Neutral Citation Number: [2018] EWHC 1524 (Admin)

Case No: CO/4504/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 June 2018

Before :

MRS JUSTICE LANG DBE

Between :

CHESHIRE EAST COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
GEORGE BARLOW	**Interested Party**

Katherine Olley (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Jack Parker (instructed by the **Government Legal Department**) for the **Defendant**
Guy Williams (instructed by **DFW LLP**) for the **Interested Party**

Hearing date: 10 May 2018

Approved Judgment

Mrs Justice Lang :

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the Defendant, made on his behalf by an Inspector on 22 August 2017, granting planning permission for a development of ten dwellings at Dunkirk Farm Paddock, London Road, Holmes Chapel, Cheshire CW4 8AX ("the Site").

2. The Site comprises an open grassed area of agricultural land, approximately 1.6 hectares in size. It is located in the open countryside, outside the settlement of Holmes Chapel within the parish of Brereton.

3. The Interested Party applied for planning permission for the construction of ten dwellings to the Claimant, which is the local planning authority. When the application was not determined within the prescribed period, the Interested Party appealed under section 78 TCPA 1990.

4. The Claimant indicated to the Inspector that it would have refused planning permission on the basis that the proposed development would be located within the open countryside beyond existing settlement boundaries, where development should be restricted to that which is essential for a countryside location, and from where there is a need to protect the intrinsic value of the open countryside from unwarranted incursion.

5. The Defendant's Inspector, Mr M. Seaton BSc (Hons) DipTP MRTPI determined the appeal by way of written representations, following a site visit. In his decision ("DL") dated 22 August 2017, he identified the main issue as the effect of the proposed development on the character and appearance of the countryside (DL 11].

6. The Inspector allowed the appeal and granted planning permission, concluding at DL 38:

> "38. Overall, and having regard to all other matters raised and the economic, social and environmental dimensions of sustainable development set out in paragraph 7 of the Framework, I am satisfied that the limited harm likely to be caused by the proposal would be outweighed by the development's benefits, particularly in terms of the provision of affordable housing to meet local needs. I conclude that the scheme therefore represents sustainable development."

7. The Claimant applied for permission to challenge the decision on two related grounds. First, that the Inspector failed to take into account, properly or at all, material considerations, namely, the conflict of the proposed development with the Development Plan, in particular, saved Policy PS8 of the Local Plan, Policy PG6 of the Local Plan Strategy and Policy HOU1 of the Brereton Neighbourhood Plan. Second, he failed to give adequate reasons for allowing the appeal, given the acknowledged conflict with the Development Plan.

8. On 29 November 2017, Robin Purchas QC, sitting as a Deputy High Court Judge, refused permission to apply for statutory review, certifying the claim as totally without

merit. The Claimant appealed to the Court of Appeal and on 8 January 2018 Lewison LJ granted permission on the papers.

Legal and policy framework

(i) Applications under section 288 TCPA 1990

9. 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.

10. 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.

11. 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 Ltd v Secretary of State for the Environment* (1981) 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....."

12. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath giving the judgment of the Supreme Court warned, at paragraph 23, against over-legalisation of the planning process. He held, at [25] – [26]:

> "25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. [...] Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692; [2009] PTSR 19, para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence (see *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49; [2008] 1 AC 678, para 30 per Lady Hale.)

> 26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

13. A 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 Ltd 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.

14. Two citations from the authorities listed above are of particular relevance to the disputed issues in this case.

a) *South Somerset District Council*, per Hoffmann LJ at 84:

> "...as Forbes J. said in *City of Westminster v Haymarket Publishing Ltd*:
>
> > "It is no part of the court's duty to subject the decision maker to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph"
>
> The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy."

b) *Clarke Homes*, per Sir Thomas Bingham MR at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

(ii) Decision-making

15. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. 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."

16. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters... ...
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is helpful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission..... Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
>
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the

> assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell J observed in *Loup v Secretary of State for the Environment* (1995) 71 P & C.R. 175, 186:
>
> > "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."
>
> Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.
>
> .....
>
> In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

17. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, per Lord Reed at [17].

18. The application of the duty in section 38(6) PCPA 2004 was considered by Lindblom LJ in *Secretary of State for Communities and Local Government v BDW Trading Ltd* [2016] EWCA Civ 493, where he said, at [21]:

> "21. First, the section 38(6) duty is a duty to make a decision (or "determination") by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde's speech in the *City of Edinburgh Council* case [1997] 1 WLR 1447, 1458–1459. Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognising that they may sometimes pull in different directions: see Lord Clyde's speech in the *City of Edinburgh Council* case, pp 1459D–F, the judgments of Lord Reed JSC and Lord Hope of Craighead DPSC in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983, respectively at paras 19 and 34, and the judgment of Sullivan J in *R v Rochdale Metropolitan Borough Council, Ex p Milne* (No 2) (2000) 81 P & CR 27, paras 48–50. Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides "whether the development plan should or should not be accorded its statutory priority", and secondly, "if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration": see Lord Clyde's speech in the *City of Edinburgh Council* case, at p 1459–1460. Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole: see *R (Hampton Bishop Parish Council) v Herefordshire Council* [2015] 1 WLR 2367, para 28, per Richards LJ and *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2016] JPL 171, paras 27–36, per Patterson J. And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance: see the *Hampton Bishop Parish Council* case, para 30, per Richards LJ."

