Case No: CO/2639/2016

Neutral Citation Number: [2016] EWHC 3073 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2016

Before :

MRS JUSTICE LANG DBE

- -

Between :

BOROUGH OF TELFORD AND WREKIN

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) GLADMAN DEVELOPMENTS LIMITED

Defendants

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- -

Timothy Jones (instructed by **Telford & Wrekin Council**) for the **Claimant**
Tim Buley (instructed by the **Government Legal Department**) for the **First Defendant**
Jonathan Easton (instructed by **Irwin Mitchell**) for the **Second Defendant**

Hearing date: 17 November 2016

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Judgment

Mrs Justice Lang :

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant, made on his behalf by an Inspector on 15 April 2016, in which he allowed the Second Defendant's appeal against the Claimant's refusal of planning permission for a housing development at land north of Haygate Road, Wellington, Shropshire ("the Site").

2. The Site comprises some 15.2 ha of gently undulating agricultural land, principally in arable use, with some trees and hedgerows. It lies adjacent to the settlement edge of the market town of Wellington, which has become part of Telford. There are built-up areas to the east and south of the Site and there is open countryside to the north. Orleton Hall (a Grade II listed mansion) lies to the west of the Site. It is set in 25 ha of park and gardens, which are on Historic England's Register of Historic Parks and Gardens. The Wellington Cricket Club has its ground and pavilion in the park. A public right of way runs across the Site, but there is no public access to the Site beyond that.

3. The Second Defendant (hereinafter "the developer") applied for outline planning permission for a development of up to 330 dwellings, with a new vehicular access, public open space and green infrastructure.

4. The Claimant (hereinafter "the Council"), which is the local planning authority, resolved to grant planning permission in May 2014, at a time when it considered that it did not have a 5 year supply of deliverable housing land. The grant was subject to completion of an agreement under section 106 TCPA 1990, and before it was concluded, the Council decided to re-consider its decision, in the light of a new expert assessment that it could demonstrate a 5 year supply of deliverable housing land. The developer then appealed to the First Defendant on the grounds of non-determination. Shortly after lodging its appeal, the developer submitted a second application for planning permission at the Site for a development limited to 290 dwellings.

5. The Council gave putative reasons for refusing the first application in September 2015, and refused the second application in December 2015. In summary, its reasons for refusal were as follows:

    i) The proposal represented unacceptable encroachment into the open countryside and the loss of an extensive area of high quality agricultural land and would adversely affect the character and appearance of the area which has historic and sensitive value. Accordingly, the proposal was contrary to adopted Core Strategy (CS) Policies CS1, CS3, CS7, CS11, CS12, CS13 and CS14, saved Policies H9, OL6 and HE24 of the Wrekin Local Plan (WLP) and the National Planning Policy Framework (NPPF).

    ii) The proposal would adversely affect the setting of the adjacent listed park at Orleton Hall and the impact upon this heritage asset would adversely affect the character and appearance of the area. Accordingly, the proposal was contrary to adopted CS Policies CS1, CS3, CS7, CS11, CS12 and CS14, saved WLP Policies OL6 and HE24 and the NPPF.

6. The Inspector conducted a site visit and an Inquiry lasting 7 days. He identified the main issues as:

   i) The weight to be given to relevant policies for the supply of housing, and whether the Council could demonstrate a 5 year supply of deliverable housing land.

   ii) The effect of the proposed development on the character and appearance of the surrounding area, and on the setting of Orleton Hall Registered Park and Gardens.

   iii) Whether the appeal proposal should be seen as representing sustainable development, in terms of the NPPF.

7. **Main issue (i)**. The Inspector concluded that certain housing policies, namely, CS1, CS3 and CS7 were not in conformity with the NPPF and were out-of-date. Therefore they should not be given full weight when assessed, applying NPPF 215, and the proposed development fell to be considered under the fourth bullet point in NPPF 14. The Inspector did not reach a final conclusion as to whether the Council could demonstrate a 5 year housing land supply, for the purposes of NPPF 49, although on the evidence before him, he doubted whether it could do so.

8. In **Ground 1** of this application, the Council challenged the Inspector's reliance upon the Council's support for the decision to grant planning permission for a Sustainable Urban Extension ("SUE") outside Telford as a factor supporting his conclusion that the policies on settlement boundaries were out-of-date. Under **Ground 5** of this application, the Council challenged the Inspector's conclusion that policy CS7 was not in conformity with the NPPF.

