Case No: CO/5795/2014

Neutral Citation Number: [2015] EWHC 925 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 April 2015

Before :

MRS JUSTICE LANG

- -

Between :

	MARK WENMAN	**Claimant**
	- and -	
	(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) WAVERLEY BOROUGH COUNCIL**	**Defendants**

- -
- -

Michael Rudd (instructed by **Hawksley's Solicitors**) for the **Claimant**
Stephen Whale (instructed by **The Treasury Solicitor**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 27 March 2015

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Judgment **Mrs Justice Lang:**

Introduction

1. In this claim under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), the Claimant applies to quash the decision of the Secretary of State for Communities and Local Government, dated 30 October 2014, made on his behalf by an Inspector (Mr Graham Dudley), in which he dismissed his appeal against the refusal of planning permission by Waverley Borough Council ("the Council").

2. The Claimant and his wife are Romany gypsies who have been living in a mobile home

at land adjacent to East View Cottages, Dunsfold Road, Surrey, GU6 8JB ("the site"). They have been unable to find a space on the local gypsy sites. They would like their 3 year old son to attend the local schools, which the Claimant himself attended as a boy, and to have the benefit in growing up in an area where there is a community of gypsies. They have tried living in a house, but they found it too claustrophobic.

3. On 3 September 2012, the Claimant applied to the Council for planning permission for a proposed development, namely:

> "The use of land for the stationing of caravans for residential purposes for 1 no. gypsy pitch together with the formation of additional hard standing and utility/dayroom ancillary to that use."

4. The Claimant's intention was to live in the mobile home, and use the bathroom and kitchen facilities in the newly-built adjacent utility/dayroom. He would also keep a touring caravan on the site.

5. The Council refused planning permission on 2 August 2013. The reasons were:

a) The proposal conflicted with strategic and local planning policy advice regarding the countryside beyond the Green Belt set out in Policies C2, D1, D4 and H11 of the Waverley Borough Local Plan 2002. Within those areas the intrinsic character and beauty of the countryside is to be protected and the development in open countryside outside existing rural settlements is strictly controlled. The proposed development did not comply with the requirements of those policies.

b) The Claimant had not confirmed his traveller status, nor explained why he could not occupy traveller sites in the area. The Council had recently granted a number of permissions for traveller sites in the area which it believed met the current need for traveller accommodation. The proposal therefore conflicted with Local Plan Policy H11 and the national 'Planning Policy for Traveller Sites' ("PPTS"), in particular policy H.

c) The Claimant failed to comply with the Planning Infrastructure Contributions SPD and Local Plan Policies D13 and D14.

6. The Claimant and his wife sold their house in September 2013 and, despite the refusal of planning permission, began to occupy the site from November 2013.

7. In the meantime, on 15 October 2013, the Council issued an enforcement notice alleging

breach of planning control, namely, without planning permission:

a) a material change of use from agricultural to the stationing of a mobile home for residential purposes, and

b) an engineering operation consisting of excavation of the land and the laying of hard standing.

8. The enforcement notice required cessation of use, removal of the mobile home and hard standing, and restoration of the land, within one week.

9. The Claimant's appeal against the enforcement notice, under section 174 TCPA 1990, was allowed in part, by variation of the time for compliance from 1 week to 18 months, in recognition of the difficulty in finding alternative accommodation. Other than that variation, the enforcement notice was upheld, and the Claimant does not seek to challenge it in this Court.

10. The Claimant appealed against the refusal of planning permission under section 78 TCPA 1990, and the appeal was heard together with the appeal against the enforcement notice. His appeal was dismissed. The Inspector found that the proposal would cause substantial and unacceptable harm both by reason of its location, at the edge of the village, in the transitional area between settlement and countryside, and because the unsympathetic appearance of the mobile home would be at odds with its surroundings and the adjacent buildings. For these reasons, the proposed development was not sustainable and it was in conflict with the National Planning Policy Framework ("NPPF") and Local Plan policies.

Legal framework

11. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and in consequence, the interests of the applicant have been substantially prejudiced.

12. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

13. The exercise of planning judgment and the weighing of the various issues are matters for

the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision."

14. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004, read together with section 70(2) TCPA 1990. The NPPF is a material consideration for these purposes.

