CO/774/2015

Neutral Citation Number: [2015] EWHC 2489 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

The Courthouse
1 Oxford Row
Leeds
West Yorkshire
LS1 3BG

Tuesday, 21st July 2014

B e f o r e:

MRS JUSTICE PATTERSON DBE
Between:
TIVIOT WAY INVESTMENTS LTD

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
First Defendant

and

STOCKTON-ON-TEES BOROUGH COUNCIL **Second Defendant/Interested Party**

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Mr C Lockhart-Mummery QC (instructed by Irwin Mitchell LLP) appeared on behalf of the **Claimant**
Mr C Zwart (instructed by Stockton-on-Tees BC) appeared on behalf of the **Second Defendant/Interested Party**

The First Defendant did not appear and was not represented

J U D G M E N T
(As approved)

1. MRS JUSTICE PATERSON: This is an application, under section 288 of the Town and Country Planning Act, by the claimant to quash a decision letter of the first defendant, dated 20th January 2015, in which he dismissed a planning appeal by the claimant against the refusal on the part of the second defendant of an application for planning permission for residential development (up to 500 houses), local centre (2500 square metres) and means of access at Maltby Farm, Low Lane, Ingleby Barwick.

2. The claimant is Tiviot Way investments, a property development company with an interest in the appeal site. In a letter dated 14th July 2015 the first defendant conceded, on behalf of the first defendant only, that the Decision Letter should be quashed. As a result the first defendant has played no part in the proceedings before the court.

3. The second defendant is the local planning authority. It appeared to defend the Decision Letter of the first defendant.

Background

4. The claimant applied for planning permission on 9th December 2013. The planning application was recommended for approval by officers but refused by the second defendant on 28th February 2014 and an appeal was lodged. It was recovered by the first defendant because the proposal involved residential development of more than 150 units on a site of more than 5 hectares. A planning enquiry was held between the 15th and 17th July 2014.

5. On 3rd September 2014 the inspector submitted his report to the first defendant. The inspector recommended that the appeal be allowed and that planning permission be granted with conditions. The appeal site is some 22.7 hectares. It is former agricultural land. The site was described in the inspector's report as to the north of land for which the Secretary of State had granted outline planning permission for a free school and residential development (350 units) on 26th September 2013.

6. The inspector set out his overall conclusions as follows:

> "133. Paragraph 47 of the NPPF requires local planning authorities to identify and update annually a supply of specific deliverable sites to provide five years worth of housing against their housing requirements. The Council has a supply of only 4.08 years of housing land in the Borough. Paragraph 49 states that relevant policies for the supply of housing should not be considered up to date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.
>
> 134. LP policy HO3 is a policy for the supply of housing and must be regarded to be out of date. However, the proposed development has been assessed against this policy and has been found to accord with it. The development would supply much needed housing and affordable housing over the next five years and beyond. The proposed development would cause only negligible harm, to the character of the area, and has also been

assessed against relevant elements of CS policy CS3 and CS10, and has been found to accord with these policies also.

135. The proposed development accords with the development plan. Paragraph 14 of the NPPF states that '…there is a presumption in favour of sustainable development which should be seen as a golden thread running through both plan-making and decision-taking…For decision-taking this means approving development proposals that accord with the development plan without delay'. Planning permission for the proposed development should be granted without delay."

7. In his Decision Letter dated 20th January 2015 the first defendant disagreed with his inspector and dismissed the appeal. He set out the relevant planning policy and agreed with the main issues identified by the inspector. Those issues were set out in paragraph 21 of the inspector's report as follows:

"21. The main issues were set out at the Inquiry as being:

1. Whether the appeal land is part of a designated green wedge and is therefore subject to planning policy that seeks to protect such areas;

2. Whether the proposed development would undermine the separation of Ingleby Barwick and Thornaby;

3. The effect of the proposed development on the character of the area, biodiversity and the quality of the urban environment."

8. The Decision Letter then proceeded to consider each of these main issues. It said:

"10.The Secretary of State has given careful consideration to the Inspector's analysis at IR103 – 112. He agrees with the Inspector that it would be illogical for green wedge areas to exist on a Proposals Map if these areas are no longer the subject of the development plan policy to which they relate and that, when LP policy EN14 disappeared so too, metaphorically, did the green wedge notations on the LP Proposals Map (IR105). Like the Inspector (IR110), he is of the opinion that the view of the Council and local residents that the appeal land is within a green wedge is not supported by the CS's Strategic Diagram (IR110). The Secretary of State concludes that, notwithstanding the shared view of the previous Inspector and the Secretary of State in respect of Appeal Reference APP/H0738/A/13/2192538, upon the close scrutiny afforded by the inquiry into this appeal, it is evident that there is no development plan support for a conclusion that the appeal land is within a designated green wedge (IR112).

