

**Housing Needs and  
Five Year Housing  
Land Supply  
Court of Appeal  
Decision**

St Albans City and District  
Council v The Queen (on the  
application of) Hunston  
Properties Limited, Secretary  
of State for Communities and  
Local Government and  
Another

**DLP BRIEFING NOTE 141**

Prepared by  
**DLP Planning Consultants –  
Strategic Planning Research Unit**

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## Summary

This Court of Appeal case highlights the following:

- 1) **Objectively assessed needs cannot include consideration of constraints.**
- 2) **Where there is no up to date plan objectively assessed needs are the starting point for any assessment of 5 year land supply.**
- 3) **The weight to be given to the shortfall is dependent upon the following:**
  - a. **Scale of the shortfall; and**
  - b. **The circumstances of the shortfall .i.e. is the district highly constrained with little land outside of the Green Belt.**
- 4) **The fact a Council might be underperforming in terms of plan production is not a consideration as the planning system is not to act as a sanction on poorly performing Councils as the public bear the impact.**

It is recommended that:

- **If a five year land supply argument is being relied upon when submitting an application or promoting a site these need to be supported not only by a robust assessment of supply, but also a statement justifying the underlying housing requirement used to set the 5 year housing target. As most adopted plans predate that National Planning Policy Framework (The Framework) this will be recommended in most cases.**
- **Representations are made at each stage of the Local Plan process regarding the “objectively assessed” housing needs and subsequent requirement.**

### **Court of Appeal Decision – St Albans City and District Council v The Queen (on the application of) Hunston Properties Limited, Secretary of State for Communities and Local Government and Another**

As discussed in our previous Briefing Note on this matter (No. 138), in November 2011 Hunston Properties Ltd made an application to St Albans City and District Council, which was subsequently refused in February 2012 on three grounds. The Hunston Properties Ltd proposal was for the development of a five hectare site, almost entirely in the Green Belt in St Albans, for 116 dwellings and a 72 bed care home.

Only two of the three reasons for refusal were relied upon by the Council when the developer appealed, under Section 78 of the Town and Country Planning Act (1990). These related to **(i)** inappropriate development within the Metropolitan Green Belt, the Council arguing that the developer failed to demonstrate the existence of “very special circumstances” necessary to warrant development in the Green Belt, and **(ii)** that the proposed development would represent a built form of undue prominence.

An Inspector dismissed the appeal in March 2013 and found no shortfall in the supply of housing because she regarded it as necessary to identify a housing requirement figure which reflected the constraints on built development in the District generally, which resulted from the extensive areas of Green Belt there. The Inspector chose to adopt the Regional Spatial Strategy (RSS) figure, which though revoked sought to take account of such constraints.

Hunston Properties Ltd made a legal challenge in the High Court under Section 288 of the Town and Country Planning Act 1990, on the validity of this decision. In considering the submissions made to him, His Honour Judge Pelling QC concluded that the approach adopted by the Inspector was wrong in law and quashed the appeal decision.

St Albans City and District Council challenged this decision in the Court of Appeal, but three senior judges dismissed the application and confirmed the judgement of the High Court.

The judgement in this case is of very considerable significance in that it considered the approach to be adopted as a matter of policy towards a proposal for housing development on a Green Belt site, where the housing requirements for the relevant area have not yet been established in an up to date Local Plan produced in accordance with the policies in the Framework.

The three Court of Appeal Judges concluded that such development is clearly inappropriate development in the Green Belt and should only be granted permission if 'very special circumstances' can be demonstrated, which remains Government policy (paragraph 87 of the Framework). The Judges however went on to conclude that in principle a shortage of housing land when compared to the needs of the area is capable of amounting to very special circumstances.

The Court of Appeal decision also identifies that it is not for an Inspector on a Section 78 appeal to seek to carry out some sort of Local Plan process as part of determining an appeal, so as to arrive at a constrained housing requirement figure. An Inspector, in that situation, is not in a position to carry out such an exercise in a proper fashion, as it is impossible for any rounded assessment similar to the Local Plan process to be done.

The decision notes that the Inspector was only using the RSS figures as a proxy, but the Government has moved away from a top-down approach. The Judges stated that the Inspector was mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.

The Court of Appeal Judges in their decision agreed with the High Court Judge that the Inspector had erred by adopting such a constrained figure for housing need, which led her to find that there was no shortfall in housing land supply in the District. The Judges identified that the Inspector should have concluded that there was a shortfall as the supply fell below the objectively assessed five year requirement. The Judges concluded that 'very special circumstances' are not automatically demonstrated simply because there is less than a five year supply of housing land. However, one of the considerations to be reflected in the decision on very special circumstances is likely to be the scale of the shortfall.

The decision notes the arguments put forward by the developer that a Local Planning Authority, which has not produced a Local Plan as rapidly as it should, would only have itself to blame if the objectively assessed housing need figures produced a shortfall and led to permission being granted on protected land, such as Green Belt, when that would not have happened if there had been a new style Local Plan in existence.