15. In *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, the House of Lords held that the proper interpretation of planning policy is ultimately a matter of law for the court, and a failure by a planning authority to understand and apply relevant policy will amount to an error of law. However, as Lord Reed explained at [19]:

> "19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)."

16. These principles apply equally to the application of national planning policy, both by planning authorities and Inspectors.

17. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

Ground 1: a flawed approach to the application of the NPPF

Submissions

18. Mr Rudd submitted that the Inspector adopted a materially flawed approach to the application of the NPPF, in four respects:

a) It was common ground before the Inspector that the Council could not demonstrate a five year supply of deliverable housing and therefore paragraph 49 NPPF was engaged. The Inspector adopted too narrow an approach in determining what constituted a policy for the supply of housing under paragraph 49, and thus failed to dis-apply Policies C2, D1 and D4 in the Local Plan.

b) Although the Inspector acknowledged that Policy RD1 was a policy for the supply of housing, for the purposes of paragraph 49 NPPF, he gave it weight and thus failed to dis-apply it, as required by paragraph 49 NPPF.

c) The Inspector incorrectly reversed the test to be applied under paragraph 14 NPPF, which is whether the adverse impacts of the proposed development significantly and demonstrably outweigh the benefits. The test applied by the Inspector was whether the benefits outweighed the adverse impacts.

d) The Inspector erred in carrying out a free-standing assessment of the sustainability of the proposed development, in the application of paragraph 14 NPPF.

19. In response to Mr Rudd's submissions at 1(a) and (b), Mr Whale submitted that the Inspector had been inadvertently misled by the consensus on the application of paragraph 49 NPPF among the parties. Paragraph 49 only applied where the decision-maker was determining "an application for housing". The Claimant's application was not an application for housing; it was an application for a material change of use of land from agricultural use to use for the stationing of a mobile home/caravan for residential purposes.

20. In the alternative, Mr Whale submitted that Policies C2, D1 and D4 were not policies for the supply of housing within the meaning of paragraph 49 NPPF. In relation to Policy RD1, the Inspector was entitled to attribute appropriate weight to an out-of-date policy; it did not have to be dis-applied in its entirety.

21. In response to the submission at 1(c), the form of words used by the Inspector did not disclose any error of law in his reasoning or his conclusions.

22. In response to the submission at 1(d), Mr Whale relied upon the case law which confirmed that paragraph 14 NPPF only applied to development which was sustainable, and therefore the Inspector was required to consider this issue.

Conclusions

(1) The application of NPPF "6: Delivering a wide choice of high quality homes"

23. In March 2012, the Secretary of State for Communities and Local Government issued revised national planning policy for gypsy and traveller sites, the PPTS. For the purposes of the policy, the term 'travellers' is defined as including gypsies, travellers and travelling show people (Annex 1, paragraph 3). The PPTS replaced Circular 1/2006 'Planning for Gypsy and Traveller Sites' and Circular 04/2007 'Planning for Travelling Showpeople'.

24. Paragraphs 1 and 4 PPTS provide that the PPTS should be read and applied in conjunction with the NPPF, which was issued at the same time. Thus, local planning authorities preparing plans for, and taking decisions on, gypsy and traveller sites should also have regard to the policies in the NPPF, so far as relevant. This is confirmed in paragraph 4 NPPF.

25. The PPTS sets out a comprehensive policy framework for the provision of traveller sites. Policy B, headed 'Planning for traveller sites' provides that local planning authorities should set targets for the number of pitches required to meet the accommodation needs of gypsies and travellers. It reiterates at paragraph 7 that the NPPF applies. In producing their Local Plan, they should identify, and update annually, a supply of specific deliverable sites sufficient to provide five years' worth of sites against their local set target (paragraph 9(a)).

26. Policy H, entitled "Determining planning applications for traveller sites" provides that planning applications should be assessed in accordance with the PPTS and the NPPF (paragraph 21). Relevant matters to take into account, under paragraph 22, include the existing level of local provision and need for sites, and the availability of alternative accommodation. Paragraph 28 provides that if a local planning authority cannot demonstrate an up-to-date five-year supply of deliverable sites, this should be a significant material consideration when considering applications for the grant of

temporary planning permission.

27. Local authorities are also under statutory duties to assess the accommodation needs of gypsies and travellers.

28. By section 8(1) Housing Act 1985:

> "Periodical review of housing needs
>
> Every local housing authority shall consider housing conditions in their district and the needs of the district with respect to the provision of further housing accommodation."

