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on the application of

- 1) BDW TRADING LIMITED
- 2) BLOOR HOMES LIMITED
- 3) REDROW HOMES LIMITED
- 4) HARWORTH ESTATES INVESTEMENT LIMITED
- 5) RUSSELL HOMES (UK) LIMITED
- 6) CASTLE GREEN HOMES LIMITED
- 7) SG ESTATES LIMITED

Claimants

- and -

WREXHAM COUNTY BOROUGH COUNCIL

Defendant

\_\_\_\_\_

Morag Ellis KC (instructed by Gateley Plc) appeared on behalf of the Claimant \_\_\_\_\_

## J U D G M E N T

MR JUSTICE EYRE:

1 On 19 April of this year the Defendant (“the Council”) considered an officer’s report. The recommendation in that report at paragraph 3.1 was that –

“The Council –

- (a) adopts the Wrexham Local Development Plan, Appendix 3, as amended by the binding changes set out in the inspector’s report as the new development plan for the Wrexham County Borough administrative area.
- (b) approves the adoption statement, habitat regulations assessment and equalities impact assessment and,
- (c) authorises the Chief Officer Economy and Planning to make outstanding typographical, grammatical, presentation or factual amendments to the Wrexham LDP, and supporting documents prior to its final publication.”

2 The Council resolved not to support that recommendation.

3 On 14 June 2023, the question of the adoption or otherwise of the local development plan (“the LDP”) was back before the Council. Again there was a recommendation for approval and again the Council resolved not to adopt the LDP.

4 The issue before me is the lawfulness or otherwise of those decisions. Was the Council free to decline to adopt the LDP as modified or was it obliged to adopt it?

5 As I explained earlier in this hearing I am satisfied it was appropriate to allow amendment of the Statement of Facts and Grounds so as to allow a challenge to the second of those decisions as well as the first. I am also satisfied that the challenge to the second decision is clearly arguable with sufficient merit for a grant of permission to be made.

### The History and Background

6 The Council is the local planning authority for the Wrexham area. The case concerns the draft local development plan for 2013 to 2028.

- 7 That plan was submitted for examination pursuant to section 64 of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) on 18<sup>th</sup> April 2019. The inspector’s report of 27 February 2023, recommended adoption of the LDP with modifications as set out in the report.
- 8 The LDP in its modified form is a matter of some contention.
- 9 The LDP came before the Council on 19 April 2023 with the recommendation which I noted above.
- 10 In advance of the matter coming to it for decision the Council had obtained an opinion from Mr John Hunter of counsel. That opinion addressed sundry issues one of which was the implications of Regulation 25 of the Town and County Planning (Local Development Plan)

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(Wales) Regulations, 2005 (“the 2005 Regulations”) and the extent to which that imposed an obligation on the Council. In his opinion Mr Hunter said that the effect of sections 66A and 67 of the 2004 Act and of regulation 25 was that a planning authority (in this case the Council) had no discretion but must adopt the LDP as modified.

- 11 The officers’ report recommended adoption in the terms I set out above. At paragraphs 5.45.7 the officers reported on the legal background. At 5.4 the various provisions were rehearsed. At 5.5 the said that the Council was expected to adopt the LDP within eight weeks of receipt which made the deadline for adoption 24 April. At 5.6 the report said:

“All binding recommendations in the inspector’s report must be incorporated into the plan, and it is not possible to adopt the plan with any of the binding changes omitted. Should the Council elect not to adopt the LDP, the Welsh government does have the legal authority to intervene, and can endorse the LDP on the Council’s behalf. The Council may be required to reimburse the Welsh government of any costs associated with direct intervention.”

- 12 The report then commented on the power of the Welsh Minister to direct a further modification to the LDP.

- 13 At 5.7 the report said that:

“The role of the Council at this stage has considered the role of the LDP as a whole and so, the resolution sought is simply to adopt the plan or not. There is no opportunity nor is it appropriate to seek to consider just one aspect of the plan, given that the inspector's report is with us, and examination has now closed.”