9. **Main issue (ii)**. Under the heading 'Heritage Issues', the Inspector concluded that the impact of the development upon the setting of the Park would be less than substantial but the harm would be lessened dramatically if the development was limited to the smaller 290 dwellings scheme, and did not extend up to the appeal site's western boundary.

10. Under the heading 'General landscape matters', the Inspector concluded that saved WLP Policy OL6 dealing with Open Land was not applicable to the Site, and so not relevant. The Council challenged this conclusion in **Ground 2** of this application. The Inspector accepted that the policy in NPPF 112 had to be applied as the Site comprised best and most versatile ("BMV") agricultural land, but he rejected the Council's submission that NPPF 112 was a policy which indicated that "*development should be restricted*" within the meaning of NPPF 14. The Council challenged this conclusion in **Ground 3** of this application. After a lengthy analysis of the other policies and the objections raised by the Council and local people, the Inspector concluded that the proposed development would not have an unacceptable impact on the character and appearance of the surrounding area, and would not be at odds with the relevant development plan policies.

11. **Main issue (iii)**. The Inspector concluded that the proposed development was sustainable in terms of its economic and social impacts, but the environmental aspect had to be weighed in the planning balance.

12. Under the heading ‘Planning balance and overall conclusions’, the Inspector said:

> “137. In accordance with guidance contained in the Framework, there are 2 separate balancing exercises which need to be undertaken in this case, both of which have to take account of benefits which would arise from the appeal proposal. The first is the balance relating to paragraph 134 of the Framework, which requires any “less than substantial” harm to the significance of a designated asset to be weighed against the public benefits of the proposal.
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> …
>
> 141. Weighing these benefits against the harm to the designated heritage asset is, in my assessment, a fine balance, with clear and distinct differences between the 2 proposals. Although I am satisfied that the harm to the setting of the Park should be classed as less than substantial in the case of both the 330 dwelling and the 290 dwelling schemes, I consider it very important to retain some open views of the Park from Haygate Road to retain the significance of this aspect of its setting, and this increases the weight I feel I need to ascribe to the harm in the case of the 330 dwelling scheme. Because of this I am drawn to conclude that the harm to the significance of the Park would be outweighed by the public benefits in the case of the 290 dwelling scheme, but not in the case of the scheme for a maximum of 330 dwellings. In other words the proposal passes the “paragraph 134” test in the up to 290 dwelling scheme, but not in the up to 330 dwelling scheme.
>
> 142. Referring back to paragraphs 126 and 127 of this decision, I therefore conclude that the scheme for up to 330 dwellings would not satisfy the environmental role of sustainable development, whereas the scheme for up to 290 dwellings would. Accordingly, I further conclude that the proposed development can be considered as representing sustainable development, but only if the maximum number of dwellings is restricted to 290, and the development proceeds in general accordance with Development Framework Plan reference 5644-L-03-Rev N.
>
> 143. I now turn to the second balancing exercise which needs to be undertaken, In view of my earlier conclusions that development plan policies referred to in the putative reasons for refusal are out-of-date and should carry less than full weight because of inconsistencies with Framework policies, this is the weighted balance set out in the second bullet point of the decision-taking section of the Framework paragraph 14. This indicates, under its first limb, that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when

assessed against the policies in the Framework taken as a whole. The second limb of this bullet point relates to the situation where specific policies in the Framework indicate development should be restricted, such as where designated heritage assets are concerned, and I have already addressed this matter, above.

144. From the conclusions I have already reached on the main issues I consider that the proposed development would result in some adverse impacts, but that these would be limited. My reasoning is set out fully in the appropriate paragraphs, above, but in summary there would firstly be a loss of just over 15 ha of BMV agricultural land. But as much of the agricultural land surrounding Telford is of BMV status, and as it is clear that this has not prevented the Council from recently granting planning permission for a scheme at Priorslee which will result in a much greater loss of BMV land than here, I can only give this impact a modest amount of weight.

145. Insofar as impact on the Registered Park is concerned, by not seeking to provide development on the southernmost part of the site, adjacent to Haygate Road, the scheme for a maximum of 290 dwellings would only result in a low level of "less than substantial" harm to weigh against the proposal.

…

147. Turning then to the benefits of this proposal, I have already detailed, above, that there would be substantial benefits arising from the provision of up to 290 new dwellings, including up to 73 new affordable homes. I give significant weight to this provision of both market and affordable housing. I also accord significant weight to the economic and social benefits which the scheme would give rise to, and which have already been detailed above. In addition, I have concluded that modest weight should be given to the gains arising from increased public access to the appeal site, and to the highway improvements which would arise from the proposal.