29. Section 225 subsection (1) Housing Act 2004, requires a local housing authority carrying out an assessment under section 8 Housing Act 1985 to assess "the accommodation needs of gypsies and travellers residing in or resorting to their district". "Accommodation needs" are defined in subsection 5(b) to include "needs with respect to the provision of sites on which caravans can be stationed".

30. Subsections (2) and (3) provide that, where a local housing authority is required under section 87 Local Government Act 2003 to prepare a strategy in respect of such accommodation needs, the local authority must take the strategy into account in exercising their functions. The term "functions" includes functions exercisable otherwise than as a local housing authority.

31. By section 87 of the Local Government Act 2003 ("Housing Strategies and Statements"):

> "The appropriate person [the Secretary of State] may –
>
> (a) require a local housing authority to have a strategy in respect of such matters relating to housing as [he] may specify…"

32. I accept Mr Rudd's submission that these statutory provisions indicate that accommodation for gypsies and travellers is to be treated as a species of housing, when housing needs are assessed for any purpose, including planning for future housing requirements.

33. Mr Rudd also referred to the guidance issued on 14 November 2012 by the Department for Communities and Local Government to local authorities when compiling data for national and official statistics. It indicates that mobile homes and gypsy caravans occupied as a main residence are to be treated as "dwellings" for census, housing stock and planning purposes, even though they are categorised as "temporary" dwellings.

However, they would not be included in house building statistics, which only include permanent dwellings i.e. with a life of more than 60 years.

34. Under the heading "Dwelling" the guidance explains that the census definition in force at the relevant time should be used for compiling "dwelling stock data". A "dwelling" is defined as a self-contained unit of accommodation. The guidance states:

> "Non-permanent (or 'temporary') dwellings are included if they are the occupant's main residence and council tax is payable on them as a main residence. These include caravans, mobile homes, converted railway carriages and houseboats. Permanent traveller pitches should also be counted if they are, or are likely to become, the occupants' main residence.
>
> In all stock figures, vacant dwellings and second homes are included.
>
> House building statistics collect data on permanent dwellings only i.e. dwellings that have a design life of over 60 years."

35. Mr Rudd also referred to a "Good Practice Guide" issued by the Department for Communities and Local Government in 2008, entitled "Designing Gypsy and Traveller Sites", to accompany previous national planning policy. It provided that national planning policy for delivering housing objectives applied equally to accommodation for the gypsy and traveller community. It stated:

> "1.1 The Government believes that everyone should have the opportunity of a decent home. Decent homes are a key element of any thriving, sustainable community. This is true for the settled and Gypsy and Traveller communities alike.
>
> 1.2 *Planning Policy Statement 3: Housing* (PPS3) sets out the Government's national planning policy framework for delivering its housing objectives. It applies equally to site accommodation provided for the Gypsy and Traveller communities."

Mr Rudd submits, and I accept, that even with the introduction of a standalone policy for traveller sites in 2012, it is unlikely that the Secretary of State intended to depart from the general policy that housing objectives should include provision of suitable accommodation for gypsies.

36. It is common ground that, in deciding the Claimant's application for planning permission, both the PPTS and the NPPF were to be applied. The issue is whether section 6 of the NPPF, in particular paragraph 49, ought to have been excluded from consideration, on the grounds that it only applies to permanent 'bricks and mortar'

accommodation, not mobile home/caravan accommodation.

37. The PPTS emphasises that the NPPF is applicable in determining planning applications for traveller sites. In my view, the PPTS is supplementary to the NPPF. Where the PPTS makes specific provision for traveller sites, in aspects of policy which are also addressed by the NPPF, then the PPTS will take priority, thus avoiding duplication or conflict.

38. In my judgment, much of section 6 of the NPPF, which is headed "Delivering a wide choice of high quality homes", is intended to apply to all types of accommodation i.e. mobile homes and caravans as well as brick and mortar structures, provided that they are to be used as "homes". Although the word "housing" is repeatedly used in section 6, this should be broadly interpreted. The Planning Practice Guidance advises local planning authorities to include, in its assessment of housing supply, student halls of residence and care homes for the elderly, neither of which fall within the natural meaning of "housing" but do come within the natural meaning of "homes" or "accommodation". Mr Rudd also said, in his experience, local planning authorities with significant non-gypsy mobile home sites in their areas included these in their housing supply figures. In my view, that would be consistent with the guidance on the meaning of "dwellings" referred to above in which mobile homes in permanent residential use are treated as "dwellings" even though they are not "bricks and mortar" houses. Moreover, for many years, the accommodation needs of gypsies in caravans and mobile homes have been assessed and provided for as part of "housing" in both statute and national policy.