- 14 The report then commented on the possibility that non-adoption of the plan would mean that sites in the LDP area could still come forward and that the Council would be vulnerable to speculative development proposals.

15 At paragraph 6.1 the report said:

“As officers it is appreciated and respected that the decisions taken by the Council are made by members. Notwithstanding this, it is important that statutory duties and risks in relation to decision making are clearly explained, and members are provided with the correct professional advice and informed decision making.”

16 At 6.4 a number of risks were identified as associated with a failure to adopt the plan and then this was said at 6.5:

“Since the Council has a legal duty to adopt the LDP, a failure to adopt could leave the Council vulnerable for a challenge by way of judicial review. If such a challenge was to succeed, a court could make a binding order requiring the Council to comply with its duty to adopt. There will also be legal costs associated with such action.”

17 At section 8 under the heading “Evaluation of the Options”, the report identified two options. Option one was adoption of the LDP and this was said to be the preferred option as it avoided the risks identified in paragraph 6 of the report. Then option two was identified

as being not to adopt the LDP. This said to be not an advisable option as it generated the risks set out in paragraph 6.

- 18 Notwithstanding that report and those recommendations the members of the Council resolved not to adopt the LDP. The resolution giving effect to this stated: “The Council do not support the recommendations.” The reason given for the decision was said to be to meet the requirements of the 2005 Regulations to adopt the LDP within eight weeks of receiving the inspector’s report.
- 19 The decision of the Council led to the commencement of judicial review proceedings on 25 May 2023. The Claimants are various developers who have interests in land affected by the LDP. As a consequence they have an interest in the LDP being approved and, therefore, clearly have sufficient standing to bring these proceedings.
- 20 The Council acknowledged service of the proceedings and at section 1 of the Acknowledgement of Service the box saying, “I do not intend to contest the claim” was ticked.
- 21 The Welsh ministers were joined as an interested party and they also acknowledged service indicating that they did not intend to contest the claim.
- 22 In those circumstances there were proper and sensible moves to attempt to agree to the terms of a consent order.
- 23 Those came to naught because the matter was referred back to the Council on 14 June 2023. The officers’ report on that occasion addressed the matter further. At paragraph 2.7 this was said,

“Following receipt of the letter before claim, advice was sought from an experienced planning/administrative law barrister. The advice received is unequivocally clear. The judicial review claim has overwhelming merit, and the Council has, undoubtedly acted unlawfully. Counsel’s advice concludes that there are no grounds whatsoever for defending the judicial review claim. On this basis and in order to minimise costs as far as possible, the Council has no plausible option, but to concede that an unlawful decision had been made on 19 April.”

- 24 At paragraph 3.1 a recommendation mirroring the earlier recommendation was made. At paragraph 4.6 this was said:

“During the LDP process and subsequent judicial review proceedings, we have been advised by three separate legal external sources, all of which are experts in planning and administrative law. All have advised that the LDP must be adopted by the Council. While fully respecting the democratic process the Council, and that full council will take a democratic decision, given that the Council is subject to the law and to achieve the best financial value, the professional advice from the Chief Executive, Chief Officer Planning

in Economy, Chief Officer Governance and Customer and Chief Officer Finance and ICT has to be to adopt the LDP.”

- 25 The report, as had the earlier report, had a passage entitled “Evaluation of options”. This said:

“Option one: adopt the LDP. The process of adoption will be followed through, including publication. The Council will be liable for costs associated with the judicial review to date. Option two: do not adopt the LDP. The judicial review application will proceed through the court process, resulting in court orders including costs being made against the Council. The court will order the Council to adopt the LDP. The outcome will, therefore, eventually be the same, the adoption of the LDP, but the costs incurred will be significantly higher.”

