Case Name: *Wiltshire Council v Secretary of State for Housing Communities and Local Government & Anor* [2022] EWHC 36 (Admin) (14 January 2022)

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Commentary: This was an unsuccessful claim under section 288 of the Town and Country Planning Act 1990. The claimant Council had refused an outline application for planning permission for ten affordable dwellings and permission was subsequently granted on appeal by an Inspector on behalf of the Secretary of State. The Council challenged the validity of the Inspector's decision.

The Inspector had acknowledged that the proposal would conflict with the development plan, and that the harm would be significant. The benefits were also afforded significant weight. Due to a lack of five year housing land supply the presumption in favour of sustainable development applied and, since the harm would not significantly and demonstrably outweigh the benefits of the scheme, the appeal was allowed.

The first ground of challenge was that the Inspector had misinterpreted paragraph 71 (which deals with entry-level exception sites) of the National Planning Policy Framework (NPPF) 2019. This has been updated between the determination of the application and the challenge (now paragraph 72 in the 2021 version), but the differences were not material. The claimant argued that the Inspector had failed to properly consider the harm to landscape arising from the proposal: the Inspector had reasoned that paragraph 71 impliedly promotes a degree of landscape change in order to deliver its aims, but this fails to take into account other relevant paragraphs in the NPPF (127 and 170 of the 2019 version). It was further argued that the Inspector took too limited a view of design considerations and that this caused him wrongly to apply moderate weight to the landscape harm, whereas the correct application would have led him to give great weight.

The defendant submitted that entry-level exception sites are "inherently likely" to result in some harm to the landscape and this found favour, with HHJ Jarman QC further remarking that the type of development supported by paragraph 71 would almost always be in conflict with the development plan, one of the purposes of which is to identify land suitable for housing. Notwithstanding, it was held that landscape harm can be weighed in the balance: the fact that an entry-level exception site is bound to have some impact on landscape does not preclude further consideration of this issue. The Inspector had correctly considered the impact of the proposal on the landscape and had properly distinguished between impacts which could be mitigated by detailed design (such as the impact of built form on the countryside) and those which could not (such as the loss of part of the countryside gap which was to be built upon).

In respect of the second ground, the claimant argued that the Inspector had misinterpreted a policy in the development plan which seeks to ensure the conservation

of the historic environment. The Inspector considered that the development plan policy was inconsistent with paragraph 196 of the NPPF as it did not explicitly allow for any benefits of the proposal to be taken into account. The Inspector carried out a balancing exercise, but the claimant argued that this was erroneously predicated on paragraph 196 of the NPPF (now paragraph 202) rather than the applicable development plan policy (as required by s38(6) of the Planning and Compulsory Purchase Act 2004). Had he correctly applied the development plan policy, it was argued that the Inspector would have given great weight to the conflict with that policy, rather than moderate weight as he did.

The claimant relied on City & Country Bramshill Limited v Secretary of State for Housing Communities and Local Government and Another [2021] EWCA Civ 320 to argue that, as a matter of law, a balancing exercise is permissible and so the development plan policy should not have been found to conflict with the NPPF. Giving the lead judgment in Bramshill, Sir Keith Lindblom SPT had found that development plan policy does not necessarily conflict with paragraph 196 of the NPPF because it does not explicitly mention a balance between 'benefits' and 'harms', but nor does it preclude the decision maker carrying out such a balance. The decision maker is obliged, in performing their duty under s66 the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990, to give the weight they deem appropriate to development plan policy. HHJ Jarman QC found that the Inspector had carried out a balancing exercise similar to that in Bramshill and that he had properly observed the statutory duty imposed by s66 of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990. It was held that, whether the balancing exercise arose from paragraph 196 of the NPPF or the development plan policy, the weight to be applied to the conflict with the policy would remain a matter for the Inspector.

The final ground of challenge related to the Inspector's assessment of the harm arising from the proposal on the setting of a Grade II-listed church. The Inspector had concluded that there was some uncertainty as to the delivery of the village green which formed part of the proposal and did not therefore consider it to be a tangible benefit of the proposal. He had also, however, concluded that the impact of the proposal on the outward views from the church would be mitigated by the presence of the village green, apparently notwithstanding the query over its deliverability. The defendant argued that the Inspector was entitled to take into account the lack of built form on the area proposed as a village green and that in considering a future reserved matters application, the local planning authority would be able to refuse any scheme which would negatively affect the views out from the church. The judge found that this reasoning was implicit in the Inspector's decision letter and accordingly, dismissed this ground.

Case summary prepared by Aline Hyde