Neutral Citation Number: [2019] EWHC 1022 (Admin) Case No: CO/1452/2018

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

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 01/05/2019

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

- -

Between :

William Corbett	**Claimant**
- and -	
The Cornwall Council	**Defendant**
- and -	
Steven Tavener	**Interested Party**

- -

Mr William Upton (instructed by **TLT LLP**) for the **Claimant**
Mr Sancho Brett (instructed by **Cornwall Council Legal Service**) for the **Defendant**

Hearing date: 31 January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

C. M. G. Ockelton :

1. The Sun Haven Holiday Park is on the South side of a valley about 1 kilometre from the coastal village of Mawgan Porth near Newquay in Cornwall. It has a hundred pitches for tents, touring caravans and motorised caravans; in addition, there are 39 static caravan and lodge units. Across a minor road is a field of relatively low-grade agricultural land. Mr Tavener, the Interested Party, the owner of the Sun Haven Valley Caravan Park, wants to extend the caravan park into the western half of that field. He therefore sought planning permission for the requisite change of use. The proposal was to use that land ("the site") for 15 holiday lodges and 15 static caravans; there would be associated tarmac roads and parking spaces, and plantation.

2. Neither the site nor the existing holiday park are within the Cornwall Area of Outstanding Natural Beauty, part of which lies about two miles away. Both are, however, within the Watergate and Lanherne Area of Great Landscape Value (AGLV).

3. The Defendant (I was told at the hearing that the definite article is part of its name, but the usage does not appear to be consistent) is the Local Planning Authority. Following a committee meeting it decided on 1 March 2018 to grant planning permission as sought, subject to a number of conditions relating to detail, including landscaping, and requiring that none of the pitches be used other than as holiday accommodation.

4. The Claimant brings the claim in his private capacity as a resident in St Mawgan Parish, but he is also the leader of the Parish Council's Planning Group. He was thus responsible for presenting the Parish Council's views on the proposed development to the Defendant before it made its decision. The Defendant has raised issues as to his standing for the purposes of these proceedings, but does not now argue them. Permission was granted by John Howell QC, sitting as a Deputy Judge of this Court on 4 October 2018. The grounds on which the Claimant has permission to argue are that in making its decision the Defendant failed to take into account the Development Plan properly or at all, and that in the circumstances its reasons for granting planning permission are inadequate. In a separate decision on 27 November 2018, Mr Howell ordered that this claim is an Aahus Convention claim as defined by CPR 45.41(2).

5. The Defendant contests the claim. The Interested Party has not filed an acknowledgement of service or any summary grounds of defence, but has filed a witness statement, in which he indicates that he supports the Council's grounds for contesting the claim.

The Issues.

6. It is common ground between the parties that this claim raises the two issues, identified by the grounds and the grant of permission. The first is whether the Defendant took into account its development plan properly or at all when making the decision under challenge. The legal framework for a challenge on this ground is clear from authority at the highest level. The proper interpretation of a development plan and the relevant provisions in it is a matter for the Court. As Lord Reed said in Tesco Stores Limited v Dundee City Council [2012] UKSC 13:

> "18… the development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which would 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… policy statement 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."

7. That distinction was emphasised by Lord Carnwath JSC in Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] UKSC 37 at [26]:

> "[T]he judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

8. In relation to the second issue, it is clear that there is no statutory duty to give reasons for granting planning permission. Depending on the circumstances of the case, however, there may be a common law duty to explain how a decision has been reached: see the judgment of Lord Carnwath JSC in R (CPRE Kent) v Dover District Council
[2017] UKSC 79 at [51]-[56]. In the usual case, the officer's report to the Planning Committee will contain the detailed statement of the background as well as a recommendation. If the committee accept the recommendation there is unlikely to be any need to provide further reasons, because it can be assumed that the reasons for the committee's decision are the reasons given by the officer for the recommendation. The focus of the challenge of this sort therefore moves to the possibility of criticism

of the officer's report to committee. The law on this issue was recently summarised by Lindblom LJ in R (Oates) v Wealden DC [2018] EWCA Civ 1304 at [39]:

> "The approach the court will take when considering the challenge to a grant of planning permission in which criticism is made of a planning officer's report committee is well established. Minor or inconsequential errors are to be distinguished from advice that is "significantly or seriously misleading – misleading in a material way…". And "unless there is some distinct and material defect in the officer's advice, the court will not interfere" (see the judgments recently given in this court in Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314 – in particular, at paragraphs 42 and 63."

