Neutral Citation Number: [2024] EWHC 3284 (Admin)

Case No: AC-2024-LON-001206

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN LONDON

19th September 2024

Before:
FORDHAM J **Claimant**

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Between:
DORCHESTER LIVING LTD
- and -
(1) SECRETARY OF STATE FOR DEPARTMENT FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) RICHBOROUGH ESTATES
(3) LONE STAR LAND LIMITED
(4) K & S HOLFORD
(5) A & S DEAN
(6) NP GILES
(7) ALC BROADBERRY
(8) CHERWELL DISTRICT COUNCIL **Defendants**

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Philip Robson (instructed by Eversheds Sutherland) for the **Claimant**
Josef Cannon KC and Ryan Kohli (instructed by GLD) for the **First Defendant**
Sarah Reid KC (instructed by Lodders Solicitors) for the **Second and Third Defendants**

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Hearing date: 19.9.24
Judgment as delivered in open court at the hearing

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Approved Judgment

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FORDHAM J

Note: This judgment was produced and approved by the Judge.

FORDHAM J:

Introduction

1. On 5 March 2024 the Secretary of State's appointed planning inspector allowed the appeal by Richborough Estates Ltd and others against the local planning authority (LPA) Cherwell District Council's refusal to grant outline planning permission for what I will call Richborough's proposed development of up to 230 dwellings on land north of Camp Road and west of Chilgrove Drive at Heyford Park 0X25 5LX. Dorchester Living Ltd (Dorchester) have raised an issue, in the present proceedings, which overlaps with issues raised by another claimant in a linked claim (AC-2024-LON-001249), all of which has been granted permission for statutory review and is due to be ventilated and resolved in the Planning Court at a substantive hearing in November. Everyone has treated the three additional grounds with which I am concerned today, and on which permission for statutory review was refused on the papers, as distinct and freestanding points. My task is to decide whether any of these three additional grounds are viable. That is to say, whether they raise arguable grounds with a realistic prospect of success.

2. The inspector's Appeal Decision is published and can found online. The reference is APP/C3105/W/23/3326761. I can give paragraph numbers to that published Decision, for any interested reader to follow through on what I am explaining. It will help to describe the geography. At Heyford Park, Camp Road runs from west to east. To the north is the old RAF Upper Heyford airfield, a site for which Dorchester has planning permission for up to 1,235 dwellings. In between Camp Road and Dorchester's development site, to the east side, if you are going east but stopping just before Chilgrove Drive, you will find the development site in respect of which the inspector has given Richborough this outline planning permission. At the north of Richborough's development site is a boundary to Dorchester's development site. To the west of Richborough's development site is a development site called the Pye Scheme with planning permission for 420 dwellings, reference 21/03523/OUT (see Decision at §15). If you walked from east to west from Chilgrove Drive, through Richborough's development land and you kept going through the Pye development land, you would arrive eventually at Larsen Road. But you would only arrive at Larsen Road after first crossing the western boundary of the Pye development land, and then after crossing two strips of third party land (see Decision §58). These strips of third party land are owned by a Mr Fletcher and by Dorchester, but this is Dorchester land which is not part of Dorchester's Upper Heyford airfield development.

The Policy PV5 Ground of Challenge

3. Dorchester's first ground relates to the main issue (see §13) whether the development makes appropriate provision for infrastructure and transport mitigation to ensure sustainable development and make the development acceptable in planning terms. Specifically it relates to Policy PV5 of the Cherwell Local Plan 2015 (see §20). That is a Policy applicable to Dorchester's development but not to Richborough's development. But everybody agreed that it identified "design and place shaping principles" which should be applied to Richborough's appeal scheme (see §48). The inspector concluded that the Richborough proposal "meets the objectives of Policy PV5" (see §65). But Mr Robson says that her approach was arguably unlawful, so far as concerned an east-west pedestrian link through the Pye development land, and through the third party land, to link with Larsen Road. The inspector summarised Dorchester's argument about this (see

§58) and specifically considered this particular suggested link (§§61-63). Was her approach arguably unlawful? Mr Robson says it was. He says there was a misinterpretation of PV5 and/or a misapplication and/or that legally inadequate reasons were given.

