

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PLANNING PERMISSION – certificate of appropriate alternative development - former plant nursery in open countryside – certificate sought for residential development – held that residential development not appropriate alternative development – certificate varied to allow renewable energy or small-scale employment uses related to local farming, forestry, recreation, or tourism – section 18 Land Compensation Act 1961

IN THE MATTER OF AN APPEAL UNDER SECTION 18
LAND COMPENSATION ACT 1961

BETWEEN: **MR KEITH G REEVES** **Appellant**

and

THE SECRETARY OF STATE **Respondents**
FOR TRANSPORT (1)
BOLSOVER DISTRICT COUNCIL (2)

**Re: Land at 45 Chesterfield Road,
Shuttlewood,
Chesterfield,
Derbyshire,
S44 6QN**

Before: Mr P D McCrea FRICS

Sitting at: Derby Justice Centre

on

4 March 2019

Mr Stephen Locke for the appellant
Mr Chris Fridlington for the second respondent

The following cases are referred to in this decision:

The appeal of Mintblue Properties Ltd [2016] UKUT 172 (LC)

Fletcher Estates(Harlescott) Limited v Secretary of State [2000] 2 AC 307

Lockwood v Highways England [2019] UKUT 104 (LC)

Introduction

1. This is an appeal by Mr Keith Reeves (“the appellant”) under section 18 of the Land Compensation Act 1961 (“the 1961 Act”) against a Certificate of Appropriate Alternative Development (“CAAD”) issued on 23 August 2017 by the local planning authority, Bolsover District Council (“the council”) in respect of the appellant’s land at 45 Chesterfield Road, Shuttlewood, Chesterfield, Derbyshire (“the appeal site”).

2. The appeal site is within a corridor safeguarded for Phase 2B (West Midlands to Leeds) of the proposed HS2 rail link. On 27 April 2017 the Secretary of State for Transport accepted the appellant’s blight notice under HS2 Ltd’s discretionary Express Purchase Scheme.

3. On 27 July 2017 Mr Reeves’ agent applied to the council for a CAAD, submitting proposals for residential development of up to 24 units. On 23 August 2017, the council issued a “negative” certificate, certifying that the applicant’s proposals were not appropriate alternative development for the following reasons:

“The site is outside the settlement framework and lies in the open countryside. The proposed housing has not been justified with any reference to any essential need and would have a significant urbanising impact on the countryside. As such residential development is considered to be unnecessary development in the countryside in an unsustainable location. The proposal is therefore contrary to the requirements of policies HOU 2, ENV 3 and HOU 9 of the Bolsover District Local Plan and the policies of the National Planning Policy Framework.”

4. The council did not provide any indication of what development it would consider appropriate, and now accepts that it should have done so.

5. On 24 January 2018, Mr Reeves filed a reference with the Tribunal, citing the council as respondent. The council filed a response to the notice and a statement of case. After some months it was appreciated that the council was not the correct respondent – that was the Secretary of State for Transport as the acquiring authority (HS2 having no compulsory purchase powers). Following an application from both the Secretary of State and the council, and by agreement between all three parties, the Secretary of State was added as the (non-participating) respondent, with the council remaining as a participating party to the reference.

6. This situation is not unprecedented. In *The appeal of Mintblue Properties Ltd* [2016] UKUT 172 (LC) the Tribunal (Mr A J Trott FRICS) explained:

“7. The parties to an appeal under section 18(1) of the 1961 Act (as amended) are:

(a) the person for the time being entitled to [an interest in land in respect of which the local planning authority have served a section 17 certificate], or

(b) any authority possessing compulsory purchase powers by whom that interest is proposed to be, or is, acquired.’

In this case confusion has arisen because the local planning authority and the acquiring authority are not the same authority. The proper respondent to an appeal made by the person entitled to an interest in the land is the acquiring authority. The local planning authority, whose decision is the subject of the appeal, is not a party to the appeal under section 18 of the 1961 Act. Care should be taken by appellants when submitting a notice of appeal under section 18 to ensure that the acquiring authority is named as the respondent to the appeal.”

7. The Tribunal’s observations in *Mintblue* do not mean that a local planning authority which is not also the acquiring authority must be excluded from participation in an appeal against its decision. There may be good reasons why a planning authority wishes to defend its view on the appropriateness of an alternative development. If there are, the Tribunal is likely to be sympathetic to a request by the authority that it be added to the appeal as an additional respondent (under rule 9(3) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010). Nevertheless, it is hoped that by again highlighting this issue, appellants under section 18 of the 1961 Act will be careful to cite the acquiring authority as the necessary respondent to any reference to the Tribunal, whether or not it is also the local planning authority.

