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CO/2082/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 24 June 2014

B e f o r e:

MRS JUSTICE PATTERSON

Between:
DARTFORD BOROUGH COUNCIL

Claimant

v

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) LANDHOLD CAPITAL LIMITED

Defendants

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(Official Shorthand Writers to the Court)

Mr S Whale (instructed by Sharpe Pritchard) appeared on behalf of the **Claimant**
Mr R Honey (instructed by the Treasury Solicitor) appeared on behalf of the **First Defendant**
Mr R Green (instructed by Bond Dickinson LLP) appeared on behalf of the **Second Defendant**

J U D G M E N T
(Approved)

MRS JUSTICE PATTERSON:

Introduction

1. On 26 March 2014, the first defendant allowed an appeal by Landhold Capital Limited, the second defendant, against a refusal by the claimant of an outline planning application to redevelop land at Knockhall Road, Greenhithe for up to 40 residential dwellings; provision of public open space; parking; access and landscaping. The existing bowling green was to be retained with relocated and enhanced bowling club facilities and car park.

2. The appeal had been heard at a hearing over two days on 12 and 13 February 2014 before an Inspector, Ms O'Rourke(BA Hons)DipTP MRTPI. A site visit took place on the second day.

3. The claimant brings a challenge under section 288 of the Town and Country Planning Act for an order to quash the decision letter. The challenge was brought originally on four grounds as follows:

    1) a challenge on the basis of section 38(6) of the Planning and Compulsory Purchase Act 2004.

    2) a challenge on the basis of the approach to a sustainable development.

    3) a challenge on the basis of a misapplication of policy and approach on a 5 year housing land supply.

    4) that there was an absence of reasons provided by the decision maker.

4. Just before this hearing, the claimant withdrew Ground 3, dealing with the 5 year house land supply. The case has proceeded, therefore, on the three remaining grounds.

The factual background

5. On 2 November 2012, a planning application was submitted to the claimant in the terms set out above. All matters, save for access, were reserved for later approval. The Secretary of State issued a screening direction that the proposed development comprised EIA development for archaeological interests, and an environmental statement dealing with that aspect accompanied the application.

6. On the 21 May 2013, the application was refused for four reasons. The first was not maintained. Before the hearing in February 2014 three grounds of refusal were pertinent. They were:

    1) That the development proposed would encourage the use of cars by residents and would therefore be contrary to policy 10 of CS 2011.

2) That the proposed development would result in an unnecessary loss of open space, contrary to policy RT15 of the local plan 1995, CS14, and CS22 of the adopted core strategy.

3) That the disbenefits of the development were considered to outweigh the benefits such that the proposed development was contrary to CS10 of the adopted core strategy in 2011, and not, therefore, a suitable windfall housing site to bring forward for development.

7. In her decision letter the Inspector identified 6 main issues which she set out:

"Main Issues

9. The main issues in this case are:

A. The accessibility of the site for housing development;

B. The impact of development on the visual amenity, landscape character and biodiversity of the area;

C. Whether the development would result in the loss of a playing pitch needed to meet the recreational needs of future development in the area;

D. The contribution of the proposed development towards housing land supply;

E. Whether adequate provision is made for the development's infrastructure needs; and

F. Whether, having regard to the benefits and disbenefits of development, the proposal would represent a sustainable form of development."

8. She then described the site, and summarised the relevant planning policy. In paragraph 12 of the decision letter, she set out as follows:

" The formal development plan comprises the Dartford Core Strategy adopted in September 2011 (CS) and the saved policies of the Dartford Local Plan 1995 (LP). Although both plans predate the publication of the National Planning Policy Framework (NPPF), the parties agreed at the hearing that the relevant development plan policies were broadly consistent with the Framework which has at its heart a presumption in favour of sustainable development."

9. She then set out under a subheading "windfall policy" three paragraphs which dealt with windfall housing applications.

"Windfall policy

"16.The CS recognises that an element of supply from windfall sites can enable the early delivery of housing and increase flexibility. To that end, part 4 of policy CS10 provides that windfall sites will be assessed in the same way as planned development. Four considerations are listed: a) the site's sustainability for housing development; b) whether benefits of development outweigh disbenefits; c) the capacity of current and proposed infrastructure to serve the development; and d) where spare capacity is not available, the ability of the site to provide for its own requirements.