The separation of Ingleby Barwick and Thornaby

11.The Secretary of State has given very careful consideration to the Inspector's reasoning at IR113 – 116. The Secretary of State does not

share the Inspector's view (IR116) that the gap that there would be between the proposed development and Teeside Industrial Estate would not undermine the strategic objective, as shown in the CS Strategic Diagram, of providing and maintaining a green wedge in this location. Nor does he concur with the Inspector that, even had the appeal land been in a designated green wedge, the development would leave sufficient green wedge to adequately maintain the separation between Ingleby Barwick and Thornaby (IR117). Whilst the Secretary of State has concluded that the site is not within a green wedge as designated by the relevant development plan, he has taken account of CS Strategic Objective 8 as well as the position of the Council (IR45) which makes clear that it regards the site as lying within a long established green wedge, and the fact that the Council is expected to adopt a Regeneration and Environment Development Plan Document (IR111) in due course. Having also taken account of his decision to allow appeal reference APP/H0738/A/13/2192538 which impacts on the gap between the conurbations of Ingleby Barwick and Thornaby, the Secretary of State agrees with Councillor Rose that development of the appeal site would be 'a bridge too far' (IR75) and he concludes that, were the appeal development to go ahead, the objective of providing and maintaining an adequate green wedge in this location would be undermined. In these circumstances, he considers that the appeal scheme conflicts with CS policy CS10(3) and the strategic objective of providing and maintaining a green wedge between the conurbations of Ingleby Barwick and Thornaby.

The character of the area, biodiversity and the urban environment

12.The Secretary of State agrees with the Inspector that the appeal scheme's proposed buffer zone would provide opportunities for the enhancement of the amenity value of the secondary corridor and would assist the Council in meeting the strategic objectives of their Green Infrastructure Strategy, and that there is no justification for the buffer zone to be 20 metres wide (IR121). Having taken account of the Inspector's remarks at IR122-123, the Secretary of State agrees with him that the openness of the appeal land would be lost as a result of the proposed development. In view of the size of the site, which is currently undeveloped land (IR11), and the extent to which it would be built upon he does not share the Inspector's view that this loss would have only a negligible impact on the character of the area. In his opinion, the proposed development of the appeal site would have a material impact on the character of the area. Having had regard to the Inspector's remarks (IR124), he too is satisfied that the biodiversity value of the proposed development would be, at least, no less than the biodiversity value of the appeal land as it is at present and that the scheme does not give rise to conflict with policy CS10(4). The Secretary of State also sees no reason to disagree with the Inspector's remarks at IR125 and he agrees that the scheme does not conflict with CS policy CS3(8). Turning to the Inspector's remarks at IR126, the Secretary of State agrees that the

scheme lies within the limits of development of Ingelby Barwick and that it would remain available for recreational use, albeit restricted. However, as set out above, he considers that the proposed development of this undeveloped open land would have a material impact on the character of the area. Whilst he acknowledges the Inspector's view that the site is bounded on two of its three main sides by existing development (IR126), he does not consider that this renders the proposed change insignificant.

13.In conclusion, the Secretary of State finds that the proposed development of the appeal land would have a materially harmful effect on the character of the area and that this brings it into conflict with CS policy CS10(3) and LP policy HO3. However, like the Inspector, he does not consider that the scheme would conflict with CS policy CS3(8) and CS10(4) (IR127)."

9. The first defendant then considered conditions and obligations. Finally under the heading "Planning balance and conclusions" he said:

"16.The Secretary of State has taken account of the Inspector's overall conclusions at IR133 – 135. He agrees with the Inspector's remarks at IR133 and, like the Inspector (IR134), the Secretary of State considers that LP policy HO3 must be regarded as out of date. Unlike the Inspector, the Secretary of State has found conflict between the appeal scheme and this policy, albeit he attributes limited weight to this matter given his view that this policy should not be considered up-to-date. The Secretary of State has also concluded that the scheme conflicts with CS Policy CS10(3) and he gives substantial weight to this conflict.