8. At the hearing, Mr Stephen Locke, a Chartered Surveyor and Chartered Town Planner, appeared for the appellant. Mr Chris Fridlington, planning manager, and Mr Chris McKinney, principal planning officer, represented the council. On the morning of 16 May 2019, I carried out an unaccompanied inspection of the appeal site from the roadside, the village of Shuttlewood, and the Gladwell Nursery site which I deal with below.

The appeal site

9. The appeal site comprises the former Hillcott plant nursery, which closed some five years ago. It extends to about 2.3 acres and is situated on a hillside, fronting the north side of Chesterfield Road (the B6418) half a mile south-west of the small village of Shuttlewood. It has extensive views over fields to the south and west.

10. The appeal site lies outside the settlement framework of the village, being separated from it by open agricultural land. There are a small number of dwellings opposite the appeal site, but the general situation is a rural one. Further to the south west along the B6418, about another half mile away, is the former Coalite works, which are the subject of redevelopment proposals. The appeal site has bus-stops immediately adjacent, and both the village and the Coalite works are within walking distance. Junction 29 of the M1 lies about 2 miles to the south west, via the Markham Vale redevelopment area. Bolsover is about two miles to the south-east.

11. The site comprises a dwelling, garage, domestic garden and redundant nursery facilities.

Statutory Provisions

12. As far as material to this reference, section 14 of the 1961 Act, as amended by the Localism Act 2011 "... is about assessing the value of land ... for the purpose of assessing compensation in respect of a compulsory acquisition of an interest in land."

13. Section 14 provides that in carrying out the valuation exercise, account may be taken of planning permission, whether on the relevant land or other land, in force at the relevant valuation date; or of the prospect, on certain assumptions and in circumstances known to the market at the relevant valuation date, of planning permission being granted on or after that date. In addition, it may be assumed that planning permission is in force at the relevant valuation date for any development that is appropriate alternative development, or a certainty on that date that permission would be granted on a later date at which it could reasonably be expected to be granted.

14. I return to the "relevant valuation date" below.

15. In the absence of agreement as to the scope of appropriate alternative development, either the landowner or the acquiring authority can in prescribed circumstances apply to the local planning authority ("LPA") under section 17(1) of the 1961 Act for a certificate containing whichever of the following is applicable:

a) a statement that in the LPA's opinion there is development that, for the purposes of section 14, is appropriate alternative development in relation to the acquisition

or

b) a statement that in the LPA's opinion there is no development that, for the purposes of section 14, is appropriate alternative development in relation to the acquisition.

16. If the LPA issues a positive certificate under a), the certificate must also identify every description of development (whether specified in the application or not) that in the local planning authority's opinion is, for the purposes of section 14, appropriate alternative development in relation to the acquisition concerned, and give a general indication of any conditions to which planning permission for the development could reasonably have been expected to be subject; it must also state when the permission could reasonably have been expected to be granted if it is one that could reasonably have been expected to be granted only at a time after the relevant valuation date, and identify any pre-condition for granting the permission (for example, entry into an obligation) that could reasonably have been expected to have to be met.

17. If the LPA has issued a positive certificate, for the purposes of assessing compensation under section 14, the development certified is appropriate alternative development if it is of a

description identified in the CAAD, subject to the conditions, timing and any pre-conditions specified in the certificate.

18. Either party may, under section 18, appeal to the Upper Tribunal against the certificate. In any appeal, the Tribunal must consider the matters to which the certificate relates as if the application for a certificate under section 17 had been made to the Tribunal in the first place, and must confirm the certificate, or vary it, or cancel it and issue a different certificate in its place, as the Tribunal may consider appropriate. I note that there is no scope to remit the application to the LPA for reconsideration.

19. What is the relevant date at which the CAAD is determined? Prior to being amended by virtue of the Localism Act 2011, the situation was clear – the relevant date was the date of the notice that the interest in land is proposed to be acquired, described in section 22(2) of the Act (*Fletcher Estates(Harlescott) Limited v Secretary of State* [2000] 2 AC 307).

