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● ● ● barristers

## Deliverable Sites and Other Stories...

Josef Cannon, Rob Williams, Dr Ashley Bowes

# What we will cover?



- The SoS concession in The Willows
- The background and timeline
- The ramifications



- Evidence and sites after the base-date -  
What is the position now?



- Calculating 5-year housing land supply post-COVID

# What we will cover?



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- Evidence and sites after the base-date -  
What is the position now?



- Calculating 5-year housing land supply post-COVID

# The background



## The requirement to demonstrate a 5-year supply of deliverable sites

### 2012 NPPF definition

- available now,
- offer a suitable location for development now,
- achievable with a **realistic prospect that housing will be delivered on the site within five years**
- and viable.

### *St Modwen*

- Sites with **planning permission** should be considered deliverable until permission expires,
- unless there is **clear evidence** that schemes will not be implemented within five years

# The background



## The requirement to demonstrate a 5-year supply of deliverable sites

### 2012 NPPF definition

*“Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessarily will be.”*

### St Modwen

*For various financial and commercial reasons, the landowner or housebuilder may choose to hold the site back. Local planning authorities do not control the housing market. NPPF policy recognizes that.”*

# The background



## The requirement to demonstrate a 5-year supply of deliverable sites: the 2019 edit

**Deliverable:** To be considered deliverable, sites for housing should be **available now**, offer a **suitable location for development now**, and be achievable with a **realistic prospect** that housing **will be delivered on the site within five years**. In particular:

**a)** sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).

**b)** where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.

# The background



## The requirement to demonstrate a 5-year supply of deliverable sites: the 2019 edit

Two categories: (a) and (b)

- Was this a 'closed list' of site types?
- What about:
  - Resolution to grant?
  - Draft allocations in emerging plan?
  - Other 'deliverable' sites?
- *Woolpit/Woolmer Green/etc*



# The Willows





# The Willows



- Four houses
- Granted permission after a Hearing:
  - Contrary to DP
  - Undermine spatial strategy
  - No harm to c&a

**BUT**

- No 5YHLS:
  - Closed list
  - Council included 774 units not falling with cat. (a) or (b)

# The Willows: PURITY



- No issue on need: SM
- 774 units included on non-category A/B sites
- Removed as a matter of principle – no assessment of their individual features
- Went no further – without 774, no 5YHLS possible

# The Willows: the challenge



- s.288 challenge on that basis – against decision and costs decision
- Arguments on ‘closed list’:
  - Ordinary meaning suggests not closed:
    - The definition is the first bit – as in St Modwen
    - A and B are about evidential presumptions – a **gateway** and a **gate** to that definition
  - Purpose and context:
    - Certainty not required
    - Question is whether supply will constrain delivery
    - Absurd results
  - Inspector’s reasoning – ‘case law’

# The Willows: the response by the IP



- IP settled AoS before SoS, and before permission
- SoS indicated would not contest the claim
- Permission granted by Lewis J having seen IP's AoS
- IP resisted claim – comprehensive Grounds:
  - LPA conceded 'closed list' at hearing; and
  - Closed list correct:
    - Language ('in particular')
    - Evidential threshold
    - PPG ('namely')

# The Willows: the concession by the SoS



...

- B. The Defendant has carefully considered the Inspector's decision and the Claimant's Statement of Facts and Grounds and Reply, and the evidence served in support. He concedes that he erred in his interpretation of the definition of deliverable within the glossary of the National Planning Policy Framework ("NPPF") as a 'closed list'. It is not. The proper interpretation of the definition is that any site which can be shown to be 'available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years' will meet the definition; and that the examples given in categories (a) and (b) are not exhaustive of all the categories of site which are capable of meeting that definition. Whether a site does or does not meet the definition is a matter of planning judgment on the evidence available.

...