(iii) National Planning Policy Framework

19. The National Planning Policy Framework ("the Framework") is a material consideration to be taken into account when applying section 38(6) PCPA 2004 in planning decision-making, but it is policy not statute, and does not displace the statutory

presumption in favour of the development plan: *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, per Lord Carnwath at [21].

20. Neighbourhood plans are considered in paragraphs 183 to 185 of the Framework.

21. Under the heading "Decision-taking" and "Determining applications", the Framework provides as follows:

> "196. The planning system is plan-led. Planning law requires that applications for planning permission must be determined in accordance with the development plan[1] unless material considerations indicate otherwise[2]. This Framework is a material consideration in planning decisions.
>
> 197. In assessing and determining development proposals, local planning authorities should apply the presumption in favour of sustainable development.
>
> 198. Where a Neighbourhood Development Order has been made, a planning application is not required for development that is within the terms of the order. Where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted."

22. The meaning of paragraph 198 was considered in *Woodcock Holdings Ltd v SSCLG* [2015] JPL 1151 by Holgate J. who said:

> "24. Mr Honey emphasised those parts of the NPPF which attach importance to neighbourhood plans and planning (e.g. paras 183–185). Paragraph 198 provides that "where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted". However, the Secretary of State accepts through Mr Honey, that para.198 neither: (a) gives enhanced status to neighbourhood plans as compared with other statutory development plans; nor (b) modifies the application of Planning and Compulsory Purchase Act 2004 ("the 2004 Act") s.38(6)."

23. This statement was approved by the Court of Appeal in *R. (on the application of DLA Delivery Ltd.) v Lewes District Council v Newick Parish Council* [2017] EWCA Civ 58 at [11].

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[1] Section 38(1) of the Planning and Compulsory Purchase Act 2004: this includes adopted or approved development plan documents i.e. the Local Plan and neighbourhood plans which have been made in relation to the area (and the London Plan).

[2] Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990.

(iv) Reasons

24. The Inspector was under a statutory duty to give reasons for his decisions. The standard of reasons required was set out by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 W.L.R. 1953, at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Conclusions

25. As Lord Carnwath said in *Hopkins Homes* (at [25]), the Court should respect the expertise of specialist planning inspectors and start at least from the presumption that they will have understood the policy framework correctly. On reading the Inspector's decision, I have no doubt that he well understood and took into account the policies in the Development Plan upon which the Claimant relies.

26. At DL 3 and DL 4, the Inspector referred to the Brereton Neighbourhood Plan, the Local Plan Strategy and the saved policies of the Local Plan, confirming (at DL 5) that he had given careful consideration to them in reaching his decision on the appeal.

27. Having identified the main issue in DL 11, the Inspector then assessed the impacts of the development in the context of relevant Development Plan policies. He found, at DL 13, that the Site was located within the open countryside beyond the settlement of Holmes Chapel. At DL 14, he noted that the Site did not possess any specific landscape designation or any particular attribute to warrant protection above its intrinsic landscape value. The Site was located within the East Lowland Plain and the Brereton Neighbourhood Plan reflected the importance of open landscape.

28. At DL 15 he found that the loss of the existing field at the Site would inevitably have an adverse impact on the character of the countryside but the impact would be localised because of the low-density nature of the proposed development with substantial landscaping and planting, and the presence of a housing development to the north-east of the Site and the railway embankment to the west.

29. At DL 16 he found that the character and appearance of the countryside in the immediate vicinity of the Site would be significantly altered and diminished by the substantial mixed used development proposal, for which planning permission had been granted, to the east and south east of the Site. The long views (a feature of the East Lowland Plain) would be removed from much of the Site

30. The Inspector expressly took into account the conflict with the Development Plan policies at DL 17:

> "17. The Council has highlighted within its submissions that the proposed development would be in conflict with saved policy PS8 of the Local Plan, and Policy PG5 of the LP Strategy. With regards these policies, in addition to them being ... a means of seeking to control the supply of housing ... their purpose is also highlighted as being to protect the existing appearance, character and beauty of the countryside. In this respect the Council has also referred me to Policy HOU01 (settlement boundaries) of the Brereton NP, which introduces settlement boundaries to protect the character of the area."

31. The Inspector concluded that the proposal would result in a "limited and localised adverse landscape impact" which would have "some limited detriment to the character and appearance of the area, and would therefore be in conflict with saved Policy PS8 of the Local Plan, Policy PG5 of the LP Strategy and Policy HOU1 of the Brereton NP".

