Neutral Citation Number: [2021] EWHC 3464 (Admin)

Case No: CO/1187/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2021

Before :

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court
Between :

MILLWOOD DESIGNER HOMES LTD	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES HOUSING AND LOCAL GOVERNMENT	**Defendants**
(2) REIGATE AND BANSTEAD COUNCIL	

Mr Jonathan Clay (instructed by **Moore Barlow LLP**) for the **claimant**
Ms Caroline Daly (instructed by **Government Legal Department**) for the **first defendant**
The **second defendant** did not appear

Hearing dates: 7 December 2021

Approved Judgment

HH JUDGE JARMAN QC:

Introduction

1. In this claim, the claimant company seeks a review of the decision dated 18 February 2021 of an inspector appointed by the first defendant (the Secretary of State)

dismissing its appeal under section 78 of the Town and Country Planning Act 1990 (the 1990 Act). That appeal was against a failure by the second defendant (the council) as local planning authority to give notice within the prescribed period of a decision on the claimant's application for planning permission to demolish a redundant riding school (the school) and to build four new dwellings, access and associated landscaping. The school is situated in Lower Kingswood, Surrey.

2. The school comprises stables, office, tack room, hay barn and a large indoor arena. Its owners, Mr and Mrs Howell, live in a house just to the south east of the school known as Orchard House. They also own a paddock immediately to the east of the school, a sanded area to the north of the paddock, and four fields further to the east. This open land amounts to about 11.5 acres. They ran the school until 2017, and in doing so used the paddock and the fields for grazing the horses kept in the school. However, since 2012 the school had been making a loss, and in 2017 they decided they no longer wished to subsidise it. It has been closed since. The claimant was granted an option to buy the school and the paddock, the sanded area, and one of the fields, with a view to development.

3. The claimant applied to the council for permission to demolish the school buildings and to build four new houses. The application did not include any of the open land to the east of the school. No decision was made on that application. That led to the appeal before the inspector.

The appeal before the inspector

4. The main issue identified by the inspector was whether the proposal would result in a justifiable loss of a recreational facility. The claimant had undertaken a marketing exercise offering the school for sale in order to establish demand, rather than with a view to sale. The agent's report of the exercise, dated February 2020, was put before the inspector. The school was marketed for nine months, during which three offers were received. One was for £500,000, but once it was realised that no additional land would be offered with the school, the offer was withdrawn. The second was for the school and an additional 1.2 acres of land in the sum of £780,000. The third was for the school plus the sanded area for £600,000. The report concluded:

> "The main factor that seems to have put people off the property was that the site was being sold without the surrounding land."

5. The inspector found that there was clear evidence of interest in the school for continued equestrian use. Of the marketing exercise, the inspector said this, at paragraph 14 of her decision letter:

> "Whilst there were 3 offers made, there was far more interest in the site than this, which fell away before offers were made because of lack of land. Without any land being included (based on the evidence in the marketing report), it is clear the site is not of interest to those seeking to occupy the site for continued equestrian purposes. The justification for not including the land in the sale relates to the owners wishing to retain their views and use the land for their own horses. But

> taken together, this does not, in my view mean the site has been adequately marketed…"

6. The appeal was made on written representations and the inspector visited the site shortly before her decision. The claimant's statement of case before was prepared by its planning consultant, who at paragraph 6.10, said this:

> "In my view, it is unreasonable for the Council to try to use this planning application to retrospectively compel Mr & Mrs Howell to sell land that they own and which they have no wish to sell. If that is what the Council are seeking to do then the reality is that the buildings are likely to remain redundant and vacant, which would serve no planning purpose given the need for housing in Reigate and in the south east generally."

7. In the council's statement of case, the wish to retain all of this land was questioned. It was said that by offering some of it for sale with the school, for example the land included in the option to the claimant, Mr and Mrs Howell would retain sufficient land for their own horses and to maintain the views from Orchard House over open fields.

8. The inspector did not make findings on this issue, and that is one of the claimant's complaints about her decision letter.

