



Neutral Citation Number: [2022] EWHC 36 (Admin)

Case No: CO/2369/2021

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

Cardiff Family and Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 14/01/2022

Before :

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court

Between :

WILTSHIRE COUNCIL

- and -

**(1) SECRETARY OF STATE FOR HOUSING
COMMUNITIES AND LOCAL
GOVERNMENT**

- and -

(2) GREYSTOKE LAND LIMITED

Claimant

Defendants

Mr Jonathan Easton (instructed by and) for the **claimant**

Mr Andrew Parkinson (instructed by **Government Legal Department**) for the **first
defendant**

The second defendant did not appear

Hearing dates: 4 January 2022

Approved Judgment

Handed down remotely at 11am Friday 14 January 2022

HH JARMAN QC:

Introduction

1. By notice dated 20 December 2019 the claimant, as local planning authority (the Council), refused an application by the second defendant (Greystoke) for up to 10 entry-level affordable dwellings with associated access road and car parking and a publicly accessible village green on a pastoral field (the site) in a small village in its area called Broad Town. Greystoke appealed the refusal under section 78 of the Town and Country Planning Act 1990 (the 1990 Act), which appeal was heard by an inspector appointed by the defendant (the Secretary of State). By a decision letter dated 27 May 2021, the inspector allowed the appeal and granted permission for the development, subject to conditions. The Council, with the permission of Lang J, now applies to this court under section 288 of the 1990 Act, questioning the validity of that decision.
2. It does so on three grounds. The first is that the inspector misinterpreted national policy which supports entry-level affordable housing, and in particular paragraph 71 of the National Planning Policy Framework 2019 (NPPF). That has since been updated, but with no material differences. The second is that he also misinterpreted local policy, and in particular Core Policy (CP) 58 of the Wiltshire Core Strategy (WCS), which amongst other matters seeks to ensure conservation of the landscape. This is particularly important in the present case, because as the inspector acknowledged, the development would involve built form in a field presently part of a countryside gap between the built forms of the village. The third is that the inspector erred in his assessment of the harm that the development would have on the setting of a Grade II listed church, known as Christ Church, which lies just to the east of the site.

Legal principles

3. There was no dispute before me about the legal principles to be applied by a court when a decision of a specialist decision maker such as a planning inspector is challenged on the basis of misinterpretation of policy. Accordingly they can for present purposes be set out briefly so far as particularly relevant here, with reference to a helpful summary by Dove J in *Canterbury City Council v Secretary of State for Communities and Local Government and another* [2018] EWHC 1611 (Admin) at paragraph 23.
4. The essential distinction to bear in mind is that the interpretation of planning policy is a question of law for the court, whereas the value or weight to be attached to the policy is a matter of weight for the decision maker (see, for example, Lord Carnwath giving the lead judgment in *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37 at paragraph 26).
5. Second, the interpretation of such policies has to recognise that they contain broad statements of policy which may be mutually irreconcilable so that in a particular case one must give way to another (per Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13). They are designed to shape practical decision making and are primarily addressed to planning professionals and the public for whose benefit they exist.

6. Third, policies must be read in context to arrive at their proper interpretation, and context includes their subject matter and the objectives sought to be achieved. It also includes the wider policy framework and the overarching strategy (see *Tesco Stores*, paragraphs 18 and 21).
7. Fourth, courts should respect the expertise of specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local (per Lord Carnwath in *Hopkins Homes* at paragraph 25).
8. Particular reference to the interpretation of NPPF was made by Lindblom LJ recently in *Asda Stores Limited v (1) Leeds City Council and (2) Commercial Development Projects Limited* [2021] EWCA Civ 32. At paragraph 35 he said:

“When called upon – as often it is nowadays – to interpret a policy of the NPPF, the court should not have to engage in a painstaking construction of the relevant text. It will seek to draw from the words used the true, practical meaning and effect of the policy in its context. Bearing in mind that the purpose of planning policy is to achieve “reasonably predictable decision-making, consistent with the aims of the policy-maker”, it will look for an interpretation that is “straightforward, without undue or elaborate exposition” (see *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). Often it will be entitled to say that the policy simply means what it says, and that it is the job of the decision-maker to apply it with realism and good sense in the circumstances as they arise – which is what local planning authorities are well used to doing when making the decisions entrusted to them (see *R. (on the application of Corbett) v The Cornwall Council* [2020] EWCA Civ 508, at paragraphs 65 and 66).”

