Case No: CO/5040/2015

Neutral Citation Number: [2016] EWHC 571 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2016

Before:

MR JUSTICE JAY

- -

Between:

CHESHIRE EAST BOROUGH COUNCIL	**Claimant**
- and –	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
-and-	
RENEW LAND DEVELOPMENTS LTD	**Second Defendant**

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John Hunter (instructed by **Sharpe Pritchard**) for the **Claimant**
Richard Honey (instructed by **Government Legal Department**) for the **First Defendant**
Jeremy Cahill QC and James Corbet Burcher (instructed by **Irwin Mitchell LLP**) for the **Second Defendant**

Hearing date: 9th March 2016

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Judgment

Mr Justice Jay:

Introduction

1. This is an application brought by Cheshire East Borough Council ("the Claimant") under section 288 of the Town and Country Planning Act 1990 for an order quashing the decision of the First Defendant's Inspector given on 7th September 2015 allowing the Interested Party's appeal against the Claimant's refusal of outline planning permission for up to 60 dwellings with associated car parking, roads and landscaped open space on land at Kents Green Farm, Kents Green Lane, Haslington, Crewe ("the Site").

2. The main issue in this application is whether the Inspector's approach to the issue of "sustainable development" within paragraph 14 of the National Policy Planning Framework ("NPPF") was legally flawed. As a subsidiary point, the Defendant and the Interested Party contend that, even if it was, this made no difference to the outcome.

Essential Factual Background

3. The Interested Party's application for planning permission was refused by the Claimant on 17th March 2014, on the grounds that it constituted unsustainable development within the open countryside, contrary to two policies within the Crewe and Nantwich Local Plan (constituting the development plan for these purposes) and to principles in the NPFF intended to protect such areas from inappropriate development. On 19th – 20th May 2015 the Interested Party's appeal was heard by way of public inquiry, and the Inspector's decision letter was issued on 7th September 2015.

4. The main issue in the appeal before the Inspector was whether the Interested Party's proposal would amount to a sustainable form of development in accordance with national and local policy, having particular regard to its location on land allocated as open countryside.

5. The Claimant conceded that it did not have a five year supply of housing land. The effect of paragraph 49 of the NPPF was that local plan policies, promulgated in 2005, were out-of-date. The essence of the Claimant's objection to the development was that it would harm the rural character of the area.

6. The Inspector's reasoning process anterior to his addressing the main issue (and which I do not understand to be controversial) was as follows:

   (i) the development would not comply with the local plan – this was a relevant consideration, even though the relevant polices were out-of-date.

   (ii) the effect of section 38(6) of the Planning and Compulsory Purchase Act 2004 was that permission should be refused

unless material considerations were found to outweigh the conflict with the development plan.

(iii) the considerations of the greatest materiality for present purposes comprised those set out in national policy, namely the NPPF.

(iv) the case effectively hinged on the issue of "sustainable development" within the meaning of paragraph 14 of the NPPF.

7. There was a dispute before the Inspector as to the correct approach to paragraph 14 of the NPPF. The parties before me seek to take forensic points as to exactly how their and their respective opponents' cases were advanced, but in my view that is an arid line of inquiry. It is apparent from the decision letter that the Claimant was contending that "some form of separate assessment of the sustainability of the proposed development is required before deciding whether paragraph 14 is engaged", whereas the Interested Party was contending that there was no requirement to undertake any such form of free-standing assessment, and that paragraph 14 "itself provides a sufficient basis to decide whether proposed development would be sustainable". The Inspector noted that the Interested Party's submission had the support of the First Defendant.