The grounds of challenge

9. The main issue before me is whether the inspector erred in law when she concluded that offering the school for sale without adjoining land meant that the site had not been adequately marketed, so that it had not been demonstrated that the operation of the school would not resume. The claimant relies on two grounds in submitting that she did so. The first is that she misinterpreted policy in relation to the retention of recreational facilities. The second is that she failed to have regard to a material consideration, namely whether there was a likelihood of the school re-opening upon refusal of the claimant's application.

Policy

10. National planning policy in England is set out in the National Planning Policy Framework (NPPF). In the section dealing with open space and recreation, the following two paragraphs appear:

> "96. Access to a network of high quality open spaces and opportunities for sport and physical activity is important for the health and well-being of communities. Planning policies should be based on robust and up-to-date assessments of the need for open space, sport and recreation facilities (including quantitative or qualitative deficits or surpluses) and opportunities for new provision. Information gained from the assessments should be used to determine what open space, sport and recreational provision is needed, which plans should then seek to accommodate.

> 97. Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:
>
> a) an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or
>
> b) the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or
>
> c) the development is for alternative sports and recreational provision, the benefits of which clearly outweigh the loss of the current or former use."

11. Local plan policies also seek to resist the loss of leisure and community facilities. Policy CS12 of the Reigate and Banstead Core Strategy, adopted in 2014, seeks to "resist the loss of existing leisure and community facilities…" unless it can be demonstrated that the site was "surplus to requirements".

12. Policy INF2 of the Reigate and Banstead Development Management Plan (2019) states that:

> "Loss or change of use of existing community facilities will be resisted unless……reasonable attempts have been made without success for at least six months to let or sell the premises for its existing community use or for another community facility that meets the needs of the community (see Annex 3 for details…)…"

13. Annex 3, which applies to six different policies, including the safeguarding of employment land, sets out the requirements for any marketing exercise, which include the following:

> "Marketing evidence requires demonstration of an active marketing campaign for a continuous period of at least 6 months, which has been shown to be unsuccessful, and is provided in writing… It must be shown to the council's satisfaction that marketing has been unsuccessful for all relevant floor-space proposed to be lost through redevelopment or change of use...Consideration will be given to the location and type of premises and the community it serves and whether there are other premises in the vicinity."

14. After referring to the relevant policies, the inspector set out her overall conclusions in paragraphs 18 to 21 of her decision letter as follows:

> "It is my view, that the appellant has not provided adequate, compelling evidence that there is no continued demand for the site as an equestrian/centre riding school. The site has not been

> offered with the required land for a facility of this nature to be able to operate.
>
> To that end, I consider the proposals to be in conflict with DMP Policy INF2 and CS Policy CS12, as well as paras 83(d), 96 and 97 of the Framework, where the loss of the equestrian facility has not been justified.
>
> The appellant sets out that the proposed redevelopment would contribute 4 new dwellings to the market. I consider the proposals would provide attendant economic benefits associated with jobs in construction and an increase in local spending, together with the social benefits of improved housing choice. I also consider the development would result in the re-use of previously developed land.
>
> However, given the modest scale of the proposals, these benefits would be limited and would not, in my view, outweigh the policy harm I have identified."

Ground 1: Interpretation of policy

15. The proper place of the NPPF in the planning process was explained by Lindblom LJ, giving the lead judgment of the Court of Appeal, in *Barwood Strategic Land II LLP v East Staffordshire BC* [2017] EWCA Civ 893. At paragraph 10 he pointed out that section 70(2) of the 1990 Act requires that, in dealing with an application for planning permission, a local planning authority must have regard to the provisions of the development plan, so far as is material to the application, and to any other material considerations. He also referred to section 38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act), which provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

16. At paragraph 13, he continued as follows:

> "The NPPF is the Government's planning policy for England. It does not have the force of statute, and ought not to be treated as if it did. Indeed, as one might expect, it acknowledges and reinforces the statutory presumption in favour of the development plan, and it also explicitly recognizes and emphasizes its own place in the plan-led system of development control. Its "Introduction" acknowledges that "[planning] law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise."

17. At paragraph 50, he said this:

> "I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over-complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme."