National policies

9. The relevant national policies in this case are as set out in the NPPF. NPPF 11, which comes within Chapter 2 headed “Achieving sustainable development”, provides that “Plans and decision should apply a presumption in favour of sustainable development”. Sub-paragraph d) provides that for decision making this means:

“d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date⁷, granting permission unless:

- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed⁶; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.”

10. Footnote 7 provides that this includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites. It is not in dispute that the Council cannot do so in the present case, and the inspector’s finding to that effect is not challenged.
11. Footnote 6 provides that the policies referred to are those in the NPPF, rather than those in development plans, relating to a number of specified matters such as SSSIs and Local Green Space, and includes designated heritage assets
12. Chapter 5 deals with delivering a sufficient supply of homes. NPPF 59 provides that it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay. NPPF 61 provides that the size and tenure of housing needed for different groups should be assessed and reflected in policies, including not just those who require affordable housing but other groups such as older people, students, people with disabilities and travellers.
13. Homes for first time buyers are dealt with in NPPF 71, as follows:

“Local planning authorities should support the development of entry-level exception sites, suitable for first time buyers (or those looking to rent their first home), unless the need for such homes is already being met within the authority’s area. These sites should be on land which is not already allocated for housing and should:

 - a) comprise of entry-level homes that offer one or more types of affordable housing as defined in Annex 2 of this Framework; and
 - b) be adjacent to existing settlements, proportionate in size to them, not compromise the protection given to areas or assets of particular importance in this Framework, and comply with any local design policies and standards.”
14. It is not in dispute that the site is adjacent to and proportionate in size to Broad Town. The areas or assets of particular importance referred are set out in footnote 34 are the areas referred to in footnote 6, including the church as a designated heritage asset. Footnote 34 continues that entry level exception sites should not be permitted in National Parks, AONBs or the Green Belt.
15. The conservation and enhancement of such assets are dealt with in Chapter 15, paragraph 196 of which provides:

“Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits

of the proposal including, where appropriate, securing its optimum viable use.”

Local policies

16. As for the development plan, this consists of the WCS, adopted in 2015, some three years after the NPPF was first published.
17. CP 57 is entitled “Ensuring high quality design and place shaping” and requires a high standard of design in all new developments, which are expected to create a strong sense of place through drawing on the local context and being complimentary to the locality. It provides that applications for such development must demonstrate how the proposal will make a positive contribution to the character of Wiltshire through specified objectives. Some of these relate to place shaping, such as enhancing local distinctiveness by responding to the value of the natural and historic environment, relating positively to its landscape setting. Others relate to more detailed matters of design, such as building layouts, built form, height, mass, scale, building line, plot size, elevational design, materials, streetscape and rooflines to effectively integrate the building into its setting.
18. CP 58 deals with ensuring the conservation of the historic environment and provides that development should protect, conserve and where possible enhance the historic environment. Designated heritage assets and their settings will be conserved, and where appropriate enhanced in a manner appropriate to their significance.

The decision letter

19. I now turn to the inspector’s decision letter in this case. In paragraph 7, he identified five main issues before him, of which three are relevant to the Council’s challenge, namely whether the proposal is in an appropriate location for entry level housing, the effect of the proposal on the character and appearance of the area, and the effect of the proposal on a designated heritage asset, namely the church.
20. He dealt with the issues in turn. Location is dealt with in paragraphs 8 to 23. Character and appearance is dealt with in paragraphs 24 to 37. The designated heritage asset is dealt with in paragraphs 45 to 60. He then deals with planning balance at paragraphs 67 to 75.
21. In carrying out the balance, he found that the proposal would conflict with the development plan in three main ways. First, its lack of exception site status and general lack of conformity with the spatial strategy. He assessed the harm from the conflict as moderate, given the shortage of affordable homes and of housing land supply more generally (67). Second, its effects on the countryside gap and on the character and appearance of the area. He assessed the harm from that conflict, which he acknowledged would normally carry great weight, as moderate, due to the flexibility inherent in an outline proposal (68). Third, its effects on the church. Again, he acknowledged that any harm derived from conflict with WCS policies to protect designated heritage assets would normally carry great weight, but again he reduced that to moderate because the WCS did not provide for the consideration of public benefits in this regard unlike NPPF 196 (69). He assessed the cumulative effect of these harms as significant (71).

22. He then assessed the benefits. He assessed the provision of entry level affordable housing, where the need for such was not being met and there was a lack of affordable housing and a shortage in housing land supply generally, as of significant weight as a public benefit (73).
23. He assessed the balance of harm and benefit as roughly equal, so that the former would not significantly and demonstrably outweigh the later. Accordingly it was the presumption in favour of sustainable benefit in the NPPF that, in his judgment, tipped the overall planning balance in favour of the proposal (75).
24. His conclusion at paragraph 93 reads as follows:

“There is conflict with the development plan, but Paragraph 11d of the Framework is a material consideration that has been decisive in this case, indicating that a decision should be taken otherwise than in accordance with the development plan. Consequently, the appeal is allowed and planning permission is granted subject to conditions attached in the schedule.”

