Case Name: *House & Anor v Waverley Borough Council & Anor* [2023] EWHC 3011 (Admin) (28 November 2023)

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Commentary: This was an unsuccessful claim made pursuant to s.113 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") against the decision by Waverley Borough Council ("the Council") to adopt the Waverley Borough Local Plan Part 2: Site Allocations and Development Management Policies ("LPP2"). The LPP2 was adopted following examination of it by an inspector (appointed by the Secretary of State for Levelling Up, Housing and Communities) ("the LPP2 Inspector") pursuant to s.20 of PCPA 2004.

Background

The Allocation

In February 2018, the Milford Golf Course Site ("the Site") was allocated for the development of 180 dwellings as part of the Waverley Borough Local Plan Part 1: Strategy Policies and Sites ("LPP1") and was also removed from the Green Belt following examination of the, then proposed, LPP1 by an appointed inspector ("the LPP1 Inspector"). The Claimants own and occupy a dwellinghouse and 27 acres of open land which form part of the Site ("the Property"). The Property has the benefit of a restrictive covenant, the effect of which is to restrict the development of the Site to one detached house (plus ancillary accommodation) per acre. At the time of the judgement, no application had been made, pursuant to s.84 of the Law of Property Act 1925 ("LPA 1925"), to discharge or vary that restrictive covenant.

The Council granted planning permission for 190 dwellings to be developed on the Site in 2019, despite opposition from the Claimants. In 2021, the Council approved reserved matters of appearance, landscaping, layout and scale.

The LPP2

The Council began preparation of LPP2 in 2017 but only submitted a draft plan to the Secretary of State in December 2021. The preamble to LPP2 explained that it was the "daughter document" of the LPP1 and that it provides a *"suite of development management policies and allocates sites for housing and other uses consistent with the strategic approach expressed in LPP1".*

The Claimants, and other potential developers, had argued at the time of the examination of LPP2, that the housing allocations in LPP2 were insufficient and ought to be increased. The Claimants in making this argument relied on the restrictive covenant in relation to the Property, which they were not willing to release, and they identified

changes in circumstance since the examination at LPP1 which meant that the chances of the covenant being discharged or varied had materially decreased. The LPP2 Inspector did not accept the Claimant's representations that the Site should no longer be allocated because he concluded that there a was reasonable prospect of varying or discharging the restrictive covenant.

Following examination, the LPP2 Inspector concluded in March 2023 that the LPP2 was legally compliant and sound subject to the main modifications which were identified in the examination process.

Grounds 1 and 2

Ground 1

The Claimants argued that the LPP2 Inspector failed to take into account a material consideration, namely whether it was sound to restrict the scope of LPP2 to be a "daughter document" to LPP1.

The following were the arguments in support of Ground 1:

a) Development plan documents ("DPDs") may be of equal status and a later DPD may supersede an earlier one;
b) The LPP2 Inspector had to consider whether the requirement of s.19(1C) PCPA 2004 was met, including whether LPP2 contained policies which tackled the identified strategic objective of meeting the housing requirement as set out in LPP1;
c) The question of whether the scope of LPP2 was sound was an obviously material consideration to the assessment of soundness as set out under paragraph 35 of the NPPF, namely:
    a. Whether LPP2 was positively prepared – does it provide a strategy which meets the area's objectively assessed needs;
    b. Whether LPP2 was justified – it was obviously material to consider how far LPP2 should contribute to the overarching strategy in LPP1; and
    c. Whether LPP2 was consistent with national policy on the delivery of housing.

    The Claimants argued that the LPP2 Inspector failed to consider, or reach conclusion on, the above matters.

Ground 2

Alternatively, the Claimants argued that the LPP2 inspector misinterpreted LPP1 in that he read that the modular approach prescribed in LPP1 rendered unnecessary a

consideration of either, whether a 5 year housing land supply could be demonstrated in the adoption of LPP2 or, whether the LPP2 would ensure that the housing requirements (identified in LPP1) would be met during the plan period. By disregarding those two questions, the Claimants argued that the LPP2 Inspector failed to take into account mandatory considerations which were required to be considered either by the statutory framework, namely s.20(5)(a) PCPA 2004, or because they were so obviously material.

Further or alternatively, the delivery of the 11,210 homes (the target number of homes to be delivered during the plan period as set out in LPP1) and the maintenance of a 5 year housing land supply were obviously material considerations which the LPP2 Inspector was required to taken into account and failed to do so.