The quotations in that paragraph are of the key phrases in the judgment of Lindblom LJ in Mansell at [42]. In that case he added this:

> "Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R (Loader) v Rother District Council [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of the relevant policy (see, for example, R (Watermead Parish Council) v Aylesbury Vale District Council [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, R (Williams) v Powys County Council [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

9. In his concurring judgment at [63] Sir Geoffrey Vos C emphasised the last sentence of that paragraph.

The Development Plan

10. Section 70(2) of the Town and Country Planning Act 1990, as amended, reads as follows:

> "In dealing with [a planning] application the authority shall have regard to -
>
> (a) the provisions of the development plan, so far as material to the application,

> (b) any local finance considerations, so far as material to the application, and
> (c) any other material considerations."

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

> "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."

11. Section 38 of the 2004 Act also defines the development plan for these purposes. So far as relevant to these proceedings the Development Plan is as defined in s 38(3) as follows:

> "(a) the regional strategy for the region in which the area is situated (if there is a regional strategy for that region), and (b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area. (c) the neighbourhood development plans which had been made in relation to that area."

Sub-section (5) provides that:

> "If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained at the last document to become part of the development plan."

12. The Development Plan for Cornwall consists of the *Cornwall Local Plan: Strategic Policies 2010 to 2030*, adopted in November 2016, and a number of saved policies from older Local Plans. As it says on its title page, the Cornwall Local Plan document it is to be "read in conjunction with the Policies maps and the Community Network Area Sections." It also contains, at Appendix 3, a schedule of saved and replaced policies. I need to quote extensively from Policies 1 and 23 of the Strategic Policies, and one saved policy, as follows:

> "**Policy 1: Presumption in Favour of Sustainable Development**
>
> When considering development proposals the Council will take a positive approach that reflects the presumption in favour of sustainable development contained in the National Planning Policy Framework and set out by the policies of this Local Plan.
>
> We will work with applicants, infrastructure providers and the local community to find solutions which mean that proposals will be approved wherever possible, and to secure development that improves the economic, social and environmental conditions in the area.

Planning applications that accord with the policies in this Local Plan and supporting Development Plan and Supplementary Planning Documents (including, where relevant, with policies in Neighbourhood Plans) will be regarded as sustainable development and be approved, unless material considerations indicate otherwise

When considering whether a development proposal is sustainable or not, account will be taken of its location, layout, design and use against the three pillars of economic development, social development and environmental protection and improvement.

Where there are no policies relevant to the application or relevant policies are out of date at the time of making the decision the Council will grant permission unless material considerations indicate otherwise – taking into account whether:

a) Any adverse impact of grating permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework taken as a whole; or

b) Specific policies in that framework indicate that development should be restricted.

Policy 23 – Natural Environment

1. Development proposals will need to sustain local distinctiveness and character and protect and where possible enhance Cornwall's natural environment and assets according to their international, national and local significance.

2. Cornish Landscapes.

   Development should be of an appropriate scale, mass and design that recognises and respects landscape character of both designated and undesignated landscapes. Development must take into account and respect the sensitivity and capacity of the landscape asset, considering cumulative impact and the wish to maintain dark skies and tranquillity in areas that are relatively undisturbed, using guidance from the Cornwall Landscape Character Assessment and supported by the descriptions of Areas of Great Landscape Value.

   In areas of undeveloped coast, outside main settlements, only development requiring a coastal location and that cannot be acheived elsewhere, will be acceptable.

   …

   2(b) The Heritage Coast and areas of Great Landscape Value.

> Development within the Heritage Coast and/or areas of Great Landscape Value should maintain the character and distinctive landscape qualities of such areas."

13. The opening text of Appendix 3 indicates that:

> "The saved policies that are not being replaced by the Local Planned Policies will continue to form part of the Development Plan and will continue to be used in conjunction with the Local Plan."