39. There is a significant distinction in planning law and practice between obtaining planning permission for caravans and mobile homes on the one hand, and "bricks and mortar" houses on the other. The construction of a "bricks and mortar" house is a "building operation" under section 55(1) TCPA 1990, and the installation of a caravan/ mobile home is not treated as a "building operation" as the structure is not fixed to the land. In such cases, planning permission has to be obtained for a "material change in the use of … land" under section 55(1) TCPA 1990.

40. The application in this case stated that both the mobile home and the touring caravan would fall within the definitions in section 29(1) Caravan Sites and Control of Development Act 1960 and section 13(1) Caravan Sites Act 1968. It followed that the application would be for a change of use from agricultural use to residential use. The day room/utility room and hardstanding were classified as building operations.

41. Despite this distinction, I do not consider that the words "housing applications" in paragraph 49 NPPF should be interpreted narrowly so as to be restricted to applications for planning permission to construct "bricks and mortar" houses. "Housing application" is not a statutory term under section 55(1) TCPA 1990. Nor is it defined in the NPPF.

Whilst I appreciate that a caravan or a mobile home would not usually be described as a "house", planning policies are not to be interpreted as if they were statutes or contracts (*Tesco Stores Limited v Dundee City Council* supra). As I have explained above, I consider that section 6 NPPF is intended to cover homes and dwellings, in a broad sense, and it would be inconsistent with that interpretation if an application for planning permission for a mobile home was excluded from the scope of paragraph 49.

42. However, under the PPTS, there is specific provision for local planning authorities to assess the need for gypsy pitches, and to provide sites to meet that need, which includes the requirement to "identify, and update annually, a supply of specific deliverable sites sufficient to provide five years' worth of sites against their local set targets" (paragraph 9(a)). These provisions have a direct parallel in paragraph 47 NPPF which requires local planning authorities to use their evidence base to ensure that the policies in their Local Plan meet the full objectively assessed needs for housing in their area, and requires, inter alia, that they "identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing".

43. The rationale behind the specific requirement for a five year supply figure under paragraph 9 PPTS must have been to ensure that attention was given to meeting the special needs of travellers. Housing provision for this sub-group was not just to be subsumed within the general housing supply figures for the area. Therefore it seems to me most unlikely that the housing needs and supply figures for travellers assessed under the PPTS are to be included in the housing needs and supply figures under paragraph 47 NPPF, as this would amount to double counting.

44. Paragraph 47 exhorts local planning authorities to adopt policies for the supply of housing, sufficient to provide five years' worth of housing (excluding traveller sites), and paragraph 49 sets out the consequences of a failure to comply with this exhortation. Paragraph 49 states:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five year supply of deliverable housing sites."

45. The purpose of paragraph 49 is partly to incentivise local planning authorities to provide the requisite 5 year supply of deliverable housing sites and partly to assist applicants in obtaining planning permission for housing in areas where the supply of housing is insufficient. It is only triggered by a failure to demonstrate the supply of housing sites other than pitches on traveller sites.

46. Applicants for planning permission for mobile homes or caravans, whether they be

gypsies, travellers or others, may wish to rely on the failure of the local planning authority to demonstrate a 5 year supply of deliverable housing sites in support of their application for planning permission. In principle, paragraph 49 enables them to do so. But in deciding which policies for the supply of housing are relevant to the application for planning permission, the decision-maker will be entitled to consider whether, and to what extent, a policy for the supply of housing, other than for pitches on traveller sites, has any relevance to the application before him, and if so, what weight should be accorded to it in the particular circumstances of the case.

47. In this case, the Local Plan policies for the supply of housing were relevant to applications for new traveller sites because Policy H11 on Gypsy Sites provided:

> "Proposals for new sites and for additional development on the existing sites will only be acceptable where they are consistent with other policies in this Plan …" (emphasis added)

The Council and the Inspector applied the constraints on development in the Local Plan policies for the supply of housing to the Claimant's application for a caravan pitch in much the same way as they would have done if he had been applying for permission to build a house.

