Neutral Citation Number: [2022] EWHC 445 (Admin)

Case No: CO/1846/2021

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

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 4 March 2022

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Stratford on Avon District Council	**Claimant**
- and -	
The Secretary of State for Levelling Up, Housing and Communities	**Defendant**
- and –	
JP Dudfield	**Interested Party**

- -
- -

Jonathan Easton (instructed by **Legal Services, Stratford on Avon District Council**) for the **Claimant**
Ben Du Feu (instructed by **Government Legal Department**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 11 January 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ WORSTER

HHJ WORSTER :

Introduction

1. The Claimant is the local planning authority for the Stratford on Avon District. It brings this claim to quash the decision of the Defendant made by its Planning Inspector on 15 April 2021. The Claimant contends that the Inspector erred in his interpretation of its Local Plan and misinterpreted policy CS.15 (ground 1) and policy AS.10 (ground 2). The Defendant seeks to uphold the Inspector's interpretation of those policies, and in the alternative asks the Court to exercise its discretion under section 31(2A) of the Senior Courts Act 1981. The Interested Party has played no active part in the proceedings. References in this judgment to page numbers in square brackets are to the pages of the hearing bundle.

2. The factual background is relatively straightforward. On 16 October 2019 the Interested Party made an application for outline planning permission in relation to a site adjacent to Grafton Lodge, Binton Hill in Binton. Binton is a village in Warwickshire, and the site is in the open countryside for planning purposes. It is currently used by a business which provides storage and maintenance for motor racing vehicles, and it has buildings on it associated with that business. Some of the buildings are run down, and the occupiers have outgrown the site. The application was to demolish the existing buildings and erect 4 dwellings.

3. The Claimant refused that application on 15 May 2020 on the basis that it failed to comply with policies CS.15 and AS.10 of the Stratford on Avon District Council Core Strategy. The reason given was as follows [67]:

> *The application site is outside of any local service village and is considered to be in a countryside location. In accordance with CS.15, development in the countryside is restricted to small scale community led schemes which meet an identified need. This proposal is not such a scheme, and therefore is not in accordance with CS.15. Policy AS. 10 lists several forms of residential development which may be acceptable in countryside locations, however the application proposal is not one of the identified forms of acceptable development. Officers therefore consider that the future occupiers of the development would be wholly reliant on the private motor vehicle to access services and would be unacceptably remote from the support of a sustainable community. Approval of this development would undermine the intentions of the spatial strategy of balanced dispersal set out in the Core Strategy. As such, the proposal is not Sustainable Development and conflicts with policies AS. 10 and CS.15 of the Stratford on Avon District Core Strategy 2011-2031.*

4. The appeal was by written submissions. The Inspector visited the site on 23 March 2021 and made his decision on 15 April 2021. He allowed the appeal and granted outline planning permission for residential development for up to 4 dwellings subject to the conditions set out in the schedule to the decision letter.

5. The Claimant seeks an order quashing that decision. I gathered from Mr Easton's submissions that its concern was not simply the fact that permission had been granted in relation to this specific application (although it stands by the correctness of its decision to refuse planning permission) but that the Inspector had misinterpreted its Core Strategy in a way which would have wider consequences. The Claimant was at pains to emphasise that this was not a challenge to the Inspector's planning judgment, but to his interpretation of the planning policy, which was a matter of law.

The "Core Strategy"

6. This is the Local Plan for the Stratford on Avon District prepared under The Town and Country Planning (Local Planning) (England) Regulations 2012. It covers the period from 2011 to 2031 and was adopted on 11 July 2016. The document begins with "Context" at Section 1 and at Section 1.4 [24] sets out the "Vision and Strategic Objectives". Under the heading "Vision" the document refers to the way in which future development needs will be met and to the reinforcement of the existing settlement pattern supplemented by development on brownfield sites in sustainable locations. I was referred to the passage which follows:

> *Small-scale housing development in villages not identified in the settlement hierarchy will have been provided to meet local needs and will reflect their rural character. …*
>
> *Overall, the strategy will have strengthened town and village communities whilst maintaining their characteristics, protected the countryside from inappropriate development and activities and ensured a safe high quality of life for residents throughout the District.*

There then follows a summary of the vision for the towns and villages identified in the plan.

7. The next heading is "Strategic Objectives". There are sixteen. They are prefaced by the following statement at 1.4.3 [28]:

> *It is critical to the success of the Core Strategy that an appropriate balance is secured between providing development which meets the needs of the District and protecting the character and qualities of Stratford-on-Avon via the realisation of these objectives.*

Mr Easton drew attention to the first of those objectives:

> *By 2031... (1) The rural character of the District will have been maintained and enhanced. The Green Belt and countryside of the District will have been protected from inappropriate development.*

8. Mr Du Feu for the Defendant referred me to the Contents page for a snapshot of the structure of the plan [22]:

Section 2 - Sustainability Framework. This includes Policy CS.1 "Sustainable Development", the wording of which reflects the presumption in favour of sustainable development found in the National Planning Policy Framework ("NPPF") current in 2016;

Section 3 - District Resources, which includes Policies CS.2-9;

Section 4 - District Designations, which includes Policies CS.10-14;

Section 5 - Development Strategy, which includes Policies CS.15-24;

Section 6 - Area Strategies which includes Policies AS.1-11, and some other policies particular to certain towns); and

Section 7 - Infrastructure.