17. In considering the sustainability of development on windfall sites, a footnote to policy CS10 refers to the Sustainability Assessment of Housing Sites, produced by the Council in 2010. The appeal site was assessed but was not identified as a specific site for development being placed in Sustainability Band D, described as having *'more limited potential to provide sustainability benefits for the key objectives and a broadly neutral result across the other objectives with a number of potential sustainability issues.'*

18. Subsequently in September 2012, the Council published a Windfall Site Practice Note setting out its approach to windfall sites. The Practice Note is not adopted policy or a supplementary planning document. However in that it gives guidance on how part 4 of policy CS10 is to be applied, it is a material consideration to which I attach some weight. A completed Windfall Site Questionnaire accompanied the application and the case officer assessed the site using the Windfall Site Matrix."

10. She then proceeded to deal with each of the issues that she had identified. In each issue which is relevant to the current challenge, she set out the development plan policy, national guidance if relevant and then analysed the issue against that background.

11. On issue A, accessibility, she concluded in paragraph 33:

"33.Policy CS10 refers at 4.a)to the sustainability of the site of which accessibility is one aspect. I now turn to consider the other issues before concluding on the balance of benefits and disbenefits and the overall sustainability of the site for housing development."

On Issue B, visual amenity, landscape, character and bio-diversity said:

"34. Local Plan policy RT15 resists development that would involve

the loss of private or educational open space *'where the open space is important to the environment and amenity of the area in which it is situated ...'* CS policy CS14 deals with green space and sets out how the Council intends to work with its partners to implement a multi-functional, high quality, varied and well-managed Green Grid. The Green Grid is defined as *'a strategic network of multi-purpose, attractive public open spaces consisting of green corridors, rivers, lakes and landscapes linked via a series of urban and countryside footpaths, Public Rights of Way, cyclepaths and roads, and designed to connect with the main open areas with the urban area.'*

She concluded:

"52.I conclude on this issue that although the appeal scheme would not protect the existing open space, contrary to the provisions of policy CS14 1.e, it would contribute to the underlying aim of the policy for the delivery of a multi-functional, high quality, varied and well managed Green Grid by providing publicly accessible open space and links to the network. As such this is another matter to be weighed in the balance when considering the sustainability of the proposal and the benefits and disbenefits of development."

On issue C, the playing pitch, she concluded:

"65.Whilst there would be benefits to the Bowls Club, the scheme would result in the loss of the potential to use this private open space to meet local needs for playing pitches. I conclude on this issue that in terms of the NPPF, policy CS22 and LP policy RT15, the proposal would result in the loss of open space that could provide an opportunity to meet the sport and recreational needs of the population of the area. This is a disbenefit that must weigh against the release of the site."

Issue D related to housing land supply which I do not need to deal with.

12. Issue E dealt with infrastructure needs. In relation to that, the Inspector concluded:

"89:Whilst the Borough and County Councils declined to enter into a legal agreement with the appellant, they have seen and agreed the terms of the UU. I am satisfied that, other than the NHS contribution, its provisions satisfy the tests of Regulation 122 in being necessary to make the development acceptable in planning terms, directly relate to the development and fairly and reasonably relate in scale and kind. Accordingly I am satisfied that the requirements of CS policy CS10 4.c) and d)

would be met."

Issue F dealt with whether the proposal would be sustainable development. Given the importance of that issue to this hearing, it is sensible to set out those paragraphs:

"90.The NPPF establishes that sustainable development should be see as the golden thread running through both plan-making and decision-taking. As there is not a 5 year supply, relevant policies relating to housing should not be considered up to date. However CS policy CS10 4 on windfall sites is at one with paragraph 49 of the NPPF in that it requires consideration of '*a) the sustainability of the site for housing development*' and 'b) w*hether(the)benefits of development outweigh disbenefits*'. I now turn to address those matters

"91.The NPPF identifies three dimensions to sustainable development - economic, social and environmental. In terms of the economic dimension, the appeal proposal would be deliverable and increase the supply and choice of housing, where there is not a 5 year supply of deliverable housing sites. It would contribute towards economic growth, provide affordable housing, meet its own development needs, and make a contribution towards the strategic transport infrastructure intended to have wider benefits in the area. I have concluded that the development would be accessible and would support sustainable patterns of development by offering choice to future residents in terms of their mode of travel to encourage a shift from car use.

