[2019] EWHC 556 (Admin)

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

Case No: CO/1830/2018

Courtroom No. 2

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

2:05pm – 2:54pm
Wednesday, 23rd January 2019

Before:
THE HONOURABLE MRS JUSTICE ANDREWS DBE

B E T W E E N:

BASSETLAW DISTRICT COUNCIL

and

SECRETARY OF STATE FOR HOUSING

MR F HUMPHREYS appeared on behalf of the Claimant
MR K GARVEY appeared on behalf of the Defendant

JUDGMENT
(Approved)

MRS JUSTICE ANDREWS:

1. This is a statutory challenge under Section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"), to a decision dated 27 March 2018 of a Planning Inspector appointed by the Secretary of State allowing an appeal by the Interested Parties under Section 78 of the Act against the refusal by the claimant, the local planning authority ("the LPA" or "the Council") of outline planning permission for a residential development of a plot of land at 48 Town Street, Sutton-cum-Lound, DN22 8PT. The Planning Inspector also made an award of costs in favour of the successful appellants. He found that the LPA had adopted an unreasonable approach. That decision is also challenged. It was common ground before me that in the particular circumstances of this case, the fate of the costs appeal necessarily depends on the outcome of the substantive appeal.

2. In the decision that was the subject of the appeal to the Inspector under Section 78, which was made on 3 August 2017, the LPA set out two reasons for refusing outline planning permission for the development. The first reason was that the development would be contrary to policies CS1, DM3 and DM4 of the Bassetlaw Local Development Framework. The second was that the proposed development would be contrary to the 'priorities and objectives' of the emerging Sutton-cum-Lound neighbourhood plan ("the Plan"); in particular, Objective 1, as the site was not one of those selected and allocated for development within policies 3, 4 and 5 of the Plan.

3. At paragraph 10 of the Plan, seven so-called "community objectives" are identified as '*reflecting the area of focus for this neighbourhood plan*'. Objective 1 is to '*bring forward carefully selected housing sites to meet the future needs of the community'*.

4. Paragraph 11 of the Plan addresses the difficulty of getting the balance right between maintaining the distinctive character of the area and allowing modest growth that enables the community to thrive. The paragraph goes on to state that the neighbourhood plan will ensure that the right balance is achieved up to 2031, inter alia, by the careful selection of sites with a lot of community consultation. It refers to the fact that residents of the village have considered carefully the location and approximate amount of development that would be appropriate, given the rural setting and scale of the village. It refers to the parish council working proactively with developers on the three sites that were allocated for development.

5. A little later in the Plan, a number of policies are set out. Policy 1 relates to the design of residential development, and the types of design that will be seen to demonstrate the distinctiveness and quality of the village and contribute to its historic rural character. Policy 2 relates to the mix of housing types that will be required. Inter alia, planning applications are required to deliver a mix that reflects the demonstrable need of smaller market dwellings.

6. In addition, there is reference to three specific sites that have been selected as being appropriate sites for development. Prior to the adoption of the Plan, those sites were outside the development boundary. However, as Mr Humphreys on behalf of the LPA pointed out, paragraph 97 of the Plan and the map which is attached to it indicated that the development boundary was going to be revised by the Plan to include those three sites, so that they now fall within the boundary rather than outside it as they previously did.

7. Under Policy 2, reference is made to the fact that the community considered 20 different sites

at a consultation session in March 2016. The sites that were included in the site selection consultation are set out in an appendix, Appendix C, which shows the feedback in relation to each of those sites, which are marked in different colours. That appendix is a document to which reference was made by the parties, or at least by the interested parties, before the Planning Inspector on the s.78 appeal. For present purposes, suffice it to say that the site which is the subject of this planning dispute was identified in the appendix as being a site which may be supported for development based on the findings from the site assessment report, subject to overcoming conditions relating to access and concerns about whether it would detract from the current character of the locality, without other sites being developed first. There are also references to the build-up of traffic. It was not one of the sites that was indicated in red on appendix C which meant that it was not going to be supported at all for future development.