# The Willows: ramifications



- Not a citeable decision – not binding, doesn't 'decide' anything

## **BUT:**

- Very clear exposition of SoS' view
- Of his own policy
- Inspectors appointed by SoS to determine appeals on his behalf

## **SO:**

- Question is whether a site is deliverable – on the evidence
- Categories A and B only concern evidential *presumptions*



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**Base-dates and the like (or what is left of  
Woolpit?)**

Robert Williams

# Casting a long-shadow?



# A slide from a pre covid-19 world



~~1. Closed lists?~~ (Woolmer Green)

2. Must evidence of deliverability be contained in AMR or other published statement? (Woolpit)

3. Are you required to ignore evidence/data which emerges after base-date? (Woolpit)

4. Is it permissible to include permissions granted after base-date? (Woolpit)

# Hot(-ish) off the Press





# Woburn Sands



- Inspector's Reasoning (IR12.8-12.10):
  - Nothing in NPPF or NPPG that stipulates documentary evidence must be available at base-date;
  - PPG advocates use of latest available evidence;
  - An LPA can prepare and consult on APS after base-date;
  - Previous appeal decisions (including by SoS) not followed approach in Woolpit;
  - Concluded - *"Therefore, I consider it acceptable that the evidence can post-date the base date provided that it is used to support sites identified as deliverable as of 1 April 2019."*
  - Also noted- *"The Council has avoided adding new sites after the base date to prevent the skewing of supply in line with the Woolpit decision."*

# Woburn Sands



- Secretary of State agreed (25<sup>th</sup> June 2020; 3169314)
- *“The Secretary of State has considered the Inspector’s analysis at IR12.4-12.64. For the reasons given at IR12.8-12.12 the Secretary of State agrees with the Inspector that it is acceptable that the evidence can post-date the base date provided that it is used to support sites identified as deliverable as of 1 April 2019 (IR12.11). Like the Inspector, the Secretary of State does not consider it necessary to apply a 1 October 2019 base date (IR12.12). For the reasons given at IR12.13-12.15, the Secretary of State agrees with the Inspector that a proforma can, in principle, provide clear evidence of a site’s deliverability (IR12.14).*



# Recap



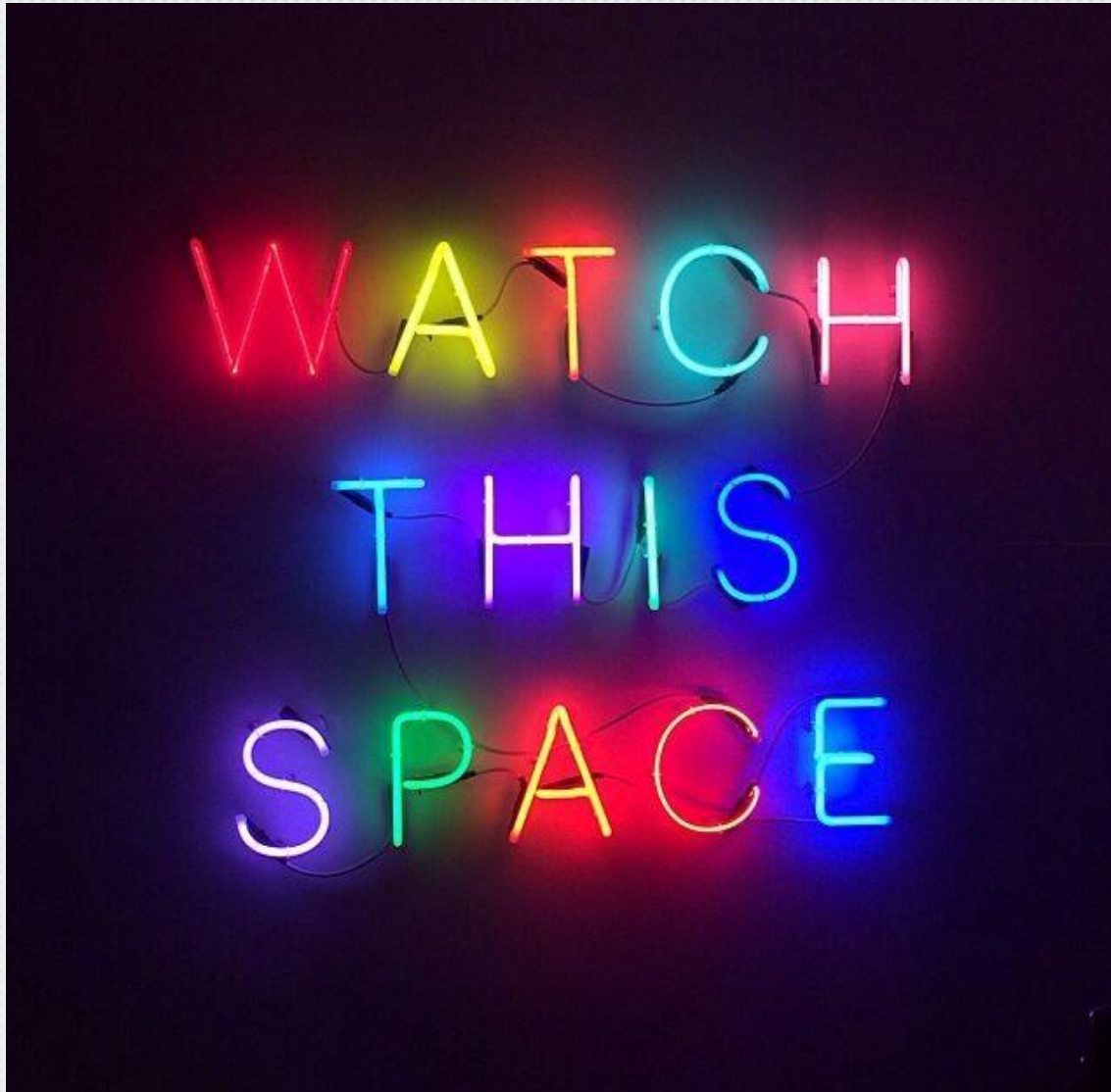
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(Woolpit)