9. Policy CS.15 [32] is entitled "Distribution of Development". All Strategic Objectives are said to be relevant to this Policy. It begins with the following:

> *The distribution of development in Stratford-on-Avon District during the plan period 2011 - 2031 will be based on a pattern of balanced dispersal, in accordance with the distinctive character and function of the wide range of sustainable locations across the District:*

10. This balanced strategy relates to all types of development and not just to residential development. That approach is consistent with the NPPF. Paragraph 5.1.1 of the Explanation which follows Policy CS.15 [34] says this:

> *The National Planning Policy Framework (NPPF) expects development to be focussed in the most sustainable locations in terms of availability of shops, facilities and services, as well as access by modes of transport other than the private car. But it has also placed emphasis on providing some development in rural areas to meet housing needs and to support the vitality of village communities.*

11. There then follows a hierarchy of locations for development, from A to G:

    A. Main Town (Stratford-upon-Avon);

    B. Main Rural Centres, of which there are eight;

    C. New Settlements at Gaydon/Lighthorne Heath and at Long Marston Airfield;

    D. Local Service Villages. These fall into four categories, and are identified at paragraph 5.1.10 of the Explanation which follows [36];

    E. Large Rural Brownfield sites;

    F. All other Settlements; and

    G. Local Needs Schemes.

Generally these are ranked from the most sustainable location to the least. Binton is a small village and does not fall within any of the Local Service Villages in D.

12. Residential development in a village such as Binton might potentially come within F or G.

> *F. All other settlements*
>
> *Development is restricted to small-scale community-led schemes which meet a need identified by the local community.*
>
> *G. Local Needs Schemes*
>
> *Within and adjacent to settlements, development may include small-scale community- led schemes brought forward to meet a need identified by that community. Dwellings provided through such schemes will contribute to the overall housing requirement for the District.*

It is not suggested that the proposed development in this case qualifies under either head. This was not a community-led scheme, and it is not within or adjacent to a settlement. Policy CS 15 then sets out six "Requirements" for all development at existing settlements.

13. There is no express provision in Policy CS.15 for residential development in open countryside.

14. Section 6 of the plan sets out the "Area Strategies". Policies AS.1 to AS.9 relate to particular towns or villages.

> AS.1 (and SUA 1-4) relates to Stratford on Avon.
>
> AS.2-9 are policies which refer to the eight "Main Rural Centres" identified at B in the hierarchy of settlements under CS.15.
>
> Policies GLH and LMA relate the New Settlements identified at C in that hierarchy of settlements.
>
> AS.11 refers to Large Rural Brownfield Sites.
>
> Redditch has it own Area Strategy

This leaves policy AS.10. The title is "Countryside and Villages" [39]. There is one Strategic Objective, and that is number 1:

> *The rural character of the District will have been maintained and enhanced. The Green Belt and countryside of the District will have been protected from inappropriate development.*

15. The application of the policy is dealt with in the first paragraph:

> *This policy applies to all parts of the District apart from those which lie within the Built-Up Areas Boundaries defined for Stratford-upon-Avon and the Main Rural Centres, the area covered by Proposal GLH, the area covered by Proposal LMA and land covered by Policy AS. 11 Large Rural Brownfield Sites.*

In other words, it does not cover the locations for development identified in the hierarchy at A, B, C or E. In terms of the settlement hierarchy identified in CS.15, that leaves D (the local service villages), F (all other settlements) and G (local needs schemes). But the scope of the policy is not framed in terms of its application to D, F and G. It is said to apply to "*all parts of the District apart from …*" A, B,C and E. On the face of it "*all parts of the District*" includes the open countryside. That interpretation is consistent with the title of the Policy "Countryside and Villages" and with the Strategic Objective. It is also consistent with the terms of the next paragraph of the policy:

> *In order to help maintain the vitality of rural communities and a strong rural economy, provision will be made for a wide range of activities and development in rural parts of the District.*

That is of relevance to a consideration of the question of whether residential development within the open countryside might be in accordance with the development plan.

16. The next paragraph of the policy says this:

> *All proposals will be thoroughly assessed against the principles of sustainable development, including the need to:*
>
> - *minimise impact on the character of the local landscape, communities and environmental features;*
> - *minimise impact on the occupiers and users of existing properties in the area;*
> - *avoid a level of increase in traffic on rural roads that would be harmful to the local area;*
> - *make provision for sustainable forms of transport wherever appropriate and justified;*
> - *prioritise the re-use of brownfield land and existing buildings; and*
> - *seek to avoid the loss of large areas of higher quality agricultural land.*

17. This next part of the policy begins with the following words:

> *The following forms of development and uses in the countryside are acceptable in principle:*

The policy then sets out twenty-two forms of development and uses under four sub-headings which are acceptable in principle. The sub-headings are "Community"; "Residential"; "Business; and "Tourism and Leisure". The first "form of development or use" is (a), which comes under the subheading "Community":

> *(a) Small-scale schemes for housing, employment or community facilities to meet a need identified by a local community in a Parish Plan, Neighbourhood Plan or other form of local evidence, on land within or adjacent to a village.*

Sub-paragraphs (b)-(j) come under the subheading of "Residential". These cover a wide range of possible developments. The first is (b):

> *(b) small-scale housing schemes, including the redevelopment of buildings, within the Built-Up Area Boundary of a Local Service Village (where defined), or otherwise within the physical confines, in accordance with Policy CS.15 Distribution of Development and Policy CS.16 Housing Development.*

Pausing there, it is to be noted that this part of policy AS.10 refers expressly to CS.15 and CS 16, although it is the only such reference.

