Neutral Citation Number: [2016] EWHC 2830 (Admin)

Case No: CO/3517/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT SITTING

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 09/11/2016

Before :

MR JUSTICE GREEN

- -

Between :

SAN INVESTMENTS LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	
(2) BIRMINGHAM CITY COUNCIL	**Defendants**

- -
- -

Mr Anthony Crean QC (instructed by **Gowling WLG**) for the **Claimant**
Ms Naomi Candlin (instructed by **the Government Legal Department**) for the **First Defendant**
No Attendance for the **Second Defendant**

Hearing date: 19th October 2016

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Approved Judgment

MR JUSTICE GREEN :

A. Facts: The Issue

1. The Claimant owns commercial units at 10-12 Regent Parade, Hockley, Birmingham ("the Site"). The Claimant seeks permission to challenge the decision of the Planning Inspector ("the Inspector") of the 1st June 2016 who dismissed the Claimant's appeal against the decision of Birmingham City Council ("BCC") who refused permission to convert the units for residential use. On the 7th July 2011 BCC granted permission to the Claimant for the construction of six town houses, two duplexes and six class B1 commercial units at the Site which is located within the Jewellery Quarter Conservation Area in Birmingham. The commercial units were completed in about August 2014. In March 2015 the Claimant sought permission to convert the commercial site for residential use upon the basis that they had been unable to sell or rent the premises. BCC refused the application on the 13th May 2015. Thereafter the Claimant appealed to the Inspector. The Inspector rejected the appeal on the 1st June 2016. On the 10th August 2016 HHJ David Cooke refused permission on the papers.

2. The matter comes before this court upon a renewed application for permission. It raises a point of some broader significance about the relationship between paragraphs [22] and [51] of the National Planning Policy Framework ("NPPF") in the context of applications to convert commercial units into residential units in conservation areas. It is convenient at the outset to set out the terms of paragraphs [22] and [51] NPPF:

> "22. Planning policies should avoid the long term protection of sites allocated for employment use where there is no reasonable prospect of a site being used for that purpose. Land allocations should be regularly reviewed. Where there is no reasonable prospect of a site being used for the allocated employment use, applications for alternative uses of land or buildings should be treated on their merits having regard to market signals and the relative need for different land uses to support sustainable local communities."
>
> "51. Local planning authorities should identify and bring back into residential use empty housing and buildings in line with local housing and empty homes strategies and, where appropriate, acquire properties under compulsory purchase powers. They should normally approve planning applications for change to residential use and any associated development from commercial buildings (currently in the B use classes) where there is an identified need for additional housing in that area, provided that there are not strong economic reasons why such development would be inappropriate."

3. Originally the Claimant advanced three grounds of challenge. These were: first, that the Inspector misunderstood paragraph [22] NPPF and/or failed to have regard to a material consideration; secondly, that the Inspector failed to apply paragraph [51] NPPF and/or failed to have regard to a material consideration; thirdly, and in any event, that the Inspector failed to give any or any adequate reasons for his conclusions. By the time this matter came before this court for oral hearing Mr Anthony Crean QC, for the

Claimant, had substantially narrowed the challenge so that, in substance, it focussed upon an alleged error of law on the part of the Inspector in dismissing the applicability of paragraph [22] NPPF. He advanced, as a subsidiary point, that the Inspector failed to give adequate reasons in relation to paragraph [22] but, in the course of the hearing, it became apparent that this was subsumed within the principal complaint about the Inspector misapplying paragraph [22].

4. Before turning to the arguments relating to paragraph [22] NPPF it is helpful to describe the Jewellery Quarter in Birmingham.

B. The Jewellery Quarter

5. The Inspector rejected the appeal on the 1st June 2016. The issue, as articulated by the Inspector, was in the following terms:

> "The main issue for the appeal is whether the proposed development would preserve or enhance the character or appearance of the Jewellery Quarter Conservation Area."

