Neutral Citation Number: [2013] EWCA Civ 1610

Case No: C1/2013/2734

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
HIS HONOUR JUDGE PELLING QC (Sitting as a Judge of the High Court)
CO 4686 2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2013

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE RYDER
and
SIR DAVID KEENE

Between :

City and District Council of St Albans	**Appellant**
- and -	
The Queen (on the application of) Hunston Properties Limited	**1st Respondent**
Secretary of State for Communities and Local Government and anr	**2nd Respondent**

Matthew Reed (instructed by the **Appellant's Head of Legal Services**) for the **Appellant**
Paul Stinchcombe QC and Ned Helme (instructed by **Photiades Solicitors**) for the **First Respondent and (Treasury Solicitors** for the **Second Respondent).** The Second Respondent did not appear.

Hearing date: 20 November 2013

Judgment Approved by the court for handing down (subject to editorial corrections)

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Sir David Keene :

Introduction

1. This appeal concerns the interpretation of the relatively recent (March 2012) National Planning Policy Framework ("the Framework") and in particular of the policies contained therein in respect of residential development proposals. The issue is one which arises in the situation where, as in the present case and in a number of other planning authority areas, there is not as yet a local plan produced after and in accordance with the Framework.

2. Hunston Properties Limited ("Hunston") applied for outline planning permission for the construction of 116 dwellings, a care home and some associated facilities on five hectares of agricultural land within the district of St Albans. Permission was refused by the District Council, now the appellant, principally on the ground that the site was almost entirely within the Metropolitan Green Belt. Hunston appealed under Section 78 of the Town and Country Planning Act 1990 ("the 1990 Act") and, simplifying the history of the matter, the appeal was dismissed on 12 March 2013 by an inspector appointed by the Secretary of State. Hunston then challenged that decision in the Administrative Court under Section 288 of the 1990 Act. H.H. Judge Pelling QC, sitting as a judge of the High Court, quashed the inspector's decision, and the Council now appeals with permission granted by Sullivan LJ. The Secretary of State appeared by counsel in the Administrative Court to resist the Section 288 challenge but seeks to play no part in these appeal proceedings.

3. I note the basis on which Sullivan LJ gave permission to appeal. He said that he was not persuaded that the appeal had a real prospect of success, but he found there to be a compelling reason for the appeal to be heard so that there could be a "definitive answer to the proper interpretation of paragraph 47" of the Framework, and in particular the interrelationship between the first and second bullet points in that paragraph.

Policy Context

4. The Framework was published by the Government in order to set out its planning policies for England, so as to give guidance to local planning authorities and other decisions-makers in the planning system. It was seen by the Minister for Planning as simplifying national planning guidance "by replacing over a thousand pages of national policy with around fifty, written simply and clearly." Unhappily, as this case demonstrates, the process of simplification has in certain instances led to a diminution in clarity. It will be necessary to set out the wording of paragraph 47 of the Framework very soon in this judgment. I have to say that I have not found arriving at "a definitive answer" to the interpretative problem an easy task, because of ambiguity in the drafting. In such a situation, where one is concerned with non-statutory policy guidance issued by the Secretary of State, it would seem sensible for the Secretary of State to review and to clarify what his policy is intended to mean. Nonetheless, the Supreme Court in *Tesco Stores Ltd -v- Dundee City Council* [2012] UKSC 13 has emphasised that policy statements are to be interpreted objectively by the court in accordance with the language used and in its proper context, so that the meaning of the policy is for the courts, even if the application of the policy is for planning authorities and other planning decision-makers: see paragraphs 18 and 19. That case

was concerned with policy in a statutory development plan, but it would seem difficult to distinguish between such a policy statement and one contained in non-statutory national policy guidance. I accept, therefore, as do the parties to this appeal, that it is for this court to seek to arrive at the appropriate meaning of paragraph 47 of the Framework.

5. That paragraph begins the section of the Framework entitled "Delivering a wide choice of high quality homes." Insofar as material for present purposes, it reads as follows:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> - Use their evidence base 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, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
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> - Identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land."