18. A number of the forms of development or use under the sub-heading "Residential" refer expressly to development in the open countryside. Sub-paragraphs (d) and (e) refer to the conversion of buildings in the open countryside, sub-paragraph (i) refers to a dwelling for an agricultural worker in the countryside, and sub-paragraph (j) to:

> *A new single dwelling in open countryside which is of exceptional quality and design and makes a positive contribution to the character of the local area.*

19. The list is framed in relatively specific terms, and identifies particular situations where a case can be made for development. I have already referred to conversions, but the list also includes replacement dwellings, the redevelopment of bad neighbour sites, and small scale mobile home or park home sites. It is not suggested that the application made in this case falls within any of these forms of development, but the nature and terms of these provisions is of relevance to the interpretation of the policy. The key question for the purposes of the interpretation of AS.10 is whether or not this is a closed list. If it is a closed list then it may be argued that a proposal which does not fall within it is not acceptable in principle, and consequently is outside the terms of policy AS.10.

20. After sub-paragraphs (s)-(v) which deal with Tourism and Leisure, the policy provides as follows:

> *Tourism and leisure-related schemes will also be assessed against the provisions of Policy CS-24.*
>
> *All other types of development of activity in the countryside, unless covered by a specific policy in the Core Strategy, will need to be fully justified, offer significant benefits to the local area and not be contrary to the overall development strategy for the District.*
>
> *For proposals relating to sites within the Green-Belt or the Cotswolds Area of Outstanding Natural Beauty, the specific provisions of Policy CS.10 and Policy CS.11 respectively will be taken fully into account.*

[my emphasis]

The penultimate paragraph of policy AS.10 (the section which I have underlined in the quoted passage above) was referred to in argument variously as a "tailpiece" or a "residual category", and is of particular relevance to the argument on Ground 2.

21. An "Explanation" follows. Paragraph 6.12.14 says this:

> *It is not possible to indicate how every potential form of development proposal that might come forward in the rural parts of the District will be treated. Provision is made in the policy for the merits of other forms of development and activity that are not specifically identified to be assessed. However, the Council will apply a strong level of restriction on development in the countryside in order to protect it for the sake of its intrinsic value and to ensure that natural assets and resources are preserved.*

The Decision Letter

22. At this stage I refer to those parts of the decision letter which relate to the issue of interpretation. I return below to those parts relevant to the argument as to discretion. Having identified the main issue, the Inspector set out his reasons [51].

> *6. Policy CS.15 of the Stratford-on-Avon Core Strategy outlines the Council's strategy for the distribution of development in the District. The appeal site falls outside of the settlement hierarchy and lies beyond the built-up area boundary of a settlement in open countryside.*
>
> *7. I acknowledge that the proposed development would not be a small-scale community led scheme. However, the policy makes reference to schemes within Stratford-upon-Avon, Main Rural Centres, Local Service Villages or other villages or hamlets rather than proposals that sit within open countryside. As such, I find that with specific regard to this appeal I give the policy negligible weight in coming to my decision.*
>
> *8. With regard to developments outside of built-up areas boundaries Policy AS. 10 states that in order to maintain the vitality of rural communities and a strong rural economy, provision will be made for a wide range of activities and development in rural parts of the District.*
>
> *9. The Council contend that as the proposed development does not fall within one of the residential exceptions listed in parts (b) - (j) of Policy AS. 10 it is not acceptable in principle. However, there is no evidence before me to indicate this is a closed list. In other words, the policy does not state that these are the only circumstances where such development will be permitted. It is apparent to me from the wording of the policy and its 'explanation' including paragraph 6.12.14 that the policy allows a more flexible approach to rural development including new housing. The policy states that proposals will be assessed against the principles of sustainable development.*

23. The Inspector then proceeds to consider a series of factual issues at paragraphs 10-17 of the Decision Letter, and sets out his conclusions at 18-19:

> *18. Taking the above into account there would be significant benefits resulting from the proposed development including the provision of housing on previously*

> *developed land, the relocation of a business to more suitable premises and an enhancement of the site. I find that the economic, social and environmental benefits of the proposal would overcome the perceived locational disadvantages of the appeal site. It would make a positive contribution to the vitality of Binton and the surrounding area as a rural community.*
>
> *19. I conclude that the proposed development would accord with Policy AS. 10 of the CS which, amongst other things, seeks to help maintain the vitality of rural communities through the provision of a wide range of development that minimise the impact on the character of the local landscape, communities and environmental features; minimise the impact on the occupiers and users of existing properties in the area; avoid increased levels of traffic, prioritise the re-use of brownfield land and avoid the loss of higher quality agricultural land.*

24. The essence of ground 1 is that the Inspector erred in law when in paragraph 7 he gave negligible weight to Policy CS.15 because it did not refer to proposals in the open countryside. On a proper interpretation of the policy he should have concluded that the proposal conflicted with this policy and was not in accordance with the development plan. The consequence of his error was that he did not apply section 38(6) of the Planning and Compulsory Purchase Act 2004 and ask the right question. In those circumstances the decision should be quashed.