8. Finally on the subject of the Plan, it is worth pointing out that Policy 6 relates to infill and redevelopment in the village, and explains the circumstances in which residential development on infill and redevelopment sites will be supported. Policy 7 is about enhancing facilities in the village, but on its face that appears to be directed towards matters other than domestic housing, and is not directly relevant to the present dispute.

9. The Neighbourhood Plan came into force between the date of the original decision and the appeal to the Planning Inspector. At earlier stages of the dispute between the interested parties and the LPA, there was quite a lot of debate about how much weight could or should be attached to it, but by the time the Inspector came to deal with the appeal that dispute had effectively become academic. The reasons for this will become apparent when I address his decision later in this judgment.

10. The LPA contends firstly, that the Inspector failed in his decision to address the second reason for refusal at all. Mr Humphreys contends on behalf of the LPA that this was a clear error of law and that in itself should suffice to enable the appeal to succeed and the decision to be set aside. Alternatively, he contends that, if and insofar as the inspector did address the second ground, he erred in interpreting the Neighbourhood Plan as allowing *any* residential development outside the (re-defined) development boundary. On its proper interpretation, Mr Humphreys submitted that the only residential development that was permitted specifically was development on the three favoured sites. That development would not be outside the development boundary because the boundary was redrawn. The only other possibility was that Policy 6 might allow for infill or redevelopment outside the boundary, although Mr Humphreys contended that on its proper interpretation that, too, related only to sites within the development boundary.

11. The upshot of that submission, if it were correct as a matter of interpretation of the Plan, would be that the Plan would conflict with the Local Development Framework because even policy CS1 envisages that in certain circumscribed circumstances, a development outside the development boundary would be permissible. It would certainly add nothing to policy CS1 in terms of substance.

12. There was no dispute between the parties as to the legal principles that apply to challenges brought under Section 288. They are usefully summarised by Mr Justice Lindblom, as he then was, in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government and Hinckley and Bosworth Borough Council* [2014] EWHC 754 (Admin)

at [19]. There is no reason to repeat them in this judgment.

13. As the Courts have stressed time and again, excessive legalism has no place in the planning system. Whilst the meaning of a policy is a matter of interpretation for the Court, the Court must exercise caution to avoid treating it like a statute or a contract. The Court's task in such cases is simply to construe the words of the policy, reading them sensibly in their context. It should resist overcomplication of concepts that are basically simple.

14. In determining whether or not a proposed development is in conflict with a relevant development plan, be it a national one, a local development plan or a neighbourhood plan, the correct focus must be on the plan's detailed policies for the development and use of land in the area. In *R (Cherkley Campaign Limited) v Mole Valley District Council* [2014] EWCA Civ 567, Lord Justice Richards, who delivered the leading judgment in the Court of Appeal, drew a distinction between the policies themselves and explanatory text. He said that he did not think that a development that accorded with the policies in the local plan, could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text, even if the supporting text indicates how the policies will be implemented.

15. In a more recent decision, *Chichester District Council v Secretary of State for Housing, Communities and Local Government & Anor* [2018] EWHC 2386 (Admin), the relevant plan had identified an underlying aim of two of the policies, as being to avoid development to the north of a particular level crossing in order to avoid traffic congestion. That aim was not explicitly part of either of the two policies. This Court held that the planning inspector did not err in law in drawing a distinction between the aim, on the one hand, and the policies themselves. The judge found that because the limitation in terms of the location of the development was not expressed in policies 1 and 2, it could not properly be said that any proposed development outside the identified area to the south of the level crossing or indeed anywhere outside the settlement boundary and specified areas, conflicted with the neighbourhood plan.

16. Therefore, whilst the stated aims or objectives in a neighbourhood plan may cast light on how the policies in that plan are to be interpreted, they are no substitute for the policies themselves, and the fact that a proposed development is assessed as being contrary to the objectives stated in the neighbourhood plan, does not mean that it conflicts with the plan itself. In the present case, that difference is of some importance.