"92.In terms of the environmental dimension, the Windfall Matrix is weighted towards the use of brownfield/previously used land which is a prudent use of natural resources. Whilst there is development on the upper part, the main part of the site is undeveloped and development would conflict with policy CS14 which seeks to protect and enhance existing open space. However it has been shown that the site could be developed in a manner which delivers the principles of safer places, would not be harmful to the landscape character or visual appearance of the area, would have no adverse impact on Craylands Gorge, would secure net benefits in biodiversity and would contribute to the underlying aim of the policy for the delivery of a multi-functional, high quality, varied and well managed Green Grid by providing publicly accessible open space and links to the network. On balance, I conclude that in respect of the environmental dimension to sustainable development, the benefits are just sufficient to outweigh the disbenefits.

"93.In terms of the social dimension, the site is in the urban area and

served by a range of community facilities. The scheme would help meet the needs of present and future generations for housing, and could create a high quality built environment including an area of publicly accessible open space. It would secure significant enhancements for the Bowls Club and help ensure its long term future for the benefit of the local community.

"94.However by building on a playing pitch, albeit one that has not recently been in use, it would remove a potential opportunity to meet the sport and recreational needs of the population of the area, contrary to national and local policy. In that respect the scheme would not be sustainable development. The loss of a former playing pitch that still has potential to be used is a material disbenefit that weights against scheme and the CS sustainable development objectives.

"95.Balanced against that disbenefit is the benefit of the delivery of 40 dwellings, 30% of which would be affordable, where the Council is unable to demonstrate a 5 year housing land supply when assessed against the requirement in the CS. In such cases, where paragraph 49 of the NPPF indicates that relevant policies for the supply of housing should not be considered up to date, paragraph 14 indicates that permission should be granted unless - '*any adverse impacts of doing so would significantly or demonstrably outweigh the benefits, when assessed against the policies in the Framework as a whole; or specific policies indicate development should be restricted*.'.

"96.In respect of the balancing exercise required to be undertaken by policy CS10 4.b) and by the NPPF, I conclude that in this case the adverse impact of allowing development, and therefore the loss of the potential of the playing pitch, would not significantly and demonstrably outweigh the benefits such as to justify the refusal of planning permission. Having come to that view, I am satisfied that in terms of the CS, and LP and the national policy in the NPPF, the appeal proposal can be considered to be sustainable development."

The Inspector set out her overall conclusion:

"101.Having regard to the policies in the adopted development plan, I have concluded that, in terms of CS policy CS10, the benefits of development on this windfall site outweigh the disbenefits and the planning balance is in favour of the development proceeding. As such I find that the proposal would be sustainable development and the presumption in the NPPF is that permission should be granted. For the reasons given

above, I conclude that the appeal should be allowed."

Legal framework

Under section 288(1(b) of the Town and Country Planning Act, a claimant as a person aggrieved is able to make an application to the High Court to question the validity of a decision on the basis that:

1) It is not within the powers of the Act;

2) That any of the relevant requirements have not been complied with in relation to that action.

13. It is common ground that the inspector's determination here has to be made in accordance with the development plan unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004.

14. Section 38(6) requires an exercise that recognises that while material considerations may outweigh the development plan; the starting point is that the plan receives priority, the scales do not start off in an even balance (see South Northamptonshire Council V SSCLG & ors [2013] EWHC 20.

15. An Inspector's decision can be vitiated by mistake of fact, irrationality or procedural unfairness. The reasons for a decision must be intelligible and must be adequate: See South Buckinghamshire DC v Porter (No.2) [2004] 1 WLR 1953 36.

Ground 1: Section 38(6)

16. The claimant accepts that there is no need for an Inspector to set out sections from statutes or to recite any particular mantra. A decision is not to be read like a judgment or statute. A court should not readily infer that the Inspector erred in law but the claimant is entitled to know whether the law has been followed by an Inspector (see South Northamptonshire (supra) at 67.

17. The claimant submits that the Inspector identified relevant development policies and applied the NPPF, but did not accord the planning development plan priority required by law. Section 38(6) was drawn to the attention of the Inspector in the statement of common ground.

18. The Inspector referred to the development plan policies in the context of their consistency with the NPPF and found that they were broadly consistent. That finding serves to increase the weight to be given to development plan policy (see NPPF paragraph 215) and the significance of the inspector's express finding of any conflict with the development plan.

19. The Inspector did make express findings of conflict with the development plan, in development plan policy CS14, so far as one aspect that of policy is concerned relating to open space, CS22 and RT15. It is submitted that those findings cannot be reconciled with the Inspector's approach in determining the appeal.