These are the two bullet points referred to by Sullivan LJ.

6. There is no doubt, that in proceeding their local plans, local planning authorities are required to ensure that the "full objectively assessed needs" for housing are to be met, "as far as is consistent with the policies set out in this Framework". Those policies include the protection of Green Belt land. Indeed, a whole section of the Framework, Section 9, is devoted to that topic, a section which begins by saying "The Government attaches great importance to Green Belts": Paragraph 79. The Framework seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that "the general extent of Green Belts across the country is already established." It seems clear, and is not in dispute in this appeal, that such a Local Plan could properly fall short of meeting the "full objectively assessed needs" for housing in its area because of the conflict which would otherwise arise with policies on the Green Belt or indeed on other designations hostile to development, such as those on Areas of Outstanding Natural Beauty or National Parks. What is likely to be significant in the preparation of this Local Plan for the district of St Albans is that

virtually all the undeveloped land in the district outside the built up areas forms part of the Metropolitan Green Belt.

7. However, no such new Local Plan for this district currently exists. There remains the old-style Local Plan, the St. Albans City and District Local Plan Review, dating from 1994, but it is not suggested that its contents insofar as they deal with housing land requirements are of any relevance today. The most recent policy document containing a quantified assessment of such requirements in the district was the East of England Plan, which contained a figure of 360 dwelling units per annum, but that Plan was revoked on the 3 January 2013, in accordance with the Government's move away from strategically based figures. Thus, as the inspector in the present case put it:

> "there is a policy vacuum in terms of the housing delivery target." [paragraph 23]

8. The appellant Council resolved on 17 January 2013 that the target of 360 dwellings per annum from 2001 to 2021 remained the most appropriate interim housing target for housing land supply purposes.

9. There are a number of other policies in the Framework which are of relevance. At paragraph 13 it states that the Framework:

> "constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications."

Paragraph 14 begins by saying that:

> "At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking."

It goes on in that same paragraph to spell out what that means for plan-making and for decision-taking. In respect of the latter, it sets out two bullet points. The first deals with cases where there is a development plan. The second is relevant to the present appeal:

> "where the development plan is absent, silent or relevant policies are out-of-date, [it means] granting permission unless:
>
> any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole;
>
> or
>
> specific policies in this Framework indicate development should be restricted."

A footnote, no.9, gives examples of such policies as are meant by that last sentence, including policies relating to land designated as Green Belt.

10. As I have already said, the Framework includes specific policies to protect Green Belt land. Paragraphs 87 and 88 are of particular relevance. They state:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

The Framework does not seek to define further what "other considerations" might outweigh the damage to the Green Belt, but in principle there seems no reason why in certain circumstances a shortfall in housing land supply might not do so.

The Planning Appeal and the Inspector's Decision

11. It was agreed at the planning inquiry that the proposed development on this site would constitute inappropriate development in the Green Belt. The inspector noted that, by virtue of paragraph 87 of the Framework, it should not be permitted except in very special circumstances. That led her to the topic of housing land supply.

12. The inspector referred to paragraph 47 of the Framework and then considered the development plan position. She observed that there was "no definitive housing delivery requirement" in any relevant plan (paragraph 24 of decision letter). She described the Department for Communities and Local Government ("DCLG") 2008 projections of new households as providing the most up-to-date figures. They gave a projection of 688 new households per annum in this district. Hunston contended for various upwards adjustments of that annual figure, but even without those it can be seen that arithmetically the projection produced a five year requirement of 3,440 dwelling units. Hunston's figure was 3,600 units.

13. However, the inspector regarded such figures as failing to take account of the constraints on development within the district, particularly the Green Belt. She noted that the old East of England (regional) Plan had reflected such constraints and had come up with its figure of 360 units per annum:

> "26... striking a balance of the social, economic and environmental objectives with the aim of achieving sustainable development. The balance was evidence based, consulted upon, subject to a sustainability appraisal, justified and publically examined."