20. However, a difficulty arises from the amended legislation. As I indicated above, the planning assumptions under section 14 are made at the relevant valuation date, which is defined in section 5A. In this reference, the effect of the Secretary of State accepting the appellant’s blight notice is that there was a deemed notice to treat on the expiration of two months after the service of the notice. In these circumstances, section 5A(3) defines the relevant valuation date as the earlier of a) the date when the acquiring authority enters on and takes possession of the land and b) the date when the assessment (of valuation) is made. In its recent decision of *Lockwood v Highways England* [2019] UKUT 104 (LC) the Tribunal (Mr A J Trott FRICS) highlighted the issue that similar circumstances can create (at [44]):

“where a blight notice has been accepted and a deemed notice to treat served but entry onto the land has not yet been taken, the relevant valuation date is still in the future. This presents obvious difficulties in considering what might be appropriate alternative development at that time.”

21. The Tribunal concluded (at [47]):

“In the absence of any provision dealing with a deemed notice to treat it is necessary to have regard to section 5A(3). Subsection (a) does not apply because possession has not yet been taken. Subsection (b) only applies when the valuation assessment has been made, an assessment which it appears the parties wish to achieve by negotiation. In my opinion, in circumstances such as these where a section 18 appeal has been made before entry has been taken, and where the Tribunal is not being invited to determine the compensation payable at the same time, the appellant must be taken to be willing to have the terms of the CAAD determined on the basis of policy at the date of determination. That is the closest date to the date of entry for which a policy framework can reliably be identified and without speculating about future policy changes. One way of looking at it might be to say that, by bringing the appeal when they have, the appellants have waived the right to rely on any relevant changes of policy which might occur before the date of entry or assessment.”

22. Similar circumstances are present in this reference - a blight notice has been accepted but the reference land has not yet been acquired. I am left, as the Tribunal was in *Lockwood*, to do the best I can on the material available at the date of my determination.

23. In *Lockwood*, the Tribunal went on to explain the consideration given to the Planning Acts and the development plan:

“49. In determining the appeal the Tribunal should apply ordinary planning principles: see *Fletcher Estates (Harlescott) Limited v Secretary of State* [2000] 2 AC 307 per Lord Hope at 324 and *Rooff Limited v Secretary of State* [2011] EWCA Civ 435 per Carnwath LJ (as he then was) at paragraph 5. Those ordinary planning principles are set out in section 70 of the 1990 Act and section 38(6) of the 2004 Act.

50. Section 38(6) of the 2004 Act refers to a determination that is required to be made under the Planning Acts. The definition of the Planning Acts is contained in section 117(4) of the 2004 Act and does not include the 1961 Act. The consequences of this for the determination of an appeal under section 18 of the 1961 Act were analysed at paragraph 65 in *Tescan Limited v Cornwall Council* [2014] UKUT 408 (LC) where the Tribunal, Mr A J Trott FRICS, determined that regard should be had to the development plan in accordance with section 38(6) of the 2004 Act.

51. The Tribunal is therefore required to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from that plan. The requirements for interpreting the provisions of a development plan were considered by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13: see Lord Reed at paragraphs 17 to 19. What constitutes a “material consideration” is a matter of law; what weight should be given to it is solely a judgement for the decision-maker: see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 ALL ER 636 per Lord Hoffmann at 657 [13].

52. The Tribunal must be satisfied on the balance of probabilities that planning permission would have been granted for the description of development applied for and it does not have to assess more precisely the prospects of that development happening or of the permission being implemented: see *Harringay Meat Traders Limited v Secretary of State* [2012] EWHC 1744 (Admin) per McCombe J at paragraph 11 and *Porter v Secretary of State for Transport* [1996] 3 ALL ER 693 per Stuart-Smith LJ at 704e.

53. The Government’s updated guidance on *Compulsory Purchase Process and the Crichel Down Rules* (February 2018) gives guidance about what a section 17 certificate should contain at paragraph 263:

‘If giving a positive certificate, the local planning authority must give a general indication of the conditions and obligations to which planning permission would have been subject. As such the general indication of conditions and obligations to which the planning permission could reasonably be expected to be granted should focus on those matters which affect the value of the land. Conditions relating to detailed

matters such [as] approval of external materials or landscaping would not normally need to be indicated. However, clear indications should be given for matters which do affect the value of the land, wherever the authority is able to do so.

Such matters would include, for example, the proportion and type of affordable housing required within the development, limitations on height or density of development, requirements for the remediation of contamination or compensation for ecological impacts, and significant restrictions on use, as well as financial contributions and site-related works such as the construction of accesses and the provision of community facilities. The clearer the indication of such conditions and obligations can be, the more helpful the certificate will be in the valuation process.”

