

INSPECTOR'S QUESTION 8

GALLAGHER HOMES LTD AND LIONCOURT HOMES LTD V SOLIHULL METROPOLITAN BOROUGH COUNCIL

OPINION

1. The inspector appointed to examine the Sevenoaks Allocations and Development Management Plan has sought a response from the Council to address two matters arising from the judgement of Hickenbottom J in Gallagher Homes Ltd and Lioncourt Homes Ltd v Solihull Metropolitan Borough Council [2014] EWHC 1283.

Issue 1

Adoption of a plan that is not supported by a figure for objectively assessed housing need (within the meaning of the NPPF).

Legal Context

2. The inspector's role at the examination is to examine the plan and determine whether the plan (i) complies with various procedural requirements (ii) whether the plan is sound (iii) whether the local planning authority has complied with any duty imposed to co-operate in relation to its preparation (section 20 (5) of Planning and Compulsory Purchase Act 2004 "the 2004 Act").
3. Those involved in plan-making and decision-taking in a planning context must interpret relevant policy documents properly (see: Tesco Stores Ltd v Dundee City Council [2012 UKSC 13 at [17]-23] per Lord Reed).
4. Paragraph 182 of the NPPF gives advice as to what is meant in section 20 of the 2004 Act by a local plan being "sound":

“The Local Plan will be examined by an independent inspector whose role is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and whether it is sound. A local planning authority should submit a plan for examination which it considers is “sound” – namely that it is:

- Positively prepared – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;
 - Justified – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;
 - Effective – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities; and
 - Consistent with national policy – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework.
5. The Court of Appeal has considered the proper approach to be applied in respect of the term “soundness” and the approach to government guidance in this context. In Barratt Developments Plc v City of Wakefield Metropolitan Borough Council [2010] EWCA Civ 897 , Carnwath LJ (as he then was) considered “soundness”, then found in a similar context in the pre-NPPF Planning Policy Statements. His guidance remains apposite (see Zurich Assurance Limited v Winchester City Council [2014] EWHC 758 (Admin) at [114] per Sales J). Carnwath LJ said:

“11. I would emphasise that this guidance, useful though it may be, is advisory only. Generally it appears to indicate the Department’s view of what is required to make a strategy ‘sound’, as required by the statute. Authorities and inspectors must have regard to it, but it is not prescriptive. Ultimately it is they, not the Department, who are the judges of ‘soundness’. Provided that they reach a conclusion which is not ‘irrational’ (meaning ‘perverse’), their decision cannot be questioned in the courts. The mere fact that they may not have followed the policy guidance in every respect does not make the conclusion unlawful.

....

33. ... As I have said, ‘soundness’ was a matter to be judged by the inspector and the Council, and raises no issue of law, unless their decision is shown to have been ‘irrational’, or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law.”

6. Therefore, whether a plan is “sound” for the purposes of Section 20(5) of the 2004 Act is a matter of planning judgment for the inspector, and is subject to challenge only on normal public law grounds. The court is not concerned with the merits, which are a matter entirely for the inspector. However, in accordance with those principles, an inspector would err in law if he fails to take relevant guidance into account, or fails to deal with a “material controversy” (see Barratt at [45]).

7. In so far as the term “objectively assessed needs” is concerned paragraph 47 of the NPPF is to be interpreted as follows:

“... The words in [the first bullet point of paragraph 47], ‘as far as consistent with the policies set out in the Framework’ remind one that the Framework is to be read as a whole, but their specific role in that sub-paragraph seems to me to be related to the approach to be adopted in producing the Local Plan. If one looks at what is said in that sub-paragraph, it is advising local planning authorities:

to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework.’

That qualification contained in the last clause quoted is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs. The needs assessment, objectively arrived at, is not affected in advance of the production of the Local Plan, which will then set the requirement figure.” (City and District Council of St Albans v Hunston Properties Limited and the Secretary of State for Communities and Local Government [2013 EWCA Civ 1610 at [25] – [26] per Sir David Keene).