6. Information relating to the Conservation Area is found in the "Jewellery Quarter Conservation Area – Character Appraisal and Management Plan" (28th January 2002) ("the Management Plan"). This Management Plan was reviewed and updated in 2016 but with no changes which are material for present purposes.

7. The Jewellery Quarter's significance lies in its long history as a centre for jewellery and small metalware production performed in a tight concentration of converted houses, workshops and manufactures. It is said to be "*unparalleled anywhere else in the world*". It remains a working environment and is a major centre of gold jewellery production in the United Kingdom. Since the designation of the St Paul's Square Conservation Area in 1971 there has evolved an increased appreciation of the unique qualities of the Jewellery Quarter, of its building and of the traditional trades which were and are performed therein. The Jewellery Quarter conservation area was designated in 1980. A report by English Heritage, "The Jewellery Quarter Urban Village, An Architectural Survey of the Manufacturers 1760 – 1999" (1999) established the significance of the Quarter. It was upon the basis of this that a new and enlarged Jewellery Quarter Conservation Area was designated in September 2000.

8. The 1990 Planning (Listed Buildings and Conservation Areas) Act defines a conservation area as "*an area of architectural or historic interest the character and appearance of which it is desirable to preserve or enhance*". The Act imposes upon local authorities a duty to designate, and from time to time review the scope of, conservation areas.

9. Part 2 of the Management Plan is entitled "New Design and Development Within the Historic Environment". Paragraphs [2.2] and [2.4] are in the following terms:

> "2.2 Residential Use
>
> The Council will not normally permit new residential uses, whether by conversion of existing buildings or new build in the areas defined as the Golden Triangle and the Industrial Middle

> (Map 4). Exceptions will be made only in the case of mixed use development which accords with policy 2.4 below.
>
> The dominant development trend in the Jewellery Quarter in recent years has been the provision of new residential accommodation. This has been built on sites formally occupied by industrial premises or provided by their conversion. Residential development has not only resulted in the loss or change of use of industrial buildings but has significantly enhanced potential property values. This latter factor both threatens the continued industrial use of manufacturing premises and reduces the amount of workspace available to the traditional industries in the Quarter. The density and integrity of the surviving industrial premises within the localities of the Golden Triangle and the Industrial Middle makes a powerful contribution to the character of the Jewellery Quarter such that it is considered inappropriate to permit any change of use of industrial or commercial premises to residential usage."
>
> "2.4 Live-Work Units
>
> The Council will support the provision of live-work units as a component of mixed use development in the areas defined as the Golden Triangle and the Industrial Middle where the ratio of living to working spaces does not exceed 50% of each unit.
>
> It is expected that a number of proposals will include live-work, defined for the purposes of this document as living and working accommodation combined within a single self-contained unit where the unit contains a defined working space with its own toilet and kitchen. Live-work is classified as sui generis and a change of use requires planning permission."

10. Paragraph [1.3] in relation to "Change of Use" indicates that the Council will not normally permit changes of use to buildings where the new use would adversely affect its character and appearance or that of the conservation area. The Management Plan emphasises that the special architectural and historic character of the area reflects the "*… interaction of trades in a complex network of interdependent activities*". It continues that: "*… The industrial presence in the Quarter is part of the particular 'mix' of uses which contributes to its character, quality and interest. The maintenance of industrial uses is an important part of a conservation policy that addresses the character of the area and the quality of its townscape in the broadest sense as well as protecting individual buildings*".

11. The Appraisal Review of the Management Plan of January 2016 (referred to in paragraph [6] above) reinforces the policy expressed in the 2002 Management Plan. Paragraph [6.1] describes the Jewellery Quarter as:

> "… a predominantly hard, urban and industrial area, although the scale in many parts is essentially domestic; buildings are seldom more than two or three stories high. The area contains an

> outstanding collection of unique building sites, dating mostly from the early/mid-19th century up to the early-20th century. Many of these buildings had been created as a result of specific design responses, including adaptations of once-suburban houses to provide solutions for the very rapid expansion of the jewellery-making trade which occurred during the latter half of the 19th century."