Common ground on planning documents

24. The parties agreed a helpful statement of common ground in which they agreed:
- a. The statutory development plan is the correct starting point from which to determine the appropriateness of the proposals for alternative development and alternative use value of the land.
 - b. The adopted Bolsover District Local Plan (2000) [which I shall call the Local Plan] is part of the statutory Development Plan for the local area.
 - c. The Publication version of the Local Plan for Bolsover District [which I shall call the new Local Plan] is not part of the statutory Development Plan for the local area and therefore carries less weight than saved policies in the Local Plan. The Publication version of the new Local Plan has been submitted to the Secretary of State.
 - d. The appeal site is outside the “settlement framework” in both the Local Plan and the new Local Plan. In the new Local Plan, the appeal site is outside the proposed open space break area south of Shuttlewood but is within walking distance of a proposed priority regeneration area. The appeal site is on a bus route.
 - e. Other material planning considerations including policies in the new National Planning Policy Framework (2018) [“NPPF”] may indicate an exception to the Development Plan may be appropriate in some cases.
 - f. The NPPF says that to promote sustainable development in rural areas housing should be located where it will enhance or maintain the vitality of rural communities.
25. In addition, at the beginning of the hearing Mr Locke accepted that the council has an adequate five-year housing delivery supply. Accordingly, in outlining the appellant’s case below, I do not include the lengthy submissions to the effect that the council did not have such a supply. I should add that I make no criticism of Mr Locke’s change of position – made after considering documents supplied by the council shortly before the start of the hearing.

The appellant's case

26. Mr Locke began by describing the location of the appeal site, falling within the Estate Farmlands landscape character of the Nottinghamshire Derbyshire and Yorkshire coalfield landscape character type. This is a broad, gently undulating and industrial landscape where arable farming tends to dominate. Being an extensively managed landscape, it has little ecological value as confirmed in the Derbyshire landscape character assessment. The former mining villages and terraces are a distinctive attribute of many of the settlements in this area and the Estate Farmlands have been impacted by industrialisation such as open cast coal mining, the development of major transport routes and the expansion of settlements. The landscape is not pristine and could accept additional residential development. The appeal site is also large enough to accept some new tree and hedge planting which would help to re-establish and enhance the physical links between existing isolated features.

27. Mr Locke submitted that the appeal site is ideally positioned close to the settlement of Shuttlewood and within easy walking distance of the proposed employment site at the former Coalite Plant some 400m away to the south west, where up to 68,350 sq metres of employment space has been proposed. The appeal site is one of the least tranquil areas of Derbyshire and as such is more suited to development than some of the more rural areas.

28. Shuttlewood is classed as a “small village” in the local plan but has been targeted for additional development and has a range of employment, shopping/community facilities and general amenities. A public bus route runs directly through the village with a bus stop directly next to the proposed site, making it extremely sustainable.

29. Mr Locke submitted that there were no known physical constraints upon the ability to construct dwellings. The appeal site is not in a flood risk area, it is compatible with neighbouring uses, there is direct access to public transport, good access to key services, no contamination, no constraint by way of topography, no major impacts on wild life, no heritage and no major conservation issues. He added that the landscape is not exceptionally high value and mitigation and enhancement can be implemented. The land is not of high agricultural quality and the appeal site is suitable and available for development.

30. As for planning policy, Mr Locke submitted that the Local Plan is out of date, being produced well in advance of the NPPF. Accordingly, it should only be afforded some weight when determining planning applications, whereas the NPPF is a material consideration that must be afforded significant weight. While the Local Plan contains local and site-specific policies on general development issues and allocates sites for specific development, many of the policies have expired. The council is now considering representations received during the consultation draft of the new Local Plan which directs growth to the district's more sustainable settlements such as Bolsover and Shirebrook, beyond which lower levels of growth will be directed to the

smaller settlements in recognition of their lower sustainability and often greater environmental constraints.

31. While Shuttlewood is identified as a small village in the settlement hierarchy, Mr Locke submitted that the appeal site is highly accessible being directly off the B6418 and on a public transport route. It is therefore in a sustainable location close to the village of Shuttlewood and within easy walking distance of the former Coalite works site, earmarked for a new development hub. The linear character of development will also be retained.

32. He accepted that while the appeal site is not within the village envelope of Shuttlewood, and therefore its development would conflict with emerging policy SS3 of the new Local Plan, the plan states that beyond the more sustainable settlements, there would be support for some limited development in a small number of villages – Shuttlewood is identified as one of these villages.