14. The saved policies include policies relating to areas of Great Landscape Value in the Penwith Local Plan of 2004, the Restormel Local Plan of 2001 and the Caradon Local Plan First Alteration 2007. The site is within the area covered by the Restormel Local Plan 2001. The saved policy is Policy 14 of that Local Plan. The policy ("saved Policy 14") is as follows:

> "Areas of Great Landscape Value
>
> Policy 14
>
> (1) Developments will not be permitted that would cause harm to the landscape, features and characteristics of Areas of Great Landscape Value.
>
> (2) The following parts of the plan area are proposed as Areas of Great Landscape Value:
>
> …
>
> (2) Watergate and Lanherne
>
> …"

The Officer's Report

15. The meeting at which the decision under challenge was taken was informed by the Officer's Report, prepared by Michelle Billing, the case officer. The report begins with "Balance of Considerations and Conclusion", to which I shall return. It then lists, but does not set out, the relevant policies including Policy 23 in the Cornwall Strategic Plan and saved Policy 14 of the Restormel Local Plan. Under "Summary of Consultations", the longest section is paragraph 17, which runs to two pages of typescript and sets out the Parish Council's objections to the application.

16. Those objections are (in my judgment) fairly summarised. They were made by reference to the relevant policies and also to the views of inspectors in appeals relating to nearby sites. The objectors are reported as arguing that the application appears to fall foul of Policy 14 which holds that "developments will not be permitted which would cause harm to the landscape, features and characteristics of AGLVs" and, further, appears not to conform with the explanatory text to Policy 23. Then, under "Representations", the report states that "the key planning related points have been summarised below" and there is a bullet-pointed list, headed "Oppose", and including (as relevant for present purposes) Significant visual impact, Detrimental impact upon

the character of the area, Intrusion into the landscape, and Loss of view. That list is not further discussed as such, but the Report then has sections under the general heading of
"Assessment of Key Planning Issues". I do not need to make any comment on the sections related to Agricultural Land Classification, Highways, Ecology, Drainage, or Residential Amenity save to say that under each of those heads the impact of the development is (using one term or another) neutral. I do need to say something about the remaining heads, "Principle of Development" and "Impact upon Landscape Character".

17. The former is also the first of these sections. It considers various matters including that what is proposed is a change of use of land rather than new housing in the countryside. It notes that Policy 5 of the Cornwall Local Plan says that the development of sustainable new or upgraded tourism facilities will be supported where the development is of an appropriate scale to the location. It assesses the scale of the development as reasonable and that the proposal will enhance the standard of accommodation at the site. Further, there will be an inward investment of £1.8 million, and some new jobs will be created. The conclusion is that the proposal would comply with both paragraph 28 of NPPF and Policy 5 of the Local Plan, and that the identified economic benefits would weigh in favour of the application.

18. Under 'Impact upon Landscape Character, the relevant parts of Policy 23 and saved Policy 14 are set out without comment, followed by this:

> "44. Chapter 11 of the NPPF provides that the planning system should contribute to and enhance the natural and local environment."

19. The report then goes on to describe the site and its surroundings in some detail, with particular reference to how difficult or easy it is to see the site from elsewhere. The author concludes that it is difficult to get a long distance view, although localised views can be obtained "but these glimpses would be seen in context with the existing holiday park and other built development, it would not break the skyline or project into any views and would therefore temper [sic] the impact upon the landscape character". The conclusion is:

> "58. It is considered that the overall impact upon the Area of Great Landscape Value would be slight/moderate at a local level, which would weigh against the proposal."