20. At paragraph 33 of the decision letter, the Inspector set out her conclusion on accessibility which was one aspect of sustainability. It is accepted that that is an interim conclusion and before the overall sustainability of judgment of the site for housing but it feeds into that eventual judgment.

21. The Inspector followed through at paragraph 96 of her decision letter the balancing exercise required by policy CS10 4(b), which again is not consistent with section 38(6). It is revealing that she makes no reference there to conflict with development plan policies or conflict with NPPF. She omits reference to criteria for(a)on sustainability of the site for housing. Her use of the words "significantly and demonstrably" is derived from NPPF, paragraph 14. But she had made no permissible finding that the presumption in favour of sustainable development applied. Indeed, the Inspector found that the adverse impact would not significantly and demonstrably outweigh the benefits and therefore the application would be sustainable development. That was contrary to the Secretary of State's declared position as to when paragraph 14 of the NPPF was engaged.

22. It is accepted that the policies in the development plan pull in different directions but the test under section 38(6) is not abrogated by the NPPF and the claimant is entitled to know what the findings of the Inspector on the development plan were.

23. The Inspector's overall conclusion, at paragraph 101 above, contains no reference to the conflicts with the Local Plan Core Strategy and NPPF which she found. There is only reference to CS10 and NPPF. The claimant did not know, therefore, what conclusions the Inspector had come to on the development plan.

24. The claimant relied on the recent case of Lark Energy Ltd v Secretary of State for Communities And Local Government & Anor [2014] EWHC 2006 (Admin) where there was a challenge on the basis that the Secretary of State had not fulfilled his duty under section 38(6). That case involved an appeal concerning a solar energy farm.

25. There were two policies, DMO3 and DM27, in tension with each other. DMO3 was the dominant policy and regarded as comprehensive, and entitled low carbon and renewable energy. DM 27 was entitled protection of landscape character. Lindblom J said:

> "56. In these circumstances, I think the Secretary of State had to explain how he would reconcile his conclusions relating to those two policies when he considered whether the proposal complied with the relevant provisions of the development plan. Because he was disagreeing with the Inspector he could not rely on the Inspector's reasoning. He had to ask himself whether the proposal was or was not in accordance with the plan, read as a whole, and he had to provide clear reasons for the view to which he had come on that question. Otherwise, his decision would be vulnerable to the criticism that he did not ask himself, and answer, that important question, and therefore that he failed to perform the duty imposed upon him by section

38(6).

> "57. Nowhere in his letter did the Secretary of State say that in his view the proposal was in accordance with the development plan or that it was not. He did not acknowledge any tension between Policy DM03 and Policy DM27, or between the conclusions he had reached when applying each of those two policies to the proposal before him. I think his own assessment of the planning merits made it necessary for him to decide which approach to the balance between harm and benefit should be followed, the more generous approach in Policy DM03 or the more demanding one in Policy DM27. Should he give precedence to Policy DM03 or should he regard Policy DM27 as dominant? He could have taken the view that in this case Policy DM27 should prevail. But if this was his view the reasons for it are not clear in his decision letter, and I think they should have been."

26. The first defendant submits that the Inspector recognised the status of the development plan as is clear from paragraphs 12 and 101 of the decision letter, as well as the way that the Inspector approached her task of considering the issues that she identified.

27. She noted the relevant policy, considered the merits and reached conclusions by reference to the policy. That showed she was conscious of the task that she had to discharge. The Inspector found non-compliance with policy RT15 from the saved local plan and policy CS22 in one aspect, but found in relation to CS22 accordance with its objectives.

28. She found non-compliance also with one aspect of CS14 but compliance otherwise with the underlying aims of the policy. That shows that there is no conflict between the Inspector's findings on the development plan compliance when the decision letter is read as a whole and section 38(6).

29. The Inspector clearly regarded policy CS10 as the most applicable policy. She was entitled to do so because CS10 dealt with windfall housing sites and encompassed a wide range of considerations: sustainability, infrastructure and whether the benefits outweighed the disbenefits.

30. In her conclusions, the Inspector considered the balance of benefits against disbenefits because that was what was required by the terms of the main development plan policy CS10, as well as NPPF. Her approach shows that she applied the relevant legal framework. The second defendant to all intents and purposes adopts the argument of the first defendant.