C. The Inspector's Reasons

12. I turn now to the reasons given by the Inspector for his decision. There were nine main points made by the Inspector, which may be summarised as follows.

13. First, a changed use to residential would be apparent on all floors when viewed from the street which had a strongly defined commercial character (Decision paragraph [6]).

14. Second, the commercial units represented an opportunity for future economic activity. Paragraphs [7] and [8] of the Decision were in the following terms:

> "7. The Appellant has provided evidence that despite being complete since August 2014, it has not been possible to let or sell the business units. Although the units have been marketed since September 2011, I apply lesser weight to marketing efforts undertaken prior to the completion of the development as the properties were not available. However, they have remained unused since their completion. **Whilst the Council has questioned the marketing undertaken, from the evidence before me, it appears to have been appropriate**.
>
> 8. I saw at my site visit that whilst the building subject of this appeal is recent and is in good order, it also has the appearance of being vacant. I do not agree however that a vacant building appears 'sterile' in the Conservation Area nor does it harm the character or appearance of the Conservation Area in this condition. **The commercial units, whilst vacant, do offer benefit to economic development through the provision of available business floor space and I am not convinced from the evidence that this use is not the optimum viable use of the building**."
>
> (Emphasis added)

It is clear that the Inspector whilst accepting that appropriate marketing of the site had taken place (cf paragraph [7] above) was not of the view that a lack of success to date, in finding a tenant or a purchaser, meant that there would be failure in the future. This is apparent from the last sentence of paragraph [8] above.

15. Third, the vacant nature of the premises did not, as the Claimant submitted, convey a "*sterile*" appearance nor did it harm the character of the Conservation Area in that condition. Commercial use remained the optimal use for the premises. The existence of

vacant space was not out of place in the area: "*a degree of vacancy is to be expected*" (paragraph [9]).

16. Fourth, the Conservation Area Appraisal Review of January 2016 (*supra*) had not been the subject of consultation but had been referred to by both parties. It reiterated the special qualities of the "*Industrial Middle Area*" and the need to resist changes to residential use. The document promoted the idea of new uses for vacant commercial premises but it did not support their conversion into residential use (paragraph [10]).

17. Fifth, pursuant to paragraph [126] NPPF historic assets were to be treated as an irreplaceable resource that should be preserved. In the present case the resource was the Jewellery Quarter Conservation Area as a whole. Change to residential use would undermine the character and appearance of the Quarter and would be inconsistent with paragraph [126] NPPF, (Decision paragraph [12]).

18. Sixth, the development was also inconsistent with the emerging Development Plan to which the Inspector gave some weight, bearing in mind its inchoate status. This Plan also laid great store by the preservation of the existing (commercial) character of the Quarter, (Decision paragraph [13]).

19. Seventh, the harm flowing out of the conversion should, notwithstanding the above considerations, properly be analysed as less than substantial within the context of paragraphs [133] and [134] NPPF. That level of harm therefore had to be weighed against the benefits of conversion to residential use. As to this the four residential units in question would make only a modest contribution to housing stock (the properties are not affordable housing); though this was to be viewed in the context of a number of policies, including paragraph [51] NPPF which encouraged conversion to residential use. Paragraphs [132] – [134] NPPF, upon which the Inspector relied (in Decision paragraphs [13] – [14]), are in the following terms:

> "132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
>
> 133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:

> ● the nature of the heritage asset prevents all reasonable uses of the site; and
>
> ● no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
>
> ● conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
>
> ● the harm or loss is outweighed by the benefit of bringing the site back into use.
>
> 134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

20. Eighth, paragraph [22] NPPF was concerned with land allocations for employment use. However, that was: "*... not directly applicable to the appeal scheme*", (Decision paragraph [15]).