48. The decision-maker will also have to take into account a failure to demonstrate a five year supply of deliverable traveller sites, under paragraphs 22 and 25 PPTS, in determining an application for permission. It was conceded before the Inspector that there was such a failure in this case. However, Local Plan policies for the supply of traveller sites are not treated as "not up-to-date", unlike policies for the supply of housing under paragraph 49 NPPF. Although Mr Rudd suggested that this policy regime discriminated against gypsies, in breach of section 19 Equality Act 2010, that point was not part of his pleaded case, and so the Secretary of State was not in a position to deal with it. In those circumstances, it is not right for me to address it here.

(2) Local Plan Policies C2, R1 & R4

49. The Courts have considered and applied the phrase "policies for the supply of housing" in paragraph 49 NPPF on several occasions.

50. The leading case is *South Northamptonshire Council v Secretary of State for Communities and Local Government & Ors* [2014] EWHC 573 (Admin). Ouseley J. held that a policy which stated planning permission would not be granted for development in the open countryside, subject to certain exceptions, was a policy for the supply of housing within paragraph 49 NPPF. In considering the proper interpretation of

paragraph 49 NPPF he said:

> "46. [The] phraseology is either very narrow and specific, confining itself simply to policies which deal with the numbers and distribution of housing, ignoring any other policies dealing generally with the location of development or areas of environmental restriction, or alternatively it requires a broader approach which examines the degree to which a particular policy generally affects housing number, distribution and location in a significant manner.
>
> 47. It is my judgment that the language of the policy cannot sensibly be given a very narrow meaning. This would mean that policies for the provision of housing which were regarded as out of date, nonetheless would be given weight, indirectly but effectively though the operation of their counterpart provisions in policies restrictive of where development should go. Such policies are the obvious counterparts to policies designed to provide for an appropriate distribution and location of development. They may be generally applicable to all or most common forms of development, as with EV2, stating that they would not be permitted in open countryside, which as here could be very broadly defined. Such very general policies contrast with policies designed to protect specific areas or features, such as gaps between settlements, the particular character of villages, or a specific landscape designation, all of which could sensibly exist regardless of the distribution and location of housing or other development."

51. Other policies which have been held by the courts to be policies for the supply of housing within paragraph 49 of the NPFF either expressly address housing or are general policies restricting development, and so come within Ouseley J's first category:

a) *Cotswold District Council v Secretary of State for Communities and Local Government & Anor* [2013] EWHC 3719 (Admin), Lewis J. A policy which restricted development outside development boundaries, and dealt with new-builds and other matters if the authority was to allow housing outside the development boundary, was a policy for the supply of housing within paragraph 49.

b) *Hopkins Homes Ltd v Secretary of State for Communities and Local Government & Ors* [2015] EWHC132 (Admin), Supperstone J. A policy which restricted new development outside the physical limits of settlements, subject to exceptions, was a policy for the supply of housing within paragraph 49.

52. Cases which fall within Ouseley J's second category are:

a) *William Davis Ltd v Secretary of State for Communities and Local Government & Anor* [2013] EWHC 3058 (Admin), in which I decided that a Green Wedge policy, intended to prevent the merging of settlements and preserve open space, was not a policy for the supply of housing within paragraph 49.

b) *Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor* [2015] EWHC 410 (Admin) in which I decided that a Green Gap policy, intended to maintain the separation between settlements, and to prevent development which would erode the gaps between settlements and adversely affect the character of the landscape, was not a policy for the supply of housing within paragraph 49.

53. I now turn to apply those principles to the policies in this Local Plan.

54. Policy C2 provides:

> "**Policy C2 - Countryside Beyond the Green Belt**
>
> In the Countryside beyond the Green Belt defined on the Proposals Map and outside rural settlements identified in Policy RD1, the countryside will be protected for its own sake.
>
> Building in the open countryside away from existing settlements will be strictly controlled."

55. In my judgment, Policy C2 is a very general restriction on development in the open countryside. It falls within Ouseley J's first category and so the Inspector erred in treating it as a policy which was not for the supply of housing, and in not considering the application of paragraph 49 NPPF.