Discussion and conclusions

31. In Tesco Stores v Dundee City Council [2012] PTSR 983 Lord Reed said in relation to policy in a development plan:

"19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

32. It is not unusual when considering a development plan (which in its nature will have to cover a broad range of topics and development) that it will contain many strands some of which will be in potential conflict with each other. The requirement is to consider the development plan as a whole. As Ouseley J said in R (Cummins) v SSETR [2001] EWHC 1116 (Admin) at paragraphs 161 (part) to 162:

161. "it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein."

162. It may be necessary for a Council in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given.

33. The Inspector here considered the development proposed by reference to the six main issues that she had identified. In considering each of those which are relevant to today's challenge she took the development plan policy as her starting point, made findings of compliance or otherwise with that, went on to consider other material considerations and then reached her conclusion on the issue.

34. Sometimes that involved a finding of conflict with part of the development plan such as the open space aspect of CS1 in the core strategy and RTL 15 in the saved local plan and sometimes a finding of compliance. The Inspector followed a structured and perfectly acceptable approach to her decision making.

35. In paragraph 101, the Inspector then drew upon her conclusions on the various issues to reach an overall judgment. In considering that paragraph, one must step back and consider it in the context of the immediately preceding decision letter. The Inspector was not dealing with a situation such as that in Lark Energy (supra), where there needed to be a resolution of conflict between two policies which had not been explained earlier in the decision letter.

36. In this decision letter, the Inspector had set out in dealing with her issues which part of the development plan proposal complied or conflicted with a development plan policy on an interim basis. That exercise was missing in the Lark Energy (supra) case.

37. Further, it is clear from the reasons for refusal, the Local Authority case at the hearing, as well as the subject matter of the policy what policy CS 10.4 was dealing with. Windfall housing policy was the main policy directly applicable to the development proposal. It reads:

"Policy CS 10: Housing Provision

Windfall Sites

> 4. Planning applications for sites not identified as deliverable or developable in the SHLAA [109. Strategic Housing Land Availability Assessment, Dartford Borough Council, 2010] will be assessed in the same way as planned development by consideration of:
>
> a) The sustainability of the site for housing development [110. Sustainability Assessment of Housing Sites, Dartford Borough Council, 2010]
>
> b) Whether benefits of development outweigh disbenefits;
>
> c) The capacity of the current and proposed infrastructure to serve the development taking into account committed and planned housing development; [111. Infrastructure Background Paper, Dartford Borough Council 2010]
>
> d) Where spare capacity is not available, the ability of the site to provide for the requirement it generates.
>
> 5. The Council will monitor the role of windfall sites in overall housing provision and the impact on infrastructure capacity. Where critical trigger points are reached, the Council will take appropriate management action. [112. As set out in table 5 of this document: Triggers and Management Action.]"

38. It is evident from the policy that evaluating a development proposal against the criteria contained within it will involve a comprehensive exercise of planning judgment, and will include consideration of the issues raised by the local plan policies RT15, CS22 and CS14. Those issues are effectively subsumed into a consideration of policy CS 10.4.

39. It was, therefore, to that policy that the Inspector directed her express overall conclusion in paragraph 101. She had clearly had regard to policies in the development plan as is evident in the preceding paragraphs. It was not incumbent upon her, in my judgment, to again iterate those parts of the development plan where she had found a conflict and carry out a further express balancing exercise. She had done that

previously in resolving the issues that she had identified and which the claimant accepts were properly formulated.

40. Reading the decision letter as a whole, it is evident that her overall conclusion was that the development proposed was in accordance with the development plan.

41. The development was specifically supported by a directly applicable policy. The Inspector's overall judgment is seen through her resolution of the identified issues. Of course, that involved elements of conflict with other policies but given they were not of such comparable direct application to the development proposal as CS 10.4 it was to that policy that greater weight attached.

42. That is what, in my judgment, a fair reading of the decision letter discloses. It follows that ground 1 fails.

Ground 2. Sustainable development

43. The claimant submits that the Inspector began her considerations on sustainable development correctly in paragraphs 91 to 95, by identifying the three dimensions of sustainability: economic, social and environmental dimensions, derived from paragraph 7 of NPPF and making findings upon them.

44. Where she went wrong was then failing to make a consequential finding on sustainable development. Instead, she put the cart before the horse and concluded in paragraph 96 that the adverse impact of allowing the development would not significantly and demonstrably outweigh the benefits.

45. That was highlighted in paragraphs 84 and 95 of the decision letter where the Inspector stated in paragraph 84 that a balancing exercise would determine whether the scheme was a sustainable form of development; and in paragraph 95 where she said that NPPF 14 was engaged, even though she had omitted to make the necessary prior finding on sustainability.