Conclusion

Mrs Justice Lang held that the issues in Grounds 1 and 2 were raised at some length at the examination and these were addressed by the LPP2 Inspector in his report. Importantly, under the heading "Assessment of Soundness", the LPP2 Inspector formulated the test under paragraph 35 of the NPPF, and, under the first sub-topic titled "The scope of LPP2 and relationship to housing supply matters", he dealt with the matters raised under Grounds 1 and 2.

Mrs Justice Lang continued that the LPP2 Inspector was entitled, in the exercise of his planning judgement, to accept the Council's approach in deciding that LPP2 should be a "daughter document" to LPP1 as appropriate. The LPP2 Inspector was also entitled to accept the Council's submission that strategic matters would be more appropriately considered in a review of LPP1.

The LPP2 Inspector was carrying out an exercise of planning judgement when he considered the following points in favour of the approving the LPP2:

a) LPP2 seeks to bring forward a considerable number of allocations in the Borough so the allocations would make a significant contribution to the Borough's housing supply. Therefore, the timely adoption of the LPP2 weighed in favour of it in housing supply terms;
b) The matters raised by the Claimants would go beyond the scope of LPP2; and
c) LPP2 is not solely focused on the provision of housing and covers a wide range of land use and planning issues.

Therefore, Mrs Justice Lang held that the LPP2 Inspector did acknowledge the statutory requirement for consistency with LPP1 and he was entitled to conclude that he was satisfied that this requirement was met. Further, Mrs Justice Lang held that the adoption of a modular approach to the development plan is permissible.

Ground 3

The Claimants argued that the LPP2 Inspector's conclusion that there was a reasonable prospect of varying or discharging the restrictive covenant over the Site was irrational. The Claimants cited the following arguments in support of Ground 3:

a) The continued promotion of the Site is not a factor that has any bearing on the prospects of success for an application pursuant to s.84 LPA 1925. The continued promotion was only relevant to whether such an application would be made;
b) The LPP2 Inspector concluded that the outcome of a s.84 application is "unknowable" and yet went on to conclude that it had a reasonable prospect of succeeding on the basis of the Claimants' Opinion;
c) The Claimant's Opinion, produced by a Counsel, estimated that there was at least a 70% chance of the application failing and a Counsel's opinion will rarely predict 100% or close to it, therefore, 70% was as close to a certain outcome as the Claimants were likely to obtain that a s.84 application would be unsuccessful;
d) It was irrational to equate 30% chance of success with a "reasonable prospect" of success; and
e) The possibility of a review of LPP1 before the end of the plan period is no answer since the task for the LPP2 Inspector was to determine whether the Site was developable now.

Mrs Justice Lang dismissed this ground and held that the Claimant's analysis failed to take into account the entirety of the evidence before the LPP2 Inspector, in particular, the following:

a) The LPP1 Inspector had allocated the Site for housing development despite being aware of the covenant and having seen Counsel's opinion that advised that a s.84 application would be "highly unlikely" to succeed – this was the starting point for the LPP2 Inspector;
b) The LPP2 Inspector had sight of Counsel's opinion from the Council which concluded that it was "very likely" that the restrictive covenant would be released; and
c) The fact that the Site had already been released from the Green Belt by the LPP1 Inspector due to "exceptional circumstances", namely since the land was needed for housing development and the Site was well located, relatively flat, and well-enclosed so the development on it would have minimal effect on the wider landscape.

Mrs Justice Lang also held that it was appropriate for the Inspector to first acknowledge the obvious fact that, at the time of examination, no one knew exactly what the Upper Tribunal would decide on a s.84 application, and then proceed to express his view on the prospects of success.

Therefore, Mrs Justice Lang dismissed Ground 3.

For the above reasons, the claim was dismissed.

Commentary

Two key points to take away from this case are:

1. An inspector may consider issues of scope of a DPD under s.20(5)(a) to (b) of PCPA 2004, although challenges to scope are rarely likely to succeed since "[t]he task of testing the soundness of development plan document is not a task for the court. It lies squarely within the realm of planning judgement, exercised within the relevant statutory scheme and in the light of relevant policy and guidance." (see [44] of the judgement where Mrs Justice Lang quotes from the case of Oxted Residential Ltd v Tandridge District Council [2016] EWCA Civ 41); and
2. Claimants should avoid "hypercritical scrutiny" of inspectors' reports and should not seek to re-run submissions made at an earlier examination where the Inspector had exercised their planning judgement and rejected those submissions and provided sufficient reasons for their conclusion (see [88] of the judgement).

Case summary prepared by Chatura Saravanan