56. Policy D1 provides:

> "**Policy D1 - Environmental Implications of Development**
>
> The Council will have regard to the environmental implications of development and will promote and encourage enhancement of the environment. Development will not be permitted where it would result in material detriment to the environment by virtue of:-
>
> (a) loss or damage to important environmental assets, such as buildings of historical or architectural interest, local

watercourses, important archaeological sites and monuments and areas of conservation, ecological or landscape value;

(b) harm to the visual character and distinctiveness of a locality, particular in respect of the design and scale of the development and its relationship to its surroundings;

(c) loss of general amenity, including material loss of natural light and privacy enjoyed by neighbours and disturbance resulting from the emission of noise, light or vibration;

(d) levels of traffic which are incompatible with the local highway network or cause significant environmental harm by virtue of noise and disturbance;

(e) potential pollution or air land or water, including that arising from light pollution and from the storage and use of hazardous substances;

The Council will seek, as part of a development proposal, to resolve or limit environmental impacts. This may include the submission of a flood-risk-run-off assessment to determine the potential flood risk to the development, the likely effects of the development on flood risk to others, whether mitigation is necessary, and if so, whether it is likely to be effective and acceptable. The Council will also seek remedial measures to deal with existing problems such as land contamination."

57. In my judgment, the purpose of Policy D1 is to restrict development where it would result in material detriment to the environment, in diverse ways. It is not a general restriction on development. The detriments identified are ones which would be routinely considered in any assessment of proposed development. This policy could "sensibly exist regardless of the distribution and location of housing or other development" and thus falls within Ouseley J's second category.

58. Policy D4 provides:

"**Policy D4 - Design and Layout**

The Council will seek to ensure that development is of a high quality design which integrates well with the site and complements its surroundings. In particular development should:-

(a) be appropriate to the site in terms of its scale, height, form and appearance;

(b) be of design and materials which respect the local

distinctiveness of the area or which will otherwise make a positive contribution to the appearance of the area;

(c) not significantly harm the amenities of occupiers of neighbouring properties by way of overlooking, loss of daylight or sunlight, overbearing appearance or other adverse environmental impacts;

(d) pay regard to existing features of the site such as landform, trees, hedges, ponds, water courses and buffer zones, walls or buildings;

(e) protect or enhance the appearance of the street scene and of attractive features such as landmark buildings, important vistas and open spaces;

(f) incorporate landscape design suitable to the site and character of the area, of a high standard and with adequate space and safeguards for long-term management;

(g) provide adequate amenity space around the proposed development; and

(h) provide safe access for pedestrians and road users and, where appropriate, servicing facilities and parking for motor vehicles and bicycles."

59. In my judgment, the purpose of Policy D4 is to achieve high quality design which integrates with the site and complements its surroundings. It is not a general restriction on development. This policy could "sensibly exist regardless of the distribution and location of housing or other development" and thus falls within Ouseley J's second category.

60. Therefore the Inspector did not err in his approach to Policy D1 and D4.

(3) The application of paragraphs 49 & 14 NPPF

61. The proper application of paragraph 49 NPPF has been considered in two recent cases.

62. In *Cotswold District Council v Secretary of State for Communities and Local Government & Anor* [2013] EWHC 3719 (Admin), Lewis J. held, at [72]:

> "Local Plan Policy 19 is a policy relating to the supply of housing (amongst other developments). It restricts development, including

> housing development. As the inspector correctly held, applying the Framework, Local Plan Policy 19 should be disapplied "to the extent" that it "seeks to restrict the supply of housing" …"

63. In *Crane v Secretary of State for Communities and Local Government & Anor* [2015] EWHC 425 (Admin), Lindblom J adopted a more nuanced approach, holding that the inspector had to decide, in the exercise of his planning judgment, what weight should be given to an out-of-date policy for the supply of housing (at [70] – [74]), when applying paragraph 14 NPPF. He acknowledged that the weight to be given to such policies is likely to be "greatly reduced", depending upon the circumstances, (at [71]). However, importantly, he rejected a submission that, when conducting the assessment under paragraph 14 NPPF, the out-of-date policy should simply be disregarded in its entirety.

64. In my judgment, Lindblom J's thoughtful analysis is, in principle, correct. It also reflects the statutory framework within which the NPPF operates. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "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."