The Submissions made to the Inspector

17. Both parties to the Section 78 appeal identified in their written submissions to the Inspector, that there were two reasons for refusal. The Interested Parties addressed reason 1 in paragraph 4.1 of their case and reason 2 in paragraph 4.2. In relation to reason 1, they referred to the fact that the NPA did not have a five-year housing land supply, and contended that by virtue of paragraph 49 of the NPPF, the relevant policies for the supply of housing were not considered up to date. They then referred to the so-called "tilted balance" brought about by paragraph 14 of the NPPF, and submitted that the LPA had failed to demonstrate that the adverse impacts of the development it had identified, outweighed the benefits.

18. As far as reason 2 was concerned, the Interested Parties did not draw the distinction between

objectives and policies to which I have already referred. They argued that the proposal was not against the aims and objectives of the Neighbourhood Plan. They submitted that objective 1 had identified three sites that had gained more support from the community than others for development, but the Plan did not preclude development from taking place on other sites. They referred to the table at appendix C of the Plan as indicating that this interpretation was correct, because it envisaged that some of the other sites, at least, including the one with which this case is concerned, might be supported for development based on findings from the site assessment report.

19. In its response on reason 1, the LPA referred to the density of the housing, which it said could be up to 45 new dwellings, a number which it suggested would significantly alter the make up of a village of 300 houses, on a site which was not within the development boundary, and was not one of what it described as the "preferred sites" in the draft Neighbourhood Plan. The LPA referred to policies CS1, DM3 and DM4. It submitted that a development of this scale, would be at odds with and detract from the rural character of the village, and concluded:

'*Whilst the LPA is unable to demonstrate a deliverable five-year land supply for housing, it has not been demonstrated that the benefits of additional housing would outweigh the significant adverse impacts outlined above, as required by paragraph 14 of the NPPF'.*

20. In its response in relation to reason 2, the LPA concentrated on the amount of weight that was to be given to the Neighbourhood Plan. It submitted that because of the stage in the process towards adoption the Plan had then reached, having been through several rounds of public consultation and independent examination, it was to be given significant weight. The submissions made passing reference to policy intentions and then concluded in paragraph 36: '*The neighbourhood plan carries significant weight. The site is located outside of the defined Sutton-cum-Lound development boundary, and as such it is at odds with policy CS1 and therefore, would be due to its scale would be at odds with policy DM4 and therefore, detract from the rural character of the village'.*

It then reiterated what had previously been said in relation to reason 1, about the benefits not outweighing the significant adverse impacts.

21. On the face of it, therefore, the LPA's response to reason 2, apart from the question of the weight to be attached to the Neighbourhood Plan, appeared to be exactly the same as its response to reason 1, as the two seem to be tied in together. At no point in its submissions did the LPA submit to the Inspector that the policies in the neighbourhood plan were to allow no development at all outside the three favoured sites; or that the policies were to allow no development at all outside the three favoured sites or in accordance with policy 6, let alone that the Neighbourhood Plan effectively vetoed any development whatsoever outside the development boundary. Indeed, no mention was made of policy 6.

The Inspector's decision

22. The Inspector identified early in his decision that the Neighbourhood Plan had now been made and formed part of the Local Development Plan. The other significant matter to which he referred, which had a material bearing on the approach that he had to take to the appeal, was the Written Ministerial Statement ("WMS") of 12 December 2016, which advises that a neighbourhood plan should not be considered to be out of date even in the absence of a

demonstrable five-year housing land supply under paragraph 49 of the NPPF, if: (i) the local planning authority can demonstrate a three-year housing land supply and (ii) both the WMS and the neighbourhood plan are less than two years old.

23. That being the situation in the present case, the Inspector quite correctly came to the conclusion that he should not consider the Neighbourhood Plan out of date, and that it should carry significant weight notwithstanding the LPA's inability to demonstrate a five-year housing land supply. It is for that reason that I described the issue of the weight to be ascribed to the Neighbourhood Plan as having become academic by the time of the Planning Inspector's decision.