The Court of Appeal Judges further concluded that this was not a proper approach as planning decisions are ones to be arrived at in the public interest, balancing all of the relevant factors and are not to be used as some form of sanction on local Councils. The Judges noted that where the Inspector went wrong was to use a quantified figure for the five year housing requirement, which departed from the approach in the Framework, with particular regard to paragraph 47. They stated that on the figures before the Inspector, she was obliged (in the absence of a Local Plan figure) to find that there was a shortfall in housing land supply.

The Judges noted that decision makers have to determine if 'very special circumstances' have been shown which outweigh the contribution of the site in question to the purpose of the Green Belt. The ultimate decision may well turn on a number of factors including the scale of the shortfall, but also the context in which that shortfall is to be seen, a context which may include the extent of important planning constraints in the District as a whole. The Judges noted in the decision that there may be nothing 'special' and certainly nothing 'very special' about a shortfall in a District, which has very little undeveloped land outside the Green Belt, but ultimately this is a matter of planning judgment for the decision maker.

The Court of Appeal Judges overall conclusion is that the Inspector did err in law in the approach that she adopted to calculating the housing land requirement over the five year period. They therefore quashed her decision and as a consequence the Section 78 appeal will now have to be redetermined in accordance with the guidance in the judgement. The appeal by the Council to the Court of Appeal was therefore dismissed.

### **DLP Planning Consultants – Strategic Planning Research Unit Comments**

It is clear from this case that the Inspector in the Section 78 Appeal had misdirected herself in using the constrained housing requirement figure of the revoked RSS as the start point for assessing whether there was a five year supply of housing within the District. Instead, the starting point should have been a more up to date 'objectively assessed' housing requirement figure, as required by the Framework.

The Inspector was mistaken to use a figure for the housing requirements below the fully objectively assessed needs figure until such time that the Local Plan process arrived at a properly constructed constrained figure. It is not for an Inspector to seek to carry out some form of Local Plan process in determining a Section 78 appeal and arrive at a constrained figure, since they are not in a position to carry out such an exercise as it is impossible for any rounded assessment similar to the Local Plan process to be done. The Inspector in this case should have concluded, using the correct policy approach, that there was a shortfall in housing and weighed whether the shortfall amounted to the 'very special circumstances' needed to allow what would otherwise be inappropriate development in the Green Belt.

The Judges' clear steer is that, in light of there being no Local Plan and shortfall in housing land, permission should not be granted automatically and that planning decisions should be arrived at in the public interest, balancing all the relevant factors. Planning decisions are a matter of balance and may well turn on a number of factors, including the scale of the housing shortfall but also in the context in which the shortfall is to be seen. There may be nothing 'special' and certainly nothing 'very special' about a shortfall in a District, which has very little undeveloped land outside the Green Belt, but ultimately this is a matter of planning judgment for the decision maker.

This case is particularly relevant to local authority areas whose previous RSS housing requirements were constrained when measured against their objectively assessed needs. This is also applicable to the review of development plans as this means that objectively assessed needs cannot be constrained by policy designations. It should be noted that in this case there was a policy vacuum with no up to date plan meaning that the emerging plan might have been capable of attracting some weight. This suggests that promoters of housing development should make representations on housing numbers in emerging plans even if they are promoting sites in advance of the Plan otherwise weight might be placed on these emerging assessments.

The Court of Appeal judgment has established that where there is no up to date plan objectively assessed needs must be the starting point for any assessment of 5 year land supply.

#### **DLP Planning Consultants – Strategic Planning Research Unit**

In the case of a planning application or appeal a robust up to date evidence base will be needed to support the provision of housing in terms demonstrating that the proposal is required to meet the objectively assessed housing need. While reliance may be placed on previous development plans in many cases the evidence base will have changed and in some circumstances where plans have failed to be updated such evidence may be absent altogether.

A comprehensive review of the demographic and associated evidence provided by the Strategic Planning Research Unit (SPRU) to provide an objective assessment of housing need is therefore an essential piece of evidence to demonstrate to the decision maker that the proposal is required to meet an existing need. The output of this work can also provide guidance to the appropriate level of housing provision against which to calculate the five year land supply.

The SPRU has a proven track record of producing and presenting evidence on housing need and the economic benefit of housing development both at planning appeals and in Local Plan examinations.

Whether supporting a proposed allocation or promoting an alternative allocation in an emerging plan it is essential that the case is supported by a robust assessment of the level of housing need for the plan period. The Framework requires that the overall level of need is assessed prior to any policy decisions regarding the impact of meeting that need in full. The SPRU is experienced at critically examining the evidence base for Local Plans and testing the assumptions prior to producing their own independent objective assessment of housing need.

Members of the SPRU have experience of presenting their findings at Local Plan examinations and utilising the evidence base to argue for the appropriate level of housing within a district and its distribution.

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A summary of matters that the DLP Consulting Group provide services for follows:

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Five Year Land Supply Assessment  
Economic Impact of Housing  
Economic Impact of development proposals  
Retail Impact Analysis  
Expert Witness on housing needs  
Local Plan Examinations

### **DLP Planning Consultants**

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