25. The essence of ground 2 was that the Inspector erred in law when in paragraph 9 he decided that the list of what was acceptable in principle at AS.10(a)-(j) was not a closed list, and went on to consider the application under the "tailpiece" or "residual category" assessed against the principles of sustainable development. Once again he should not have concluded that the proposal accorded with the policy, and was in error in not applying the presumption in favour of the development plan. Alternatively, if the residual category applied, he failed to assess whether the proposed development was contrary to the overall strategy for the District.

The relevant law

26. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provide as follows:

> *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.*

The parties agree that if the proposal was in conflict with the development plan, the Inspector's decision is flawed and liable to be quashed. The Defendant submits that in those circumstances the Inspector's findings allow me to conclude that it is highly likely that the Inspector would have found that material considerations outweighed any conflict with the development plan, and to exercise my discretion under section 31(2A) of the Senior Courts Act 1981. The principal issue however is whether the Inspector's approach to the development plan was correct.

27. I begin with the seven familiar principles set out by Lindblom J (as he then was) in *Bloor Homes East Midlands v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at [19]. The challenge to the Inspector's decision in this case is not directed at the coherence of his expression, or to matters of fact or planning judgment, and so it is not necessary to refer to all of the principles in this judgment. It is always important to remember the first principle: the decisions of planning inspectors are to be construed in a reasonably flexible way; but it is principles (4) and (5) which are of particular relevance:

> *(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council … at paragraphs 17 to 22).*
>
> *(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80, at p.83E-H).*

28. There is no issue between the parties as to the status of the development plan, the approach to its interpretation, or as to the consequences of failing to comprehend the relevant policies. The approach to those matters are summarised in the following passages from the judgment of Lindblom LJ in *Gladman Developments Ltd v Canterbury City Council* [2019] EWCA Civ 669:

> *[21] The correct approach to determining an application for planning permission has been considered several times at the highest level, and this court has amplified the principles involved. Section 38(6) of the 2004 Act requires the determination to be made "in accordance with the [development] plan unless material considerations indicate otherwise". The development plan thus has statutory primacy, and a statutory presumption in its favour – which government policy in the NPPF does not. Under the statutory scheme, the policies of the plan operate to ensure consistency in decision-making. If the section 38(6) duty is to be performed properly, the decision-maker must identify and understand the relevant policies, and must establish whether or not the proposal accords with the plan, read as a whole. A failure to comprehend the relevant policies is liable to be fatal to the decision …*

> *[22] If the relevant policies of the plan have been properly understood in the making of the decision, the application of those policies is a matter for the decision-maker, whose reasonable exercise of planning judgment on the relevant considerations the court will not disturb (see the speech of Lord Hoffmann in Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 WLR at p.780H). The interpretation of development plan policy, however, is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to discern from the language used in formulating the plan the sensible meaning of the policies in question, in their full context, and thus their true effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text. The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making, in the public interest …*

29. There is, however, some difference between Mr Easton and Mr Du Feu as to the Court's approach to assessing when an application is to be considered as being in conflict with the development plan. In the event that may only be a difference of emphasis, but it is an important part of the argument. The issue arose in *Gladman* where the Court of Appeal upheld the decision of Dove J at first instance, both as to his approach and his construction of the relevant development plan. Lord Justice Lindblom gave the leading judgment in Gladman, and considered the matter again in his judgment in *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640. Mr Easton relied upon the approach of Dove J in *Gladman* to argue that the proposed development in this case was in conflict with the development plan.

30. Dove J's understanding of the relevant policies in *Gladman* was that they identified where housing development would be acceptable and, by necessary implication, where it would not; see Lindblom LJ @ [24] where he sets out this passage from Mr Justice Dove's judgment:

> *[33] . … I am satisfied that the Inspector was in error when he interpreted policies H1 and H9 as being silent in relation to housing development which was not on previously developed land within urban areas and therefore concluded that there was no conflict with either of those policies in principle. Taking the language of the policy itself, and without reference to any of the explanatory text, it is clear that the purpose of the policy is to identify, for the purposes of housing development, the types of location where the plan required housing development to take place. In essence, the locations which are identified for the permission of residential development are those allocated in the plan, or non-identified sites on previously developed land within urban areas (if other criteria unrelated to location are met). It follows that if housing development is proposed in a location which does not accord with the types of locations specified in the policy, that*

proposal will be inconsistent with and unsupported by the policy and therefore not in accordance with it and in conflict with it. The interpretation is simple: policies H1 and H9 identify the types of location where housing development will be permitted; if housing development is proposed in other types of location it is not supported by the policy and therefore in conflict with it and, to the extent of that policy (as part of the exercise of assessing compliance with the development plan taken as a whole), not in accordance with the development plan. Whether it is described as a "negative corollary", or a necessary inference, or an obvious implication, what matters is that it is clear that the purpose of the policy is to identify those types of location where housing development is to be permitted and if an application is made outside one of those identified types of location then that is clearly not in accordance with the policy.