65. Paragraph 2 NPPF re-states the statutory provisions, and explains that the NPPF is a material consideration in planning decision-taking. The NPPF emphasises the value of local development plans since they reflect the needs and priorities of local people for their area:

> "1….local people and their accountable councils can produce their own distinctive local and neighbourhood plans, which reflect the needs and priorities of their communities."
>
> "150. ….Local Plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities…"

66. The dis-application of local policies is a significant departure from the plan-led approach to decision-making required by statute. Since paragraph 49 has been broadly interpreted by the courts so as to include any policy which has a general restriction on development in the countryside, it is all the more important that it remains open to a decision-maker to give weight to any aspects of such a policy which may remain relevant to the overall assessment under paragraph 14 NPPF, whilst having due regard to the failure to achieve the key policy objective of "boosting significantly the supply of housing" (paragraph 47

NPPF).

67. In this case, the Inspector concluded that Policy RD1 was a policy for the supply of housing, within the meaning of paragraph 49 NPPF. It provides:

> "**POLICY RD1 - Rural Settlements**
>
> Within the Rural Settlement boundaries identified on the Proposals Map, the Council will only permit appropriate development which is well-related in scale and location to the existing development and which:-
>
> (a) comprises infilling of a small gap in an otherwise continuous built up frontage or the development of land or buildings that are substantially surrounded by existing buildings; and
>
> (b) does not result in the development of land which, by reasons of its openness, physical characteristics or ecological value, makes a significant contribution to the character and amenities of the village; and
>
> (c) does not adversely affect the urban/ rural transition by using open land within the curtilage of buildings at the edge of the settlement; and
>
> (d) takes account of the form, setting, local building style and heritage of the settlement; and
>
> (e) generates a level of traffic which is compatible with the environment of the village and which can be satisfactorily accommodation on the surrounding network."

68. Policy RD1 has to be read with Policy C2, which restricts development beyond the rural settlements identified in RD1.

69. In the light of *Crane*, the Claimant's submission in his skeleton argument that the Inspector erred in giving any weight to Policy RD1 cannot succeed. However, I agree with the Claimant's submission made orally that, in paragraph 19 of the Decision, and to some extent in paragraphs 20 & 21, the Inspector erred in applying the criteria in Policy RD1 as if it was fully in force and unaffected by paragraph 49 NPPF.

70. It may be that the Inspector was applying the approach in *Crane*, but this is not apparent from the face of the Decision. In my view, where an inspector decides to have regard to a policy falling within paragraph 49, he ought to explain whether, and to what extent, he found it to be out-of-date, and indicate which aspects of the policy he gave weight to and

why. Otherwise it is not possible for the parties to understand how the overall assessment under paragraph 14 has been conducted, and whether an inspector has erred in his approach.

71. Where a policy is considered out-of date, there is a presumption in favour of granting planning permission for sustainable development. By paragraph 14 of the NPPF, the presumption operates in the following way when decisions are made:

> "where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted."

72. In his conclusions on planning balance (Decision, paragraph 33), the Inspector reversed the test to be applied under paragraph 14 NPPF, stating:

> "…. I conclude overall that the significant benefits do not and would not outweigh the substantial harm to the surrounding area."

I accept the Claimant's submission that the Inspector erred in applying the wrong test.

(4) Sustainable development

73. Paragraph 14 NPPF states:

> "At the heart of the National Policy Planning Framework is a presumption in favour of sustainable development which should be seen as a golden thread running through both plan-making and decision-making.
>
> For plan-making this means that…
>
> For decision-taking this means that …"

74. In my view, it is clear that the presumption in paragraph 14 of the NPPF can only apply in favour of development which is "sustainable", as defined in paragraphs 6 and 7, and

explained in the policies in paragraphs 18 to 219.

75. In *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin), I said at paragraph 37:

> "I accept Mr Maurici's submission that paragraph 14 NPPF only applies to a scheme which has been found to be sustainable development. It would be contrary to the fundamental principles of the NPPF if the presumption in favour of development in paragraph 14 applied equally to sustainable and non-sustainable development. "

76. In *Dartford BC v Secretary of State for Communities and Local Government* [2014] EWHC 2636 (Admin), Patterson J rejected the submission that a sequential approach to decision-taking was required saying, at [54]:

> "As was recognised in the case of *William Davis* (supra) at para. 38 the ultimate decision on sustainability is one of planning judgment. There is nothing in NPPF, whether at para.7 or para.14 which sets out a sequential approach of the sort that Mr Whale, on behalf of the Claimant, seeks to read into the judgment of Lang J at para.37. I agree with Lang J in her conclusion that it would be contrary to the fundamental principles of the NPPF if the presumption in favour of development, in para.14, applied equally to sustainable and non-sustainable development. To do so would make a nonsense of Government policy on sustainable development."