8. Section 19 (2) of the 2004 Act provides:

In preparing a [development plan document or any other] local development document the local planning authority must have regard to–

(a) national policies and advice contained in guidance issued by the Secretary of State;

(h) any other local development document which has been adopted by the authority;

9. The duty is to have regard to Government Policy – provided it has regard to it, the decision maker is entitled to depart from it so long as it gives adequate reasons for doing so (Carpets of Worth v Wyre Forest (1991) 62 P & CR 334 and Laing Homes v Avon County Council (1993) 67 P & CR 34).

10. In the light of the Gallagher judgement, the issue for the inspector is, in short, whether the plan can be found sound in the absence of an NPPF objectively assessed housing need.

Advice

11. Having regard to the above principles it is plain that as long as the inspector understands and has regard to the NPPF, it is entirely open to him to form the view that the plan is sound notwithstanding that there is not an objectively assessed housing need potentially subject to modifications.

12. In the present situation the Council adopted its Core Strategy in February 2011 prior to the publication of the NPPF and the abolition of the South East Plan. The Council does not contend that it has established its objectively assessed housing need pursuant to the NPPF either in the Core Strategy or the ADMP. It has been clear from the outset that the housing targets in the Core Strategy will fall short of the housing need for the area.
13. The Council began work on the evidence base for the ADMP in 2007. Work on the Strategic Housing Land Availability Assessment SHLAA took place in 2008/9 and the first consultations took place in 2010 with further consultations in 2011. A substantial amount of work was undertaken before the NPPF and the changes to the local development framework.
14. The Council took the pragmatic decision to progress the ADMP to examination given the extensive work already done rather than commencing a Local Plan Review (including objectively assessed housing need) which could have meant considerable wasted time, effort and expense and essentially disregarding 5 years work.
15. The benefits of adopting the ADMP were also considered. These include updated development management policies which are consistent with the NPPF. Importantly, the ADMP includes site allocations for housing, employment, mixed use and open space. The ADMP allocates suitable sites to meet the Core Strategy housing target and includes a buffer to provide flexibility. The Council will also be allocating reserve land for approximately 275 units and proposals for redevelopment of other land with housing elements.
16. For each of the housing sites in the Plan, the Council has drafted detailed development guidance covering design, layout, landscaping, access, infrastructure and delivery which will result in sustainable, well planned development.
17. The Plan is focussed on implementation and bringing forward development. The Plan will shape sustainable development within the District and respond to local needs and character. The allocations will promote plan-led development and protect designated land such as the Green Belt at 93% and AONB at 61%.
18. The Council considers that if it had abandoned work on the ADMP when the NPPF was published and commenced a local plan review, this would have wasted 5 years work but also meant that the Council would have had to start again in a process which would inevitably take several years. In the absence of the ADMP there would have been a planning vacuum which would have resulted in planning applications coming forward on an ad hoc basis and for there to be planning by appeal to a large degree and not determined on a plan led basis.
19. Instead, the ADMP is the planned spatial expression of the policies and targets set out in the Core Strategy adopted in February 2011. The ADMP plays an important role in identifying how the strategic CS policies will be implemented including the scale and distribution of development.
20. The ADMP will therefore help boost sustainable housing supply through the certainty brought about by its allocation policies and detailed development guidance. The fact that the ADMP does not provide for objectively assessed needs pursuant to the NPPF and

therefore the whole need for the District can readily be addressed by a commitment by the Council to an early review of the Core Strategy.