25. In so concluding, in my judgement the inspector was clearly dealing with the statutory presumption in favour of the development plan. Section 70(2) of the 1990 Act requires that, in dealing with an application for planning permission, a local planning authority must have regard to the provisions of the development plan, so far as is material to the application, and to any other material considerations. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) provides:

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Ground 1

26. I deal now with each of the grounds in turn. A number of points are, in my judgment, immediately obvious from a reading of NPPF 71. The first is that local planning authorities should support the development of sites suitable for first time buyers or tenants. The second is that such sites are exceptional and should be adjacent (so not in) existing settlements . The third is that such sites should be on land which is not already allocated for housing. In my judgment, this means that such development will almost always, if not always, not be in accordance with the development plan, one of the functions of which is to identify and allocate sites suitable for housing.
27. The passages of the decision letter dealing with this part of the NPPF are paragraphs 15-17, which provide as follows:

“15. It is clear that the very nature of proposals advanced pursuant to Paragraph 71 of the Framework would deliver an implicit level of landscape change at the edge of a settlement, with a certain degree of tolerance for harm built into its provisions. Accordingly, in my mind, the starting point for considering compliance with local design policies and

standards in the context of Paragraph 71 of the Framework can only logically involve detailed matters about the design of housing, not matters of principal landscape change.

16. For me to consider compliance with local design policies and standards in the context of principle landscape change would be a contradiction of the provisions within Paragraph 71 of the Framework, which allow small numbers of entry level homes to emerge at the edge of a settlement on the basis that the benefits would outweigh any limited changes and potential landscape harm.

17. With this in mind, and as will be reasoned later in my decision, the existence of fundamental landscape harm would not render the proposal incompatible with Paragraph 71 of the Framework and compliance with local design policies and standards can be achieved through the flexibility inherent in an outline proposal, including the Council's and other interested parties' continued agency in relation to future reserved matters applications."

28. Mr Easton, for the Council makes four criticisms of this interpretation. First, it removes from consideration of NPPF 71, fundamental landscape harm on the basis that the paragraph presupposes that such harm will be tolerated.
29. Second, it fails to read the paragraph in the context of other policies of the NPPF and particularly those in Chapter 12 which emphasises the importance of adding to the overall quality of the area and ensuring development is sympathetic to local character (NPPF 127), and Chapter 15 which requires planning decisions to contribute to and enhance the natural environment and recognising the intrinsic character and beauty of the countryside (NPPF 170).
30. Third, it limits consideration of local design policies to what can be achieved by decisions of the Council on reserved matters applications, whereas matters of design encompass broader issues such as local character and landscape setting. Fourth, and a related point, this led the inspector to reduce the great weight normally giving to such policies to moderate weight.
31. Mr Parkinson, for the Secretary of State, submits that the role of NPPF 71 is to support entry level housing subject to meeting the specified criteria. It cannot have been intended that if these criteria are met, then other material considerations should not be considered. While he accepts that the critical paragraphs of the decision letter could have been better expressed, he submits that NPPF 71 recognises that entry level housing sites are inherently likely to involve some landscape harm, and that is clear by providing they should not be permitted in National Parks, AONB or Green Belt.
32. He further submits that reading the decision letter as a whole the inspector clearly dealt with location, character and appearance as material considerations. He did not take the view that the harm referred to in paragraph would always be trumped if the criteria in NPPF 71 were met. In referring to fundamental landscape harm in paragraph 17 of the decision letter, the inspector specifically refers to the reasoning

later in the letter. In paragraph 27, he refers to the site as contributing to the countryside gap which helps to prevent coalescence between Broad Town's distinct pattern of development.

33. In paragraph 30, he says:

“In principle, the proposal would deliver built form where currently there is none, and within a countryside gap that has an integral function in preventing coalescence between the north and south of Broad Town. Clearly, therefore, the proposal would erode some of the countryside gap and cause a degree of harm to the rural character and appearance of the area.”

34. In paragraph 35, he says this:

“Consequently, my overarching assessment of the principle harm to the rural character and appearance of the area is the fact that the proposal is put forward in outline wherein lies a significant degree of flexibility to deliver a development which accords with local design requirements, and otherwise mitigates the most serious and harmful effects. For example, layout of the units could be evolved at reserved matters and the community car parking area could be the subject of robust soft landscaping measures to control the effects of the built form on the countryside gap.”