17.The Secretary of State has had regard to the scheme's benefits which include up to 550 dwellings including up to 83 affordable dwellings. Whilst he considers the housing to be a significant benefit in this case, especially given the absence of a 5 year supply of deliverable sites for housing in the Borough, the Secretary of State has also taken account of the submission of the Council (IR50) about the likely build time for the scheme and the uncertainty as to the number of dwellings which would be built in the initial five year period. The Secretary of State considers that this somewhat reduces the benefit of the scheme's contribution to meeting the 5 year housing land supply.

18.The Secretary of State considers that the conflict with CS policy CS10(3) and the strategic objective of providing and maintaining a green wedge between Ingleby Barwick and Thornaby renders the scheme in conflict with the development plan overall. He has gone on to consider whether there are any material considerations which mean that he should determine the appeal other than in accordance with the development plan. Given his conclusion that relevant development plan policies are out-of-date in this case, the Secretary of State has considered whether permission should be granted under the second bullet point of the

> decision-taking section of paragraph 14 of the Framework. However, in his view, the conflict with CS Policy 10(3) and his conclusion that the scheme would not maintain the separation between Ingleby Barwick and Thornaby and the quality of the urban environment is an adverse impact which significantly and demonstrably outweighs the scheme's benefits when assessed against the policies in the Framework taken as a whole." Please take in paragraph 16 to 18 inclusive."

The first defendant dismissed the appeal.

10. After the Decision Letter was sent out to the parties it came to the attention of the solicitor acting for the claimant that James Walton MP was reported in a local newspaper as saying is:

> "I asked the Secretary of State to look at this appeal personally because I knew that was our best chance. He listened to local concerns and has taken a decision on sound planning grounds."

The claimant's solicitor sought disclosure of the relevant documents. Disclosure was eventually given. That revealed an e-mail on 7th October 2014 to the Private Secretary of the Minister of State for Housing and Planning from the planning casework division in the following terms:

> "I attach a submission (in cover sheet style), Inspector's Report and Costs Report. This relates to an appeal seeking planning permission for 550 dwellings on a site in the borough of Stockton-on-Tees. The Inspector recommends allowing the appeal. We agree with this recommendation. The case appears straight-forward and the Minister may be willing to decide it on the basis of the papers."

11. The Private Secretary sought information on the progress of the local plan. That was provided as follows:

> "The core strategy was adopted in 2010 and there are no emerging plans of relevance (including neighbourhood plans)."

12. On 23rd December 2014 an e-mail was sent by the Assistant Private Secretary to the Minister of the State for Housing and Planning to the planning case work division in the following terms:

> "Further to the discussion at the planning casework meeting, the Minister has considered this case but disagrees with your recommendation. The Minister is minded to dismiss the appeal and refuse permission. The Minister did, however, ask whether it would be possible to refer back to parties and in particular the Council on a green wedge argument that they have put forward."

On 13th January 2015 the planning case work division responded but there was no basis for referring the case back to the parties. The e-mail continued:

> "The refusal letter states that the fact that the appeal scheme would reduce the gap between the conurbations of Ingleby Barwick and Thornaby conflicts with one of the Core Strategies's strategic objective/policies. The letter goes on to say that there is no 5 year housing supply in this case, so under the Framework policies for the supply of housing are not considered to be up-to-date and the presumption fails sustainable development applies. The letter takes the view that the scheme's failure to maintain the separation of Ingleby Barwick and Thornaby and the quality of the urban environment amounts to an adverse impact which significantly and demonstrably outweighs the scheme benefits (namely housing and affordable housing).
>
> Whilst we have drafted the decision letter as robustly as we can, please note that our view is that it is almost inevitable that the appellant will challenge this decision. If that happens Planning Casework does not consider it likely that CLG would be able to successfully defend the decision letter in the Courts."

Grounds of Challenge

13. Mr Lockhart-Mummery QC, counsel for the claimant, who appear at the inquiry and settled the particulars claim pursues two grounds of challenge before the court: (i) whether in the Decision Letter the first defendant applied section 38(6) of the Planning Compulsory Purchase Act 2004 in a way that was legally incorrect; (ii) whether the first defendant reached an unlawful conclusion that the development conflicted with CS policy 10(3) and the strategic objective of providing a maintaining Green wedge between conurbations and Ingleby Barwick and Thornby.