21. Indeed, the Planning Practice Guidance published in March 2014 states that local plans “may be found sound conditional upon a review in whole or in part within 5 years of adoption”.
22. The Council has already given a commitment to an early review of the Core Strategy for the purpose of undertaking an objective assessment of its need.
23. The difficulty in the Gallagher case was that the judge considered that the inspector had not understood the meaning of objectively assessed need in the NPPF. The judge acknowledged that the inspector could have departed from the precise terms of the NPPF if he had given reasons for so doing. However, in the judge’s view, the inspector had misunderstood the meaning of the NPPF (see for example: paragraph 79 of Gallagher).
24. The approach I have advised may lawfully be taken above was recently considered in the case of Grand Union Investment v Dacorum BC [2014] EWHC 1894 (Admin). In a judgement handed down on 12 June 2014, Lindblom J, a judge experienced in planning matters held that it was entirely lawful for a plan to be made sound in circumstances where there was no objectively assessed need by a commitment to an early review.
25. He rejected the submission that such an approach was unlawful and held as follows:

67. The assessment of soundness was not an abstract exercise. It was essentially a practical one. If the core strategy as submitted was unsound, the inspector had to consider why and to what extent it was unsound, what the consequences of its unsoundness might be, and, in the light of that, whether its unsoundness could be satisfactorily remedied without the whole process having to be aborted and begun again, or at least suspended until further work had been done.

68. The inspector did that. The genesis of Main Modification 28 lay in his view that the work done in the preparation of the core strategy was not so defective, and the evidence on which it was based not so incomplete, that it had to be rejected as unsound in any event. If he had seen the potential unsoundness as irremediable, he would not have issued his preliminary findings suggesting, as one option for addressing that problem, the mechanism of an early partial review. By the time he came to write his report the Council’s commitment to that review and the agenda for it set out in the additional text in paragraphs 29.7 -29.10 of the core strategy were, in his view, enough to make the document sound at the point of its adoption. Though he could not be sure that the core strategy in its adopted form would provide to the fullest possible extent for the housing needs of the borough all the way through to the end of the plan period in 2031, he had enough confidence in it to be able to conclude that, as modified, it was sound.

69. Main Modification 28 was, in the inspector’s judgement, a sufficient solution – a solution proportionate to the problem. I do not think this was an irrational view. On the contrary it was entirely reasonable. The inspector described the Main

Modification 28 as “pragmatic, rational and justified.” That, in my opinion, would be a fair description of his own conclusions. And the reasons he gave for those conclusions were not only adequate and clear, but make perfectly good sense. Another inspector might have come to a different view, I accept that. But that does not mean this inspector’s conclusion, formed on the evidence and representations which he had heard, was bad as a matter of law. And I do not think that it was.

70. The inspector neither neglected nor misunderstood any relevant aspect of government planning policy. He plainly had regard to the principles in national policy bearing on the matters he had to consider. He referred to the relevant parts of the NPPF-including paragraphs 47, 83 and 159 – both in his preliminary findings and in his report. He began his report by acknowledging the four criteria of soundness in paragraph 182. The assessment which led him to suggest the option of a main modification started with the his finding that the Council ought to have assessed the full housing needs of its area for the plan period as policy in the NPPF required. The course he suggested, which the Council followed by promoting Main Modification 28, was intended to ensure that the relevant objectives of national policy in the NPPF would be met.

26. In my view, the Council’s position in the present case has a further dimension which lends support to its approach. There is an existing Core Strategy. Section 19 of the 2004 Act requires regard to be had to other development plan documents. There is no reason why the inspector should not find the ADMP sound by reason of having regard to the need to implement the policies in the Core Strategy to deliver sustainable development through a plan led approach subject to an early review of the housing need numbers in order to comply with the aims of the NPPF.

27. The present situation is readily distinguishable from Gallagher and more akin to that in the Grand Union case.. As long as the inspector has regard to and understands the national policy in NPPF, it is entirely open to him to find the ADMP sound for the practical and pragmatic reasons set out above. The requirement for an early review is a proportionate response to the issues raised the NPPF.