The inspector added that there was no evidence to suggest that the constraints would be any less applicable now, and at paragraph 29 she said that the figure in the East of England Plan (the RSS):

> "29. ... provided housing requirements for the period to 2021 and took account of the severe constraints in the District. It provides the only figure that has been scrutinised through the independent examination process. Government policy aims for localism rather than top down set targets but there was nothing to indicate that the constraints identified in the RSS process are reduced because the RSS is no longer extant."

14. Consequently, the inspector concluded as follows on housing need:

> "At this time and in the absence of an identified need that takes account of any constraints to development and acknowledging the age of the RSS data, and the fact that the RSS has now been revoked, I consider it is reasonable that the annual housing target should have regard to constraints in the district and be that which takes them into account. As resolved by the Council on 17 January 2013, provision should be made for a minimum of 360 residential units per annum on specific deliverable sites." (Paragraph 30)

15. On the supply side of the exercise, the District Council put forward a figure of 2183 dwelling unit sites available within five years. On analysis, the inspector found that that was too high by about 100 units, but nonetheless it meant that there was a supply of housing land in excess of the five year requirement if that was put at 360 dwellings per annum. As a five year total, she appears to have put the total five year housing land supply at about 2080 units. Thus the inspector at paragraph 67 concluded:

> "67. Additional delivery of housing would be of value as would the proposed affordable housing provision whether at 35% or 53%. Nevertheless, the five year housing land supply has been found to be robust even if the delivery may not be as high as the Council advises on some sites. A 5% buffer over and above the five year supply has been found to be appropriate and there is a realistic prospect that adequate provision has been made for the delivery of five years plus 5% supply of housing land. Therefore the supply of additional housing on a greenfield Green Belt site is not afforded weight."

16. The inspector in her overall conclusion on the residential development gave weight to certain factors, but said:

> "However, in the absence of an identified need for the release of a greenfield Green Belt site, the substantial harm to the Green Belt and significant harm to the character and appearance of the countryside are not clearly outweighed by the other material considerations either individually or as a whole. Therefore the very special circumstances necessary to justify the inappropriate residential development in the Green Belt do not exist." (Paragraph 71)

She added that the development would be contrary to Local Plan policies and to Government policy in the Framework, and consequently she dismissed the appeal.

The High Court Decision

17. In the Section 288 proceedings it was argued by Hunston that the inspector had erred by failing to identify the "full objectively assessed needs" for housing in the area, as required by the first bullet point in paragraph 47 of the Framework, and had failed, in this situation where there was no new Local Plan containing housing requirements, to recognise the shortfall between those needs and the supply of housing sites. Had she adopted the correct policy approach, she might have found that very special circumstances, sufficient to outweigh the contribution of the appeal site to the Metropolitan Green Belt, existed. Thus she erred in law.

18. The deputy judge accepted this argument. In his judgment at paragraph 28 he said:

> "28. Where it is being contended that very special circumstances exist because of a shortfall caused by the difference between the full objectively assessed needs for market and affordable housing and that which can be provided from the supply of specific deliverable sites identified by the relevant planning authority, I do not see how it can be open to a LPA or Inspector to reach a conclusion as to whether that very special circumstance had been made out by reference to a figure that does not even purport to reflect the full objectively assessed needs for market and affordable housing applicable at the time the figure was arrived at."

He went on to add:

> "A figure that takes account of constraints should not have any role to play in assessing an assertion by an applicant in the position of HPL that an actual housing requirement has not been met."

He observed that the Framework did not encourage the use of need figures derived from such earlier regional plans as the East of England Plan, as it could have done if it had been intended by the government that such should be the approach where a new Local Plan prepared in accordance with the Framework had not been adopted.