33. The current local plan indicates the new safe cycling route to the south of the appeal site defined under policy TRA13. This would allow the appeal site to be linked to Bolsover by a new cycle route, thus enhancing the site's sustainability credentials. In addition, policy TRA07 shows strong support for sites that have safe and convenient access to public transport - the site is directly adjacent to a bus route.

34. It is important to look at the NPPF to establish the degree to which the council's development policies are up to date. The core planning principles at paragraph 17 of the NPPF include the need to drive economic development and deliver the homes that the country needs, locating development where there is accessibility to non-car modes of transport. Whilst paragraph 55 seeks to avoid isolated houses in the countryside for less specified purposes, the overarching aim is to promote sustainable development in rural areas and maintain the vitality of rural communities.

35. At paragraph 11 the NPPF states that development that is sustainable should go ahead without delay and applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. The restrictive approach of the Bolsover Development Plan to limiting new housing allocations within defined settlement boundaries is insufficiently flexible to be NPPF compliant. In the context of paragraph 215 of the NPPF, the existing development plan should be considered out of date and the wider aim of focussing on sustainable and deliverable sites is key.

36. The NPPF also states (at paragraph 14) that where relevant policies are out of date, permission should be granted unless adverse impacts would significantly and demonstrably outweigh the benefits when assessed against the policies in the framework as a whole, or specific policies in the framework. The contribution that 24 houses would make to the supply of housing therefore weighs heavily in support of the application.

37. Mr Locke referred to a decision of the Planning Inspector (APP/R1010/W/18/3198997) in respect of Glapwell Nurseries, Glapwell, S44 5PY where, on appeal, planning permission was granted for the development of up to 65 dwellings on the site of a nursery and garden centre. The Inspector concluded:

“46. The appeal site is located in the countryside outside of the Settlement Framework for Glapwell. Policies GEN 8 and ENV 3, seek to restrict new development in the countryside unless it would meet one of a limited number of exceptions. The development would not meet any of these exceptions and would therefore be contrary to those policies. Whilst the Local Plan is now of some age, Paragraph 213 of the Framework states that existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of the Framework. As set out above, the Council is also able to demonstrate a 5 year supply of deliverable housing sites.

47. Set against this, I have found that the site would not significantly harm the character and appearance of the area, and would be relatively well served by services, facilities, and public transport. In addition, the development would provide for the restoration and reuse of the Grade II listed bothy within the site, which is identified in the Council’s Heritage at Risk Strategy. This would be a significant benefit in my view that would put the building into a viable long term use. The development would also provide a significant number of new dwellings, including affordable housing, and would generate economic benefits through the creation of employment and the purchasing of materials and furnishings. The planning obligation would also provide contributions towards off-site sports facilities, children’s play facilities, education, and public art. Moreover, the existing garden centre would be retained and improved.

48. Overall, there is conflict with the development plan but no other significant harm would arise from the development. Moreover, significant benefits would be delivered. In this case, the conflict with the development plan would therefore be outweighed by other material considerations.

49. For the reasons given above I conclude that the appeal should be allowed.”

38. In short, Mr Locke’s point was that this decision, which involved a similar existing use to that formerly at the appeal site, set a precedent.

39. As regards planning conditions, matters likely to be the subject of planning conditions include external finishes, ground levels, boundary treatments, landscaping, car parking and turning, provision and retention of new access and visibility splays, noise attenuation measures, hours of work and approval of site foul and clean water drainage schemes. No section 106 planning obligations were anticipated.

40. In summary, the applicant’s case was that overall the certificate should be issued as the presumption in favour of sustainable development applies in this case and there are no adverse impacts sufficiently and demonstrably outweighing the benefits of the proposed development.

41. In the event that I found that the proposed development did not amount to appropriate alternative development, Mr Locke submitted that, under paragraph 17(5)(a) of the Act, the council should in any event have identified in its certificate every description of development, other than that specified in the application, that in the council's opinion would constitute appropriate alternative development. I should add at this point that Mr Fridlington very fairly accepted that the certificate was defective in that respect.

42. Mr Locke submitted that other types of development that would be acceptable included social housing (three social housing providers had expressed interest in the appeal site, and a study for the council had identified a social housing need); a tourism-based use including a caravan park or holiday lodges; a travellers site; or for renewable energy. He said that there was a real need for social and affordable housing in the district.