4. Mr Robson accepts that PV5 was accurately encapsulated in the inspector's summary (see §49) where she said that Policy PV5 set out the following: that the settlement should be designed to encourage walking cycling and the use of public transport with provision of footpaths and cycle links to existing networks; that development should also include a layout "maximising the potential for walkable neighbourhoods" with a legible hierarchy of routes; that it should have a "high degree of integration" with development areas within the PV5 allocation, with "connectivity" between new and existing communities; with "integration" of the new community into the surrounding network of settlements by reopening historic routes and encouraging travel by means other than the private car. In particular, Mr Robson emphasises "high" degree of integration (as opposed to what he calls "mere" integration); and he emphasises the word "maximising" in the context of the potential for walkable neighbourhoods. He says this "maximising" has an objective legal meaning. It called for a correct self-direction in law, but that was absent from the inspector's decision, and her reasoning conflicted with it. It conflicted, in particular, when she spoke (at §62) of the east-west link route as not being "critical to the overall accessibility of the appeal site". That language ("not critical"), says Mr Robson, was adopting a bare minimum standard; and not a maximising one. It was adopting a "negative" rather than the positive approach required, he says, on the legally correct interpretation of this part of the Policy. In the alternative, he says that the inspector's conclusions that the objectives of policy PV5 were met (§65) involved an unreasonable application of the policy and the facts and circumstances of the case. In the further alternative, and in any event, he says that the inspector gave legally inadequate reasons for explaining her thinking and conclusions. Specifically, on that point, he relies on the inspector's description of the view that the developer had "made all reasonable steps to maximise [the appeal scheme's] connectivity to the wider allocation" (§63). He says that is legally inadequately reasoned, as well as being an unreasonable conclusion, in circumstances where the developer had not even made enquiries in relation to the two strips of third party land, to seek to secure a link through that land to Larsen Road. For the purposes of today Mr Robson emphasises, rightly, that the threshold is the arguability threshold to which I referred at the outset.

5. I can start with the question of reasons. In my judgment, there is no lack of clarity or uncertainty, even arguably, on the face of the inspector's reasoned decision on this aspect of the planning application (§§48-65). There is no room for doubt as to what the inspector concluded; or why she arrived at her conclusions. It is all spelled out, in my judgment, beyond argument, in the passages in the decision document; specifically those which addressed (§§61-63) as an issue which had been raised for the inspector's consideration (§58) this east-west route through to Larsen Road. Dorchester is amply equipped to be able to come before this Court, as it has done, to submit that the inspector's reasons betray a misinterpretation or unreasonableness in application of the Policy.

6. I turn to those questions of misdirection and unreasonable application. As it seems to me, having considered the written and oral submissions made on its behalf, Dorchester's suggested 'sole legally correct objective interpretation' of this aspect ("maximising") within Policy PV5 really comes to this:

> Any pedestrian link that is not being proposed by the developer, but which or whose direction is assessed as being an improvement on those links which are being proposed by the developer – whether it is an improvement in terms of connectivity or integration and whether in terms of locations or distances or the experience of a pedestrian walking along the link – must be demonstrated by the developer, after diligent pursuit of that option by the developer, not to be 'realistically deliverable', assessed in terms of what can reasonably be expected of them.

At the heart of this formulation of "maximising" is the idea of disproving the 'deliverability' of a particular link or a particular direction which can be said to have advantages compared to those which are being put forward.

