Case Name: *Stratford on Avon District Council v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 445 (Admin) (04 March 2022)

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Commentary:
This was a successful challenge brought under section 288 of the Town and Country Planning Act 1990. The Council ("Claimant") had refused an outline application for planning permission for four dwellings on a previously-developed site in open countryside. Permission was subsequently granted on appeal by an Inspector on behalf of the Secretary of State ("Defendant"). The Council challenged the validity of the Inspector's decision on two grounds, both of which succeeded.

The Inspector had had regard to two policies in the development plan, concluding that the proposal would accord with both of them. The Claimant was concerned to establish the correct interpretation of these policies, disputing as it did that the Inspector had properly understood and applied them.

The first ground turned on the interpretation of a policy which dealt with the distribution of development across the District. The relevant policy included a hierarchy of locations, ranked from most to least sustainable. In locations outside of the main centres, service villages and large rural brownfield sites, development is restricted by the policy to small-scale community-led schemes which meet an identified local need. It was common ground that the proposal would not qualify as such a scheme. The issue was that the Inspector had read the policy on the basis that it would not apply to locations such as this (within open countryside) at all, and he therefore gave the policy negligible weight in his decision-making.

The Claimant submitted that the policy identifies all of the locations in which development is acceptable in principle and, since the proposal fell outside of these locations, it conflicted with the policy. Such an interpretation would not necessarily preclude development in open countryside, but a proposal would conflict with this policy and in those circumstances, section 38(6) of the Town and Country Planning Act 1990 applies. The Defendant argued that the policy did not provide a comprehensive list of locations in which development would be acceptable in principle, and to read the policy as such would present an irreconcilable conflict with another policy which addresses development within the countryside.

Giving judgment, HHJ Worster remarked that there would be little benefit derived from a policy outlining the distribution of development if it was not comprehensive, and indeed the effect of the Defendant's construction would be to have a more benevolent policy position for development proposals outside the ambit of the policy, than within it. He therefore concluded that the Inspector's decision to give this policy negligible weight, and not to engage with section 38(6), was an error.

The second ground concerned a policy which lists the forms of development and uses which are considered to be acceptable within the countryside. In this case, the development proposed did not fall within the list and so the question was whether or not that list was closed. The Inspector had understood the list not to be closed and the Defendant relied on the identification of a 'residual category' of development which would not be unacceptable in principle, arising from the words "All other types of development or activity in the countryside…" in the policy's penultimate paragraph. The Claimant sought to distinguish between "forms of development" (listed in the policy) and "types of development" (caught by the sentence in the penultimate paragraph). Neither of these interpretations found favour with the judge. Instead, he reasoned that the overall effect of the policy was to refer the reader to other policies within the development plan which need to be satisfied, and that the sentence of note applies where there are no other relevant policies in the development plan. This being so, he concluded that the policy did present a closed list and ground 2 succeeded.

The Defendant invited the judge to exercise his discretion under section 31(2A) of the Senior Courts Act 1981, which provides that the court may refuse to grant the relief sought if "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". Here, the test was whether or not the Inspector would have reached the same decision if he had correctly interpreted the relevant policies. Though HHJ Worster noted that the proposal was not without its merits, he considered that in this case a decision not to quash the permission would amount to the exercise of planning judgment (which is outside the court's remit). Accordingly, the decision was quashed and has been remitted to the Defendant for redetermination.

Case summary prepared by Aline Hyde