

Case Name: *Mead Realisations Ltd v The Secretary of State for Levelling Up, Housing And Communities & Anor* [2024] EWHC 279 (Admin) (12 February 2024)

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Commentary: This case dealt with two claims issued under s.288 of the Town and Country Planning Act ("TCPA 1990") against the following decisions by Inspectors appointed by the Secretary of State for Levelling-Up Housing and Communities:

- a) The Mead Decision: this was a decision to dismiss the appeal by Mead Realisations Limited ("Mead") against the refusal by North Somerset Council ("NSC") for a residential development of up to 75 dwellings ("Mead's Proposal"); and
- b) The Redrow Decision: this was a decision to dismiss the appeal by Redrow Homes Limited ("Redrow") against the refusal by Hertsmere Borough Council ("HBC") for a residential development of up to 310 units and other facilities ("Redrow's Proposal").

Both claims were unsuccessful.

NPPF vs PPG

The claims were heard together since they raised the common central issue of what is the correct interpretation and application of the flood risk sequential test. Specifically, Mead and Redrow argued that the Inspectors misinterpreted paragraph 162 of the NPPF in that they applied the approach outlined under paragraph 028 of the PPG, which conflicted with paragraph 162 of the NPPF. This raised the question of whether the PPG did indeed conflict with the NPPF and, if so, whether the NPPF should supersede the PPG.

Paragraph 162 of the NPPF states:

"The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."

Paragraph 028 of the PPG states:

"What is a "reasonably available" site?

'Reasonably available sites' are those in a suitable location for the type of development with a

reasonable prospect that the site is available to be developed at the point in time envisaged for the development.

These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'.

The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications."

Mr Justice Holgate held that both the NPPF and the PPG are planning policy with the former setting out policies in broad terms and the latter giving more specific guidance on those policies. Neither have the force of the statute (i.e. they do not have a binding legal effect). The Defendant's power to adopt either the NPPF or the PPG comes from the same legal source. Crucially, Mr Justice Holgate noted at paragraph 70 as follows:

"As a matter of policy, PPG is intended to support the NPPF. Ordinarily, therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF. However, I see no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF"

In any event, Mr Justice Holgate held that paragraph 028 of the PPG does not conflict with paragraph 162 of the NPPF and noted at paragraph 108 of the judgement that:

"[...] The PPG performs the legitimate role of elucidating the open-textured policy in the NPPF. The PPG describes "reasonably available sites" as sites "in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development." The PPG provides for issues as to suitability of location, development type, and temporal availability to be assessed by the decision-maker as a matter of judgment in accordance with the principles set out above. In this context, the PPG correctly states that "lower-risk sites" do not need to be owned by the applicant to be considered "reasonably available." That is consistent with the need for flexibility on all sides."

Having concluded on the central issue of the interpretation of paragraph 162 of the NPPF, Mr Justice Holgate went on to apply the principle to various grounds of challenge raised in both decisions.

The Mead Decision

Four key issues specific to the Mead Decision were considered by Mr Justice Holgate.

First, Mr Justice Holgate held that, when considering "reasonably available alternative sites", there is no need for the alternative site to follow the same timescale as that envisaged for the appeal proposal to be considered as "reasonably available". He held

that comparison of availability of two sites does not require precise alignment and is a matter of judgement for the Inspector and Mead did not show irrationality on the part of the Inspector in the exercise of this judgement.

Second, Mead argued that the Inspector considered only whether the other alternative sites proposed were available for residential development in general, rather than specifically for “lower density suburban housing”. Mr Justice Holgate held that this was an issue relating to the application of a policy rather than its interpretation and that there was no evidence that the Inspector acted irrationally in applying the policy in this manner.

Third, Mr Justice Holgate held that the Inspector was correct to consider housing need in the overall planning balance rather than as part of the assessment for determining the availability of alternative sites under the sequential test.