7. The starting point, in my judgment, is that this is not the Policy says. If it were intended for the design of a Policy to contain such strictures it would be open to the writer of the Policy to spell it out. Indeed, the starting – in my judgment – needs to be the recognition that when PV5 talks about a layout which "maximises", in the context of pedestrians walking along links, what the Policy is actually clearly and expressly doing is describing "layouts that maximise the potential for walkable neighbourhoods …" So the focus is on whether the potential for "a walkable neighbourhood" has been "maximised". It is not on whether any particular link, or for that matter direction for a link, is said to "maximise" any particular virtue or advantage. I put to Mr Robson that one can suppose situations where having multiple routes (eg. ten east-west links) could be said to be an improvement, to provide greater pedestrian access. I asked him whether, if multiple routes could in principle be "delivered", whether they would then need to be included within a proposal for the purposes of "maximisation". He rightly accepted that a line has to be drawn. That must be so because at the heart of this – as with other planning policies – is an evaluative planning judgment. What the inspector did was to start with the concept of a "walkable neighbourhoods" (at §50) and to explain, by reference to identified sources and arguments of Richborough which she accepted, why the "range" of facilities within an appropriately close walking distance was "achieved in the appeal case" (§52).

8. The inspector's later discussion of the east-west link through to Larsen Road (§§58, 61-63) needs to be read in the context of all the points that have been made about walkable neighbourhoods and criteria in ranges of distances and relevant facilities that people needed to be able to get to being incentivised to walk (§§50-53). The inspector had also made points about public transport (§54) and about the other pedestrian links that were being provided within the scheme and their implications (§§55-57).

9. Then, in the context of the argument with which she was dealing (§58), she went on to consider the evidence of the practical effects of alternative routes in terms of how long it would take people to walk from the Richborough development site to particular relevant locations, with or without an east-west link through to Larsen road (§62). In that context, she found that the distances "would only marginally be shorter". She used the word "marginal" again later in §62. That was the context in which she said that, although it "may be desirable", the east-west route that was being emphasised by Dorchester was "not critical to the overall accessibility of the appeal site". Although at that stage she refers to "accessibility" she had already, as I have explained, recognised the Policy PV5 focus on "maximise the potential for walkable neighbourhoods". But she cannot be criticised for considering the point in terms also of "accessibility" and the maximisation of accessibility (see §63) or for that matter the maximisation of "connectivity" (§112), in the light of the features of the Policy read together and as a whole (§49).

10. Far from there being any misdirection, even arguably, it is very clear in my judgment that not only did the inspector accurately set out the relevant contents of the policy (at §49), but she also asked herself the right question (at §61), as Mr Robson rightly accepts. The way the inspector put it (at §61) was this:

> ***The question is whether it is necessary for the appeal scheme to provide this link in order to maximise the potential for a walkable neighbourhood in line with Policy PV5 …***

In my judgment, it is very clear that in the paragraphs that follow (§§62-63; also §§65, 112), the inspector was answering that question. Her answer is a "negative" answer. But that is because she was finding – when asking the right question – that it was "not" necessary to maximise the potential for a walkable neighbourhood that this scheme should provide this link. As I have already explained, her consideration of the link involved recognising aspects which could make it "desirable", but aspects in terms of improved walking distances and times which were "marginal" (§62). What could be said to make this link "desirable" – as she accepted – was its being shorter in distance and time and a "quieter more attractive route". But what she had to do was to exercise an evaluative judgment in deciding whether, by reference to those and the other aspects of this and other links, this east-west link was necessary in order to "maximise the potential for a walkable neighbourhood".

11. That, in my judgment, was – beyond argument – a reasonable application of the Policy. The inspector, moreover, expressly addressed the question of whether she was satisfied that in all the circumstances Richborough had "made all reasonable steps" to maximise connectivity to the wider allocation (§63). She made the point that the local highway authority had raised no objection. She made the point that the LPA – who had previously refused planning permission – had raised no objection. And she found that it was not reasonable or necessary to expect the developer to provide this east-west route through to Larsen Road, in circumstances where it would connect through another development site (the Pie development land) and require access across third party land (a reference to Mr Fletcher's strip of land and Dorchester's own strip of land (§63). She went on to deal with another point raised by Dorchester about whether Richborough had done "all that they could reasonably have been expected to do", in the context of cycle paths and Camp Road (§64).