Issue 2

The proper test for revising Green Belt boundaries

28. Paragraph 83 of the NPPF provides that Green Belt boundaries should not be altered other than in exceptional circumstances. The judge in Gallagher took the view that this meant that, in principle, it was necessary for there to be some event which rendered the assumptions upon which the boundary was originally set to be falsified in some way. He based this on his interpretation of the judgement in COPAS v Royal Borough of Windsor and Maidenhead [2001] EWCA Civ 180.

29. COPAS was fact specific. The inspector had found the “necessity” for the revision to include land in the Green Belt essentially having regard to one planning appeal decision which made certain judgments about the openness of the land and certain listed buildings. This decision, the inspector considered led to “an incongruous anomaly”.
30. It was against that background that the Court of Appeal rejected the inspector’s approach and held that more was required than merely a planning judgement in that context. The words in COPAS at [40] and quoted in Gallagher at [130] should not be taken too literally (see: R (Hague) v Warwick District Council [2008] EWHC 3252 at [29] –[30] where a clear error in the original decision was sufficient).
31. COPAS did however emphasise again that the policy guidance in the then PPG 2 could be departed from as long as adequate reasons for so doing were provided. This is also explained in Laing Homes where Brooke J (as he was) held that it was lawful for a finding to be made that the boundary should change without having to decide if the circumstances for so doing were exceptional as long as regard is had to the policy and adequate reasons provided.
32. There are three sites in the plan which the Council seeks to make modifications to the Green Belt boundary. It is difficult to see why the alteration which arises in the context of the Billing Hill Shaw site in Hartley should not be made. It was previously recommended to be made by an earlier inspector on the basis of apparent cartographical errors dating from 1984 and 1994 which led to its exclusion from the Green Belt. The Council expressly included a statement in the Sevenoaks Plan 2000 at paragraph 13.24 that it accepted the recommendation and would make the change “at the earliest opportunity”. I am instructed that the present ADMP provides this opportunity. The judgement in Hague held that an error in the original decision could satisfy the test in COPAS.
33. The next site is Warren Court Farm, Halstead. This site also appears to have some anomalies relating to its inclusion in the Green Belt. If the inclusion of the site can be shown to be erroneous, it would also fall within the principles in Hague. The existing boundary of the Green Belt is sought to be altered to allow for the allocation of residential development having regard to the earlier allocation without the constraint of the Green Belt policy restrictions. In the light of the existing allocation of part of the site, the need for the allocation and the anomalies already existing in respect of its Green Belt boundary, it seems to me that this could be sufficient to constitute exceptional circumstances, particularly having regard to the need to clarify the uncertainty in connection with the site. If there is any doubt about this, there is no reason why the alteration should not be made in any event, as long as the exceptional test is had regard to (see: Laing Homes [54]). It would be open to the inspector to find that, even if there are not exceptional circumstances, it is appropriate to make the amendment for the above reasons. As noted above, policy may be departed from as long as adequate reasons for so doing are provided.
34. The third site is College Road and Crawfords, Hextable. There is no particular error identified in this case. However, it is considered that the character of the site has changed due to the

level of the development on the site since it was first designated in 1958 and its location adjacent to the village envelope.

35. There is no detailed planning history available relating to the numerous buildings on the site nor what very special considerations were considered to exist to justify the development that has taken place. Some appears to be permitted development. Be that as it may, it seems to me that the significant change on site as a matter of fact since 1958 is capable of nullifying original assumptions made as to its inclusion in the Green Belt. Again, if exceptional circumstances are not considered to arise, it would be open to alter the boundary in any event, as long as adequate reasons were provided for not applying the policy test.
36. It is worth noting that the Gallagher judgement is under challenge to the Court of Appeal on both grounds albeit permission to appeal has not yet been granted.
37. In all the circumstances, for the reasons set out above, in my view, it would be sound in law for the Council to prepare and adopt the ADMP based on its approach to housing need and the proposed revisions to the Green Belt.
38. Those instructing me should not hesitate to contact me to discuss any matters arising from this advice.

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