46. The approach of Lang J in William Davis Ltd & Anor v Secretary of State for Communities and Local Governments & Anor [2013] EWHC 3058 (Admin) at paragraph 37 is specifically relied upon. That says:

> "37. In my judgment, the Inspector and the Secretary of State directed themselves correctly by asking the question whether the proposed development was "sustainable development". At the Inquiry, the Claimants did not dissent from the Inspector's analysis that the fourth main issue was "whether the appeal scheme represents sustainable development, to which the Framework's "presumption in favour" should apply" (paragraph 317). In their written submissions to the Inspector, the Claimants expressly referred to this question, I accept Mr Maurici's submission that paragraph 14 NPPF only applies to a scheme which has been found to be sustainable development. It would be contrary to the fundamental principles of NPPF if the presumption in favour of development in paragraph 14 applied equally to sustainable and

non-sustainable development."

47. Here, the Inspector jumped to her own conclusion without making any prior finding.

48. The first defendant contends that the two stage test contended for by the claimant is misconceived. There is no such legalistic straight-jacket. Sustainable development is about seeking an overall net positive contribution to economic, social and environmental gains together. That was explained in Gallagher Estates Ltd & Anor v Solihull Metropolitan Borough Council [2014] EWHC 1283 (Admin), where Hickinbottom J says:

> "25. As I have indicated (paragraph 15 above), sustainable development is at the heart of the NPPF. There is no specific definition of "sustainable development" in the NPPF, but it is to be defined in terms of development which meets the needs of the present without compromising the ability of future generations to meet their own needs. That is reflected in the very first words of the Ministerial Foreword to the NPPF, which state:
>
> "The purpose of planning is sustainable growth.
>
> "Sustainable means ensuring that better lives for ourselves don't mean worse lives for future generations.
>
> "Development means growth. We must accommodate the new ways in which we will earn our living in a competitive world. We must house a rising population … ".

49. It is said in paragraph 6 of the NPPF that the policies set out in paragraphs 18-219, taken as a whole, constitute the Government's view of what sustainable development means in practice for the planning system. "Sustainability" therefore inherently requires a balance to be made of the factors that favour any proposed development and those that favour refusing it in accordance with the relevant national and local policies. However, policy may give a factor particular weight, or may require a particular approach to be adopted towards a specific factor; and, where it does so, that weighting or approach is itself a material consideration that must be taken into account.

50. Here the Inspector considered whether the development was sustainable by reference to the three dimensions. The one aspect where the scheme was not sustainable development was in relation to the social dimension, as it would remove a potential opportunity to meet recreational needs but even then there were positive aspects of the scheme. She, therefore, asked herself the right question, considered it in a structured way and reached a justified conclusion.

51. The second defendant again substantially adopts the arguments of the first defendant.

Discussion and conclusions

52. In my judgment, the claimant's argument depends on elevating the dicta in William Davis (supra) into a formulaic approach to be followed in a step by step sequential order in a decision letter. I reject that approach.

53. As has been said repeatedly, an Inspector is not writing a examination paper and a decision must be read in good faith, see South Somerset District Council v Secretary of State for Environment [1993] 1 PLR 80 at 83(e) to(f). The court should employ a straightforward down to earth reading of a decision letter without excessive legalism, (see Clarke Homes v Secretary of State for the Environment [1993] 6 PNCR 263, at paragraph 272.

54. In my judgment the claimant's approach is excessively legalistic. When the decision letter is read as a whole it is clear that the Inspector reached an overall conclusion, having evaluated the three aspects of sustainable development, that the positive attributes of the development outweighed the negative. That is what is required to reach an eventual judgment on the sustainability of the development proposal. As was recognised in the case of William Davis (supra) at paragraph 38 the ultimate decision on sustainability is one of planning judgment. There is nothing in NPPF, whether at paragraph 7 or paragraph 14 which sets out a sequential approach of the sort that Mr Whale, on behalf of the claimant, seeks to read into the judgment of Lang J at paragraph 37. I agree with Lang J in her conclusion that it would be contrary to the fundamental principles of the NPPF if the presumption in favour of development, in paragraph 14,applied equally to sustainable and non-sustainable development. To do so would make a nonsense of Government policy on sustainable development.