35. Mr Parkinson also accepts that matters of design can encompass landscape and enhancing the character of the countryside, as is obvious from CP 57 and the notes thereto. To the extent that the countryside gap is built upon, then detailed design could not mitigate the loss of that part of the gap. However, as recognised by the inspector, the effect of the built form on the remainder of the gap could be mitigated by detailed design. Accordingly, the inspector was entitled to reduce the harm caused by the conflict with CP 57, for example, to moderate weight.

36. In my judgment, NPPF 71 clearly envisages that by supporting entry level exception sites, harm to the landscape would be likely, at the least. That is shown by providing that sites should be adjacent to existing settlements and on land not already allocated for housing. It is also shown by the need to emphasise that sites should not be permitted in National Parks, AONB or Green Belt. That is so even when other NPPF policies protecting the countryside are considered. That does not mean that landscape harm should not be weighed in the balance. Reading the decision letter fairly as a whole, and the inspector in paragraph 17 expressly refers to his reasoning later in the letter, in my judgment it is clear that that is precisely what he did. He did not regard compliance with NPPF 71 as trumping, or even impacting upon, such consideration.

37. Moreover, again on a fair reading of the decision letter as a whole, and in particular paragraphs 30 and 35, the inspector had well in mind the distinction between impacts which could not be mitigated by design, namely the loss of the part of the countryside gap to be built upon, and those which could, namely the effects of the built form on the countryside. It was a matter of planning judgment for the inspector to decide what weight to attach to the conflict with policies requiring development to protect and conserve

and where possible enhance the landscape character, particularly as the proposal involves both built form such as the dwellings themselves, and non-built form, such as the village green.

38. Accordingly in my judgment ground 1 is not made out.

Ground 2

39. Ground 2 relates to the weight which the inspector attached to the harm derived from the conflict with CP 58. At paragraph 56 of the decision letter he said this:

“Overall, the proposal would conflict with Core Policy 58 of the WCS, which among other things seeks to ensure conservation of the historic environment. The harm derived from this conflict with the development plan would normally carry great weight, however given that the policy does not include provision for balancing potential benefits and is therefore plainly inconsistent with Paragraph 196 of the Framework, any harm should be reduced to carrying moderate weight in this context.”

40. Whilst accepting that CP 58 does not expressly provide for a balance with potential benefits, Mr Easton nevertheless submits that the inspector was wrong to downgrade the weight to be attached to the harm derived from the conflict with CP 58, because as a matter of law a balancing exercise is permissible when applying CP 58.

41. He relies upon a decision of the Court of Appeal in *City & Country Bramshill Limited v Secretary of State for Housing Communities and Local Government and another* [2021] EWCA Civ 320. In that case a planning inspector attached significant weight to development plan policies aimed at conserving the historic environment, even though it was common ground before him that such policies were inconsistent with NPPF policy on heritage assets because they did not provide for public benefits to be balanced against harm. The Court of Appeal rejected the submission that the inspector had misapplied the local policies.

42. Mr Easton referred me to paragraph 87 of the lead judgment of Sir Keith Lindblom SPT, in that case:

“The absence of an explicit reference to striking a balance between "harm" and "public benefits" in the local plan policies does not put them into conflict with the NPPF, or with the duty in section 66(1). Both local and national policies are congruent with the statutory duty. The local plan policies are not in the same form as those for "designated heritage assets" in the NPPF. They do not provide for a balancing exercise of the kind described in paragraphs 193 to 196 of the NPPF, in which "public benefits" are set against "harm". But they do not preclude a balancing exercise as part of the decision-making process, whenever such an exercise is appropriate. They do not override the NPPF policies or prevent the decision-maker from

adopting the approach indicated in them. They are directed to the same basic objective of preservation.”

43. However, as Mr Parkinson points out, Sir Keith went on at paragraph 88 to observe that the inspector was free, and indeed obliged, in performing the duty under section 66(1) of the Planning (Listed Buildings and Conservation Area) Act 1990, to give such weight to local plan policies as she reasonably judged appropriate. That duty is as follows:

“In considering whether to grant planning permission or permission in principle for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”

44. In paragraph 89, Sir Keith continued:

“The inspector’s conclusion on weight, though it was not urged on her by either side at the enquiry, was nonetheless a lawful conclusion. That was a matter of planning judgment for her. Her conclusion was rational, and adequately reasoned...She acknowledged that those policies lacked the “balancing requirement” of the NPPF, but added that “they contain the statutory requirement.” By this she clearly meant that they embodied the objective of preserving listed buildings and their settings, in accordance with the duty in section 66(1). She was not saying she interpreted them as shutting the balancing exercise under paragraphs 196 and 196 of the NPPF. She went on to apply that balancing exercise in the assessment that followed, and she did so meticulously.”