The Legal Framework

14. In a challenge under section 288 of the Town and Country Planning Act 1990 an application may be made to the court to question the validity of the decision on the grounds:

> "288 Proceedings for questioning the validity of other orders, decisions and directions
>
> (1)If any person—
>
> (a)is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—
>
> (i)that the order is not within the powers of this Act, or
>
> (ii)that any of the relevant requirements have not been complied with in relation to that order; or .
>
> (b)is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that

action on the grounds—

(i)that the action is not within the powers of this Act, or

(ii)that any of the relevant requirements have not been complied with in relation to that action, .

he may make an application to the High Court under this section."

By section 288(5) the court may:

"(b)if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

15. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides:

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

In City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, Lord Clyde (with whom the remainder of their Lordships agreed) dealt with the approach to be adopted to section 18A of the Town and Country Planning (Scotland Act) 1972 (to which section 38(6) of the Planning Compulsory Purchase Act is the English equivalent). At reference 1459D-E:

"In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it."

16. In R v Rochdale Borough Council ex parte Milne [2000] EWHC 650, Sullivan J (as he then was) having set out the quote from City of Edinburgh (supra) said at paragraph 49:

"In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be 'in accordance with the plan'. Given the numerous conflicting interests that development plans seek to reconcile:

the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes et cetera, it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies."

17. In Tesco Stores Ltd v Dundee City Council [2012] 2 P&CR 9 the Supreme Court held:

"18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as 'a proper interpretation' of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a 'proper interpretation' of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in R (Raissi) v Secretary of State for the Home Department [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which

may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20. The principal authority referred to in relation to this matter was the judgment of Brooke LJ in R v Derbyshire County Council, Ex p Woods [1997] JPL 958 at 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

'If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy.'

By way of illustration, Brooke LJ referred to the earlier case of Northavon DC v Secretary of State for the Environment [1993] JPL 761, which concerned a policy applicable to 'institutions standing in extensive grounds'. As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of R (Heath and Hampstead Society) v Camden LBC [2008] 2 P & CR 233, where a planning authority's decision that a replacement dwelling was not 'materially larger' than its predecessor, within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase 'materially larger' referred to the size of the new building compared with its predecessor, rather than requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in City of Edinburgh Council v Scottish Ministers 2001 SC 957 the reporter's decision that a licensed restaurant constituted 'similar licensed premises' to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other."

18. In R (Cherkley Campaign Ltd) v Mole Valley DC [2014] EWCA Civ 567, Richards LJ held:

> "16. Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed policies for the development and use of land in the area. The supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the polices will be implemented."

19. In Fox Land & Property v Secretary of State for Communities and Local Government [2015] EWCA Civ 298, Richards LJ dealt with the relationship of the proposals mapped policies in paragraph 28:

> **"That reasoning can, in my view, be applied across to the relationship between Local Plan policies and the Proposals Map with which the present case is concerned. The Proposals Map is not itself policy, but it illustrates detailed policies, to use the term in section 36(6)(a) of the 1990 act. In particular, it identifies the geographical areas to which the detailed policies apply. Just as the supporting text is relevant to the interpretation of a policy, so the Proposals Map is relevant to the geographical scope of application of a policy and thus to a proper understanding of the policy. One looks at the supporting text and the Proposals Map not because they are themselves policy -- they are not -- but because of their relevance to a proper understanding of the policies properly so-called."**

20. In R (Hampton Bishop Parish Council) v Herefordshire County Council [2014] EWCA Civ 878, Richards LJ dealt with a view expressed at first instance that there was:

> "... no legal or practical requirement for planning decision-makers specifically to determine whether a development proposal is or is not in accordance with the development plan."

He said:

> "I respectfully disagree with a proposition formulated in those terms. It will be clear from what I have said above that in my view compliance with the duty under section 38(6) does as a general rule require decision-makers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on that issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord

> Reed in Tesco Stores v Dundee City Council (see paragraph 29 above), they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations."