55. Here, most materially, through the development's compliance with CS 10.4, a judgment was able to be reached by the decision maker that the proposal was in fact sustainable. The policy framework set the structure for determining that issue. Once that was resolved in favour of the development, the additional presumption in NPPF paragraph 14 applied. That is what paragraph 101 of the decision letter says. There is no error of law in the way the Inspector approached that issue.

56. To conclude on this ground, I find that the claimant has placed too much weight on the phrase in paragraph 96 of the decision letter where the Inspector, having considered that the adverse effect of the loss of potential playing fields would not significantly and demonstrably outweigh the benefits (such as to justify a refusal of the planning permission) says "having come to that view" she was satisfied that the development was sustainable development.

57. In my judgment the claimant has taken that phrase in isolation from its context. Reading the decision letter as a whole based, on the entirety of the preceding section from paragraph 90, the Inspector approached the issue fairly and in a way that was unassailable. For those reasons, Ground 2 fails.

Ground 3 Reasons

58. I can deal with this ground extremely shortly. In my judgment this ground is essentially parasitic upon the other two grounds. I have found in relation to each of

them for the reasons set out above that the Inspector expressed herself with sufficient clarity to comply with the approach of Lord Brown in South Buckinghamshire Council v Porter 2 (supra).

59. For that reason, ground 3 fails also. This claim is therefore dismissed.

60.

61. MR HONEY: Thank you, my Lady. There is an application for the Secretary of State's costs to be made.

62. MRS JUSTICE PATTERSON: Yes.

63. MR HONEY: There is a schedule which has been circulated. I do not know whether that has reached your Ladyship.

64. MRS JUSTICE PATTERSON: Yes, I have seen that.

65. MR HONEY: There is one change, or two changes. The same point that needs to be made in as much as on the second page, the hearing has taken, let us say 4 hours in total, rather than 7, so attendance at hearing at B should be 4 hours instead of 7. Then the same point applies, my Lady, to my fee for the hearing which is 700 based on 7 hours. Should be 400.

66. MRS JUSTICE PATTERSON: I see.

67. MR HONEY: Based on 4 hours.

68. MRS JUSTICE PATTERSON: Yes, and what does that do to the overall total.

69. MR HONEY: Which then takes the total down to £9,918. I have not been able to agree the figures, even amended in that way, with my learned friend. I understand he is going to make some submissions on them.

70. MRS JUSTICE PATTERSON: All right.

71. MR HONEY: If I may, I will reserve any further comment until I have heard what he has to say.

72. MRS JUSTICE PATTERSON: Yes, of course. Yes, Mr Whale.

73. MR WHALE: Obviously, the principle of costs is not in dispute.

74. MRS JUSTICE PATTERSON: No.

75. MR WHALE: In truth there is not very far between us in terms of the quantum, either.

76. MRS JUSTICE PATTERSON: All right.

77. MR WHALE: But I am going to invite the court to summarily assess the Secretary of State's costs at £8,000. I make that submission even having regard to the concession, if that is the right word, that my learned friend has had to make in terms of the timing. In terms of the detail and how I arrive at that conclusion, it is principally in relation to the work done on documents which is at the top of the second page.

78. MRS JUSTICE PATTERSON: Yes, £2,000-odd, is it?

79. MR WHALE: It is.

80. MRS JUSTICE PATTERSON: Yes.

81. MR WHALE: It is perhaps easier to analyse it in terms of hours first and foremost, because by my calculation at least, it comes in over 16 hours, no less, as work done on documents.

82. MRS JUSTICE PATTERSON: Sorry, that is a summation, is it, of what: A, B and C, is it, Mr Whale?

83. MR WHALE: It is indeed.

84. MRS JUSTICE PATTERSON: Yes.

85. MR WHALE: It is indeed, yes, 16.9, I think.

86. MRS JUSTICE PATTERSON: Yes.

87. MR WHALE: Certainly on this side of the courtroom we are at something of a loss as to how the Secretary of State can properly recover almost 17 hours' worth of work on documents.

88. On the preceding page there is section on attendances on opponents (as distinct from attendances on others). My instructing solicitor tells me that he has record 42 minutes. That is, to say between him and the Secretary of State, not 1.8 hours.

89. MRS JUSTICE PATTERSON: All right.

90. MR WHALE: I make that point, but I come back to the point about work done on documents. That is excessive, in my submission. Going back to my learned friend's fees, no quibble at all as to the fee for the hearing.

91. MRS JUSTICE PATTERSON: No.

92. MR WHALE: But we see that in terms of advice documents and conferences bearing in mind that this would inevitably be on the hundred pounds rate, that that comes in at some £3,800.