21. Ninth, as to the evidence of other B1 premises for which consent had been given in the past to change use to residential (relied upon by the Claimant as, in effect, precedent), first, none were in the Industrial Middle Area and, second, there was insufficient evidence to show that they would properly be relevant as comparables, (Decision paragraph [16]).

22. In the light of these nine points the Inspector came to the following overall conclusion:

> "18. It is acknowledged that the proposed change of use may bring some short term economic benefit, but the loss of B1 space could affect the economy of the area over the longer term. Whilst the provision of housing would be a social benefit and would assist in boosting housing supply and the Council in meeting its dwelling requirements as set out in its emerging Development Plan, the provision of four dwellings would not make a significant contribution. The Framework also supports the change of use of commercial buildings to residential use where there is an identified need for additional housing in an area. However, the appeal proposal would give rise to harm to the character and appearance of the Conservation Area, a designated heritage asset, the conservation of which should be given great weight as set out in paragraph 132 of the Framework. The harm identified to the Conservation Area therefore is not outweighed by the public benefits identified. The appeal scheme also does not meet the environmental dimension of sustainable development as set out in the Framework, due to the harm identified to the Conservation Area."

D. Claimant's Submissions: Scope of Paragraph 22 NPPF

23. Mr Anthony Crean QC, who appeared for the Claimant, in concise and helpful submissions, focussed his arguments upon a single point which he said was arguable, and indeed correct. This concerns the meaning of the phrases "*allocated*" and "*allocations*" in paragraph [22] NPPF (set out in paragraph [2] above). His submission was that there were two possible interpretations of these phrases. The "*narrow*" and wrong construction (being that favoured by the Secretary of State) was that paragraph [22] and the concept of allocation therein referred to the formal process of designation or specification in the Development Plan. Mr Crean, for his part, advocated a "*broad*" construction pursuant to which the concept of allocation included formal specification or designation in the Development Plan but also any other form of designation outside of the Development Plan. He submitted that this, broad, interpretation was consistent with the proper approach to construction of the NPPF as most recently adumbrated by the Court of Appeal in *Suffolk Costal District Council v Hopkins Homes Limited, and, Secretary of State for Communities and Local Government* [2016] EWCA Civ 168 ("*Suffolk*").

24. Mr Crean argued that with this in mind the Inspector erred in law in dismissing the relevance of paragraph [22]. He submitted that the test in paragraph [22] was applicable to the present facts and that, properly construed, it laid considerable emphasis on an economic approach to decision making and that it was more conducive to a positive outcome (for the Claimant) than the more rigid application of paragraph [51] NPPF.

25. It was argued that this error of law on the part of the Inspector could, in a real and non-theoretical sense, have led to a different outcome to the planning application. For this reason the error on the part of the Inspector was a material error.

26. In support of his conclusion that the concept of allocation in paragraph [22] should be construed broadly and hence apply to the present case, Mr Crean, for the Claimant, relied upon a number of guides to interpretation. In particular he refers to the observations of Lord Justice Lindblom in *Suffolk* (*ibid*). In that case the Court was concerned with paragraph [49] NPPF pursuant to which housing applications were to be considered in the context of the presumption in favour of sustainable development. The paragraph provides: "*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*". The question for the Court was as to the identity of the "*policies*" which were the subject of the obligation. The Court made a number of points about both the NPPF generally and particular phrases therein. In paragraph [32] the Court stated that the policies in issue were those "*affecting the supply of housing"*. The Court also concluded that this was a "*literal*" interpretation of paragraph [49] but was in addition, the only interpretation consistent with the obvious purpose of the policy when read in its context. A "*relevant*" policy was simply a policy relevant to the application for planning permission before the decision maker, "… *relevant either because it is a policy relating specifically to the provision of new housing in the local planning authority's area or because it bears upon the principle of the site in question being developed for housing*". Elsewhere in the same paragraph the Court preferred this "*wide*" interpretation because it did not strain the natural ordinary meaning of the words that the draftsman had used. It did not do "*violence at all to the language*". On the contrary it construed "... *the policy exactly as it is written*". In paragraph [33] the Court referred to policies as relevant because they *influenced* the supply of housing. In