Those principles have recently been applied by the High Court in BDW Trading Ltd v Secretary of State for Communities and Local Government [2015] EWHC 886 (Admin). Hickinbottom J said at 33:

> "iii) However, as Mr Kimblin properly concedes, it was necessary for the Inspector, having found the development to have been in conflict with one policy within the development plan, to proceed to determine whether the development was or was not in accordance with the plan as a whole.
>
> iv) I accept Mr Kimblin's forceful submission that whether the Inspector considered and determined that the development was or was not in accordance with the plan as a whole is a question of substance and not form. The use of a mantra in an inspector's decision is not necessary; and, if an inspector uses such a mantra, that may not necessarily be sufficient. However, if an inspector fails to indicate expressly that he has at least considered that issue, it may be more difficult for a court to find that he has done so. Where an inspector has identified conflicts between a development and the plan, if he sets out his reasoning, brief as it might be, as to why he considers that the development is not in accordance with the development plan or, despite conflicts with individual policies, that it is, that will be helpful not only to those involved in the application but also to the court in any later challenge. Such express reasoning will usually make clear that the inspector has brought his mind to bear upon the relevant issue and has drawn a rational conclusion."

Ground 1

Whether the first defendant erred in his application of section 38(6) of Planning Compulsory Purchase Act 2004.

21. The claimant submits that at the inquiry the claimant led evidence that the development proposed complied with core strategy policies which were supportive of the development as follows: CS1 locating housing and accommodation; CS2 unsustainable location; CS3 complying with carbon policies and protecting environmental assets and the layout; CS5 appropriate shopping in Ingleby Barwick; CS7 meeting housing needs; CS8 affordable houses and ability to provide property mix and CS11 appropriate planning obligations.

22. The inspector set out local planning policy in his report. The first defendant in his Decision Letter considered that the development plan policies of particular relevance to the proposal were those set out by the inspector in his report at paragraphs 16 to 18. Those paragraphs read as follows:

"16. Saved LP policy HO3 relates to housing development on unallocated sites and states that within the limits of development residential development may be permitted provided that, amongst other things, the land is not specifically allocated for another use, it does not result in the loss of a site which is used for recreational purposes, and it is sympathetic to the character of the locality and takes account of and accommodates important features within the site. The LP Proposals Map indicates that land to the west of Thornaby Road and to the north of Low Lane, including the appeal land, is within the limits of development.

17. The LP originally included policy EN14, which related to green wedge areas, but this policy was replaced on the adoption of the CS, by CS policies CS1 and CS10 (page 74 of CD2). CS policy CS10(3) refers to green wedges and states that the separation between settlements together with the quality of the urban environment will be maintained through the protection and enhancement of the openness and amenity of, amongst other things, green wedges within the conurbation including the Bassleton Beck Valley between Ingleby Barwick and Thornaby. The CS includes a Strategic Diagram (ID25) which indicates the location of green wedges.

18. CS policy CS3(8) states that, in designing new development, proposals will, amongst other things, make a positive contribution to the local area, by protecting and enhancing important environmental assets and biodiversity, by responding positively to existing features of natural character such as hedges and trees, and by including the provision of high quality public open space. CS policy CS10(4) states that the integrity of designated sites will be protected and enhanced and that the biodiversity and geodiversity of sites of local interest will be improved."

In the inspector's overall conclusions, set out above, he found that the development proposed afforded with the development plan. In paragraph 16 of his Decision Letter the first defendant agreed with the inspector that local plan policy H03 was out of date. Although there was conflict with that policy he gave little weight to it because the policy was out of date.

23. It was the conflict with core strategy policy CS10(3) and the strategic objective of providing and maintaining a Green wedge between Ingelby Barwick and Thornaby to which he attached significant weight and which rendered the scheme in conflict with the development plan overall.

24. The claimant submits the first defendant's approach was akin to that found impermissible in Milne. There is no suggestion by the first defendant that the proposals failed to perform against the policies relied upon by the claimant yet there is no mention of them in the Decision Letter. It is submitted that the decision maker needs to understand the nature and extent of the compliance with and departure from the development plan to be able to undertake the statutory balance between the development plan and other material considerations.

25. The second defendant submits that the first defendant is not required to cite and analyse each and every policy to demonstrate that he has fully considered the development plan. The Decision Letter shows that he had in mind the full range of policies. He judged two policies to be of particular importance, namely CS10(3)(ii) and local planning policy H03. He was entitled to approach consideration of the appeal by focusing on those two main policies.

26. The other policies in the development plan were complied with. The issue was whether the breach of CS10(3) was so fundamental as to cause a finding of noncompliance with a development plan as a whole. No submissions were made about H03 given the lesser weight attached to it and its vintage in development plan terms.