93. Again so far as we are concerned on this side, that is too much and so we are asking that you assess the costs at £8,000, not £9,918.

94. MRS JUSTICE PATTERSON: All right, thank you.

95. MR WHALE: Thank you.

96. MRS JUSTICE PATTERSON: Mr Honey.

97. MR HONEY: Thank you very much. My Lady, the first point to make is of course this covers the issues that have been abandoned by the claimants, although we only been here for a short period of time today.

98. MRS JUSTICE PATTERSON: Yes.

99. MR HONEY: The preparation work includes all that, preparation. Taking it step by step for the first page: attendance on opponents. I do not at all say my learned friend is not telling the truth when he says that his solicitor has got 42 minutes for attendance on opponents.

100. There is not only the contact time between the opponents, there is also the work done in preparation for that contact time. In my submission, if there was that amount of contact time then 1.8 hours is far from excessive and we are only looking at £288, in any event. Work done on documents.

101. My Lady, there are three main elements within that. The first is that it covers the minute of advice that is prepared by the Treasury Solicitor to advise the Planning Inspectorate and the department whether the case should be defended or not. So that advice is included within that.

102. It also includes in this case the work done in terms of preparation of documents for the bundle, because you will recall my Lady from the index, there is a section where it says: "Documents included at request of Secretary of State".

103. MRS JUSTICE PATTERSON: Yes.

104. MR HONEY: These were documents mainly relevant to the grounds, not pursued, but were relevant as well; and there was work done in terms of trying to ascertain what needed to go in the bundle and make sure that it was included. Then the third element is in relation to the witness statement of the Inspector, the need to prepare and deal with that which again related to the issue that has not been pursued.

105. So, I say, my Lady, having regards to the case and what work was involved under that heading, in my submission those hours are reasonable and those are no grounds at all for drawing an adverse inference in attempts that they should be reduced because they must be unreasonable.

106. That as far as counsel's fees are concerned it is based on the Treasury Solicitor's hourly rates; but that, my Lady, as you will see the fee for the hearing, only physically attending for the hearing, so that work includes all the preparation for the hearing. It includes skeleton argument drafting and to the *ad hoc* advice as the case unfolded,

including in relation to the witness statement from the Inspector in matters that have been avoided.

107. Again, I say, as a whole there is nothing on the face of it unreasonable about that; and then certainly putting it in context of the costs for the other two parties, it is significantly below those. In my submission, my Lady, there is no basis in this case for reducing it below the figures which have actually been incurred.

108. MRS JUSTICE PATTERSON: Yes. I have not actually seen the cost schedule for anybody else, Mr Honey, so although you refer to the other parties, I am afraid I cannot carry out that exercise.

109. MR HONEY: Yes, there are, I think for developer, the total figure was something in the order of £25,000. My learned friend's figure was £12,000.

110. MRS JUSTICE PATTERSON: All right.

111. MR HONEY: We are asking for that figure of £9,918.

112. MRS JUSTICE PATTERSON: Yes, all right. Thank you very much.

113. MR WHALE: My Lady, the second defendant's costs, they do not come into it, frankly.

114. MRS JUSTICE PATTERSON: No, but it just gives a feel of what people are --

115. MR WHALE: -- indeed, and whilst the Council's costs are a shade higher than its Secretary of State's, that would be expected as we were driving the claim.

116. MRS JUSTICE PATTERSON: Yes.

117. MR HONEY: What it really comes down to, it seems to me, is we have, it still remains the case, over 16 hours on documentation. Even factoring in the minute of advice, I submit that is too much, particularly in circumstances where there has plainly been some duplication.

118. My learned friend has been instructed to advise as well and on the Secretary of State's rates, my learned friend's fees for revised documents and the conferences; if my maths is right at this part of the day, come in at just over 38 hours' worth. Thirty-eight hours on his part, more than 16 on the Secretary of State's. Fifty-four hours is unwarranted, that is why I say again £8,000, my Lady. We would not object.

119. MRS JUSTICE PATTERSON: All right. Thank you both very much. I am going to award the costs to the first defendant, slightly less than that which is claimed. The claimant is to pay the costs of the first defendant in the sum of £9,000.

120. (To Mr Green) You make no application, jolly good. You knew the response, Mr Green.

121. MR GREEN: Oh yes, my Lady.

MRS JUSTICE PATTERSON: All right, thank you all very much.