8. The Inspector favoured the Interested Party's submissions on this issue. His core reasoning is as follows:

> "No prior or parallel assessment is needed, but the sustainability of the proposed development is to be judged by a positively weighted balancing of the benefits and adverse impacts against the policies of the NPPF as a whole. [DL20]
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> ..
>
> For the reasons set out above, I consider that apart from some very limited harm to rural character, the environmental dimension of sustainable development would largely be addressed. When assessed against the policies of the NPPF as a whole, the adverse impacts of the proposed development would not significantly and demonstrably outweigh the benefits. The proposal must therefore be regarded as sustainable development, to which the presumption in favour set by the NPPF would apply. [DL40]
>
> …
>
> For the reasons set out above, I conclude that the proposal would be contrary in principle to LP Polices NE.2 and RES.5, but that the conflict would be outweighed by other material considerations. These are principally the contribution that the proposal would make to meeting unmet need for market and affordable housing that arises from the borough's lack of an adequate housing supply, and the very limited harm that it

would cause, thereby benefitting from the presumption in favour of sustainable development set out by the NPPF. [DL56]"

9. *En route* to the second and third of these conclusions, the Inspector had examined the planning merits of the case within the framework of the three "dimensions" of the concept of sustainable development. He concluded that the economic and social dimensions would clearly be met, and that the harm to the environmental dimension was not considerable (e.g. "some loss of rural character"; "the environmental dimension would largely be addressed"). There is no challenge in these proceedings to these exercises and expressions of planning judgment.

The Legal Framework

10. The concept of "sustainable development" is the bedrock of the NPPF. It is a concept very familiar to those practising and working in this field. I think that it must be obvious from a cursory examination of the concept that it is seeking to secure the attainment of a proper balance between different factors pulling in different directions. In relation to the open countryside, it must also be obvious that the factors potentially telling against development include the ecological, aesthetic and environmental, whereas – in an age of increasing demand for affordable housing – there may be a range of economic, demographic and social factors telling the other way. Thus, or so the framers of the NPPF have conceptualised the matter, development which balances these factors in the right way is "sustainable development".

11. It is unnecessary for present purposes to cite extensively from the NPPF. Although paragraphs 6, 7 and 8 are also relevant, the key provision is paragraph 14, which provides:

> "At the heart of the NPPF is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
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> …
>
> For decision-taking this means:
>
> - approving development proposals that accord with the development plan without delay; and
>
> - 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 polices in this Framework taken as a whole; or

- specific policies in this Framework indicate development should be restricted."

12. In the text of paragraph 14, there is footnote 10 after the words, "for decision-taking this means" – the footnote states, "unless material considerations indicate otherwise". After the words, "… should be restricted", there is footnote 9 which provides a number of examples, including policies relating to Green Belt.

13. In their skeleton arguments the parties have taken time to remind me of familiar principles of planning law applicable to this section 288 application. I naturally take these into account, but generally refrain from setting them out. However, this abstinence should yield to these three exceptions. First, that the Court should deploy a straightforward and down-to-earth reading of the Inspector's decision letter "without excessive legalism" (see Clarke Homes v SSE [1993] 66 P&CR 263). Secondly, that the proper interpretation of the NPPF is an objective question of law (see Tesco Stores Ltd v Dundee City Council [2012] UKSC 13). Thirdly, that an application of this type should be refused if, having found legal error by the Inspector, I were satisfied that there is no real possibility that the Inspector's decision might otherwise have been different (see Tesco Stores v Dundee CC [2012] UKSC 13).

The Applicant's Case

14. Mr John Hunter's core contention on behalf of the Claimant was that Mr Jeremy Cahill QC for the Interested Party's beguiling submissions drew the Inspector into error. Mr Hunter's submission was that paragraph 14 of the NPPF only applies to development which is assessed to be sustainable, and to allow paragraph 14 to define that question is illogical, because it is circular, a misunderstanding of what the policy says, and accordingly an error of law.

15. In developing that submission, Mr Hunter pointed out that paragraph 6 of the NPPF makes no reference to paragraph 14. Indeed, it provides that the policies in paragraphs 18-219, taken as a whole, constitute the Government's view of what sustainable development in the planning system means. Pressed by me to explain where that leaves paragraph 14, Mr Hunter submitted that it is designed to create an enhanced presumption in favour of development which has already been assessed to be sustainable, and/or exists in order presumptively to trump other material considerations. Mr Hunter also pointed to other provisions in the NPPF, such as paragraphs 64, 87, 109, 112 and 144, which he submitted would be unworkable if the Defendant's and Interested Party's cases were correct.

