Case No: AC-2024-LON-001387

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
[2024] EWHC 2074 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 25 July 2024

BEFORE:

MRS JUSTICE LANG DBE

BETWEEN:

REDROW HOMES LIMITED

Claimant

- and -

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) DACORUM BOROUGH COUNCIL

Defendants

MR C YOUNG KC and **MR J CORBET BURCHER** (instructed by Town Legal LLP) appeared on behalf of the Claimant.
MR B DU FEU (instructed by Government Legal Department) appeared on behalf of the First Defendant.
The Second Defendant did not appear and was not represented.

JUDGMENT
(Approved)

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1. MRS JUSTICE LANG: The claimant renews its application for permission to bring a planning statutory review, pursuant to section 288 of the Town and Country Planning Act ("TCPA 1990"), challenging a decision of the first defendant, dated 15 March 2024, to dismiss its appeal against the second defendant's refusal to grant planning permission for a residential and mixed-use development in Tring, Hertfordshire. The proposed development includes up to 1,400 dwellings, including 45 per cent affordable housing, schools, community and sports facilities, and public open spaces.

2. Permission to apply for statutory review was refused on the papers by Mould J on 14 June 2024.

3. Following a public inquiry, the appointed inspector recommended in his report ("IR") that permission should be granted, but the first defendant did not accept his recommendation.

Ground 1

4. Under Ground 1, the claimant submits that when the first defendant stated at paragraph 56 of the decision letter ("DL/56") that the proposal was in conflict with policies CS18 and CS19, he misinterpreted the development plan, acted irrationally, failed to have regard to material considerations and failed to give adequate reasons.

5. I accept the first defendant's explanation that this was a clerical or drafting error. In my view, it is clear from reading the decision letter as a whole that the first defendant did not consider that the proposal was in conflict with policies CS18 and CS19.

6. Policy CS18 concerns the mix of housing, including the provision of affordable housing. Policy CS19 concerns affordable housing and requires 35 per cent of new dwellings to be affordable homes. By the time of the inquiry, the claimant had committed, by way of planning obligation, to provide 45 % of the new dwellings as affordable housing, and all parties agreed that the proposal was in accordance with both policies. The inspector expressly found compliance with both policies in IR 420 and IR 504. In IR 504, the inspector specifically recorded that the appeal proposal "would

provide a greater percentage of affordable homes than required by CS policies CS18 and CS19".

7. In DL/41, the first defendant referred expressly to the reasons given by the inspector in IR 504 to 505. He confirmed that he was satisfied, as was the inspector, that the appeal proposal would deliver the proposed number of affordable homes. He specifically recognised that 45% of the dwellings would be affordable. 45% was, of course, a greater level than that required by policy. No reasons or explanations were given for the contradictory statement that there was a breach of CS18 and CS19.

8. At DL/58, the first defendant concluded that the provision of affordable housing was to be given substantive weight in favour of the appeal proposal. Thus, policies CS18 and CS19 did not weigh against the grant of planning permission.

9. In those circumstances, applying the test in *Simplex GE (Holdings) Ltd v. Secretary of State for the Environment* [2017] PTSR 1041, I am satisfied that the first defendant would necessarily have reached the same conclusion even if the error had not occurred. Therefore, permission is refused on ground one.

Ground 2

10. Under Ground 2, the claimant submits that the first defendant ignored the fact that the proposal not only met the requirements of policies CS18 and CS19 for affordable housing, but substantially exceeded it. In my view, the first defendant was plainly aware that the proposal would provide above policy levels of affordable housing and took this factor into account. That is apparent from the references I gave under Ground 1. Therefore, Ground 2 is unarguable and permission is refused.

Ground 3

11. Under Ground 2, the claimant submits that the first defendant failed to recognise that the policies that were most important for determining the application were deemed out of date as the council could not demonstrate a five-year supply of housing, applying NPPF paragraph 11 and footnote 8. Therefore the first defendant misinterpreted the

NPPF, failed to have regard to material considerations, failed to give adequate reasons and acted irrationally.

12. It is a well-established principle that the first defendant can be assumed to be familiar with national planning policy and to have applied it lawfully, absent any positive indication to the contrary.

13. Furthermore, at DL/21 the first defendant found that the council was unable to demonstrate a five-year supply of deliverable housing sites, and at DL/22 he held that, as a result, the "presumption in favour of sustainable development is triggered in accordance with footnote 8, paragraph 11(d) of the NPPF". I agree that he must have reached this conclusion on the basis that the most important policies for determining the application were deemed to be out of date.

14. The inspector found, at IR 463, that as a result of the lack of a five-year supply, "the policies which are most important for determining the application are considered to be out of date in accordance with footnote 8, paragraph 11(d) of the framework". The inspector then went on to assess the weight to be given to those policies (see IR 474, 488, 490 and 504).