Fourth, Mead argued that the Inspector erred in law in his interpretation of the NPPF and PPG and subsequent application of Policy CS3 (from NCS’s Core Strategy 2017). Part 1 of Policy CS3 requires development in Zones 2 and 3 (as per the Environment Agency Flood Map) to comply with the sequential test in the NPPF. Part 2 of Policy CS3 outlined how the search area for identifying alternative sites should be defined and what criteria should be met for a site to be considered “reasonably available”. The Inspector held that Mead’s Proposal conflicted with the NPPF’s sequential test and thus was in conflict with Part 1 of Policy CS3. The Inspector then held that the criteria set out under Part 2 of Policy CS3 (excluding the guidance on defining the search area) was out-of-date and in conflict with the NPPF read together with the PPG. Therefore, he concluded that Mead’s Proposal conflicted with Policy CS3 as a whole. Mead argued that the Inspector’s reliance on the PPG and use of it to define the objective of paragraph 162 of the NPPF was unlawful. Mr Justice Holgate dismissed this argument and held that the Inspector was correct to treat the PPG as supporting material which clarifies policies in the NPPF.

The Redrow Decision

The following two elements of the Inspector’s decision were challenged by Redrow:

- a) The Inspector’s conclusion that Redrow had not shown that its proposal cannot be delivered through reasonably available alternative sites (both large and series of smaller sites) (“the RAAS Element”); and
- b) The Inspector’s approach in not considering housing need when carrying out the sequential test as set out in paragraph 162 of the NPPF (“the HN Element”).

The RAAS Element

This element of the Redrow Decision gave rise to two grounds of challenge. Firstly, Redrow challenged the Inspector’s conclusion that the housing proposed could be provided across smaller but unconnected sites, and the lack of consideration of the

argument that that approach could not deliver the range of interconnected benefits that Redrow's Proposal would. Mr Justice Holgate accepted this argument and held that this was a matter of significance in the planning appeal and that the Inspector did not sufficiently address it when concluding that Redrow did not adequately show that its proposal could not be delivered through a "series" of smaller sites.

However, the Inspector's conclusion on the availability of alternative sites did not rely solely on the availability of smaller sites. Mr Justice Holgate noted, and Redrow agreed, that unless it can be shown that the Inspector erred in law in her conclusion that other large sites were also reasonably available, then the Inspector's error on consideration of smaller sites would not be material to the lawfulness of her decision.

Redrow submitted that the Inspector erred in law in concluding that alternative sites did not need to be shown to be able to follow the appeal scheme's trajectory for start and build-out dates in order to be considered "reasonably available". Redrow accepted that the sequential test does not require precise alignment, nevertheless, it argued that since it is both the owner of the appeal site and the housebuilder, it was in a position to be able to start and complete development as soon as possible. Redrow argued that, in contrast, the large alternative sites considered would not meet those timescales. The Inspector accepted the principle of this argument but noted that Redrow did not provide sufficient evidence to show that those timescales could not be met by the alternative sites, especially since the information Redrow relied on was from 2019 and, it had not contacted owners to obtain current information to determine availability and timescales.

As a result, Mr Justice Holgate dismissed both grounds raised by Redrow regarding the RAAS Element of the Redrow Decision.

The HN Element

Redrow, like Mead, argued that housing need and the implications of failing to meet that need were matters that should be considered when carrying out the sequential test. Mr Justice Holgate again dismissed this argument and held that these were matters to be weighed in the assessment of the overall planning balance but not relevant to the sequential test itself.

Redrow made another related point that if the sequentially preferable sites were assessed for delivery, they would not in any event deliver houses to meet HBC's housing need within 5 years. Mr Justice Holgate noted that this was not a point raised at the inquiry stage by Redrow and no proper justification was provided as to why it was not raised. Thus, he concluded that there was no cause for the court to exercise its discretion exceptionally to entertain a new point which could have been, but was not, raised with the Inspector at inquiry stage.

For the reasons above, both claims were dismissed.

Case summary prepared by Chatura Saravanan