16. Against that backdrop, Mr Hunter criticised two parts of the Inspector's decision letter. First, the reference to "overall assessment" in the final sentence of paragraph 19 ("… where policies are out-of-date an overall assessment under paragraph 14 is required"), which Mr Hunter submitted was based on a misunderstanding of the decision of Lang J in Wenman v SSCLG [2015] EWHC 925 (Admin)). Secondly, the inappropriate deductive reasoning inherent in paragraph 40 of the decision letter; and, in particular, the use of the verb "must".

17. Mr Hunter referred me to a considerable number of first instance decisions in which both the correct and the erroneous approach were, he said, evident. His overarching theme was that the preponderance of authority favoured his argument.

Discussion and Conclusions

18. My point of departure is not an analysis of the first instance decisions to which I was referred but my own approach to paragraphs 6-8 and 14 of the NPPF, assisted as I have been by the submissions of Mr Richard Honey for the First Defendant and Mr Jeremy Cahill QC for the Interested Party.

19. Although there may be cases where sustainable development "jointly and simultaneously" achieves economic, social and environmental gains (as per the optimistic language of paragraph 8 of the NPPF), I have already said that it must be obvious that in most situations there will be somewhat of a trade-off between competing *desiderata*. It follows that a balance must be struck but on what basis? In my judgment, the answer is to be found in the language of paragraph 14 of the NPPF. Where the second bullet point applies, because the development plan is absent, silent or relevant policies are out-of-date, the proposal under scrutiny will be sustainable development, and therefore should be approved, unless any adverse impacts significantly and demonstrably outweigh the benefits.

20. In the absence of paragraph 14, decision makers would be unable to decide how tensions between the competing *desiderata* should be reconciled. If, for example, the economic and social merits only slightly outweighed the environmental, what then? The answer is not to be found in paragraphs 6-8. The framers of the NPPF rightly thought that guidance in this regard was necessary. The guidance they have provided in the form of paragraph 14 is to say that the proposal should be approved as sustainable development unless the adverse impacts clearly and significantly outweighed the benefits.

21. On this approach, the effect of paragraph 14 is that proposals which would otherwise have been refused because their planning merits were finely balanced should be approved – subject to the first indent of the second bullet point being made out. Another way of putting the matter is that the scales, or the balance, is weighted, loaded or tilted in favour of the proposal. This is what the presumption in favour of sustainable development means: it is a rebuttable presumption, although will only yield in the face of significant and demonstrable adverse impacts.

22. In practice, there will be questions of fact and degree. If, for example, the planning advantages are assessed to be non-existent, the presumption is likely to be easily displaced. The stronger the planning benefits are assessed to be, the more tenaciously the presumption will operate and the harder it will be to displace it.

23. In my judgment, this is not, and cannot be, a question of assessing whether the proposal amounts to sustainable development before applying the presumption within paragraph 14. This is not what paragraph 14 says, and in my view would be unworkable. Rather, paragraph 14 teaches decision makers how to decide whether the proposal, if approved, would constitute sustainable development.

24. I do not fully understand the reference in some of the authorities to sequential decision making or to decisions being made about the sustainability of development somewhere along the notional road. The whole point of paragraph 14 is to lead decision makers along a tightly defined and constrained path, at the end of which the decision must be: is this sustainable development or not? If what is being said in these authorities is that decisions about the *weight* to be given to each of the paragraph 7 NPPF dimensions should be made before paragraph 14 is considered and applied, then I would have no difficulty at all, because these are logically prior planning judgments which fall to be made on all the evidence.

25. Nor do I believe that it is necessarily helpful to say that paragraph 14 does not apply to development which is not sustainable. If, having applied the paragraph 14 algorithm, that is the conclusion which is reached, I have no difficulty with this formulation. However, a decision maker will only know if a proposal is sustainable or not by obeying the processes mandated by the paragraph. An integral part of the process is a positive weighting in favour of sustainable development in the sense that the proposal will be assessed as such unless the planning harm clearly and significantly outweighs the planning gain.