That was the recommendation and the information that was given to the Council. The Council, nonetheless, resolved that it did not support the recommendations set out in the report, and the reason on that occasion was said to be the upholding of local democracy.

- 26 The matter came before HH Judge Jarman KC for consideration of permission on the papers. He gave permission and set out directions. These included a time for the Defendant to file written evidence and a period of time for any challenge to be made to the Claimant’s skeleton argument in due course. The Council has not put any material before the court and has chosen not to contest these proceedings. It has not, however, consented to the relief sought by the Claimant.

### The Issue

- 27 The issue before me is the lawfulness of the Defendant’s actions. The following need hardly be stated but I do so out of abundance of caution and in light of the stance which appears to have been taken by members of the Council. The court is not concerned with the merits of any particular version of the LDP, whether with or without the modifications proposed by the inspectors. It is not concerned with the wisdom or appropriateness of the LDP or of the modifications. Still less is it concerned with the wisdom or appropriateness of the applicable law whether contained in statute or in regulation. The court is concerned solely with the question of whether it was lawful for the Council to refuse to adopt the LDP.
- 28 It is important for all concerned also to remember that the Council is a body set up by law. Its obligations and its powers depend not on some abstract democratic entitlement but on particular statutory provisions. Inevitably on some occasions elected councillors will find the restrictions on their powers irksome. On other occasions they will feel unhappy about the actions they are obliged by law to undertake. There will be other occasions when citizens will feel aggrieved at the extent of the powers a local authority has. The powers of a local authority and the duties to which it is subject are sides of the same coin. The Council’s powers derive from legislation but it cannot claim to use those powers without being subject to the duties which also imposed by legislation.

- 29 I return to the point that the court is not dealing with the question in the abstract of whether a local council should be free to adopt or to decline to adopt an LDP, let alone whether this council should in abstract be free to adopt or decline to adopt this LDP with modifications. It is concerned with the concrete question of whether the Council have the legal power to do what it did under the particular legislation.

### The Legislative Framework

- 30 I turn therefore to the relevant statutory provisions. I begin with section 62 of the 2004 Act. Sub-section 1 provides that:

“(1) The local planning authority must prepare a plan for their area to be known as a local development plan.

(2) The plan must set out—

(a) the authority’s objectives in relation to the development and use of land in their area;

(b) their general policies for the implementation of those objectives.”

- 31 Sub-section 3(a) and (b) provide for the plan to be in general conformity with the national development framework for Wales, and set out matters which must be specified in the plan. Sub-section (8) says that:

“A plan is a local development plan only insofar as it is –

(a) is adopted by resolution of the local planning authority as a local development plan,

(b) is approved by the Assembly under section 65 or 71 of the Act.”

- 32 Section 63 provides:

“Preparation requirements

(1) A local development plan must be prepared in accordance with –

(a) the local planning authority’s community involvement scheme;

(b) and the timetable for the preparation and adoption of the local authority’s development plan.

(4) The authority and the Assembly must attempt to agree the terms of the documents mentioned in paragraphs (a) and (b) of subsection (1)

(5) But to the extent that the Assembly and the authority cannot agree the terms the Assembly may direct that the documents must be in the terms specified in the direction.

(6) The authority must comply with the direction.”

33 Section 64 says

“Independent examination

(1) The local planning authority must submit their local development plan to the Assembly for independent examination

(2) But the authority must not submit a plan unless—

(a) they have complied with any relevant requirements contained in regulations under this Part, and

(b) they think the plan is ready for independent examination.

...

(4) the examination must be carried out by a person appointed by the Assembly.

(5) The purpose of the independent examination is to determine in respect of a local development plan—

(a) whether it satisfies the requirements of sections 62 and 63 and of regulations under section 77;

(b) whether it is sound.

...

(7) The person appointed to carry out the examination must—

(a) make recommendations;

(b) give reasons for the recommendations.

(8) The local planning authority must publish the recommendations and the reasons.”