31. The Council's case in *Gladman* was that policies H1 and H9 belonged to a comprehensive local plan strategy for housing development in the city council's area. It did not merely include specific allocations of land for such development in the local plan period, but established a "clear and complete hierarchy of locations in which proposals for new housing would or might be acceptable and consistent with the plan". One feature of the language used was that the individual policies were framed in permissive terms. But the Council argued that taken together they formed a "suite of policies" which left out none of the locations where development might be expected to receive planning permission, subject to relevant criteria being met. Having reviewed the terms of these policies, Lord Justice Lindblom concluded that the Council's case was basically right, and that Dove J's construction was correct; see at [31]-[35]. He says this at [34]-[35]:

[34] There was no implication in Chapter 2 of the local plan that housing development outside the identified hierarchy of locations in the saved policies would or might be acceptable. A housing proposal with no explicit support in any of those policies was not to be treated as favourably as a proposal within the hierarchy – or even more so. On the contrary, I think the judge was right to conclude that the natural and necessary inference here was that housing development of a kind or in a location other than those explicitly supported under the saved policies, including Policy H1 and Policy H9, could not be regarded as being in accordance with the development plan. Indeed, it would be in conflict with the plan, because it would be contrary to the comprehensive strategy for housing development embodied in the surviving policies. This, in my view, is plain from the policies in their own terms, read together, and without recourse to their objectives and the explanation given for them in their supporting text. The simple point here is that if it had been the intention of the city council that housing development outside the locations identified in Policy H1 would generally be acceptable, a policy such as Policy H9 would not have been necessary, and would not have been cast as it was.

> *[35] The policies themselves were perfectly clear. The judge's conclusion to that effect was right. As he recognized, the fact that the polices were expressed in permissive terms does not exclude the obvious corollary that proposals without their explicit support were not in accordance with them or with the plan's comprehensive strategy for housing development. As he also recognized, however, this necessary inference is only reinforced by the policy objectives and the supporting text, which emphasized the city council's intention to steer housing development to the existing urban areas and previously developed land and away from undeveloped sites in the countryside. The inference, therefore, is not neutral or positive towards development without specific support in the policies, but negative.*

32. Mr Du Feu would also refer to *Gladman* at [36]. He emphasises that there is no general principle of wide application beyond cases which are truly analogous. The key feature in *Gladman* was that:

> *... the relevant policies made a unified strategy, which governed proposals for housing development in the area covered by the plan and implicitly excluded proposals other than those with express support.*

33. He also relies upon the decision in *Chichester*, where Lord Justice Lindblom says this at [32]:

> *Reading the analysis in one case across into another can be mistaken. No two plans are the same. The policies of each are unique, crafted for the area or neighbourhood to which they relate, not to fit some wider pattern or prescription.*

Later in his judgment, Lord Justice Lindblom refers back to *Gladman* and to his own decision in *Crane v Secretary of State for Communities and Local Development* [2015] EWHC 425 (Admin) and summarises the position in this way:

> *[47] What those two cases show is that there will sometimes be circumstances in which a proposal for housing development, though it neither complies with nor offends the terms of any particular policy of the development plan, is nevertheless in conflict with the plan because it is manifestly incompatible with the relevant strategy in it. This may be a matter of "natural and necessary inference" from the relevant policies of the plan, read sensibly and as a whole. The effect of those policies may be – I stress "may be" – that a proposal they do not explicitly support is also, inevitably, contrary to them. Whether this is so will always depend on the particular context, and, critically, the wording of the relevant policies, their objectives, and their supporting text.*

Ground 1

34. The Inspector read Policy CS.15 on the basis that it was not intended to apply to *"... development within open countryside ...* " or *"... outside of built-up areas …*" at all; see DL/7 and DL/ 8 respectively. Consequently he gives the policy negligible weight. Mr Easton submits that this is an error. Policy CS.15 is a strategic policy within the development plan by which development is distributed in accordance with an overall

spatial strategy. It identifies the locations where development will be acceptable in principle and sets out the criteria which proposals have to satisfy if they are to be supported by the policy. This proposal fell outside the parameters of policy CS.15 and so was outside the plan. In those circumstances section 38(6) applies.

35. The argument may be summarised in this way:

    (1) Whilst it is stating the obvious, the purpose of this plan is to provide a plan for the whole of the District. That includes everywhere from the Main Town to the open-countryside.

    (2) The intention would be to provide some certainty and to be a means to achieve predictable decision making.

    (3) The overall structure of the plan assists with identifying how it works. Policy CS.15 is a "high level" strategic policy rather than one which deals with development in a particular location. CS.15 is the part of the plan which identifies locations for development which are in accordance with the plan.

    (4) That is apparent not only from the structure of the plan, but from:

        (i) the title of Policy CS.15: "Distribution of Development", and

        (ii) the opening line, which refers to the distribution of development within the District being based on a pattern of balanced dispersal in accordance with the distinctive character and function of the wide range of sustainable locations across the District.

        The intention appears to be to identify the locations for the sustainable development the plan contemplates. As Mr Easton notes, that is consistent with the NPPF, and reinforced by paragraph 5.1.1 of the Explanation.

    (5) The hierarchy of sustainable locations makes no express reference to development in the open countryside, although the provision for Local Needs Schemes provides for development adjacent to settlements. That is not to say that there will not be proposals for development in the open countryside, or that such proposals might on their particular merits be given permission, but they would not be consistent with Policy CS.15, and so would be in conflict with the plan.