26. In short, paragraph 14 is about process, not outcome. There is no circularity in the foregoing analysis, because if the adverse impacts do significantly and demonstrably outweigh the benefits (when assessed against the rest of the NPPF), then the proposal will not amount to sustainable development, and will be refused. Indeed, Mr Hunter's argument seems to me to place an almost insurmountable hurdle against development being sustainable, because he fails to explain how the concept should be applied outside the scope of paragraph 14. It is a freewheeling exercise of discretion without parameters. Moreover, I agree with Mr Honey that it is difficult to understand on what basis paragraph 14 would have any practical utility if it only applied to cases where the development had already been found to be sustainable, and to my mind Mr Hunter's "enhanced presumption" is a completely incoherent and unworkable concept, also one being nowhere to be found in the policy wording.

27. Further, the possibility of a prior or extrinsic assessment of sustainable development is quite inconsistent with the first bullet-point in paragraph 14. No explanation was provided by Mr Hunter as to how and why the two bullet points might work differently.

28. Mr Honey made the good point that the meaning of sustainable development is not rigidly to be determined solely by reference to the indented methodology. As I have pointed out, it is always subject to material considerations indicating otherwise, thereby introducing an element of flexibility both ways. If, taking just one example, the impact or harm is substantial but not such as significantly and demonstrably to outweigh the benefits, then the decision-taker has sufficient flexibility to refuse permission, provided of course that the other material considerations, if any, are carefully defined and assessed.

29. This point disposes of Mr Hunter's argument based on later provisions of the NPPF, but his argument is also defeated by the application of the second indent in paragraph 14. If, for example, the proposal falls within one of the specific policies restricting development, then the presumption either is very readily rebutted, or its effect is heavily diluted to reflect the precise provisions of the restrictive policy in question.

30. Although I would agree that paragraph 6 of the NPPF does not mention paragraph 14, that latter paragraph is highlighted in the text and, furthermore, must refer back to paragraphs 6-8 on account of the clause, "when assessed against the policies in this Framework taken as a whole". So, paragraph 14 is the driver to correct decision-taking, not paragraphs 6-8.

31. I am not persuaded that it is necessary to conduct an exhaustive analysis of non-binding, first instance authority. I confine myself to two sets of observations.

32. First, my approach is consistent with, if not supported by, the decisions of Hickinbottom J in Cheshire East BC v SSCLG [2013] EWHC 892 (Admin) (paragraph 16), Stratford v SSCLG [2013] EWHC 2074 (Admin) (paragraph 12), Exeter CC v SSCLG [2015] EWHC 1663 (Admin) (paragraph 15) and Malvern Hills DC v SSCLG [2015] EWHC 2244 (Admin) (paragraphs 10 and 13); of Lindblom J in Bloor Homes v SSCLG [2014] EWHC 754 (Admin) (paragraph 44) and Crane v SSCLG [2015] EWHC 425 (Admin) (paragraphs 72-73); of Males J in Tewkesbury BC v SSCLG [2013] EWHC 286 (Admin) (paragraph 14); and, of Kenneth Parker J in Colman v SSCLG [2013] EWHC 1138 (Admin) (paragraph 52).

33. Secondly, Mr Hunter placed particular reliance on the decision of Lang J in William Davis Ltd v SSCLG [2013] EWHC 3058 (Admin). In that case the developer was appealing the Inspector's finding that the proposal was not sustainable development, notwithstanding the presumption. The following two sentences in paragraph 37 of Lang J's judgment have been subjected to much scrutiny:

> "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 NPPF if the presumption in favour of development in paragraph 14 applied equally to sustainable development and non-sustainable development."