34 Section 65 gives the Assembly powers to intervene in circumstances if it thinks the local development plan is unsatisfactory and then section 66(1) provides that the Welsh Ministers may at any time before the plan is adopted under section 67 direct the local



planning authority to withdraw the plan. Sub-section (3) provides that where there is such a direction the Authority must withdraw the plan in accordance with it.

35 Section 66A reads: -

- “(1) This section applies where a local planning authority are not required to withdraw their local development plan under section 66.
- (2) Subject to the provisions of this section, the authority may withdraw the plan at any time before adopting it under section 67.
- (3) A local planning authority may not withdraw their local development plan when the Welsh Ministers have—
  - (a) directed the authority to submit the plan for approval under section 65(4), or
  - (b) taken any step under section 71 in connection with the plan.
- (4) A local planning authority may withdraw a local development plan that has been submitted for independent examination under section 64 only if—
  - (a) the person carrying out the independent examination recommends that the plan is withdrawn, and
  - (b) a recommendation is not overruled by a direction given by the Welsh Ministers.
- (5) A local planning authority may withdraw a local development plan to which subsection (6) applies only if—
  - (a) the authority have given notice to the Welsh Ministers of their intention to withdraw the plan, and
  - (b) the notice period has expired.
- (6) This subsection applies to a local development plan if the local planning authority—
  - (a) have not yet submitted the plan for independent examination under section 64, but
  - (b) have taken steps in connection with the preparation of the plan that are specified in regulations made by the Welsh Ministers.

(7) Where a local planning authority have given notice under subsection (5)(a), the Welsh Ministers may, by direction to the authority, do either or both of the following—

(a) require the authority to provide further information;

(b) extend the notice period.”

36 Section 67 provides as follows:

“Adoption of local development plan –

(1) The local planning authority may adopt a local development plan as originally prepared if the person appointed to carry out the independent examination of the plan recommends that the plan as originally prepared is adopted.

(2) The authority may adopt a local development plan with modifications if the person appointed to carry out the independent examination of the plan recommends the modifications.

(3) A plan is adopted for the purposes of this section if it is adopted by resolution of the authority.

(4) But the authority must not adopt a local development plan if the Assembly directs them not to do so.”

37 Section 68 gives the Assembly power to revoke a local development plan at any time at the request of a local planning authority.

38 Section 71 of the Act applies if the Assembly thinks the local planning authority are failing or omitting to do everything it is necessary for them to do in connection with the preparation and revision or adoption of the local development plan. In summary, it provides for there to be the holding by the Assembly of an independent examination and the approval of the plan as a local development plan by the Assembly.

39 Section 77(1) says “(1)The Assembly may by regulations make provision in connection with the exercise of functions conferred by this Part on any person” and then sub-section (2) sets out a non-exhaustive list of the matters in respect of which regulations may be made.

40 In purported exercise of the power under section 77, the Ministers made the 2005 Regulations and at 25(1) these provide:

“The LPA must adopt the LDP within eight weeks within receipt of the recommendations and reasons given by the person appointed to carry out the examination, unless otherwise agreed in writing by the National Assembly.”