24. The Inspector defined the main issue for his determination as '*the effect of the proposed development on the character and appearance of Sutton-cum-Lound and the surrounding area*'. Under the heading "character and appearance" in his reasoning, he then referred in some detail to policy DM4 in the Local Development Framework core strategy, but he also referred to policies 1, 6 and 7 of the Neighbourhood Plan. He described all of these as seeking to ensure that developments were in keeping with and appropriate to the character of the village, and that they complemented and enhanced the character of the area where they would be located.

25. The Inspector made findings as to the appearance of the village and he described its physical characteristics. He explained whereabouts the appeal site was, relative to the buildings within the village itself. He described it as being between the arms of a horseshoe, and to the west of some dwellings in Portland Place and on Town Street, with an open field to the East. As a matter of planning judgment, he came to the conclusion that the housing was an eclectic mix with no predominant style.

26. At paragraph 9 he addressed squarely the essence of reason 1. He said that the council's decision notice states that the form, size and scale of the proposal would be at odds with and detract from the rural character of the village. He concluded that the character of the village was suburban rather than rural, and therefore he was not prepared to accept that the village itself was of a rural character, although he said that the administrative district as a whole could be described as rural.

27. He then referred to policy CS1 of the local plan. He stated that the appeal site consisted of approximately 1.4 hectares of previously undeveloped land, which is outside the existing development boundary, and he specifically referred to the fact that policy CS1 makes an exception for sites that meet affordable housing or community infrastructure exceptions criteria, or where it can be demonstrated that the proposal would address a shortfall in the council's five-year housing land supply or deliver the council's strategy for a specific settlement.

28. He then referred to an indicative target of a 20% increase in housing in the village which, the LPA had provided to the parish council as part of the evidence base for the Neighbourhood Plan, equating to approximately 70 new dwellings. He then made a point which was made by the Interested Parties in their appeal case, that effectively the lack of suitable land for development within the village meant that development beyond the boundary was inevitable, if that indicative target was to be met. He pointed out that the Plan allocates three sites for housing on the edge of the settlement area, but it does not specify the number of houses that

should be built on each site. He described those sites in some detail, and he then went on to refer to features of policies 6 and 7 of the Plan which provide that development proposals should meet and evidence local need, and not cause harm to the living conditions of the occupiers of neighbouring properties. He quite rightly pointed out that other criteria dealing with building lines and boundary treatments would be matters for determination at the detailed approval stage, this being a case where the application was for outline permission only.

29. Paragraph 14 of the decision is of importance. The Inspector said that whilst the proposed development is in outline only, with only the matter of access to be determined at this stage, the site is clearly large enough to accommodate a significant housing development that would make a substantial contribution to both the shortfall in the council's housing land supply and in the delivery of affordable housing. For those reasons, he concluded on what he described as "the first main issue", that the proposed development would be in accordance with policy DM4. He went on to say that, given the close proximity of Portland Place to the appeal site, it would also comply with Policies 1, 6 and 7 of the Neighbourhood Plan. It would contribute to meeting the identified need for housing in the village and in the wider council area, which would be in accordance with Policy 7. He considered that a housing development on the site would not cause unacceptable harm to the suburban character of the village, and that it would accord with policy CS1 with regard to housing supply, affordable housing and the indicative target for housing in the village.

30. On the face of it that is a fairly comprehensive grappling with reason 1. Essentially what the Inspector was saying there was that he disagreed with the pivotal finding by the LPA that the proposed development would be out of keeping with the character of the village, and that he considered that it would be in keeping with those Policies with which it was said to conflict.

31. The Inspector then turned to the planning obligations under Section 106, which is not material to this appeal. He referred to the fact that a number of interested parties had provided comments, and representations had been made on those comments by the parties to the appeal. He noted the majority of the objections that were made were in support of the council's position on the Neighbourhood Plan, and that concerns were also raised in relation to drainage, and the concerns in relation to character and appearance which have been mentioned above. He then referred to non-designated heritage assets and matters such as tree preservation orders and went on to deal with conditions.