45. Mr Easton accepts that the inspector in the present case carried out such a balancing exercise, but submits that he did so by applying NPPF 196 which expressly permits such an exercise, rather than by applying CP58 as required by section 38(6) of the 2004 Act. Had he done so, he should and would have applied great weight to the conflict of the proposal with that policy. That is of significance given that the inspector found that the harm and the public benefit of the proposal was finely balanced.
46. In my judgment, the inspector in this case carried out a similar exercise to that carried out in *Bramshill*, and also referred to the statutory duty in paragraph 58 of the decision letter, saying that he had “given considerable weight to the statutory duty to preserve” the church. There is an element of circularity in Mr Easton’s argument. If, as he submits, the inspector should have carried out the exercise under CP58, and if, as he submits, it is permissible to have regard to benefits under that policy, then the matter of what weight to give to the conflict with the policy having regard to the fact that on its terms it does not provide for balance exercising, would remain a matter for the planning judgment for the inspector. It is clear from paragraph 89 of the judgment in *Bramshill* that the inspector was entitled to acknowledge that lack.

47. Accordingly, ground 2 fails also.

Ground 3

48. In respect of ground 3, Mr Easton submits that it is illogical for the inspector to find that the harm to the church would be mitigated by the potential siting of the village green as part of the proposal, but then to hold that the village green and community car park could not be regarded as real benefits given the uncertainty as to their delivery. In oral submissions, he put this in essence as a reasons challenge.
49. In my judgment, on a fair reading of the decision letter as a whole that is not what the inspector did. In terms of mitigation of harm, what he said in paragraph 50 of the decision letter is that the outward view would be preserved due to the potential siting of the village green. On the indicative layout of the proposal, the village green is shown to the south of the built form and to the west of the church. In dealing with benefits, at paragraphs 52 and 53 he indicated that notwithstanding the merits of the village green and the community car parking area, there was no mechanism for those to come forward at the same time as the residential component which could exist for several years before details of these other components were brought forward.
50. However, as Mr Parkinson submits, even if there is uncertainty about the delivery of the car park and village green, the inspector was entitled to take into account that the proposal does not involve built form on the site of the proposed village green, which would remain open land over which the outward views from the grounds of the church directly westward would remain as at present. Mr Parkinson accepts that there is no condition preventing the proposal to change in this respect, but as control of reserved matters remains with the Council it has the power to refuse any change which would impact adversely on the outward views referred to by the inspector.
51. To the extent that this reasoning is not explicit in the decision letter, in my judgment, it is implicit from the reference in paragraph 50 to outward views being preserved because of the potential siting of the village green and from a fair reading of the decision letter as a whole. Accordingly ground 3 fails.

The same outcome

52. That is sufficient to dispose of the claim, and it is unnecessary for me to deal with alternative arguments of Mr Parkinson that even if the legal errors alleged under grounds 2 and 3 are made out, it is highly likely that the outcome would have been the same within the meaning of section 31 (2A) of the Senior Courts Act 1981. For the sake of completeness I will deal with these arguments but will do so briefly.
53. Mr Easton submits that to reach such a conclusion would be a result of post decision speculation which is impermissible (see *R(Logan) v London Borough of Havering* [2015] EWHC 3193).
54. In respect of ground 2, Mr Parkinson submits that even if the inspector had accorded great weight to the harm of the conflict of the proposal with CP58, for the purpose of NPPF 11d(ii), which the inspector found tipped the balance, this would not augment a finely balanced finding into one where the adverse impacts would significantly and demonstrably outweigh the benefits, as would be required to justify not granting

permission. Similarly, under ground 3, even if the inspector did assume that the village green would be delivered when assessing harm, there is still no basis for asserting that heritage harm would have been assessed at a higher level, given the control which the Council has over reserved matters.

55. I accept those submissions. This is not to engage in post decision speculation, but to assess the effect of these matters on the detailed assessments which the inspector carried out.

Conclusion

56. Each counsel presented his case with focussed persuasiveness and I am grateful to each for the assistance given to the court. Notwithstanding that of Mr Easton, the claim fails. Counsel helpfully indicated that any consequential matters which cannot be agreed can be dealt with on the basis of written submissions. A draft order, agreed if possible, should be filed within 14 days of hand down of this judgment, together with any such submissions if necessary.