Is it permissible to include permissions granted after base-date?



# Is it permissible to include permissions granted after base-date?



1. Starting point – general public law principle

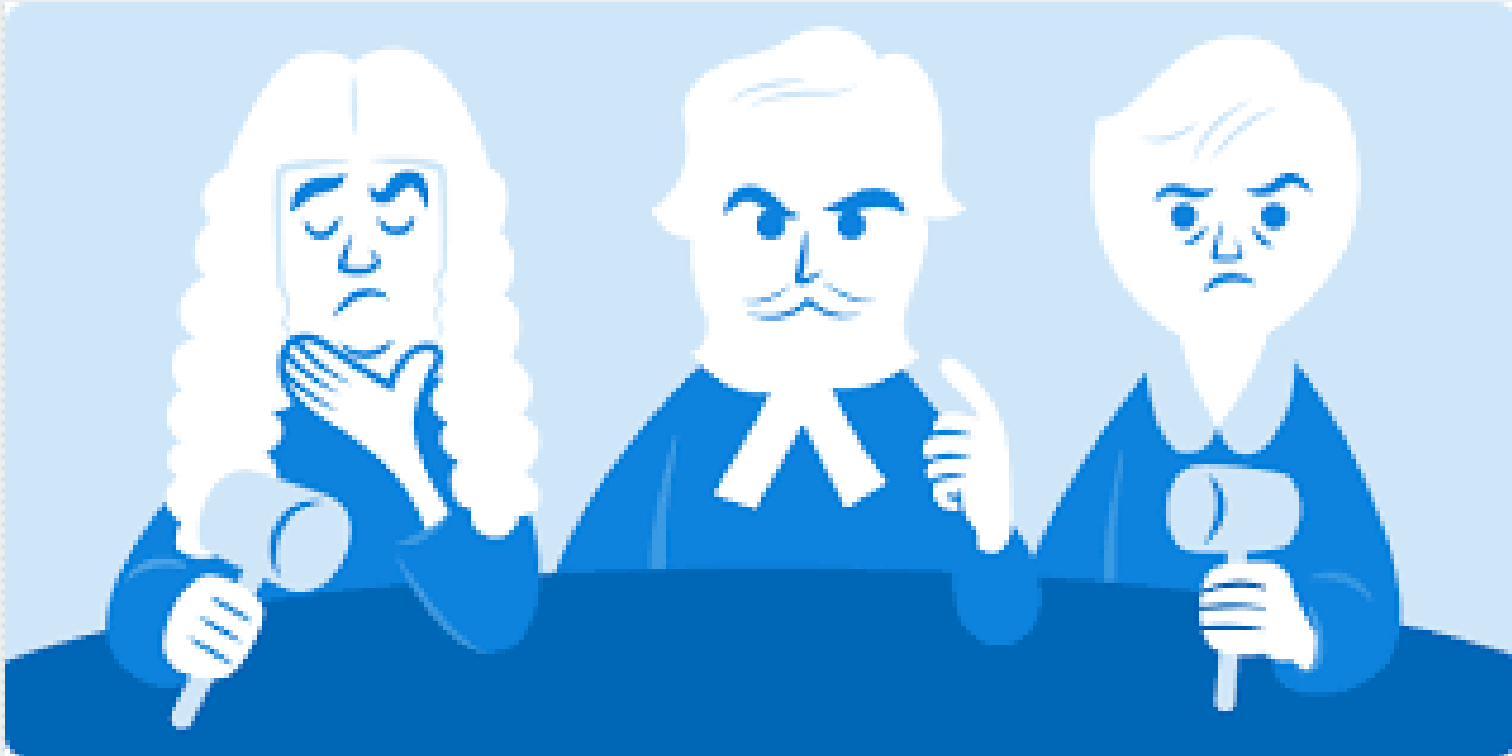
2. Nothing in NPPF or PPG which requires departure from that principle