20. The assessment of balance and conclusions are, as I have said, at the beginning of the report. At paragraph 3 it is said that the proposal falls within an AGLV, "which is protected under local planning policy". The remainder of this section is, so far as relevant, as follows:

> "4. The impact upon the landscape has been assessed and due to the valley location and the surrounding topography it is difficult to gain any long distance views of the site from public advantage points. It is accepted that views of the proposal site would be possible when approaching the site from the west and around the immediate location however

> the proposal would be seen in context with the existing development, therefore tempering its impact.
>
> 5. A landscaping condition will be imposed to further soften the localised views of the proposal.
>
> 6. It is concluded the proposal would result in a slight/moderate impact upon the AGLV at a localised level.
>
> 7. The expansion of existing tourism facilities is supported by both local and national Planning policies.
>
> 8. The proposal would provide financial investment in the existing business and provide new full time employment which would support rural economic growth.
>
> …
>
> 11. Considering the development in accordance with the development plan and the framework as a whole I would give limited weight to the impact upon the AGLV as the views are localised and can be further mitigated by suitable planting and would attribute greater weight to the economic benefits of the proposal.
>
> 12. The proposal with the recommended conditions would result in a satisfactory development which would add to sustainable economic growth in rural areas and assist the local tourist industry. The recommendation is to request delegate powers to approve the proposal."

21. The report contains no discussion of the possibility that approval of the application would amount to making a decision not in accordance with saved Policy 14, nor of any material considerations that might or would justify a decision otherwise than in accordance with the development plan.

Discussion

22. The Defendant accepts that the proposed development would have an impact on the AGLV. It assesses the impact as slight or moderate, but does not suggest that it would not be harmful. It is in this context that, because of s 70(2) of the 1990 Act, the interpretation of the Development Plan becomes important. If saved Policy 14 means what it says, the plan would require the application to be refused. In these circumstances a decision granting planning permission would be a decision made not in accordance with the plan and would have to have been justified by material considerations indicating the desirability of a determination made otherwise than in accordance with the plan. If, on the other hand, Policy 14 is to be interpreted as not imposing a prohibition on the grant of permission for a development that would cause harm to the AGLV, the Claimant's claim is likely to be properly characterised as merely a disagreement with the assessments made in applying the policy to the application.

23. It is clear that the Defendant's position is that the decision was in accordance with the plan, and that when saved Policy 14 is considered objectively and read in its proper context, it did not require the development to be refused. Mr Brett's arguments in favour of that proposition include a number of strands. First, he submits that saved Policy 14 was prepared and adopted in 2001, and the characteristics of the relevant land have changed in the mean time. Secondly, he submits that the Policy has to be considered by being read alongside the newly-adopted policies in the Strategic Policies document. He refers in particular to Policy 1, providing for a presumption in favour of sustainable development, Policy 23 which he describes as "permissive in nature" and also Policies 2 and 5 which provide for accommodating growth where there are economic benefits and allowing business and tourism development in the countryside that are either of an appropriate scale on their own or are an extension of existing businesses.

24. Looking at the Development Plan as a whole, submits Mr Brett, the Council did what it was required to do in assessing the impact or the harm and concluding that the positive factors in favour of the development outweighed the negative factors and so justified a grant of planning permission despite the harm to the AGLV. A further point made by Mr Brett was that it may be that saved Policy 14 is in conflict with other elements of the Strategic Policies document in particular Policy 23, and that in those circumstances, in accordance with section 38(5) of the 2004 Act, the conflict should be resolved in favour of the latter.

25. I do not accept those arguments. I do accept that the characteristics of the immediate area have changed since 2001. There have been a number of developments for which planning permission has been granted. Nevertheless, the area is still designated as a AGLV. Not only that, but the 2001 Policy was specifically saved in 2016. In fact the only function of saved Policy 14 is to declare that developments that would cause harm to the landscape, features and characteristics of an AGLV will not be permitted. If the development plan, read as a whole, was not intended to make that provision, there would have been no need to save Policy 14 at all. Whether or not the characteristics have changed since 2001, the 2016 Policy deliberately adopts the 2001 approach to developments in the AGLVs.

26. There is no inconsistency between saved Policy 14 and new Policy 23 or any other element of the development plan. Policy 14 does not in terms prohibit all development in an AGLV: it prohibits only development which would be harmful. A development which would not be harmful could be permitted within the terms of saved Policy 14. Policy 23(2)(b) which, as Mr Brett emphasises, is, like the rest of Policy 23, permissive, refers to development within an AGLV. But when the development plan is read as a whole, reading Policy 23 with saved Policy 14, it becomes clear that Policy 23 must be referring to proposed development which would not harm the AGLV. Reading the two together helps to understand Policy 23: it does not show that there is a conflict with saved Policy 14. The general presumption in favour of sustainable development does not assist Mr Brett because it applies, on its terms, only to applications that accord with the policies in the development plan.