19. The District Council had relied upon the wording of the first bullet point in paragraph 47 of the Framework and in particular the words about meeting the housing needs "as far as is consistent with the policies set out in this Framework." The Council contended that this justified the inspector's use of figures for housing needs which reflected the very substantial constraints on development within this district. The judge rejected that argument, commenting at paragraph 29:

> "... the suggestion that the words "... *in so far as is consistent with the policies set out in this Framework...*" requires or permits a decision maker to adopt an old RSS figure is unsustainable as a matter of language. That language requires

> that the decision maker considers each application or appeal on its merits. Having identified the full objectively assessed needs figure the decision maker must then consider the impact of the other policies set out in the NPPF...
>
> ...
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> ... It is entirely circular to argue that there are no very special circumstances based on objectively assessed but unfulfilled need that can justify development in the Green Belt by reference to a figure that has been arrived at under a revoked policy which was arrived at taking account of the need to avoid development in the Green Belt."

20. He concluded that the inspector's approach had been wrong in law. The proper approach was to assess need, then identify the unfulfilled need having regard to the supply of specific deliverable sites, and then to decide whether fulfilling the need (plus any other factors in favour of permission) clearly outweighed the harm which would be caused to the Green Belt. As he rightly said, that final stage involved planning judgment, which was not for the court. As a result he quashed the inspector's decision.

Discussion

21. In essence, the issue is the approach to be adopted as a matter of policy towards a proposal for housing development on a Green Belt site where the housing requirements for the relevant area have not yet been established by the adoption of a Local Plan produced in accordance with the policies in the Framework. Such development is clearly inappropriate development in the Green Belt and should only be granted planning permission if "very special circumstances" can be demonstrated. That remains government policy: paragraph 87 of the Framework. In principle, a shortage of housing land when compared to the needs of an area is capable of amounting to very special circumstances. None of these propositions is in dispute.

22. Neither party before us sought to take issue with the inspector's findings as to the supply of housing land over the five year period in this district. But, as will be evident from the earlier passages in this judgment, the inspector found that there was no shortfall in the supply because she regarded it as necessary to identify a housing requirement figure which reflected the constraints on built development in the district generally which resulted from the extensive areas of Green Belt there. The best she felt she could do was to adopt the earlier East of England Plan figure which, though in a revoked plan, sought to take account of such constraints. Was she entitled to do so?

23. The appellant Council contends that she was. On its behalf Mr. Reed emphasises the close links between the first two bullet points of paragraph 47 of the Framework (which I will number 47(1) and (2) for the sake of convenience.) Paragraph 47(2) requires there to be five years supply of housing sites, that is to say a supply sufficient to meet a local planning authority's housing requirements for five years. But to discover what is meant by the reference to housing requirements, one has to go to paragraph 47(1), and while that refers to "the full objectively assessed needs," it also adds the qualification "as far as is consistent with the policies set out in this

Framework." That, it is submitted, means that one has to take into account such policies as those on the protection of the Green Belt. The qualification does not relate solely to the process of producing a Local Plan. Paragraph 47(1) has to be read as a whole and, if one goes to it as Hunston do for the reference to "full objectively assessed needs" when dealing with a development control decision, one must take on board the qualification as well. One cannot rely on the objectively assessed needs part without having regard to the reference to policy constraints.

24. The Council contends that the inspector used the former East of England plan figure for housing requirements while recognising that it was not ideal. But she was doing her best to arrive at an assessment which reflected the whole of paragraph 47(1) and not just part of it, so as to include the constraints flowing from other policies as well as the household projections. The mere fact that this was a development control situation as opposed to local plan formulation does not, it is said, undermine the need to reflect the whole of paragraph 47(1). The policies in the Framework provide guidance, as paragraph 13 states, both for the drawing up of plans and in the determination of planning applications.

25. I see the force of these arguments, but I am not persuaded that the inspector was entitled to use a housing requirement figure derived from a revoked plan, even as a proxy for what the local plan process may produce eventually. The words in paragraph 47(1), "as far as is consistent with the policies set out in this 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.

26. Moreover, I accept Mr Stinchcombe QC's submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal. I appreciate that the inspector here was indeed using the figure from the revoked East of England Plan merely as a proxy, but the government has expressly moved away from a "top-down" approach of the kind which led to the figure of 360 housing units required per annum. I have some sympathy for the inspector, who was seeking to interpret policies which were at best ambiguous when dealing with the situation which existed here, but it seems to me to have been mistaken to use a figure for housing

requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.