18. Lindblom LJ dealt with the interpretation of policy more recently in *Asda Stores Limited) v (1) Leeds City Council and (2) Commercial Development Projects Limited* [2021] EWCA Civ 32. At paragraph 35 he said:

> "When called upon – as often it is nowadays – to interpret a policy of the NPPF, the court should not have to engage in a painstaking construction of the relevant text. It will seek to draw from the words used the true, practical meaning and effect of the policy in its context. Bearing in mind that the purpose of planning policy is to achieve "reasonably predictable decision-making, consistent with the aims of the policy-maker", it will look for an interpretation that is "straightforward, without undue or elaborate exposition" (see *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). Often it will be entitled to say that the policy simply means what it says, and that it is the job of the decision-maker to apply it with realism and good sense in the circumstances as they arise – which is what local planning authorities are well used to doing when making the decisions entrusted to them (see *R. (on the application of Corbett) v The Cornwall Council* [2020] EWCA Civ 508, at paragraphs 65 and 66). "

19. A number of matters were not in dispute before me in relation to ground 1. First, there is nothing in the planning process to require Mr and Mrs Howell to offer to sell any of the open land with the school. Second, the inspector does not identify what she means when she refers to the "required land" being offered with the school. Third, the term "open space, buildings or land" in paragraph 97 NPPF refers to the application or appeal site.

20. On behalf of the claimant, Mr Clay submits that that term refers to the application or appeal site and nothing more. It cannot refer to any of the undefined open land to the east, which was not included in the claimant's application and subsequent appeal. The inspector was wrong to conclude otherwise.

21. In my judgment it is important to keep well in mind that what paragraph 97 provides, so far as material in the present case, is that open space, recreational buildings and

land should not be built upon unless it is shown to be surplus to requirements. The NPPF emphasises that the decision must be made in accordance with the development plan unless material considerations indicate otherwise. The development plan in the present case include the policies identified by the inspector, which also resist the loss of the school, unless surplus to requirements.

22. Those policies should be interpreted in a straightforward way without elaborate exposition and applied with good sense and realism in the circumstances in which they arise. In my judgment, given that the school had been operated by using land to the east as grazing land, the question as to whether the school was surplus to requirements fell to be considered in those circumstances. The inspector applied those policies with good sense and realism and was entitled to approach the question of conflict with policy in the way that she did.

23. For similar reasons, the inspector was in my judgment entitled to come to the conclusion that she did about the marketing requirements set out in Annex 3. Those requirements do not apply only to community facilities, but also to other policies, such as those relating to the loss of shops and employment land. The exercise in this case was not one which was intended to lead to the sale of the school. That was not the stated intention of Mr and Mrs Howell. They had closed the school and had granted to the claimant an option to purchase with a view not to running the school but for housing redevelopment.

24. The reference to the marketing exercise being directed to "all of the floorspace proposed to be lost" must also be interpreted in a straightforward way. It is directed to prevent the fragmentation of sites. As it applies to INF2, which deals with community facilities, it cannot refer only to a space where there is a floor. Annex 3 expressly states that consideration will be given to the location and type of premises and the community it serves.

25. Although the school had ceased operation in 2017, in my judgment the open spaces and recreational buildings which it comprises were existing within the meaning of paragraph 97 at the time of the application and the appeal.

26. In my judgment it has not been shown that the inspector misinterpreted policy and ground 1 fails.

Ground 2: Material considerations

27. I turn to ground 2. The main thrust of this ground is that the inspector failed to grapple with the issue whether there was a prospect of the school resuming operations. Ms Daly, on behalf of the Secretary of State, accepts that the likelihood or prospect of the resumption of a use in the event of refusal of permission for another use is capable of being a material consideration and that it must be taken into account where it is obviously material on the facts of any given case, and that such a consideration is separate to the policy consideration of whether an existing facility is surplus to requirements to be judged by a marketing exercise. However, she submits in this case, this was not a material consideration that the inspector was obliged to take into account and the focus before the inspector was the adequacy of the marketing exercise.

28. The principles relating to the materiality of the likelihood of resumption of use in planning decision making, as applied to the present challenge, were not ultimately in dispute before me to any substantial degree. In the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant in planning terms (see Auld LJ in *Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346 at paragraph 30).