Discussion and Conclusions

27. It is axiomatic that the decision maker does not have to deal with each and every policy that has been raised by the parties during an appeal. That is not the claimant's case. Rather, it is submitted a finding of compliance or conflict with the development plan and the basis for it needs to be made so that the decision maker can proceed to undertake the planning balance in an informed way. I agree. Such a step is not just form. Rather, it is an essential part of the decision making process, so that not only the decision maker but also the reader of the Decision Letter is aware and can understand that the duty imposed under section 38(6) has been discharged properly by the decision maker.

28. The second defendant submits that what was done here by the first defendant was sufficient. That was because CS10(3) was regarded as the key and fundamental policy and to deal with that as the most relevant policy was an acceptable approach. The defendant had in mind the statutory framework - see paragraph 7 of the Decision Letter.

29. Reading the Decision Letter as a whole and in a commonsense manner it is evident that the duty under section 38(6) was discharged. The development proposals complied with the other policies and so there was no need to mention them. Conflict with section 38(6) occurred due to conflict with CS10(3).

30. The difficulty with that approach is that it does not show the decision maker engaging with and deciding whether the proposal was in compliance with or conflict with the development plan as a whole. Mr Zwart, counsel for the second defendant, in his review of the cases, emphasised that the decision maker had to make a decision. I agree the decision maker does, but it has to be made on the right basis. That is not just in relation to one policy but against the development plan as a whole. That does not mean a mechanistic approach of judging the proposals against each and every policy that may be prayed in aid of a development or against it, but an evaluation of main policy areas within the development plan that are relevant to the proposal to be determined and an assessment of how the proposal fairs against them. That can be shortly stated and the process to be followed is for the individual decision maker. But it needs to be clear at the culmination of the decision-taking process what the eventual judgment is against the development plan as a whole. Only by carrying out that exercise can the next step of evaluating the planning balance be properly undertaken.

31. Clearly some policies are going to be more material than others to a development proposed. Conflict of a proposal with one or more of the more relevant policies would be something to be put into an evaluation of whether the proposal accords with the development plan as a whole. It is important to recall the actual wording of section 38(6) and the exercise to be undertaken. To determine whether a proposal is in an accordance with the plan the decision maker needs to have regard to all of the relevant policies and not just one.

32. In the instant case the first defendant appears to have reached his decision on a conflict with a development plan as a whole (or overall, as he said here) on just one policy, material though it was to the decision to be undertaken.

33. I do not accept, lest it be thought to establish the proposition, that the case of Hampton Bishop (supra) establishes that a breach of one key policy was sufficient to found conflict with the development plan as a whole. In that case judicial review proceedings were brought against a decision by the local planning authority to grant planning permission to Hereford Rugby Club to develop grass and all-weather pitches, club house, indoor training building, car parking and landscaping supported by enabling residential development of 190 units. The first officer report referred to a variety of policies noting that those concerning sport and recreational facilities were of particular relevance. It noted also that the site was in open countryside where the UDP policy sought to restrict development. Despite a number of positive elements they were not sufficient to outweigh the significant negative landscape and visual impacts and associated policy requirements.

34. A second officer report was produced as the NPPF had been published in the intervening time. That report dealt with the NPPF and the significance of the annual monitoring report which analysed the supply of deliverable housing land. It then proceeded to evaluate the proposal by short reference to the relevant UDP policies.

35. As the decision was taken when local planning authorities still have to provide reasons for their decisions, reasons were given and included reference to a range of UDP policies. In the factual context the Court of Appeal was satisfied that the officer reports had adequately set out the development plan as a starting point for the consideration of the proposal. As part of that examination many relevant UDP policies were considered before concluding that the proposed development complied with all relevant UDP policies apart from H7. A departure from that was justified because of the material considerations.

36. That is very different from the process here where a policy conflict with CS10(3) was found sufficient to give rise to substantial weight against the proposal without any prior evaluation of development plan policies being engaged with by the first defendant. That was an inadequate and incomplete attempt to discharge the statutory duty under section 38(6). Ground 1 succeeds.

Ground 2 : Whether the first defendant reached an unlawful conclusion that the development conflicted with CS10(3) and strategic objective of providing and maintaining a green wedge between the conurbations of Ingleby Barwick and

Thornaby?

37. The claimant submits that the first defendant concluded that there was no development plan put forward for a conclusion that the appeal site was within a designated Green wedge. Notwithstanding that the first defendant reached a conclusion that the development conflicted with policy CS10(3) and its related strategic objective. It was to that conclusion that the first defendant gave substantial weight.