15. At DL/13, the first defendant specifically agreed with the inspector's assessment of the weight to be given to the eight development plan policies in question. At DL/62, the first defendant said,

> "In the light of his conclusions on the Green Belt test the Secretary of State considers that there are protective policies which provide a clear reason for refusing the development proposed. He further considers that the adverse impact of granting permission would significantly and demonstrably outweigh the benefits when assessed against policies and the Framework taken as a whole. The presumption in favour of sustainable development, therefore, does not apply".

16. For these reasons, I consider that this ground is unarguable and permission is refused.

Ground 4

17. Under Ground 4, the claimant submits that the first defendant erred in DL/52 by finding that the matters set out by the inspector at IR 522 and the last sentence of IR 531 did not carry separate weight.

18. The inspector's findings in IR 522 were as follows:

> "522. Based on the above, I consider that the Council's repeated failure to progress an up-to-date DP that would update its future housing need and ensure the provision of sufficient sites to address this need is an important factor in my determination of this appeal. This, combined with the latest findings of documents used to inform the Emerging DLP on allocations, which have identified the release of the appeal site from the Green Belt as a potential option to address the future housing needs even though it is subjected to significant constraints, weigh heavily in favour of the appeal proposal. Whilst the test for exceptional circumstances needed to justify the removal of the site from the Green Belt is less stringent than the VSC needed to justify the development in this case, this matter carries significant weight with regard to my findings on whether VSC exist."

19. The inspector's findings at IR 531 were as follows:

> "531. The other considerations that I have taken into account in my determination of whether they amount to VSC include the substantial weight that I have given to the market housing, affordable housing, self and custom build housing, extra-care housing and socio-economic benefits. I have also given moderate weight to the ecological and sustainable transport benefits and low moderate weight to the additional land for schools and educational facilities, recreational and sporting facilities, community facilities and sustainable energy measures which takes account of reductions in weigh due to measures being necessary in mitigation. Another important factor that I consider weighs in favour of granting planning permission is the evidence that has been provided to show that the proposed development would reflect that which has been considered as an allocation on the appeal site in the Emerging DLP, to which the weight is increased because of the delays in progressing the local plan given that the existing DP is out-of-date."

20. At DL/52, the first defendant stated:

> "Development Plan
>
> 52. The Secretary of State notes the Inspector's analysis at IR 518 to 522 and IR 531. He notes that the Council has accepted that it does not have an up-to-date development plan and agrees that the Council has failed to adequately plan for the Borough's future housing needs (IR 518). He has taken this into account in his consideration of this case, including via the application of a presumption in favour of the sustainable development and the weights attaching to the provision of housing. He also notes that matters relating to the emerging plan has moved on since the Inquiry, as set out at paragraphs 8 and 16 to 17 above. Overall, he agrees with the Inspector that the Council's repeated failure to progress an up-to-date development plan that would meet its future housing need and ensure the provision of sufficient sites is an important matter (IR 522), but does not consider that the matters set out in IR 522 and the last sentence of IR 531 carry separate weight in this case".

21. The claimant's case is that the inspector treated the failure to progress an up-to-date plan as an individual material consideration to be identified separately and accorded separate weight for the purpose of considering "very special circumstances" and "other considerations" under NPPF 152 to 153 and the overall assessment under section 38(6) of the Planning and Compulsory Purchase Act 2004.

22. The first defendant's failure to take into account the inspector's findings removed a significant aspect of the "other consideration", an important factor in the planning balance. In the alternative, he erred in not according any weight to this factor, acted irrationally and failed to give adequate reasons.

23. I agree with the first defendant's submissions on this ground. The first defendant noted the council's acceptance "that it does not have an up-to-date development plan" and expressly agreed with the inspector that "the Council has failed to adequately plan for the Borough's future housing needs" at DL/52, where he cross-referenced IR 518 in which the inspector found that "the Council has a history of failing to meet its commitment to deliver (an up-to-date plan)".

24. The first defendant explained that he had "taken this into account in his consideration of this case, including via the application of the presumption in favour of sustainable development and the weight attached to the provision of housing" (DL/52). As part of the planning balance, the first defendant accordingly weighed "in favour of the proposal … the delivery of market, affordable, custom and self-build and extra-care housing" giving "each substantial weight" (DL/58).

25. It follows that the first defendant (a) took into account the council's failure to plan adequately for the borough's future housing needs and the delay to the emerging local plan and (b) factored that consideration into the weight to be given to the provision of housing and, as a consequence, (c) he treated that factor as a material consideration when undertaking the planning balance.

26. As the first defendant had taken account of this material consideration in this way, he declined to treat the same factor as carrying separate weight in its own right in the planning balance. In doing so, he departed from the approach adopted by the inspector, as he explained in the last sentence of DL/52.

27. The first defendant had a wide discretion as to how to factor the failure to deliver an up-to-date plan into his decision making. His decision to take account of this material consideration through the weight to be given to the provision of housing cannot be characterised, even arguably, as irrational.

28. I agree with Mould J's conclusions when refusing permission on the papers:

> "The question whether and, if so, to what degree the delays in preparation of an up-to-date development plan weighed in favour of the proposed development, in addition to the other factors speaking in its favour, was a matter for the first Defendant's planning judgment. He was free to disagree with the Inspector (IR 522/531) on that point. Nothing more needed to be said in DL/52 to justify that. This ground impermissibly seeks to challenge the attribution of weight and is unarguable".