3. Woolpit –based on flawed premise?

4. Potential for Absurd results

5. Unintended Consequences

# 1. Starting Point



- General public law principle – decision makers entitled to take account of all relevant considerations as at the date of their decision.
- Woolpit proposition – is departure from that principle

## 2. NPPF nor PPG require departure



- NPPF silent on the issue
- PPG:
  - authorities can demonstrate a five-year supply in “one of two ways”. Either confirming it through a recently adopted plan or annual position statement or “using the latest available evidence” (ID: 68-004-20190722)
  - “in order to demonstrate 5 years’ worth of deliverable housing sites, robust, up to date evidence needs to be available to support....planning decisions” (ID: 68-007-20190722)

### 3. Woolpit – based on a flawed premise?



- Inspector's Stevens central rationale:

*“inclusion of sites beyond the cut-off date skews the data by overinflating the supply without a corresponding adjustment of need.” (para 67).*

- Flawed premise?
  - First – it assumes that updating of the deliverable sites only operates to inflate supply
  - Second – there is no requirement to adjust the need figure so long as the base-date (and therefore the 5-year period) remains the same



## 4. Potential for absurd results



## 5. Unintended Consequences



*“For ‘tis the sport to have the engineer , Hoist with his own petard”*  
(Hamlet, Act 3, Scene iv)



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## Deliverability in a covid-19 world

Dr Ashley Bowes

# COVID-19



- **Nine Mile Ride, Finchampstead (Wokingham DC)  
(3238048)**
    - **9 April 2020**
    - **Insp invited comment on COVID-19 post Feb inquiry**
    - **168 dwellings removed to account for:**
      - **(i) closed sites**
      - **(ii) open sites unsupported by supply chain and**
      - **(iii) reduced consumer confidence**
- (paras.109-111)**

# COVID-19



- **Bells Piece, Farnham (Waverley BC) (3211033)**
    - **14 May 2020**
    - **Wokingham decision cited to SofS**
    - **SofS rejected general discount:**
      - **No quantification of potential impact**
      - **No evidence about deliverability of specific sites**
- (para.24)

# COVID-19



- **Woburn Sands, Buckinghamshire (Milton Keynes Council) (3169314)**
  - **25 June 2020**
  - **No reduction in supply because:**
    - **No evidence about deliverability about specific sites**

**(para.16)**



# COVID-19



- **Three key lessons:**
  - **MHCLG anxious not to endorse a pessimistic economic narrative**
  - **No real hope of gaining a general “COVID-discount”**
  - **Evidence needs to be site-specific and quantified**

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**Deliverable sites, and other stories...**

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