## Discussion

- 41 The approach to be taken to the interpretation of legislation is not contentious and is well established. In very broad summary the exercise is to determine the meaning of the legislation, having regard to the language used when seen in context. The context is: the language of the legislation as a whole so that each section is to be seen in the context of the other provisions of the particular legislation; the factual background against which the legislation is enacted; and the purpose of the legislation. Where there is a matter which has not incorporated in legislation by express words the court can conclude that it is there by way of necessary implication. However, the implication has to be a necessary one having regard again to the language seen in context but also to the purpose of the legislation.
- 42 In that regard, I have been referred helpfully to the case of *R (on the application of VIP Communications Ltd v Secretary of State for the Home Department* [2023] UKSC 10, at paragraphs 15 and 16 in the judgment of Lord Richards with whom the other members of the Supreme Court agreed. I have also had regard to the judgment of the Chancellor in *Darwall -v- Dartmoor National Park Authority* [2023] EWHC 35 Ch, [2023] Ch 141, at paragraphs 16-19, referring there again to the Supreme Court analysis of the approach. I also take into account the dictum of Lord Hobhouse in the case of *R (Morgan Grenfell & Company Ltd) v Special Commissioner Income Tax* [2002] UKHL 21 at paragraph 45 and the qualification of Lord Hobhouse's language by Lady Hale in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] AC 2015, at paragraphs 36(3) and (4).
- 43 Before me Miss Ellis KC submitted that when seen in context section 67 is to be read as imposing a duty as well as a power with the effect that it imposes a duty to adopt the LDP as well as a power as to the way in which the LDP is to be adopted. As a fallback position, she contended that Regulation 25 was within the powers given by section 77 and that it was to be seen also as imposing a duty if (which she did not accept) one did not arise from the Act itself.
- 44 It will already have been seen that there has been ample opportunity for the Defendant to take part in these proceedings and to advance arguments contrary to the contentions made by the Claimants. It has chosen not to do so. It is also clear that the repeated legal advice to the Council was that it had a duty to adopt the LDP and that the duty arose by virtue of the provisions either of the Act or the Regulation.
- 45 Interpretation is, however, a matter for the court. The court cannot allow a matter of interpretation to pass by agreement or the absence of opposition. Instead it must itself have regard to the legislation to determine whether the interpretation being pressed upon it is the correct one. I have engaged in that exercise and I am entirely satisfied that the analysis advanced by Miss Ellis is correct.
- 46 Out of an abundance of caution, I have considered potential counter arguments. I have taken account of the fact that the Act does not expressly impose an obligation to adopt. It does not anywhere say in terms, "Following receipt of the inspector's report the Authority shall adopt the LDP". I have taken account of the fact that it would have been possible for

the legislation to have included such an express obligation. I have also considered as a potential countervailing factor the existence of the Welsh Ministers' default powers.

- 47 However, I am satisfied that none of those factors out-balance the following particular features of the legislation when seen in context which are compelling in support of the conclusion that there was a power imposed by the Act. Those matters are the scheme of the Act as a whole; the requirement in section 62 that a plan be prepared; the requirement in section 64 for independent examination; the power in section 66 whereby withdrawal of the LDP can be directed; the restrictions in section 66A on the power of a local authority to withdraw its own LDP; and the language of section 67.
- 48 It is right to note that section 67 does say that the local authority "may adopt" a local development plan. However, when seen in context the language of that section and the reference to "may adopt" is talking about the different ways in which adoption can be affected or rather about the different forms of plan which can be adopted in different circumstances. The section does not suggest that the authority has any true discretion as to whether or not the plan should be adopted and certainly does not indicate a discretion to decline to adopt. Indeed, when seen in context the effect is that it is a necessary implication into section 67 that the authority must adopt the plan in one or other of the ways set out there, those ways being governed by the particular circumstances of whether there has or has not been a recommendation for modification to the plan.
- 49 I am satisfied the fact that the Welsh Ministers have fallback powers does not preclude the Council having an obligation and does not countervail against the factors I have just recited.
- 50 It follows that on a proper reading of the Act, after receipt of the recommendation by the inspectors, the Council had to adopt the LDP. Section 67 imposes a duty as well as a power.
- 51 I reach that conclusion without reference to regulation 25. Regulation 25 clearly purports to impose a duty to adopt an LDP or rather it purports to be regulating a duty which it envisages as already existing and to govern the timing of the performance of that duty. I have some reservation as to whether regulation 25 would be effective to impose a duty if one did not already exist under the Act. There is scope for debate as to whether the section 77 power to make regulations extends as far as entitling the regulation-making body to compel an authority to exercise a power in a particular way if the power in question is a discretion which could be exercised in the contrary way. Putting it more directly, if the relevant authority had a discretion not to adopt an LDP, notwithstanding the recommendation of an inspector, I would have reservations as to whether the regulationmaking power extended to making a regulation totally to remove that discretion. I therefore do not base my decision on the effect of regulation 25.
- 52 However, regulation 25 is a potent indication of the Assembly's understanding of the meaning of the 2004, and on the footing that the Act does impose a duty, the regulation is effective to specify when that duty must be exercised, or rather the time that duty must be performed.