36. Mr Du Feu submits that the Council's approach is wrong. His starting point is that the plan is to be read as a whole. As I note above, the hierarchy of locations found in CS.15 is echoed in the Area Strategies, each of which are specific to different locations.

37. Mr Du Feu accepts that (as he puts it) Policy CS.15 does not directly address all development proposals that sit within the open countryside. But he submits that the Council's construction of CS.15 is irreconcilable with the terms of AS.10. The point is that the forms of residential development found in the list of those acceptable in principle under Policy AS.10 includes development in the open-countryside under sub-paragraphs (d),(e),(i) and (j). So if the Claimant is right, development in the open-

countryside would be in conflict with Policy CS.15, but it would be acceptable in principle within the terms of Policy AS.10. Mr Du Feu submits that this demonstrates that the Claimant's case that Policy CS.15 is comprehensive as to the distribution of development is wrong. CS.15 does not identify the only locations in which residential development will accord with the development plan. It sets out a hierarchy of locations at which development is to be focussed.

38. Mr Easton submits that there is no such internal conflict in the plan, and even if there was, it would not matter. His first submission is that CS.15 establishes a presumption against development in the open-countryside, the only exception being under G (community led schemes). Policy AS.10 identifies some particular exceptions to that general rule, but does not conflict with it. His second submission is that, even if there is some conflict here, it is not unusual for different policies in the same development plan to pull in different directions. The decision maker has to make a choice.

39. I make two further observations. Firstly, the list of the forms of development acceptable in principle in Policy AS.10 is a relatively specific and well defined list of circumstances in which development will be acceptable in principle under policy AS.10. Secondly, the Area Strategies fulfil a different function to a strategic policy such as CS.15. Rather than identifying where sustainable development is to take place, the Area Strategies consider particular forms of development and (in the case of AS.10) identify those which are acceptable in principle.

Discussion

40. I am not construing a commercial contract. I have to read the words of these policies sensibly and in the context of their objectives. Mr Du Feu's point that the policy is to be read as a whole is plainly correct, but I have concluded that the Claimant's construction is the right one.

41. The words of CS.15, when read with its purpose and its place in the overall plan in mind, indicate that it applies to the whole of the District. Or to turn the point on its head, to exclude the open-countryside from the strategic policy which deals with the distribution of development within the District makes no sense. That is particularly so when this plan makes repeated reference to protecting the countryside from inappropriate development. There is little point in having a strategic policy for the distribution of development within the district if it is not comprehensive. The argument that it merely serves to focus development in these areas runs counter to my reading of it as a comprehensive policy, and significantly weakens the overall effect of the plan.

42. The effect of the Defendant's construction is that applications made for development in the open-countryside are to be considered only under Policy AS.10. Again, that seems most unlikely. True they would be considered against the principles of sustainable development and/or be limited by the list of the forms of development identified as acceptable in principle. But that approach gives rise to the prospect of a proposal within the hierarchy of CS.15 being treated less favourably than one which is outside it, and at the very least, reduces the predictability of the decision making process. For example,

development within Category F settlements would be caught by CS.15, and so would be restricted to small-scale community led schemes which meet a need identified by the local community. Whereas proposals in the open countryside would not be subject of such a restriction.

43. The internal conflict identified by Mr Du Feu is to be seen in the context of the different functions of CS.15 and AS.10. The former deals with location, and the latter with the form of the development. I agree that they are to be read together, and that they have to work together. But the fact that a proposed development is in conflict with CS.15 is not a complete barrier to permission. It triggers the section 38(6) process, but does not preclude the granting of permission.

44. I have concluded that the necessary inference to be drawn from the absence of any reference to development in the open countryside in policy CS.15 is that such development would be contrary to that policy and so to the plan. Policy CS.15 is designed to be a comprehensive strategy for the distribution of development. Much of its effect would be lost if proposals for development outside the hierarchy of locations it establishes were not to be treated as contrary to the policy it establishes.

45. It follows that subject to the issue of discretion, the Inspector's decision to give policy CS.15 negligible weight and the failure to apply section 38(6) was in error, and I would set the decision aside.

Ground 2.

46. The principal issue here is whether the Inspector was correct to construe the list of the forms of developments and uses in the countryside said to be acceptable in principle in Policy AS.10 as not being a closed list. If this is a closed list of what is acceptable in principle, the necessary inference is that a development proposal which falls outside one of the categories on the list is not acceptable in principle, and so is in conflict with the Policy. If that is right, then given that the proposal in this case did not fall within one of those categories, once again the Inspector has failed to engage with the section 38(6) process.

47. The Claimant's position is that a proposal meets policy AS.10 only if (i) it is within the list of the forms of development said to be acceptable in principle, and (ii) it satisfies the development management criteria and the principles of sustainable development.

48. The Inspector took a different view. He decided that this was not a closed list, and relied on two matters in particular in the decision letter:

    (i) the policy does not state that exceptions listed in paragraphs (b)-(j) were the only circumstances in which development would be permitted: and

    (ii) the wording of the policy and the terms of paragraph 6.12.14 of the explanation.