32. In my judgment, these paragraphs in the decision make it abundantly clear that the Inspector had regard to the relevant Development Plan policies and applied them to this proposal when considering the character and appearance of the countryside. His reasoning was both detailed and clear, and certainly met the standards set out by Lord Brown in *South Bucks*.

33. The Inspector also considered the relevant Development Plan policies in the context of housing need. He said, at DL 22 and DL 23:

> "22. It has been contended that there is no longer an unmet housing need for the type and mix of housing being promoted through this development and in this location, with reference made to both the Brereton NP and Holmes Chapel NP. In this respect, I am also mindful of the recent adoption of the LP Strategy.
>
> 23. I have had regard to the suggestion that targets for housing set out in the two neighbourhood plans have already been met or exceeded for residential development within (Brereton NP), or

> adjacent (Holmes Chapel NP) to, the neighbourhood plan boundaries as a consequence of already committed development. However, whether or not this may be the case, the targets set out in the neighbourhood plans and indeed the Development Plan as a whole, should not be viewed as maxima and therefore a means of resisting sustainable development. This would be contrary to the underlying objectives of the Framework and the need to continually seek to boost significantly the supply of housing. Furthermore, in respect of the housing type and mix proposed, I am mindful that the Council has identified a need for the provision of affordable housing in the rural area including Holmes Chapel and Brereton, of a varying size and range, and which I am satisfied the appellant has sought to address through their submission."

34. The Inspector accepted that the Claimant had a 5 year housing land supply (DL 29) but he concluded that the additional housing, especially affordable housing, was a planning benefit which accorded with the policy objectives of the Framework and the LP Strategy in the Development Plan. In my view, he was entitled to reach this conclusion. He said, at DL 30:

> "30. Nevertheless, the proposed development would result in the contribution of 10 dwellings towards the delivery of housing in Cheshire East, which would accord with the objective of the Framework of seeking to boost the supply of housing, and meet the long-term housing requirement. Whilst I accept that the quantum of development would make only a comparatively small contribution, some limited weight in support of the proposals must nevertheless be afforded to this provision. Furthermore, and despite falling beneath the threshold for the requirement of affordable housing as set out at Policy SC5 of the LP Strategy, and as established within the Court of Appeal judgement of 11 May 2016 in respect of affordable housing, the provision of 3 affordable housing units would go towards meeting the identified local need for such accommodation, which would accord with one of the policy principles highlighted in the LP Strategy and the Case for Growth. I am satisfied that this provision would attract moderate weight in support of the proposals."

35. In my judgment, these paragraphs demonstrate that the Inspector clearly had regard to the housing provision in the Development Plan, in particular the Neighbourhood Plans, and the fact that the proposed housing development fell outside it. He gave clear and detailed reasons for treating the proposed housing development as a planning benefit, despite the fact that it fell outside the Development Plan.

36. I find it inconceivable that, in this short decision, the Inspector overlooked his findings in relation to the Development Plan when he came to the final section of his decision headed "Planning Balance and Conclusion". His decision should be read as a whole, and his earlier findings can be assumed to form the basis for his conclusions. On a fair reading of the decision, by this stage the Inspector was weighing up the planning harm

to the appearance and character of the countryside, which he had found was contrary to the Development Plan, against the planning benefits which he had identified, which were material considerations indicating that the determination should be made otherwise than in accordance with the Development Plan, applying the requirements of section 38(6) PCPA 2004.

37. I do not consider that the Claimant has established that the Inspector failed to consider paragraph 198 of the Framework in reaching his decision. No doubt as a specialist planning inspector, he was familiar with the Framework and the fact that he did not set out paragraph 198 in his decision does not necessarily mean that it was ignored: see *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419, per Lang J. at [58], followed in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), per Lindblom J. at [19].

38. Paragraph 198 does not give enhanced status to neighbourhood plans, nor does it modify the application of the PCPA 2004 (see *Woodcock Holdings Ltd v SSCLG* [2015] JPL 1151, per Holgate J. at [24], approved by the Court of Appeal in *R. (on the application of DLA Delivery Ltd.) v Lewes District Council v Newick Parish Council* [2017] EWCA Civ 58 at [11]). In principle, the Inspector was entitled to decide that planning permission should be granted for a proposal which departed from the neighbourhood plan if material considerations so indicated. The Inspector's conclusions were not, therefore, inconsistent with paragraph 198.

39. Ultimately, the Inspector disagreed with the Claimant's assessment of the weight to be accorded to the planning harm and benefits. However, he was entitled to exercise his own planning judgment on these issues, and the Court will not interfere with it. In my view, the Inspector's reasons for his conclusions were adequate and intelligible, and met the standards set out by Lord Brown in *South Bucks*.

40. For these reasons, the application is dismissed.