not possible for the submitted version to have had regard, in the way set out in paragraph 29 of PPS 3, to economic viability because that PPS had only come into existence in November 2006. But he criticised the Council's PPS 3 Compliance Statement for asserting that the Core Strategy complied with PPS 3, including paragraph 29, because (in his judgment) Policy H4 did not comply. It did not base its target for affordable housing on an assessment of the economic viability of such a figure. The judge noted that counsel for the Borough Council did not submit that in that respect the policy did comply (paragraph 30).

29. He acknowledged the point made by the inspector (see paragraph 23 ante) that on future planning applications an applicant could seek to demonstrate that the 30 per

cent target could not be met on the site in question, but Collins J added at paragraph 63:

> "Nonetheless, it is equally important to bear in mind that the target set must be a target which is not flawed by any deficiency in the process which has led to it being imposed, and if it is a flawed target, it should not stand as one which is to be achieved."

He went on to say this:

> "... what is wrong in my view, is to let a policy be established which may be unsupportable on a proper consideration of all material factors. It seems to me that on the material I have had placed before me, that is the situation in this case. The 30 per cent has been produced on the basis of material which is not supported by the guidance and which ignores a highly material factor, namely the economic viability of the relevant target. True it is, as Mr Porten submits and as the Inspector himself pointed out, that individual applications will be dealt with on the basis of an assessment of economic viability. On the other hand, the target will be there. It is set out as what is to be achieved and it is what section 38(6) of the Act will require to be taken into account as the relevant planning policy. In my judgment, that, in the circumstances of this case, means that there is a legal flaw."

The reference to section 38(6) is, of course, to the statutory provision requiring planning applications to be determined in accordance with the development plan, unless material considerations indicate otherwise. For the reasons indicated, the judge quashed policy H4.

The issues:

30. That decision is now challenged by the borough council. The main issue is whether it was open to the inspector, on the evidence before him, to find that policy H4 complied with PPS 3 and was consequently "sound" within the meaning of section 20(5)(b) and the Secretary of State's guidance. I put the main issue in these terms because, although at times in the appellant's submissions it appeared to be suggested that there was insufficient time for the Core Strategy to comply with PPS 3, that in the end was not how its case was put. It is obvious that the "insufficient time to comply" argument is incompatible with the submission that the Core Strategy did comply, and though Mr Porten QC did refer to the problems caused by the timing of the publication of PPS 3, he in the event opted for the latter argument.

31. That is not surprising. As I have already noted, it was not submitted by the appellant at the examination that there had not been time to carry out an informed economic viability study as required by PPS 3. No such suggestion appeared in its Compliance Statement. Nor did the appellant do what the letter of 29 November 2006 from the Department of Communities and Local Government advised should be done where it was not practicable to change an emerging plan so as to be consistent with a recent

change in national planning policy, that is to say, "set out the steps they will be taking to address any issues arising from this PPS *through an early plan review*" (emphasis added): see paragraph 14, ante. The closest one gets to such a suggestion comes in what the inspector said at paragraph 7.37 of his report, quoted earlier in this judgment at paragraph 25, when he recommended that the appellant should undertake "viability studies on UCS sites and by commissioning an SHMA for the Borough." But, as Mr Village QC for the respondents pointed out, Urban Capacity Study sites exclude the larger greenfield sites, the strategic sites, and relate only to those sites within the urban area: see PPG 3. Nothing in the material put before this court indicates that an SHMA would necessarily involve the sort of economic viability study required by PPS 3. In any event, neither the inspector in this passage nor the appellant was proposing an early review of the Core Strategy to achieve consistency with PPS 3. The inspector's conclusion was that the Core Strategy *did* conform with PPS 3 as a result of the changes made to it, as he indicated at paragraphs 4.5 and 7.30 (see paragraphs 22 and 23, ante).

32. I have taken a little time to deal with what, in the event, was a non-issue because at first blush one might have understood it if the appellant had said to the inspector that it had not had sufficient time to comply with PPS 3 and that it wanted to modify policy H4 to indicate that it was not compliant and was therefore merely a temporary holding policy pending an early review of the Core Strategy. That would have made it clear at any subsequent section 78 planning appeal that somewhat less weight than usual was to be attached to this particular development plan policy. One is conscious that the appearance of a new government planning policy late in the processes leading to independent examination and adoption of a development plan can cause problems for the local planning authority, and had that been the stance adopted at the examination and subsequently by this authority, I for my part would have felt some sympathy. But it was not.