paragraph [33] the Court concluded that its interpretation reflected the "*reality that policies may serve to form the supply of housing land either by creating it or by constraining it*". In paragraph [34] the Court rejected the "*narrow*" interpretation of the policy because it led to a result which was unrealistic and inconsistent with the context in which the policy occurred. In coming to this conclusion the Court made an observation about allocations. The Court stated, of the "*narrow*" interpretation:

> "It ignores the fact that in every development plan there will be policies that complement or support each other. Some will promote development of one type or another in a particular location, or by allocating sites for particular land uses, including the development of housing. Others will reinforce the policies of promotion or the site allocations by restricting development in parts of the plan area, either in a general way – for example, by preventing development in the countryside or outside defined settlement boundaries – or with a more specific planning purpose – such as protecting the character of the landscape or maintaining the separation between settlements."

E. Analysis

27. I do not accept the Claimant's analysis of paragraph [22] NPPF. There are three principal reasons for this.

28. First, the short answer is that the Inspector correctly concluded that paragraph [22] NPPF was not directly applicable since the paragraph applied explicitly to <u>allocated</u> employment uses as set out in the relevant Plans, and the appeal site had never been so allocated. It followed that this part of the Framework simply did not apply. Ms Candlin appearing for the Secretary of State pointed out that there was a well-worn dichotomy at the heart of the planning system which distinguished between ordinary decisions taken in respect of planning applications and decisions against allocations in Plans requiring that land be used in a specific or a particular way. She said that this conclusion flowed out of paragraph [22] itself which encouraged the planning authorities to perform regular reviews of the allocation which encouragement only made sense in the context of a <u>prior</u> allocation exercise.

29. This dichotomy is also reflected in language adopted throughout the Framework. So, for example, in paragraph [23] (concerned with ensuring the vitality of town centres) planning policies are required to be drawn up such that planning authorities should "... *<u>allocate</u> a range of suitable sites to meet the scale and type of retail, leisure, commercial, office, tourism, cultural, community and residential development needed in town centres*". Also in the same paragraph authorities are required to "... *<u>allocate</u> appropriate edge of centre sites for main town centre uses that are well connected to the town centre where suitable and viable town centre sites are not available*". Equally, in paragraph [85] when defining boundaries planning authorities are required to make sure that safeguarded land is not "*<u>allocated</u> for development at the present time*". In paragraph [101] in relation to meeting climate change, flooding and coastal change challenges, local authorities were required to ensure the development was not "*<u>allocated</u>*" if there were reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. A similar point is made about "*sites <u>allocated</u> in development plans*" in paragraph [104]. In paragraph [110]

authorities should plan to "*allocate land with the least environmental or amenity value, where consistent with other policies in this Framework*". Finally, in paragraph [157] in relation to the process of plan making it is stated that Local Plans should "*... allocate sites to promote development and flexible use of land…*".

30. In my view Ms Candlin is correct. The concept of allocation, although not a defined term of art, is one which has a particular meaning when understood in the context of the Framework. It is referring to the process of prior determination or designation of uses "*allocated*" to sites specifically included within the development plans. And the site in issue in the present case was not so. Accordingly paragraph [22] does not apply.

31. Mr Crean QC sought to circumvent this difficulty by eliding the concept of allocation with "*intended for employment use*" in paragraph [22]. However these were, as it was put in the Secretary of State's written submissions: "*two quite different beasts*".

32. When one stands back from the Framework it is, in my view, clear that paragraphs [22] and [51] address different but related matters and operate in parallel as complements. Paragraph [22] concerns the situation of a change of use from one which has, *a priori*, been allocated a specific employment use. It then lays down the criteria which a planning authority should have regard to in deciding whether to permit a change of use away from employment. Paragraph [51], however, governs the situation of non-allocated uses. It also seeks to identify the sorts of criteria that should apply to a planning decision but it is addressing a different situation to that covered by paragraph [22].