## Conclusion

53 The effect of all that is that the Council did not have a power to decline to adopt the LDP. It had to adopt that plan with the recommended modifications and should have done so within eight weeks of 27 February 2023. The resolutions declining to adopt the LDP were ultra vires, that is outside the powers of the Council, and/or irrational by reason of taking account of irrelevant considerations, namely the mistaken belief that the Council had power to decline to adopt the LDP. Further, by declining to adopt the LDP, the Council was failing to perform a duty which was imposed on it by statute. The claim therefore succeeds in respect of both the decisions of April and of June.

## The Order to be made

54 I turn to the question of redress. Both decisions are to be quashed. I remit the matter to the Council and direct them to reconsider the matter and to reach a decision in accordance with the judgment of this court. To be clear: the only decision which would be capable of being a decision in accordance with the judgment of the court would be the passage of a resolution adopting the LDP as modified.

55 I have reflected on timing. The Claimants invite an order directing that the reconsideration be by 31 December of this year. I am conscious that the Council is a public body. I must proceed on the footing that now that the court has stated in a formal judgment what its duty is then the Council will comply with that and will carry out its duty and, moreover, will do so without undue delay.

56 I am reluctant to specify any particular time limit. That is because I have regard to the independence of the Council and because I anticipate that it will act properly. It must have however, act promptly. Undue delay would be a further failing in the performance of its legal duties. I will not, therefore, set a specific time limit for the reconsideration but that is on the footing that there will be prompt action by the Council without such a time limit being specified. I give the Claimants permission to apply to the court for further directions either if a summons for a council meeting to consider this matter has not been issued by 4.00 p.m. on 14 December of this year or if such summons does not provide for the meeting to be held within a reasonable period of the summons. Any such application is reserved to me. As I hope I have made clear, I am not requiring the Council necessarily to meet by 31<sup>st</sup> December but in my current assessment a meeting and a resolution adopting the LDP any later than the middle of January 2024, at the very latest, would not be a proper response to this order. In the absence of a proper response, the court will then have to consider taking firmer action to ensure that the Council complies with the duty which I have found it owes. I am optimistic that such a course will not be necessary because I am optimistic that, the duty having been spelt out in the court of law, the Council will comply now with its duty.

57 The Claimants are entitled to recover their costs. In a moment or two I will consider the amount of those costs. However, it follows that the effect of the Council's decisions has been that substantial legal sums have been incurred by way of the costs of the Claimants. Those are sums which the Council will have to pay. They are sums which would not have had to be paid if the Council had performed its duty under the Act and in acted accordance with the recommendations of the Council officers.

58 There has been a further adverse consequence of the Council decision. It has meant the time of the court and of court staff has been taken up with this matter. That is an important consideration. That is not because of the interests of judges or court staff themselves. Rather it is an important consideration because time has been taken up in dealing with this case when it could otherwise have been taken up with dealing with the affairs of other litigants. There is a backlog of cases with which the courts are dealing. Inevitably, this case has had the consequence that other litigants with pressing personal concerns and pressing matters of importance to them have had their cases delayed. Those cases have been delayed because the Council deliberately, in the face of legal advice and of the recommendations of its officers, chose to decline to carry out its legal duty. Sadly, that adverse effect on other members of the public is not one for which compensation can be levied but it is nonetheless, a consequence of the Council's actions which I am compelled to record.

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This transcript has been approved by the Judge.