33. I therefore return to the main issue identified earlier of whether it was on the evidence open to the inspector to find that policy H4 complied with PPS 3. Mr Porten emphasises that whether a development plan policy complies with national policy guidance such as PPS 3 is largely a matter of planning judgment with which the courts should be slow to interfere. With that proposition I agree. He goes on to emphasise that the inspector took PPS 3 into account, as he did the views of GONE. It is contended that the inspector also took into account the viability of the 30 per cent target of affordable housing, and that there was evidence to support that figure, in the shape of the HNS by Fordhams. He did not need to refer expressly in his report to the passages in PPS 3 dealing with economic viability studies. Consequently the inspector was entitled to reach the conclusion he did and the judge below erred in quashing policy H4, because that in effect amounted to substituting his own view of the merits.

34. For my part I do not find these arguments persuasive. Certainly it is first and foremost a matter for the planning inspector to reach a judgment on whether a particular policy complies with a piece of national policy guidance. But it was expressly conceded before us by Mr Porten that policy H4 did not satisfy the requirements of PPS 3 in respect of an economic viability assessment of the 30 per cent proportion of affordable housing. One only has to read paragraph 29 of PPS 3, the relevant parts of which are set out at paragraph 12 of this judgment, to see that

such an informed assessment of the viability of any such percentage figure is a central feature of the PPS 3 policy on affordable housing. It is not peripheral, optional or cosmetic. It is patently a crucial requirement of the policy. The appellant's policy H4 did not comply with that and it follows that the inspector erred in finding that H4 complied with PPS 3.

35. It is significant that nowhere in his report does he refer to this important requirement of PPS 3, and it is consequently unclear what approach, if any, he took to it. He may have overlooked it altogether and thought, as paragraph 7.32 of his report may suggest (see the end of paragraph 23 ante), that viability issues could be left to section 78 planning appeals. If so, that is clearly an error of law, because this part of PPS 3 is directed to the content of development plans. Alternatively, it may be that he believed that the Fordhams' 2004 HNS met the terms of PPS 3. But if that is so, that reveals a basic error, because that HNS, as is agreed, was using the earlier and broader meaning of affordable housing, whereas the Core Strategy adopts the new meaning which is narrower and more onerous for developers. No viability exercise carried out on the old basis could be considered to be valid for the purposes of assessing the viability of a particular proportion of affordable housing as defined now in PPS 3 and the Core Strategy.

36. That takes one to a further problem about the inspector's findings that the 30 per cent figure in policy H4 was "sound". Amongst the tests of soundness set out in PPS 12 was number (vii) which required policies to be founded "on a robust and credible evidence base". The inspector regarded the 2004 HNS as providing such a base. Yet in his report he seems never to have considered the implications of the fact that that HNS had been done using one concept of affordable housing and that the Core Strategy and policy H4 used a different concept which excluded low cost market housing. He makes no reference to that problem. Likewise he refers to the percentage of affordable housing adopted in the neighbouring district of Wansbeck, which again must have been arrived at (because of its timing) on the old meaning of affordable housing. It seems to me that Mr Village is right in his submission that the inspector failed to take into account the absence of a robust and credible evidence base for policy H4 as he should have done.

37. What is apparent is that the inspector also approached the issue of soundness on the basis that a policy such as H4 should be presumed to be sound unless evidence was produced demonstrating the contrary. I have set out his comments to that effect at paragraphs 21 and 24 of this judgment. In essence he put an onus on objectors to produce evidence showing that the policy was unsound. Mr Porten submits that he was right to rely on such a presumption of soundness and draws attention to the fact that the version of PPS 12 current at the time contained such a presumption: see paragraph 6 hereof.