27. It follows from this that I agree with the judge below that the inspector erred by adopting such a constrained figure for housing need. It led her to find that there was no shortfall in housing land supply in the district. She should have concluded, using the correct policy approach, that there was such a shortfall. The supply fell below the objectively assessed five year requirement.

28. However, that is not the end of the matter. The crucial question for an inspector in such a case is not: is there a shortfall in housing land supply? It is: have very special circumstances been demonstrated to outweigh the Green Belt objection? As Mr Stinchcombe recognised in the course of the hearing, such circumstances are not automatically demonstrated simply because there is a less than a five year supply of housing land. The judge in the court below acknowledged as much at paragraph 30 of his judgment. Self-evidently, one of the considerations to be reflected in the decision on "very special circumstances" is likely to be the scale of the shortfall.

29. But there may be other factors as well. One of those is the planning context in which that shortfall is to be seen. The context may be that the district in question is subject on a considerable scale to policies protecting much or most of the undeveloped land from development except in exceptional or very special circumstances, whether because such land is an Area of Outstanding Natural Beauty, National Park or Green Belt. If that is the case, then it may be wholly unsurprising that there is not a five year supply of housing land when measured simply against the unvarnished figures of household projections. A decision-maker would then be entitled to conclude, if such were the planning judgment, that some degree of shortfall in housing land supply, as measured simply by household formation rates, was inevitable. That may well affect the weight to be attached to the shortfall.

30. I therefore reject Mr Stinchcombe's submission that it is impossible for an inspector to take into account the fact that such broader, district-wide constraints exist. The Green Belt may come into play both in that broader context and in the site specific context where it is the trigger for the requirement that very special circumstances be shown. This is not circular, nor is it double-counting, but rather a reflection of the fact that in a case like the present it is not only the appeal site which has a Green Belt designation but the great bulk of the undeveloped land in the district outside the built-up areas. This is an approach which takes proper account of the need to read the Framework as a whole and indeed to read paragraph 47 as a whole. It would, in my judgment, be irrational to say that one took account of the constraints embodied in the polices in the Framework, such as Green Belt, when preparing the local plan, as paragraph 47(1) clearly intends, and yet to require a decision-maker to close his or her eyes to the existence of those constraints when making a development control decision. They are clearly relevant planning considerations in both exercises.

31. There seemed to be some suggestion by Hunston in the course of argument that a local planning authority, which did not produce a local plan as rapidly as it should, would only have itself to blame if the objectively-assessed housing need figures produced a shortfall and led to permission being granted on protected land, such as Green Belt, when that would not have happened if there had been a new-style local plan in existence. That is not a proper approach. Planning decisions are ones to be

arrived at in the public interest, balancing all the relevant factors and are not to be used as some form of sanction on local councils. It is the community which may suffer from a bad decision, not just the local council or its officers.

32. Where this inspector went wrong was to use a quantified figure for the five year housing requirement which departed from the approach in the Framework, especially paragraph 47. On the figures before her, she was obliged (in the absence of a local plan figure) to find that there was a shortfall in housing land supply. However, decision-makers in her position, faced with their difficult task, have to determine whether very special circumstances have been shown which outweigh the contribution of the site in question to the purposes of the Green Belt. The ultimate decision may well turn on a number of factors, as I have indicated, including the scale of the shortfall but also the context in which that shortfall is to be seen, a context which may include the extent of important planning constraints in the district as a whole. There may be nothing special, and certainly nothing "very special" about a shortfall in a district which has very little undeveloped land outside the Green Belt. But ultimately that is a matter of planning judgment for the decision-maker.

Conclusion

33. The inspector did err in law in the approach she adopted to calculating the housing land requirement over the five year period. I would therefore quash her decision. The Section 78 appeal will consequently have to be redetermined in accordance with the guidance in this judgment, if my Lords agree. I would dismiss this appeal.

Lord Justice Ryder:

34. I agree.

Lord Justice Maurice Kay:

35. I also agree.