32. Finally, in paragraphs 29 to 31 of the decision he dealt with the overall conclusions and the planning balance. As I have already mentioned, he referred to the Written Ministerial Statement and found that the Neighbourhood Plan should be considered to be in date and as carrying significant weight. However, he then said this:

"… *the benefit arising from the proposed development is substantial, and there is nothing in the evidence before me that would lead me to conclude that any adverse impacts would significantly and demonstrably outweigh that benefit, I have concluded that the proposal is in accord with the policies in the local plan and in the neighbourhood plan, and despite the proposed site being outside the settlement boundary, it would comply with the exception criteria of policy CS1. Given my conclusions on those matters, it is not necessary to consider the impact of paragraph 14 of the framework and the WMS."*

He therefore concluded that the appeal should succeed.

33. It is clear from the foregoing summary of the decision that at no point in the course of his discussion of the issues did the Planning Inspector make any express reference to reason 2. Nothing was said about the decision that was taken by the LPA that the proposed development would not be in keeping with the objectives of the plan, specifically Objective 1. However, Mr Garvey, on behalf of the Secretary of State, submitted that the Inspector had no obligation to address what was in effect a bad point. Given that the ground for refusal given under reason 2 was non-conformity with an aim or an objective, and that does not mean non-conformity with the Plan or with the Policies within it, the Inspector was not obliged to identify that as an issue with which he needed to deal. Whilst Mr Garvey acknowledged that it might have been preferable if the Planning Inspector had simply referred to the second ground if only to knock it down again as being a wholly irrelevant basis for refusing planning permission, he submitted that the failure on the face of the decision to deal with it in that way did not amount to a material error of law with which this Court could properly interfere.

34. He submitted, furthermore, that it could be inferred from the decision that the Inspector had sufficiently addressed reason 2 even though he did not do so expressly. There were references to the Neighbourhood Plan in the decision. The Inspector only needed to go into any consideration of that Plan in order to deal with the underlying thrust of the objection in reason 2. There was no point in his referring to the three sites or to what policies 6 and 7 said, if he was not trying to meet the point that had made by the Council.

35. Finally, Mr Garvey submitted that even if this was wrong and the Inspector failed to address reason 2, it mattered not, because reason 2 was not a valid objection to the grant of planning permission, and frankly, if this matter were to be sent back by the Court for reconsideration it is obvious that the Inspector would reach the inevitable conclusion that that was the case. Therefore, there would be no point in taking that course. In support of that submission Mr Garvey prayed in aid the case of *Simplex GE (Holdings) Limited v the Secretary of State* [1989] 57 PNCR 306.

36. Mr Humphreys submitted that matters were not quite so simple. He contended that reason 2, properly interpreted, had to be founded on an assumption that only developments within the three earmarked sites would be in accordance with the Policies in the Plan.

37. It is true that in their submissions to the Inspector relating to reason 2, the Interested Parties attempted to deal with the LPA's reasoning on the basis of an interpretation along those lines, because in those submissions they effectively elided the aims and objectives with the policy. However, this Court must consider a statutory appeal on the basis of the way that the matters in contention were identified to, and by, the Planning Inspector.

38. It is well-established that a planning inspector is not obliged to deal with every single argument that has been raised before him, and that he can redefine the issues, provided that he fairly deals with the contentious aspects of the underlying decision and gives adequate reasons so that the disappointed party is able to ascertain why they have lost. In the present case it seems to me that there could have been no misapprehension on the part of the unsuccessful LPA as to why the Inspector disagreed with their assessment of the non-conformity of the development with the applicable Plans, whether they be Local Development Framework or Neighbourhood Plan. On a very simplistic basis, the Inspector was saying that,

irrespective of whether it was put in terms of ground 1 or ground 2, the real objection that was being made to the grant of outline permission was that the development was not in keeping with the character of the local land.

39. The Neighbourhood Plan having been adopted, there is no doubt that the Inspector was obliged to consider it, and to look at the way in which the development outside the boundary did or did not fit in with the Policies within that Plan, but it was no part of anybody's argument before him, least of all the arguments addressed by the LPA, that that neighbourhood plan precluded developments outside of policies 3, 4 and 5 or the sites that were referred to therein, or that policy 6 had any bearing on anything he had to decide.