The council's case

43. Mr Fridlington submitted that the proposed development is contrary to the statutory development plan because it is contrary to the relevant saved policies in the local plan. The council can demonstrate that it has a five year supply of deliverable housing and therefore has an up-to-date development plan, and the adverse impact of the proposed development of the appeal site at Chesterfield Road on the character and appearance of the local area would significantly and demonstrably outweigh the benefits of granting planning permission for the proposal.

44. The appeal site lies in open countryside outside the settlement framework which acts as a development boundary – the proposals for new houses in the countryside outside of the settlement framework will only be permitted in exceptional circumstances. No such exceptional circumstances exist, and in any event the council considers that the housing on the appeal site would have a harmful impact on the character and appearance of the local area to such an extent that the proposed development cannot be determined to be a sustainable form of development.

45. Mr Fridlington submitted that the sustainability credentials of the appeal proposal do not rest simply on the proximity of local services, availability of public transport, or even future local employment opportunities. Achieving sustainable development means evaluating the socio-economic and environmental impacts of development which are independent and need to be pursued in mutually supportive ways.

46. In policy terms, applications for planning permission are determined in accordance with the statutory development plan, unless material considerations indicate otherwise. The NPPF must be taken into account in preparing the development plan and is a material consideration.

47. Paragraph 11 of the NPPF says that for applications involving the provisions of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites or where the housing delivery test indicates that the delivery of housing was substantially below the housing requirement for the last 3 years, the policies should be considered out-of-date and there should be a presumption in favour of granting permission unless

any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the framework taken as a whole.

48. However, paragraph 12 of the NPPF says that the presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making and goes on to say that where a planning application conflicts with the up-to-date development plan, permission should not usually be granted.

49. As for sustainability, the presumption in favour of sustainable developments set out in paragraph 11 of the NPPF does not simply permit housing if the development plan is considered to be out of date. It also requires planning judgment to be made in respect of whether the benefits of granting planning permission for a proposal would be significantly and demonstrably outweighed by the adverse impact of doing so.

50. Whilst the council may accept that the appeal proposals would generate economic benefits from construction and some socio-economic benefits in so far as housing on this site would support the services in the nearby village of Shuttlewood, these benefits should be considered minimum requirements for sustainable development and could be delivered by the development in the settlement framework boundary.

51. The appeal site is a prominent site as it is visible from public advantage points and the character of the appeal site would be changed from rural to suburban. The landscaping scheme could not sufficiently mitigate the loss of open countryside and the proposed development would harm the character and appearance of the countryside and harm the local landscape.

52. Paragraph 170 of the NPPF advises that planning decisions should contribute to and enhance the natural and local environment by recognising the intrinsic character and beauty of the countryside. The appeal proposals would not achieve these objectives.

53. Therefore, the council contends that the limited economic gain and the modest increase in housing from the appeal proposals would be significantly and demonstrably outweighed by harm to the countryside which means that the appeal site is inherently an unsustainable location for residential development and that the appeal proposals cannot be demonstrated to be a sustainable form of development.

54. As for Gladwell Nurseries, Mr Fridlington submitted that the Planning Inspector's decision can be distinguished since the site contained a listed building that was to be refurbished, and that Gladwell was an existing, trading, nursery, whereas the appeal site had not traded for five years.

55. In summary, Mr Fridlington submitted that the negative certificate was correct because:

- (a) The proposals are contrary to the statutory development plan because they are contrary to the relevant saved policies in the council's adopted local plan;

- (b) The council is able to demonstrate that it has a robust five year supply of deliverable housing and therefore has an up-to-date development plan;
- (c) The adverse impact of the proposed development of the site on the character and appearance of the local area would significantly and demonstrably outweigh the benefits of granting planning permission for the appeal proposals in any event.

Discussion

56. I start by considering the NPPF (February 2019), which indicates (at paragraph 11) that planning decisions should apply a presumption in favour of sustainable development, so that in taking decisions the local planning authority should:

- “c) [approve] development proposals that accord with an up-to-date development plan without delay; or
- “d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, [grant] planning 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 proposed; 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.”

57. For applications involving housing, policies will be considered out-of-date if the local planning authority cannot demonstrate a five year supply of deliverable housing sites... or where the housing delivery test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Following Mr Locke’s acceptance at the hearing that the council did in fact have a five-year supply of housing land, I find that the council does have an up-to-date housing policy.