33. Second, in relation to the argument that paragraph [22] is more flexible than paragraph [51], although different language is used in paragraphs [22] and [51] there is at one level not a great deal to differentiate them. In paragraph [22] applications for change of use should be "*treated on their merits*" having regard to "*market signals*" and the "*relative need for different land uses to support sustainable local communities*". Under paragraph [51] it has not been argued that an application for change of use should not be treated upon its merits. Nor can it be argued that the decision maker should ignore relevant market signals (such as a proven need for housing). Nor is it suggested that the authority will ignore "*relative*" need for different land uses to support sustainable local communities.

34. However, insofar as there *is* a difference, paragraph [51] provides a broader basis for permitting a change of use than would paragraph [22] which can be explained by the difference in nature between a restriction on use which comes about by virtue of a deliberate prior policy decision (i.e. allocation) and a case where there is no specific prior policy decision. It is in such circumstances understandable that the former case (i.e. those covered by paragraph [51]) might be subjected to a greater degree of decision making flexibility than in the latter case. Paragraph [51] provides that the authority should "*normally*" approve applications for change to residential use. It thereby creates a presumption in favour of change. All that has to be established in order to trigger the presumption is that there is "*an identified need for additional housing*" in the area. Where that pre-condition prevails the presumption applies and is only rebutted where there are "*strong economic reasons why such development would be inappropriate*" which, as drafted, is not intended to be easily involved (hence the word "*strong*"). The momentum implicit in paragraph [51] is, evidently, in favour of approval of a change of use. Paragraph [22] however is not, in my judgment, as flexible. Before it applies, as

a pre-condition, there must be "*no reasonable prospect of a site being used*" for an employment use. If that pre-condition is not established then paragraph [22] has no application. There is accordingly no in-built presumption in favour of approval of a change of use. But even when the pre-condition is met the authority under paragraph [22] then simply treats each application on its individual merits, which might properly be described as a neutral process where the pros and the cons are balanced but without any tilting presumption in favour of permission. It follows from this analysis that the Claimant's argument, namely that paragraph [22] would provide a greater opportunity for change of use than paragraph [55], is not borne out by an analysis of its purpose, context or wording. My conclusion in this respect adopts the broad and purposive construction of the NPPF which the Court of Appeal has endorsed in *Suffolk* (*ibid*).

35. Third, and finally, there is, quite irrespective of the proper interpretation of paragraph [22], an evidential problem confronting the Claimant. I have set out above (at paragraph [14]) the text at paragraphs [7] and [8] of the Inspector's Decision. The last sentence of paragraph [8] involves a conclusion, by reference to the evidence, on the part of the Inspector that there *is* a viable future for the Site as commercial premises. It is clear from the Inspector's analysis in paragraphs [7] and [8] that he does not view the "*appropriate*", but unsuccessful, marketing efforts undertaken by the Claimant to date as indicative that they will not be successful in the future. It follows from this finding of fact that the pre-condition in paragraph [22] is not, in any event, met. This is not a case where there was "*no reasonable prospect*" of the Site being used for an employment purpose. The notion of "*reasonable prospect*" entails a forward looking analysis and the Inspector's conclusion did just that.

36. By way of postscript I note that in paragraph [34] in *Suffolk* (set out at *ibid* at paragraph [26]) Lord Justice Lindblom spoke of the concept of allocations as being part of "*every development plan*". This affords some slight reinforcement for my conclusion above though I recognise that he was not addressing the issue of "*allocations*" in that case.

F. Conclusion

37. For all of these reasons the application does not succeed. I should add that I received the benefit of detailed and helpful written and oral submissions on this relatively narrow point of law and principle from both parties. I would not have arrived at any different conclusion had permission been granted and the matter then proceeded to full hearing.