    He concluded that the policy allowed a more flexible approach to rural development including new housing, and that these proposals would be assessed against the

principles of sustainable development. That is how he proceeded to assess the merits of this application.

49. The Defendant's case is that the Inspector was right to conclude that this was not a closed list. In addition to (or expansion of) the reasons given by the Inspector, Mr Du Feu relies upon the wording of the penultimate paragraph of the policy; what he submits is the "residual category" [41]:

> *All other types of development or activity in the countryside, unless covered by a specific policy in the Core Strategy, will need to be fully justified, offer significant benefits to the local area and not be contrary to the overall development strategy for the District.*

The argument is that this shows that the policy allows for other types of development in the countryside in addition to the list at (a)-(v). That is reinforced by the following passage from paragraph 6.12.14 of the explanation:

> *... provision is made in the policy for the merits of other forms of development and activity that are not specifically identified to be assessed*

50. Mr Easton submits that the "tailpiece" is not to be seen as a residual category. He draws attention to the use of the term "forms of development" to describe the list of what is acceptable in principle at sub-paragraphs (a)-(v), and to the use of the term "all other types" of development in the tailpiece. He submits that the use of language is deliberate, and that types of development and forms of development are not the same thing. Types of development is apt to describe development such as Community, Residential, Business and Tourism and Leisure. Forms of development is apt to describe what is set out under sub-paragraphs (a)-(v). Mr Easton submits that when this tailpiece refers to all other types of development it is referring to types of development other than the four identified in the sub-headings in the Policy; in other words other than Community, Residential, Business and Tourism and Leisure. There is a difference in the language, but this is a rather fine distinction to draw. Nor is it clear to me what those other types of development would be.

Discussion

51. It helps to stand back from the words and consider the structure of this policy. It begins by saying that it applies to all parts of the District apart from A, B, C and E. Then it provides that all proposals will be thoroughly assessed against the principles of sustainable development. Then it sets out the list of what is acceptable in principle. Finally it has the three paragraphs which include this tailpiece or residual category. These three paragraphs form a final section, and it is instructive to read them together, They follow on from each other.

52. The last category dealt with in the list at (s)-(v) is Tourism and Leisure. After sub-paragraph (v), there is the first of these three paragraphs, which provides as follows:

> *Tourism and leisure-related schemes will **also** be assessed against the provisions of Policy CS.24*

[my emphasis]

CS.24 is the Development Strategy for Tourism and Leisure Development. This paragraph refers back to the last section of the list. I read that paragraph as meaning that sub-paragraphs (s)-(v) may be acceptable in principle but that they will also be assessed against the provisions of CS.24.

53. That provides the context for the paragraph under consideration, which applies to "*All other types of development …".* Given that the immediately preceding paragraph refers to Tourism and Leisure, I read that as referring to types of development other than Tourism and Leisure; in other words, Community, Residential and Business. The approach is similar to the approach taken in the previous paragraph to Tourism and leisure related schemes. If development of these others types is covered by a specific policy in the Core Strategy (in the same way that Tourism and Leisure is covered by CS.24) then such development is to be assessed against that policy. But if they are not covered by a specific policy, they will need to be fully justified, offer significant benefits to the local area and not be contrary to the overall development strategy.

54. The final paragraph deals with sites within the Green Belt and the Cotswolds Area of Outstanding Natural Beauty, to which policies CS.10 and CS.11 apply. A similar approach is taken.

55. Read together, these three paragraphs make some sense. They follow on from the list at (a)-(v). They are not there to provide an independent basis for applications. They refer back to other policies within the plan that will be of relevance to development schemes. In the first paragraph, which deals with Tourism and Leisure, the use of the word "also" makes it apparent that those requirements are in addition to the matters that have gone before. So that even if the proposed development has been assessed against the principles of sustainable development, and is acceptable in principle, it will also be assessed against the provisions of CS.24.

56. The penultimate paragraph is to be read in the same way. It is not creating a residual category, but referring back to what has gone before. Its purpose is to make the point that other relevant policies in the Core Strategy may need to be met, and provides that if there are no other relevant policies in the Core Strategy, the proposal will have to be fully justified, offer significant benefits and not be contrary to the overall development strategy.

57. My reading of this part of Policy AS.10 is not one which either of the parties put forward at the hearing of this matter. Having heard submissions, I was unclear what the meaning of the penultimate paragraph was. It is only with the benefit of being able to work through the issues that I have reached the conclusion set out above. If this was the point which determined the case, I would have given the parties an opportunity to make further submissions. But given my views on Ground 1, I have concluded that such a

course would not be proportionate. The fact that the parties have not had the opportunity to argue this particular point may, however, be of relevance if this interpretation of Policy AS.10 is to be relied upon in the future.

58. Having reached that conclusion, I turn to the question of whether sub-paragraphs (a)-(v) is a closed list. I have concluded that it is, although the matter is not as clear as it might be.

59. Firstly the list itself. It is a matter of impression, but saying that *"... the following forms of development ... are acceptable in principle ... "* and then setting out a detailed list under four sub-headings, suggests that other forms of development are not acceptable in principle. The words of themselves though are not entirely clear. As Mr Du Feu submits, the Policy does not say that "only" the following forms of development are acceptable in principle. But then nor does this read like a list of examples, or use words such as "including the following".