58. Accordingly, in my judgment it is not necessary to apply the adverse impacts test set out in para. 11(d) of the NPPF. The written submissions prepared prior to the hearing, which referred to the adverse impacts test, assumed that the council could not demonstrate a five-year housing supply, which is no longer in issue.

59. It is therefore only necessary to consider the application in the light of the council’s policies, which I now turn to, mindful of the NPPF’s guidance at paragraph 12 that the presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making. Where a planning application conflicts with an up-to-date development plan (including any neighbourhood plans that form part

of the development plan), permission should not usually be granted. Local planning authorities may take decisions that depart from an up-to-date development plan, but only if material considerations in a particular case indicate that the plan should not be followed.

60. Are there any such material considerations? I start by considering the Local Plan policies referred to in the council's negative certificate.

61. It is common ground that the appeal site is outside of the settlement framework identified in policy HOU2 of the Local Plan. Policy HOU9 is therefore engaged. This provides that new dwellings will be permitted outside settlement frameworks only where they are essential to the operation of agriculture and/or forestry. The appellant does not suggest that the exception applies in this is the case.

62. It is also common ground that the appeal site is in the countryside. The restriction on development in the countryside imposed by Policy ENV3 must therefore be considered; it provides:

“Development in the countryside

Outside settlement frameworks planning permission will only be granted for development which :

- 1) is necessary in such a location; or
- 2) is required for the exploitation of sources of renewable energy; or
- 3) would result in a significant improvement to the rural environment; or
- 4) would benefit the local community through the reclamation or re-use of land.

Permission will only be granted in such cases provided it is demonstrated that:

- a) the location of the development outside the settlement framework is environmentally sustainable; and
- b) the proposed development, either individually, or cumulatively with recently completed developments and outstanding planning permissions, would not seriously undermine the vitality and viability of existing town or local centres; and
- c) the proposed development would not materially harm the rural landscape and avoid unnecessary urbanisation and sprawl; and
- d) the proposed development would avoid the coalescence of distinct settlements.”

63. As for 1) it has not been suggested that the proposed development is necessary (the appellant's case being that there is no good reason to refuse permission, rather than that there is any positive need for the proposal to be implemented).

64. In respect of 2) Mr Fridlington accepted that the council should have certified that appropriate alternative development would include a use to exploit sources of renewable energy.

65. As for criteria 3) my impression was that the appeal site sits in an elevated position in a largely rural area. Whilst there are some dwellings across the road, the appeal site is entirely separate from the village of Shuttlewood, with a large tract of undeveloped land between the two. In my judgment residential development of the appeal site would not result in an improvement to the rural environment, still less any significant improvement. While paragraph 170 of the NPPF is arguably aimed at more picturesque settings than that surrounding the appeal site, to the extent that it applies I accept the council's submission that the proposed development would not contribute to or enhance the natural and local environment.

66. That leaves criteria 4, and whether redevelopment of the land would benefit the local community through the reclamation or re-use of land. In principle it would, as the site is currently underused and largely overgrown. But criteria 4, like 1-3, is conditional upon the development satisfying the further criteria a) - d). I am not satisfied that the appellant has demonstrated that the development of the appeal land for housing would not materially harm the rural landscape.

67. In my judgment the Gladwell Nurseries permission does not set any relevant precedent. From my inspection I noted that the site is much closer to the edge of the village, albeit still in the countryside from a planning aspect. But it is fairly low-lying, and the proposal did not affect the view from the north, as the garden centre operation was being relocated within the appeal site as part of the development. Having read the planning inspector's decision allowing development at Gladwell Nurseries, I accept the council's submission that it is of little assistance to the appellant. In addition to the material differences between the two sites, the refurbishment and reuse of the Grade II listed bothy was, in the inspector's opinion, "a benefit that lends significant support to the proposal". The demolition and redevelopment of the redundant nursery would not, in my view, amount to a comparable benefit.

68. It was common ground that some weight should also be afforded to the new Local Plan. Two policies were referred to in the hearing. First, an equivalent of policy ENV3 in the Local Plan:

"Policy SS9: Development in the Countryside

Development proposals in the countryside outside development envelopes will only be granted planning permission where it can be demonstrated that they fall within one or more of the following categories

- a) Involve a change of use or the re-use of vacant, derelict or previously developed land
- b) Are necessary for the efficient or viable operation of agriculture, horticulture, forestry and other appropriate land-based businesses, including the diversification of activities on an existing farm unit

- c) Are small scale employment uses related to local farming, forestry recreation, or tourism
- d) Secure the retention and / or enhancement of a community facility
- e) Secure the retention and / or enhancement of a vacant or redundant building that makes a positive contribution to the character or appearance of the area and can be converted without complete or substantial reconstruction
- f) Are in accordance with a made Neighbourhood Development Plan
- g) The building is of exceptional quality or innovative design
- h) In all cases, where development is considered acceptable it will be required to respect the form, scale and character of the landscape, through careful location, design and use of materials.”