34. The only way I can interpret these sentences is that Lang J was holding that the determination of the issue of sustainable development was a matter anterior to, or at least independent from, paragraph 14 of the NPPF. Mr Cahill had submitted to her that sustainable development should not be taken as "a preliminary issue". The final sentence from this citation can be read in two possible ways, although its more comfortable interpretation is that paragraph 14 applies after a planning judgment has been made. If my interpretation of what Lang J meant is correct, then I must record my respectful disagreement with her. I should add that in my view paragraph 37 was not essential to her decision.

35. William Davis was analysed by Patterson J in Dartford BC v SSCLG [2015] 1 P&CR 2. At paragraphs 52 and 54 of her judgment:

> "In my judgment, the Claimant's argument depends on elevating the dicta in William Davis into a formulaic approach to be followed in a step by step sequential order in a decision letter. I reject that approach.
>
> …

> In my judgment the Claimant's approach is excessively legalistic. When the decision letter is read as a whole it is clear that the Inspector reached an overall conclusion, having evaluated the three aspects of sustainable development, that the positive attributes of the development outweighed the negative. That is what is required to reach an eventual judgment on the sustainability of the development proposal. As was recognised in the case of William Davis at paragraph 38, the ultimate decision on sustainability is one of planning judgment. There is nothing in NPPF, whether at paragraph 7 or paragraph 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 paragraph 37. I agree with Lang J in her conclusion that it would be contrary to fundamental principles of the NPPF if the presumption in favour of development, in paragraph 14, applied equally to sustainable and non-sustainable development. To do so would make a nonsense of Government policy on sustainable development."

36. I am not convinced that it would be fruitful for me to seek to reach conclusions about which parts of Lang J's judgment in William Davis Patterson J was assenting to and which parts she was not, at least impliedly. It does seem clear to me that, if Patterson J's analysis of paragraph 14 of the NPPF is the same as mine, then in the penultimate sentence of the foregoing citation she has interpreted Lang J's judgment differently to me.

37. Finally, I should make clear that in my view paragraphs 74 and 79 of Lang J's judgment in Wenman v SSCLG [2015] EWHC 1663 (Admin) seem to be (unsurprisingly I might add) to be wholly consistent with her earlier decision in William Davis, save that on this occasion she is making explicit that the free-standing assessment of sustainability being conducted outwith paragraph 14 of the NPPF should be undertaken "at an appropriate stage". It follows that Lang J and I remain not *ad idem* on this point.

38. Having established the correct legal parameters, I turn now to address the Inspector's decision letter in the instant case.

39. In my judgment, DL20 is clearly correct, neatly and appositely characterising the approach mandated by paragraph 14 of the NPPF. By parity of reasoning, the final sentence of DL19 is correct, because the reference to "an overall assessment" is to one carried out according to the algorithm prescribed in paragraph 14, and not somehow extraneous to it.

40. I entirely reject Mr Hunter's submission that the use of the verb "must" in DL40 betrays an erroneous approach. All that the Inspector is saying is that an application of the presumption in paragraph 14 of the NPPF to the planning judgments he has made on the three dimensions leads inexorably to the conclusion that this is sustainable development. This was because the adverse impacts of the proposed development would not, in his view, significantly and demonstrably outweigh the benefits.

41. Moreover, it is clear from the Inspector's assessment of the weight to be given to each of the three dimensions that he was in fact of the view that the adverse impacts would not be significantly harmful: see DL29-32 and the first sentence of paragraph 40. It follows, in my judgment, that even if the assessment of the sustainability of the proposal should be carried out independently from paragraph 14 of the NPPF, and the tilted balance contained within it, the preponderance of planning considerations favoured this development. Mr Hunter did not explain by what rules and principles the balancing exercise should be performed if paragraph 14 were excluded from account, but it seems to me that he could not do better than a simple balance of probabilities approach, with the onus on the developer to discharge the burden. Ultimately, I think, Mr Hunter accepted this. On the Inspector's express findings, the Interested Party would have been successful even on that approach, applying either the test in Tesco Stores or the perhaps slightly narrower test in Simplex G.E. (Holdings) v SSE [1989] P&CR 306.

42. This application under section 288 of the Town and Country Planning Act 1990 must be refused.