29. For these reasons, I consider that Ground 4 is unarguable and permission should be refused.

Ground 5

30. Under Ground 5, the claimant submits that the first defendant erred in law in failing to have regard to the "significant ecological benefits" identified at IR 515 and IR 531 and at DL/49 in the overall "very special circumstances" balance. In the alternative, he incorrectly reduced the weight to be accorded them to merely "moderate weight" on the erroneous basis that they formed, in part, mitigation for the appeal scheme.

31. It is said that the first defendant, therefore, failed to ascribe weight to the biodiversity benefits on a rational and relevant basis and failed to give adequate reasons for his conclusions. In my view, this ground is unarguable.

32. In the section of the IR addressing "other considerations" under NPPF 153, at IR 515, the inspector identified "significant ecological benefits for people and wildlife". He then went on to conclude that the ecological enhancements were to be given "moderate weight as a benefit of the proposal". He repeated this weighting at IR 531 when considering the planning balance.

33. The first defendant agreed with the inspector's approach. He said at DL/49,

> "Ecology
>
> 49. For the reasons given at IR 514 to 515, the Secretary of State agrees that the proposal would deliver significant ecological benefits for people and wildlife (IR 515). He further agrees that, whilst the provision of SANG and the other measures would be secured as necessary mitigation, they would also provide ecological enhancement of the site which carries moderate weight (IR 515)".

34. In my view, on a fair reading of the IR and the DL, it cannot arguably be said that the weight was downgraded from significant to moderate. When the inspector described the benefits as significant, he was not attributing significant weight to them. His assessment of weight came later on in IR 515. It was not arguably irrational or inconsistent for the inspector and the first defendant to afford moderate weight to a benefit which had been recognised as significant. The attribution of "moderate weight" simply reflects the relative weight to be given to that factor in the overall assessment. Furthermore, the inspector recognised that biodiversity net gain was a benefit and gave

it appropriate weight. On a fair reading, the inspector plainly did not think that ecological enhancements were limited to necessary mitigation.

35. The case of *NRS Saredon Aggregates Ltd v. Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2795 does not assist the claimant as it was concerned with a quite different issue. In that case, the inspector erred in reducing the weight to be attached to biodiversity net gain because he incorrectly thought that some of the net gain would be required, in any event, by reason of forthcoming legislation. That issue does not arise here (see DL/11).

36. For all these reasons, I refuse permission on Ground 5.

Ground 6

37. Under Ground 6, the claimant submits that the first defendant failed to disclose post-inquiry representations to the claimant so that it could comment upon them, in breach of rule 17(5)(b) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, which provides,

> "(5) If, after the close of an inquiry, the Secretary of State–
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> (a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or
>
> (b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),
>
> and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with that recommendation without first notifying in writing the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the reopening of the inquiry."

38. Annex B to the DL set out a Schedule of Representations received after the closure of the inquiry. At DL/10, the first defendant stated that they could be obtained on request

via the email address provided. Apparently, the claimant's representatives did not take up this invitation and instead the representations were provided with the first defendant's acknowledgement of service.

39. The representations comprised letters, representations and photographs referring, in particular, to the impact of the proposal on the green belt and the AONB and to the emerging plan. The claimant submits that they were all "new evidence" or "new matters of fact" within the meaning of rule 17(5)(b) and so ought to have been disclosed. The claimant contends that it has been prejudiced as it would have wanted to respond to the points made, some of which were inaccurate.

40. In my view, this ground is unarguable. The first defendant explained at DL/10:

> "10. A list of other representations which have been received since the Inquiry is also specified at Annex B with a number of them drawing the updates regarding the production of the emerging plan to his attention. The Secretary of State is satisfied that the issues raised do not affect his decision and no other new issues were raised in this correspondence to warrant further investigation or necessitate additional referrals back to parties …"

41. Under rule 17(5)(b), new evidence or new matters of fact only trigger a requirement to notify if they cause the first defendant to be "disposed to disagree with a recommendation made by the inspector". Here the first defendant found that the "issues raised do not affect his decision" and no other new issues were raised "to warrant further investigation or necessitate additional referrals back to parties". So the first defendant's decision was in accordance with the terms of rule 17(5)(b).

42. On considering the content of the post-inquiry representations, I consider that the first defendant's conclusion in DL/10 was a lawful exercise of his judgment.

43. As the post-inquiry representations did not affect the first defendant's decision, the claimant was not prejudiced by the lack of an opportunity to make representations in response. Under section 288(5) TCPA 1990, relief can only be granted if the court is satisfied that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements. The claimant cannot here demonstrate any prejudice, let alone "substantial prejudice".

44. For these reasons, permission is refused on Ground 6.

45. In conclusion, the renewed application for permission to apply for statutory review is refused. In the absence of an arguable claim, it is not appropriate to make any order for disclosure.

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Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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