69. Secondly, policy WD10 which deals with tourism:

“Support will be given to proposals which would provide facilities, opportunities or accommodation for visitors to the District, both in terms of business trips and tourism related visits. Such proposals would be particularly welcome in Bolsover Town.

Existing tourist facilities and infrastructure will be protected and enhanced including those at Bolsover Castle, Creswell Crags, Hardwick Hall, Stainsby Mill, Pinxton Canal, Pleasley Pit and the multi-user trails network.

The majority of new tourism facilities, not directly related to a specific tourist destination, will be directed towards the towns, emerging towns and large villages. Tourism proposals will be promoted and supported where:

- a) They contribute to the achievement of regeneration aims and objectives
- b) Development is at a scale which is in keeping with local character and which preserves or enhances the quality of the natural and built environment
- c) Visitor attractions that could attract large numbers of people are accessible by a choice of means of transport, and offer good access by non-car modes.”

70. I do not find any material considerations that would lead me to depart from the policies in the Local Plan. It is necessary to consider the existing and emerging planning policies in the round, with less weight being placed on the emerging policies. As regards the existing policies, the proposed development would not comply with policies HOU2 and HOU9, and none of the limited circumstances in policy ENV3 have been shown to exist. As regards the emerging policies, while it might be compliant with SS9 a), that does not in my judgment displace non-compliance with existing policy to which greater weight must be attached. However, a use under emerging policy SS9 c) would be permissible, and as Mr Fridlington accepted, had the

application been determined under the new Local Plan, the council might give consideration to a small-scale tourism-related use where it was also compliant with existing policy.

71. In my judgment, appropriate alternative development would be for the exploitation of sources of renewable energy under policy ENV3 of the Local Plan, and small-scale employment uses related to local farming, forestry recreation, or tourism under policy SS9 of the new Local Plan.

72. In response to the draft of this judgment, both parties also referred to emerging policy SC6, which indicates that development proposals for the generation of renewable energy (except large wind turbines) will be granted unless there would be significant harm to the visual appearance and character of the area, the amenity of local residents, the ecology of the area, the historic environment, or significant adverse impacts on airport radar and telecommunications systems. I consider it appropriate to attach a condition to the certificate requiring compliance with that policy.

Determination

73. I allow the appeal. I cancel the section 17 certificate issued by the Council on 23 August 2017, and remake it as shown in the certificate in Appendix A.

74. Section 17(10) of the 1961 Act provides that in assessing the compensation payable to the appellants, there must be taken into account any expenses reasonably incurred by them in connection with the issue of a certificate under section 17, including expenses incurred in connection with an appeal under section 18 where, as here, any of the issues are determined in their favour

75. I therefore direct that the appellant's expenses reasonably incurred with the section 17 application and the appeal are to be taken into account as part of the compensation by the acquiring authority as yet to be agreed or determined.

19 July 2019

P D McCrea FRICS

APPENDIX A

LAND COMPENSATION ACT 1961

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT

LAND AT 45 CHESTERFIELD ROAD,

SHUTTLEWOOD,

CHESTERFIELD,

DERBYSHIRE,

S44 6QN

PURSUANT to the Tribunal's powers under section 18 of the Land Compensation Act 1961 and for the reasons in the Tribunal's decision dated 19 July 2019:

- (1) The certificate under section 17 of the Land Compensation Act 1961 by Bolsover District Council on 23 August 2017 IS CANCELLED

- (2) IT IS CERTIFIED THAT if the said land had not been proposed to be acquired by the Secretary of State using compulsory purchase powers, planning permission could reasonably have been expected to be granted for development of the following descriptions:
 - a. The exploitation of sources of renewable energy, subject to compliance with policy SC6: Renewable and Low Carbon Energy of the Local Plan for Bolsover District.

 - b. Small scale employment uses related to local farming, forestry recreation, or tourism, subject to compliance with policy SS9 (h) of the Local Plan for Bolsover District.