38. Core strategy policy CS10 is entitled environment protection and enhancement and consists of various paragraphs. Paragraph 3 reads:

> "The separation between settlements together with the quality of the urban environment will be maintained through the protection enhancement of the openness and amenity value of...
>
> (ii) Green wedges in the conurbation including...
>
> • Bassleton Beck Valley between Ingelby Barwick and Thornaby."

39. The core strategy key diagram shows by reference to its key the location of various Green wedges of which Bassleton Beck Valley was one. Although indicative it is clear that the appeal site was not within that illustrative Green wedge. Therefore, the appeal site was not within an area where protection and enhancement of openness and amenity value and other objectives of policy CS10(3) were operative.

40. In his report the inspector, having concluded that the appeal site was outside the CS10(3) designation, so that its protection did not apply, went on to consider the position if he was wrong on his initial finding. It had to be remembered that he was reporting to the first defendant and so had to cover all options.

41. The first defendant agreed with his inspector in paragraph 10 of his Decision Letter that there was no development support for a conclusion that the appeal site was within a designated Green wedge. As a result of that finding the claimant submits that it was not lawfully open to the first defendant to find that the proposals were in conflict with policy CS10(3) or its strategic objective. Further, the claimant submits that in reaching that conclusion the first defendant had regard to a material considerations, namely, strategic objective 8, the position of the council and the prospective adoption of a regeneration and environment development plan document in due course. He took account also of the impact of the appeal decision which affected the gap between Ingleby Barwick and Thornaby and agreed with the local councillor, Councillor Rose, that development on the appeal site would be "a bridge too far".

42. The second defendant submits that the first defendant's reasoning was sequential. There was no illustrative material to show how policies CS10(3)(ii) was to be applied on the ground. The key diagram in the core strategy was very high level and could not be used for development management. Policy CS10(3) contains a description of "Green wedge" but that term is not defined within the core strategy. The policy term is not expressly tied to any illustrative material. That then leaves open the proper scope and application of the policy. On its wording the scope of the Green wedge was not

limited by the term "Bassleton Beck Valley". The inspector had accepted that Green wedge may include flat land as well as valley land and there was some evidence that the Beck traversed in part of the appeal site so that the first defendant's conclusion was reasonable.

43. In the absence of a plan to show and define the geographical extent of Green wedges set out under policy CS10 the first defendant was entitled to disagree with his inspector's opinion as to the actual extent of the Green wedge. He was entitled having regard to his previous decision to permit development on open undeveloped land immediately southwest of the appeal site in 2013, to agree with the comments of Councillor Rose.

44. As a result the first defendant agreed with his inspector that there was no development plan illustration of how CS10(3)(ii) fell to be applied. In paragraph 11 of his Decision Letter the first defendant had then considered all the relevant factors on which to base his judgment. His resulting quantitative judgment was quite lawful.

Discussion and Conclusions

45. Prior to the adoption of the core strategy in 2010 there was a preceding policy on Green wedges EN14 in the Stockton-on-Tees Local Plan. The local plan had a proposals map. However, when the core strategy was adopted with policy CS10(3) replacing EN14 the fit and the notation on the local plan proposals map relating to it fell away. The key diagram of the core strategy shows what are best described as areas of green fingers in places approximate to the verbal description within policy CS10. To indicate CS10(3)(ii) third bullet point described as Bassleton Beck between Ingleby Barwick and Thornaby, a Green finger is shown in that general location on the key diagram. It is of course indicative as to where the policy protection applies. The precise boundaries will be determined in a DPD. But for the time being the Green finger is a helpful aid to interpretation of the policy in the statutory development plan. It is relevant to the proper interpretation of that policy.

46. The key to the strategic diagram notes that the Green fingers apply to CS10. As Richards LJ said in Fox Land (supra):

> "... so the Proposals Map is relevant to the geographical scope of application of a policy and thus to a proper understanding of the policy." (28).

47. The second defendant accepts that the key diagram is relevant but contends that it is at such a high level that nothing of meaning can be attached to it. The second defendant has always adopted a wider interpretation of CS10(3) which in its wording has a generic description which is then open to interpretation by the decision maker by reference to features on the ground.