38. That is indeed what that 2004 version of PPS 12 said. The lawfulness of such guidance is, however, challenged by the respondents on the basis that it conflicts with the 2004 Act itself, section 20(5). That sub-section defines one of the two purposes of the independent examination of the development plan document as being to determine "whether it is sound" (see paragraph 5, ante). The statute contains no presumption one way or the other, and Mr Village submits that to presume soundness unless there is evidence demonstrating unsoundness undermines the essentially inquisitorial nature of the inspector's statutory duty. He draws attention to the fact that the more recent

version of PPS 12 has dropped any presumption in those terms. What the 2008 version states at paragrapH4.49 is as follows:

> "The starting point for the examination is the assumption that the local authority has submitted *what it considers to be* a sound plan."

That, contends Mr Village, indicates a recognition by the Department of Communities and Local Government that the earlier version went too far and was in conflict with the statutory scheme.

39. We have heard submissions on behalf of the Secretary of State from Ms Busch, to the effect that the latest version of PPS 12 involves no change in approach, because that is all that the earlier version meant. She told us that the Secretary of State accepts that the inspector has an inquisitorial function and may properly find a policy unsound even if there is no convincing evidence to that effect from an objector. That is because even the 2004 version of PPS 12 required there to be a robust and credible evidence base if a policy was to be judged sound.

40. For my part, I find it difficult to accept that the two versions set out above have the same meaning, but that probably does not matter. The appellant accepted orally that the inspector has a role which is at least in part inquisitorial and Mr Porten conceded that the inspector could reject a policy without there being evidence from objectors that it was unsound. It seems to me that the inspector in the present case was misled by the wording of PPS 12 as it then stood into applying a true presumption of soundness of the kind which is found elsewhere in the 2004 Act in section 38(6), where a particular result is to follow "unless material considerations indicate otherwise." That is not what section 20(5) is providing for when soundness is being investigated. It is couched in neutral terms and its effect is more appropriately reflected in the later version of PPS 12. The Secretary of State does not seek to defend any presumption of soundness when a policy is being considered at an independent examination. Thus it may in a sense be understandable that the inspector adopted the approach he did, but in my judgment he was wrong to do so and that error in his approach to the issue under section 20(5) also vitiates his recommendation on policy H4.`

41. Finally, it is submitted by Mr Village that the inspector erred in finding that there was no evidence that a 30 per cent proportion of affordable housing would mean sites not coming forward for development. The respondents draw attention in particular to the evidence that, at the South West Sector, Cramlington site, development would be unviable if 30 per cent of the housing was required to be affordable: see paragraph 18, ante. We have been told that that site represented the largest allocated housing site at that time, and Mr Village points out that there was no evidence before the inspector that that site suffered from any unusual development costs.

42. There is no doubt that the inspector was aware of this evidence about the lack of viability at that site if 30 per cent affordable housing were to be required, since he refers to it at paragraph 7.32. But it is then very difficult to understand his statement in the following paragraph about there being no evidence that sites would not come forward for development. His process of reasoning is, to put it mildly, obscure and either is irrational or reflects a failure to take account of the evidence about the

Cramlington site when reaching this conclusion. This adds to the accumulation of defects in his report.

Conclusion:

43. The version of policy H4 eventually adopted by the appellant depended on the recommendation of the inspector, following the examination of the Core Strategy, and the legal validity of that policy depends upon the inspector having reached findings and conclusions which were properly open to him and which were not vitiated by errors in his approach. Unhappily that is not the situation which emerges once one analyses the inspector's report. He failed to reflect the requirement of PPS 3 as to the need for an informed economic viability study as part of the process leading to a policy requiring a particular percentage of affordable housing. He did not even explicitly recognise that requirement in his report, any more than he did the fact that the 2004 HNS proceeded on a different concept of affordable housing from that which he recommended. It was, further, not open to him to find that that HNS provided a robust and credible evidence base for the policy beyond merely the degree of need for such housing. His approach was also vitiated by his perhaps understandable but erroneous application of a presumption of soundness, and his finding that there was no evidence that sites would not come forward if a 30 per cent requirement were imposed is incomprehensible.

44. For all these reasons I am satisfied that the process leading to the adoption of policy H4 was legally flawed and that the Core Strategy in this respect was and is ultra vires. In terms of section 113(3), it is not within the appropriate power. Collins J was right to quash that policy. We announced at the end of the hearing that the appeal would be dismissed and these are my reasons for arriving at that decision.

Lord Justice Lloyd:

45. I agree.

Lord Justice Hughes:

46. I also agree.