29. To justify refusal of permission for a planning use on the sole ground that another such use should be preserved, it must be shown on a balance of probabilities that if permission is refused for the former, then the land will be effectively used for the latter (per Lord Bridge in *Westminster City Council v British Waterways Board* [1985] 1 AC 677 at 682). It is important to emphasise the phrase 'sole ground'. There was in that case no policy resisting the change from an existing use, unlike the present challenge where policies resist the loss of recreational or community facilities unless (so far as material) they are surplus to requirements. Moreover, as Lindblom LJ emphasised in *Barwood,* planning law now requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise, pursuant to section 38(6) of the 2004 Act.

30. In *R (Secretary of State for Communities and Local Government) v Ortona Ltd* [2009] EWCA Civ 863, Sullivan LJ giving the lead judgment dealt with a challenge to the decision of a planning inspector who refused permission for development of a bus station site, where that use had ceased, despite the operator's assertion that such use would not resume at that site. At paragraph 20 he said this:

> "On a fair reading of paragraph 13 of the decision letter, the re-use point was no more than a bare assertion by the first respondent which the inspector did not accept because it was unsupported by any evidence: "However, no direct evidence was provided by any of the operators…"…Whatever the position may be in other cases, the question of re-use was in issue given the development plan policy background to this case (no loss of the existing bus station unless there was a replacement facility). It was therefore incumbent on the first respondent to persuade the inspector not merely that the established use as a bus station had ceased but that there was no realistic possibility of it resuming. The respondent failed to do so because, although it belatedly asserted that the use would not resume, it produced no evidence in support of that assertion and preferred instead to rely on the possibility of a replacement facility either on-street or at the Cadogan Road car park, both of which the inspector rejected."

31. In the present case, Ms Daly submits that before the inspector the claimant did not squarely address the likelihood or prospect of the school resuming if planning permission for housing development were refused. The reference in paragraph 6.10 of its statement of case was to a scenario if the council were to try and use its planning application retrospectively to compel Mr and Mrs Howell to sell land that they own and have no wish to sell. The fact that the option agreement between these parties included the paddock and a field suggests that if the development did not proceed

there was such a prospect. In the absence of an adequate marketing exercise the inspector could not assess the open market demand for the school.

32. The claimant submits that the *Ortona* case is very different from the present. That involved public transport infrastructure which could be accommodated only in a limited number of sites, and the claim that the use would not resume was a bald assertion and no evidence was adduced in support. Here, the issue was obviously raised in paragraph 6.10 of the claimant's case. Mr and Mrs Howell had run the school for many years and for the last six years had made a loss. They decided to close the school. They gave good reasons why they did not want to offer land for sale with the school.

33. In my judgment, the issue of resumption was obviously raised and in the written representation procedure the claimant put forward reasons why Mr and Mrs Howell did not want to offer land for sale. Whilst the language used in paragraph 6.10 was conditional, the prospect of the school remaining redundant should the application fail was clearly raised. The inspector failed to grapple with this issue but focussed on the marketing exercise.

34. The relevant polices referred to the loss or change of use of community facilities. In paragraphs 18-20, the inspector found benefits to the development, but found that they did not outweigh the policy harm, where the loss of the school has not been justified.

35. Benefits of the development were identified by the inspector in the context that the use of the school for recreation was not then being carried on. In such circumstances, the likelihood of resumption of that use, in my judgment, is obviously a material consideration to the balancing exercise undertaken by the inspector between loss of that use and the benefits of the development proposals. The evidence of the intention of Mr and Mrs Howell as to their wish to retain all the land to the east of the school was plainly relevant in that regard. The council had raised issues about that, but the inspector did not grapple with these issues, as in my judgment she should have done.

36. The weight to be given to such a consideration and its effect on the outcome is a matter for the decision maker, and not for the court, and nothing in this judgment should be taken to indicate otherwise. However, in my judgment it is a factor which ought to have been taken into account in the decision making exercise, and as it was not, that exercise needs to be carried out again taking it into account.

37. Accordingly, ground 2 is made out. The appeal must be remitted for reconsideration by the Secretary of State, when this material consideration should be taken into account. Counsel helpfully indicated that any contentious consequential matters could be dealt with on written submissions. I am grateful to them for their helpful submissions. A draft order, agreed if possible, together with any such submissions, should be filed within 14 days of hand down of this judgment.