40. The Court must be careful in a statutory appeal such as this not to open the gates to a party to argue a point which occurs as an afterthought, and which did not in fact form part of the grounds in the appeal below or the grounds of the original decision. It seems to me that despite the eloquence with which the arguments were put forward by Mr Humphreys, it is very difficult to read reason 2 as being a finding that only sites that fell within policies 3, 4 and 5 would *ever* be permitted to be developed. What reason 2 says, is that the proposal is generally not in conformity with Objective 1 of the Plan, because the site does not fall within policies 3, 4 and 5. That begs the question of whether, and if so in what circumstances, sites falling outside those policies will be permitted to be developed.

41. It would have been preferable if the Inspector had dealt with reason 2 expressly, if only to explain why it is a bad one, but I agree with Mr Garvey's submissions that it plainly is a bad point. It would not be a valid reason for finding non-conformity with the neighbourhood plan to simply identify that this site was not one of the preferred sites earmarked for development in that plan. I am not sure, in fact, that reason 2 was a separate ground for refusal of permission anyway. Although it indicates that the proposed development site is not one of the preferred sites and that *in the absence of any other countervailing reasons,* that would be a ground for refusal, if one reads the decision as a whole, it seems to me that reason 1 is really the basic reason why the planning permission was refused, and reason 2 was merely an add-on, which did not add very much (if anything) to the mix. That is certainly the way that the LPA treated it in their own submissions to the Planning Inspector, because having addressed the question of how much weight should be attached to the Neighbourhood Plan, they then came back full circle to the aspects that were identified as conflicting with it in the original reason, reason 1. It is unfortunate that the Inspector did not specifically look at the point about objectives not being the same as the policies, but in substance when one looks at his decision, it is quite clear that he has reached a view that this development conforms with the policies in the Neighbourhood Plan. Indeed, that is what he says.

42. In my judgment, it is not open to the LPA to recharacterise reason 2 as a finding that the proposed development does not conform to the *Policies* in the Plan, when it says that it does not conform with the *objectives* in the Plan, and to then use that as a launchpad for running an entirely new argument about the scope of the Neighbourhood Plan, which was neither a justification for refusing planning permission in the first place, nor a matter that the Planning Inspector was asked to consider. It is too late to try and come up with a new justification for refusing planning permission for this development, and if the LPA expressed itself in an inelegant fashion the first time round, it only has itself to blame.

43. I am bound to say, however, having considered the argument *de bene esse*, that it seems to

me that the interpretation that Mr Humphreys wished to put upon the Neighbourhood Plan as restricting any development other than in those three specific sites (or possibly in accordance with policy 6) is too narrow. It seems to me that there is a lot of force in what was said by the interested parties, namely, that when one looks at appendix C in particular, it appears that the Neighbourhood Plan expressly envisaged that a development might take place on one of those sites outside the boundary, but intended that the three identified sites which were being brought within the development boundary were to be prioritised. That is why it was important for the Planning Inspector to consider the 3 and 5-year supply of housing and whether building on those three sites would be sufficient to meet the projected housing need, which he concluded it plainly would not.

CONCLUSION

44. Therefore, I have concluded that when the decision is considered as whole, the Planning Inspector has addressed all the objections that were reasonably raised, and the LPA's reasons for refusing planning permission, and that he has done so in sufficient detail and with sufficient reasoning to provide a decision which does not contain any material error of law. However, even if I am wrong about that, and there was on the face of it an error of law (in that he should have added a sentence in which he said that he considered that even if the proposed development was contrary to Objective 1, that would not be a good ground for refusing planning permission) the error is of minor significance. The error, if there was one, is not such as to justify the grant of relief on a s.288 statutory appeal, because the inevitable concomitant of sending the decision back would be that the Inspector would simply add that sentence to his decision, and that would achieve nothing except a second round of costs.

45. For those reasons, I dismiss this appeal. It follows that the parasitic appeal in relation to the costs award made below must also be dismissed.

End of Judgment

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This transcript has been approved by the judge.