48. The second defendant's interpretation of the policy is not the issue here. The first defendant has found in unambiguous terms that:

> "There was no development plan support for a conclusion the appeal land

was been a designated Green wedge"(10)

That is the starting point for consideration of where the policy applies. The second defendant accepted that the Green wedge was accurately drawn on the key diagram. It showed the broad location of CS10. Further, the second defendant accepted that the appeal site was not shown within the notation which related to the relevant Green wedge. The appeal site is shown marked "X" in a plan prepared for the Minister with which the second defendant did not disagree and which shows the site well outside the Green finger, as shown on the key diagram and in an area of white land. The second defendant submits that it does not apply the diagram as a development management tool. The interpretation of CS10(3)(ii) is a matter of fact and degree in each case and for interpretation by the decision maker.

49. In the skeleton argument the second defendant makes the ambitious submission that there is no illustrative material to show CS10(3)(ii) may be applied on the ground. The error in the interpretation of the second defendant, as it is on the part of first defendant in his Decision Letter, is that it is assumes that the key diagram has no meaning. That is clearly not consistent with the legal position which is set out in Fox Land at [28], as I have set out above. Although that is dealing with a local plan and the preceding legal regime for development plans, the same applies under the Town and Country (Local Planning) England Regulations 2012 - see regulation 9. Once it is accepted that the key diagram sets out the geographical extent of the Green wedge in indicative terms, as an aid to interpretation of policy CS10 and that the appeal site is clearly outside the indicative extent on any interpretation, as is the case here, there is no basis for the application of policy CS10 to the appeal site. To contend otherwise, as the second defendant seeks to do, is to (i) to seek to rerun an argument that it ran at the public inquiry and lost and (ii) to make a nonsense of the key diagram which has a clear statutory purpose to help elucidate the application of policy CS10(3)(ii).

50. So far as the first defendant is concerned, the very clear and unambiguous finding in paragraph 10 of his Decision Letter means that there is no basis for applying CS10 to the appeal site at all. It is not then open to the first defendant to embark upon the assessment of a situation on the ground in terms of policy CS10 as he does in paragraph 11, to conclude that there is a policy conflict. It may be a perfectly valid exercise in terms of the effect of the development on the general appearance of the area but not in development plan policy terms given the very clear finding in the preceding paragraph. That being the case it is impossible for the first defendant to come to the conclusion that he does in paragraph 11 that scheme conflicts with CS10(3). He has clearly misunderstood and or misapplied the policy.

51. There is reference in paragraph 11 of the Decision Letter to strategic objective 8 of the core strategy. That does not help the first defendant. Strategy objectives underpin the policy approach within the core strategy. Strategic objective 8 says that Green wedges that prevent coalescence of built up areas are to be retained as important components. That is sensible, but does not move matters of policy interpretation on from where the Green wedges are located. Precision on that will come through the eventual DPD but that is at such an early stage (issues and options) that no weight can be attached to it.

52. The first defendant in paragraph 11 of his Decision Letter proceeded also to rely on three other factors as well as strategic objective 8. They are the position of the council with the prospective adoption and regeneration of environment development plan document and council raises comments that development of the appeal site would be a bridge too far.

53. The position of the council with regard to site lying within with a long established Green wedge I have dealt with above. That may have been the second defendant's position historically but it can be no more whilst the position is guided by the core strategy. The DPD likewise I have dealt with. The comment of Councillor Rose is doubtless an expression of his genuinely held view that is completely irrelevant to the correct interpretation of the policy within the development plain.

54. It follows that in relation to all of those matters the first defendant took into account immaterial considerations and fell into error. Accordingly, this ground succeeds also. The Decision Letter must be quashed and the application succeeds.

55. MRS JUSTICE PATTERSON: Yes Ms Williams, are you able to help me on the position of costs?

56. MISS WILLIAMS: I would ask and I will discuss with my friend for the other side but we would obviously ask for our costs of the application from the second defendant subject to detailed assessment if not agreed unless you wish to summarily assess them.

57. MRS JUSTICE PATERSON: Let me hear Ms Butcher.

58. MISS BUTCHER: My Lady, there is no argument as to costs generally, it is the quantum I would seek to either agree with the claimant or to be subject to detailed assessment.

59. MRS JUSTICE PATTERSON: All right. I will order then that the second defendant pay the costs of the claimant to be agreed, failing which they are to be referred to detailed assessment.

60. Miss Williams, can you or those on your side draw an order from today and just e-mail that to my clerk and then I will approve that.

61. MISS WILLIAMS: Yes my Lady.

62. MRS JUSTICE PATTERSON: Thank you all very much.