77. Patterson J explained how sustainability should be addressed, at [46]:

> " "sustainability" therefore inherently requires a balance to be made of the factors that favour any proposed development and those that favour refusing it in accordance with the relevant national and local policies. However, policy may give a factor a particular weight, or may require a particular approach to be adopted towards a specific factor; and where it does so, that weighing or approach is itself a material consideration that must be taken into account."

78. In *Bloor Homes East Midlands v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), Lindblom J applied these principles, saying at [179]:

> "On any sensible view, if the development would harm the Green

> Wedge by damaging its character and appearance or its function in separating the villages of Groby and Ratby, or by spoiling its amenity for people walking on public footpaths nearby, it would not be sustainable development within the wide scope drawn for that concept in paragraphs 18 to 219 of the NPPF."

79. Applying these authorities, the Inspector was entitled to make a free-standing assessment of the sustainability of the proposed development, in the exercise of his planning judgment, at an appropriate stage in his reasoning process. I do not agree that his reasoning on sustainability was vitiated by his erroneous approach to Policy C2 and Policy RD1, as these were distinct issues. I am unable to discern any error of law in his approach.

Ground 2: Materially flawed approach to the best interests of the child

80. The Claimant abandoned Ground 2 at the hearing.

Ground 3: Falling into material error by taking into account material and evidence not before the Inquiry

81. The Claimant submitted that the Inspector erred in taking into account earlier unsuccessful applications for planning permission at the same site, because he did not have sufficient information available to him about the nature of the proposals or the reasons why they were refused or the policies in force at the date of the decisions.

82. The Inspector said (Decision, paragraph 22):

> "I would note that the site has been the subject of a number of applications for residential development, with presumably more traditional types of proposals and these also have not been found to be acceptable….. in this case it is the use of this 'transitional land' for residential purposes that would cause substantial and unacceptable harm. I attach substantial weight to the harm caused by residential development at the edge of the village, which does not respond to local character, history or reflect the identity of local surroundings and materials. Even if the proposed construction of the unit were more sympathetic to its location, it would still not be acceptable."

83. The Inspector had available to him the list of previous applications for planning

permission in the Officer's report:

a) Erection of detached dwelling and double garage. Refused 29.2.89

b) Erection of a two bedroom dwelling and provision of vehicular right of way. Refused 1.10.84.

c) Erection of one detached residence with garage (outline). Refused 6.2.79.

d) Erection of one detached dwelling house. Refused 20.9.72

84. The Officer's report also referred to the earlier applications in the summary of objections:

> "In the past there have been several objections to a brick built building on this property. Residential planning permissions previously refused" (emphasis added).

85. In my judgment, on a fair reading of the Decision, the previous unsuccessful applications played a very minor part in the Inspector's decision-making process. In paragraphs 19 to 21 he sets out the reasons why the current proposal would be harmful. In paragraph 22 he explains that, even if the appearance of the proposed development was more sympathetic, it would still be unacceptable because of its location. To reinforce that point, he notes that other applications for residential development at the same site had previously been refused. I consider that this was a valid point to make. It was reasonable for him to infer that the previous applications were traditional "brick-built" houses, because of the information in the officer's report. The decisions would have been worded differently if they had been applications for a change of use for mobile homes/ caravans. I have no doubt that this experienced Inspector was well aware of the changes in national and local policy over the years, and that he did not fall into the trap of deciding this appeal on the basis of previous decisions, instead of on its own merits.

Conclusions

86. I have concluded that the Inspector erred in:

e) not treating Policy C2 as a policy for the supply of housing within the meaning of paragraph 49 NPPF;

f) his approach to Policy RD1, having decided that it was a policy for the supply of housing within the meaning of paragraph 49 NPPF;

g) mis-stating and mis-applying the relevant test in paragraph 14 NPPF.

87. It is possible that, if these errors had not been made, the outcome might have been different. Therefore the decision ought to be quashed and the appeal considered afresh by a different inspector.