12. Notwithstanding the careful and focused written and oral submissions that have been put forward on the various aspects of this first ground of challenge, I am unable to accept that it has any realistic prospect of success.

The Pye Condition Ground of Challenge

13. The second ground advanced links to the first. In the context of considering the east-west link to Larsen Road that had been emphasised by Dorchester (§58), the inspector discussed the position in relation to a planning condition (condition 4) imposed on the developer of the Pye scheme (§§59-60). She described it as ambiguous and imprecise. This pre-commencement condition requires of the Pye developer:

> ***A proposed scheme of access for pedestrians and cyclists to the western edge of the application site boundary to facilitate a scheme of access for pedestrians and cyclists to Larsen Road;***

14. The inspector expressed the view that that condition "does not require [that] developer to negotiate with third-party landowners to secure a through route to Larsen Road".

Rather, she said, "it requires the scheme to provide a connection to the western boundary only". As it happens, and as she explained, that was the position of the LPA who had imposed that condition. The questions are whether that is right in terms of the objective legally correct meaning of that planning condition; and whether it matters. In refusing permission on this ground on the papers Mould J expressed the view that, beyond argument, the inspector was right about the meaning of this planning condition. I agree. In my judgment, this Pye development planning condition is not requiring that the Pye developer must, before it can begin, submit an approved scheme which "achieves" access to Larsen Road, having negotiated with the two third-party landowners (Mr Fletcher and Dorchester) to "secure" that through route. The condition is clear and express that it is a proposed scheme of access for pedestrians and cyclists "to the western edge of the [Pye] application site boundary". The condition goes on to describe – without any full stop or comma – that this is "to facilitate scheme of access for pedestrians and cyclists to Larsen Road". That is the purpose of the scheme. It is what the condition is seeking to enable. But it is not a through route to Larsen Lane which must, as a requirement, have been "delivered". It would in my judgment have been very easy to spell it out if "delivery" of a scheme to Larsen Road were what was being required. Reading the Pye condition, including in the light of the accompanying reason which says "to achieve" a comprehensive integrated form of development, the inspector's view was the legally correct interpretation.

15. As it happens, there is a reference-point in this case in the Appeal Decision itself (at §56). There, the Richborough development's "link to the northern boundary" with the Dorchester development land, which had been requested by the LPA, was "to provide the potential for a link" to the proposed pedestrian and cycle route in the Heyford Park allocation. A condition could be imposed to provide a link, at a boundary, which has as its purpose the "facilitation" of onward access to a route. But that does not mean the developer is thereby being required to "deliver" an outcome across somebody else's land. I would expect clear language to be used if that outcome were being required to have been "delivered".

16. In any event, I have not been persuaded this point could really go anywhere in the context of the challenge to the present Appeal Decision. The fact is that the question which the inspector went on to identify (at §61) was still the right question, as has been accepted. And the reasons for answering that question as she did were then given (at §§62-65). I agree that those reasons have to be read in the light of what has gone before. In particular, I have emphasised that some of the earlier discussion (§§50-57). But I have not been able to see, even arguably, how the discussion of the Pye condition (§60) would bear materially (on §§61-63 and 65), so as to vitiate that reasoning. On this further point, I emphasise that this further point could only arise on the premise – which I have rejected – that the inspector was arguably wrong about the meaning of the Pye planning condition.

The ESD-1 Ground of Challenge

17. That leaves the third additional ground. It relates to a different one of the main issues in the case (§13): questions as to suitability of the location for development having regard to relevant policies. This third ground of challenge relates to the inspector's discussion of Policy BSC1 (§§26 and 28) and "the spatial approach to growth and the distribution of development" (§26). Mr Robson submits that the inspector's reasoning was arguably flawed because she failed to follow through, on questions as to "harm" and the attribution of "weight" to that harm, in the context of considering Policy BSC1. She had said (at

§26), specifically by reference to "the figures in Policy BSC1", that "the spatial approach to growth and the distribution of development is still relevant and should attract significant weight". She then said in the other paragraph which addressed BSC1 (§29) that further development in this part of the District "could undermine the Plan's strategic distribution of housing". That, says Mr Robson, indicated "harm" in terms of BSC1, which was supposed to attract significant weight. And yet, when the inspector went on to talk about harm and then addressed the planning balance, she referred only to failure to comply with Policy ESD1 and the development plan as a whole (see §§30 and 95) – which harm she then picked up in the planning balance (at §101) – but not BSC1 to which she made no further reference.