27. An application which, under the development plan (including saved policies) would not be permitted is not a planning application according with the policies in the plan. The other policies to which Mr Brett made reference could only go to weight in relation to

an application which, under the Development Plan, might be permitted. Further, and for the avoidance of doubt, I should say that I do not accept that saved Policy 14 should be regarded as "out of date" for the purposes of Policy 1, essentially for the reasons given above. The simple statement that developments of this nature will not be permitted was deliberately adopted as part of the development plan in 2016.

28. For these reasons I have reached the conclusion that the development plan read as a whole, including saved Policy 14, does not permit a development that would cause harm to the landscape, features and characteristics of an AGLV covered by that policy. It follows that a determination granting planning permission for such a development would be a determination not in accordance with the development plan.

29. That takes me to the second issue, that relating to whether sufficient reasons have been given for the decision under challenge. The Defendant has been consistent in not treating Policy 14 as preventing the Interested Party's application from succeeding. There appears to be no mention of saved Policy 14 in any of the responses to preapplication inquiries. That may have been solely because at that stage the Development Plan had not been finalised and it may not have been made known whether saved Policy 14 was to be included. By the time the matter came to the preparation of the Officer's Report to Committee, however, the position in that respect was clear. As Mr Brett emphasised, the Report does set out saved Policy 14, and I accept that for that reason it cannot be properly be said that either the officer, or the members of the committee were unaware of its terms. But the Report gives no other hint that approval of this application would be a decision made otherwise than in accordance with the development plan, and that the development plan required that this application be refused "unless material considerations indicate otherwise". Instead, the Report simply sets out a balancing assessment of the merits and demerits of the proposal.

30. In my view, at at least two levels that was not adequate. First, it seems to me that the Officer's Report should have made it plain to the Committee that the development plan, in saved Policy 14 required this application to be refused, but that it could be granted if the Committee were satisfied that material considerations indicated that result. No doubt the Report then ought to have indicated what those material considerations were. By failing to make clear that the decision recommended by the Report was a decision not in accordance with the development plan, the Report contained "a distinct and material defect".

31. Secondly, although it is fair to say that the Report does identify material considerations weighing in favour of the application, those are only the considerations which would be applicable if the application were covered by the general policies relating to developments in the countryside, in particular Policy 23, without consideration of the special requirements in relation to an AGLV. It cannot be sufficient to say that the material considerations meriting a departure from the Development Plan are precisely the same as those which would have justified the decision in the absence of the relevant provision of the development plan. Rather, it is likely to be necessary to identify further factors in favour of the application, going beyond what would have been necessary for any development in the countryside, and some consideration of whether those factors were sufficient to amount to a reason to depart from the clear provisions of the development plan.

32. I am fortified in that view by what was said by Lord Reed in Tesco Stores Ltd v Dundee City Council at [22]:

> "Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations."

This is a case where, in the words of Lindblom LJ in Mansell quoted above:

> "The officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law."

33. The reasons for the decision under challenge have to be regarded as essentially those in the Officer's Report, because the officer's recommendation was accepted by the Committee. For the reasons I have given, on the material before me, I am satisfied that those making the decision under challenge did not appreciate that they were making a decision which did not accord with the development plan, and did not identify or assess any relevant material considerations for departing from the development plan. For those reasons the decision under challenge was unlawful.

34. In submissions before me reference was made to a number of other factors which it is said that the decision-maker should have taken into account, in particular, the question whether a development of the type proposed in this application should be regarded as the provision of "housing", to which Policy 7 of the Strategic Policies Document applies. In the circumstances, I do not need to reach a concluded view on those subsidiary issues.

35. Mr Brett invited me to refuse relief pursuant to s 31(2) of the Senior Courts Act 1981 on the ground that it is highly likely that outcome of the application would have been the same if no error of law had been made. In my judgment it would not be right to do so. No material considerations justifying departure from the development plan have been identified, and it is not the function of the Court to attempt to identify such considerations and apply them speculatively to the decision-making process.

36. The decision granting planning permission will be quashed.