60. Secondly, there is (as I have found) no residual category within the policy.

61. Thirdly, standing back from the detail, it is helpful to consider what the consequence of the Defendant's construction of Policy AS.10 would be for proposals for development in the countryside. If a proposal was within one of the situations set out in the list; for example a proposal for a new single dwelling in open countryside of exceptional quality and design, making a positive contribution to the character of the local area, it would be acceptable in principle, and so within the terms of the policy, so long as it was able to satisfy the requirements of the principles of sustainable development and any other requirements of the policy. But if it was not of exceptional quality or design, and so not acceptable in principle, on the Defendant's construction it is still within the terms of the policy so long as it satisfies the requirements of the principles of sustainable development and any other requirements of the policy. That is not an unworkable outcome. The proposal still has to satisfy a series of meaningful requirements. But it tends to reduce the value and effect of a policy which goes to the trouble of setting out a detailed list of forms of development which are acceptable in principle.

62. As Mr Easton observes in his skeleton argument, the Defendant's interpretation would allow market-led housing proposals in the open countryside so long as they met the principles set out in the third paragraph of the policy. That runs counter to the tenor of the policy, to the Strategic Objective of protecting the countryside from inappropriate development, and to the apparent intention of the policy (as expressed in the last sentence of paragraph 6.12.24 of the explanation) to ensure a strong level of restriction on development in the countryside.

63. The point which remains is how the first two sentences of paragraph 6.12.24 of the explanation fits with that interpretation. Mr Du Feu's submissions leave me in some real doubt on the point, but I have concluded that the explanation is to be taken to refer to the assessment of development proposals which are not supported by the policy. The fact that the policy makes provision for the assessment of the merits of forms of

development and activity which are not within the policy, does not bring them within the policy. The claim succeeds on ground 2.

Discretion

64. Mr Easton accepts that it was open to the Inspector to allow the appeal even if he had found that the proposal was not in accordance with the development plan. The merits of the proposal are considered by the Inspector in the Decision at paragraphs 10-19 [52]. In short terms he found that:

    (i) The location and accessibility to services was not "unacceptable".

    (ii) The current commercial buildings were in a state of deterioration, and that the proposed development would sit more comfortably with the surrounding residential properties and the otherwise tranquil setting.

    (iii) The change from commercial use to residential would reduce noise, and remove the use of the site by HGVs, which the Inspector observed caused a nuisance to neighbours and drivers using the road. There would be a betterment in terms of highway use and (likely) improve the living conditions of the neighbours.

    (iv) The business which used the existing premises could relocate, and the site was no longer viable for its commercial use. He recognised that the Council could show 7 years supply of deliverable housing land but regarded this as a windfall site.

65. At paragraph 18 of the Decision the Inspector concluded that the development would make a positive contribution to the vitality of Binton and the surrounding area as a rural community, and at paragraph 19 found that it would accord with Policy AS.10.

66. Mr Du Feu referred me to the decision of Holgate J in *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin) at [152]-[153]:

    [152] The Court of Appeal has laid down principles for the application of s.31(2A) in a number of cases, including R (Williams) v Powys County Council … ; R (Goring-on-Thames Parish Council) v South Oxfordshire District Council …; and Gathercole. The issue here involves matters of fact and planning judgment, and so the court should be very careful to avoid trespassing into the Defendant's domain as the decision-maker, sometimes referred to as "forbidden territory" (see e.g. R (Smith) v North Eastern Derbyshire PCT at [10]). Instead, the court must make its own objective assessment of the decision-making process which took place. In this case it was common ground that the Court should consider whether the Defendant's decision would still have been the same by reference to untainted parts of the Defendant's decision (as in Goodman Logistics Developments (UK) Limited v Secretary of State for Communities and Local Government [2017] J.P.L. 1115).

    [153] Although the test in s.31(2A) is less strict than that which applies in the case of statutory reviews (see Simplex GE (Holdings) Limited v Secretary of State for the Environment [2017] PTSR 1041), it nevertheless still sets a high threshold. In R

> *(Plan B Earth) v Secretary of State for Transport ... the Court of Appeal held at [273]: -*
>
> > *"It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making progress, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore. although there is undoubtedly a difference between the old Simplex test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ as he then was, in R (Public and Commercial Services Union) v Minister for the Cabinet Office ... , para 89)."*

67. It is not difficult to see that this proposal has some real merit; indeed the Inspector regarded it as an improvement on the existing use. It is tempting to conclude that had the Inspector considered that the proposal was caught by Policy CS.15 and was outside the list of what was acceptable in principle under policy AS.10, he would have still concluded that it was of sufficient merit to justify granting the appeal despite the fact that it was not in accordance with the development plan.

68. Mr Easton submits that where an Inspector has asked the wrong question, the Court should be slow to engage in what would amount to the exercise of planning judgment. It was not possible to say whether the Inspector would have granted planning permission in the face of a strong statutory presumption against the proposal. I agree with that submission. The threshold remains a high one, as the passage from *Pearce* confirms. This is not a case where I can find that it would be “highly likely” that the Inspector would have allowed the appeal had he applied section 38(6).

69. I make an order that:

    (1) The Defendant’s decision date 15 April 2021 is quashed and the be remitted back to the Defendant for redetermination.

    (2) The Defendant is to pay the Claimant’s costs in the sum of £15,298.