18. In order to understand all of this it is important, in my judgment, to keep in mind two distinct ideas. The first distinct idea is about a development taking place within an "identified sustainable location" for growth (ISL) and development taking place outside any ISL. The second distinct idea is one about whether development (within ISLs) should be in certain parts of the LPA's District or certain other parts of its District. The policy which deals, head-on, with the first of those ideas (development within or outside an ISL) is policy ESD1. It is a policy about "distributing growth to the most sustainable locations". The contents of BSC1 involve a table for the delivery of housing, by 2031, in accordance with certain requirements. Here the policy is addressing a distribution in terms of the other idea (which parts of the LPA's area): it has a column for Banbury; one for Bicester; and another for the rest of the District. Each column has its own numbers for allocations and totals.

19. In his reply, Mr Robson – rightly in my judgment – accepts that the point being made at the end of §29 by the inspector was a point about a development being outside an ISL as opposed to inside an ISL. He accepted that there was no separate point there about where in the District: whether it was in Banbury or Bicester or in the rest of the District. The sentence at the end of §29 says this:

> ***In this context, further development in this part of the District, away from the identified sustainable locations for growth, could undermine the Plan's strategic distribution of housing …***

It is, in my judgment, clear from the emphasis on development "away from the identified sustainable locations for growth" that the harm ("could undermine") was in terms of the first idea (development outside an ISL). That is the very harm which, as I have explained, is being described within the principles identified in Policy ESD1. The inspector went on to describe a finding of "failure to comply with ESD1" (§30), to which she later referred and said that the proposal "does not therefore accord with the development plan taken as a whole" (§95). The whole sentence which appears at the end of §29 is, moreover, clearly talking about non-compliance with "the Plan" and uses the phrase "the Plan's strategic distribution of housing". It follows that the point that was being made at the end of §21 is one which 'folded in' with the inspector's subsequent recognition of harm in non-compliance with ESD1 and the development plan taken as a whole. But she went on, having accepted those, to explain why they were outweighed by the benefits (§§95-101).

20. What was happening at §29 of the inspector's decision was that she was addressing an argument that it been advanced, unsuccessfully, by Richborough. The argument was to the effect that this development should be treated as though it were within an ISL. Putting it shortly, Richborough as the developer – having accepted that it should bear the burden

of the standards of Policy PV5 (§48) as representing "an extension of this allocation" – should also have the benefit and be treated as though it were within PV5 and therefore within an ISL. It developed arguments as to why it should have that advantage, because it was adjacent to an ISL. But the inspector rejected those arguments. The Richborough development was outside the ISL of Heyford Park, for the purposes of ESD1 (see §19). It was in the course of rejecting Richborough's adjacent-ISL argument that the inspector discussed the table in BSC1 and the spatial approach. And she emphasised that development away from an ISL could undermine the Plan's strategic distribution of housing.

21. In all those circumstances it is, in my judgment, not possible to identify within this reasoning some legal inadequacy or some public law unreasonableness of application , even arguably. Again, and notwithstanding the clear careful and focused way in which the arguments have been put forward in writing and orally on behalf of Dorchester, I am entirely satisfied there is no viable additional ground of challenge which should be granted permission and go through to join the other arguments at the November hearing.

Conclusion

22. For all the reasons that I have explained, and in agreement on all three grounds with the views that were expressed on the papers by Mould J, I will dismiss this renewed application for permission for statutory review on the three additional grounds advanced.

19.9.24