Overall conclusion

148. I am required to determine this proposal in accordance with the development plan, unless material considerations (which include the Framework), indicate otherwise. I have identified some conflict with development plan policies under both the first and second main issues, but have concluded that these policies are out-of-date and should carry less than full weight because of inconsistencies with policies in the Framework. Because of this, and having regard to my findings on all 3 main issues, my overall conclusion is that the adverse impacts of the proposal would not significantly and

> demonstrably outweigh the substantial benefits which would arise from this development."

13. Dove J. granted permission to apply for a statutory review on Ground 3, but refused permission on Grounds 1, 2, 4 and 5. The Council renewed its application for permission on Grounds 1, 2 and 5 which was listed to be heard at the same time as the substantive hearing on Ground 3. Ground 4 was abandoned.

Legal framework

Section 288 TCPA 1990

14. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and in consequence, the interests of the applicant have been substantially prejudiced.

15. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

16. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v. Secretary of State for the Environment* (1978) 42 P & CR 26. As Sullivan J. said in *Newsmith v. Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision."

17. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v. Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v. Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v. Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v. Secretary of State for the Environment* (1993) 66 P & CR 83.

Determining an application for planning permission

18. The determination of an application for planning permission is 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, read together with section 70(2) Town and Country Planning Act 1990.

19. In *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13, the House of Lords held that the proper interpretation of planning policy is ultimately a matter of law for the court, and a failure by a planning authority to understand and apply relevant policy will amount to an error of law. However, as Lord Reed explained at [19]:

> "… 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 659, 780 per Lord Hoffmann)."

20. Whether or not a particular consideration is material is ultimately a matter for the court to determine: *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Keith at 764A. Subject to *Wednesbury* unreasonableness, however, it is a matter for the decision maker to decide the weight (if any) to be attached to a material consideration: *Tesco Stores*, per Lord Hoffman at 780F-H.

21. In principle, any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration which falls within that broad class is material in any given case will depend on the circumstances, and whether it is relevant to the question whether the application for planning permission should be granted or refused.

National Planning Policy Framework (NPPF)

22. The Court of Appeal has recently given guidance on the NPPF in *Suffolk Coastal District Council v. Secretary of State for Communities and Local Government* [2016] EWCA Civ 168; [2016] 2 P & CR 1 where Lindblom LJ said as follows:

> "9. The Government's commitment to a "plan led" planning system is apparent throughout the NPPF. Paragraph 2 in the "Introduction" acknowledges the statutory presumption in favour of the development plan in s.38(6) of the Planning and Compulsory Purchase Act 2004, and the status of the NPPF as another material consideration:
>
> > "Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The [NPPF] must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions. … ."
>
> There are several other references to the "plan-led" system: for example, in para.17, which sets out 12 "core land-use planning principles" that "should underpin both plan-making and decision-taking". The first of these "core" principles is that

planning should be "… genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area". It adds that "[plans] should be kept up-to-date …" and "should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency".

…..

12. Under the heading "The presumption in favour of sustainable development", para.12 acknowledges that the NPPF "does not change the statutory status of the development plan as the starting point for decision making". It says that "[proposed] development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise". It adds that "[it] is highly desirable that local planning authorities should have an up-to-date plan in place". Paragraph 13 confirms that the NPPF "constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications". Paragraph 14 explains how the "presumption in favour of sustainable development" is to be applied:

> "At the heart of [the NPPF] is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> For plan-making this means that:
>
> • local planning authorities should positively seek opportunities to meet the development needs of their area;
>
> • Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
>
> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or
>
> – specific policies in [the NPPF] indicate development should be restricted. [Here there is a footnote, footnote 9, which states: "For example, those policies relating to sites protected under the Birds and Habitats Directives … and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green

> Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."]

For decision-taking this means [Here there is a footnote, fn.10, which says: "Unless material considerations indicate otherwise"]:

> • approving development proposals that accord with the development plan without delay; and
>
> • where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or
>
> – specific policies in [the NPPF] indicate development should be restricted. [Here footnote 9 is repeated.]"

…..

39. …..Footnote 9 explains the concept of specific policies in the NPPF indicating that development should be restricted. The NPPF policies it gives as examples relate to protected birds and habitats, Sites of Special Scientific Interest, the Green Belt, Local Green Space, Areas of Outstanding Natural Beauty, Heritage Coasts, National Parks, the Broads, heritage assets and locations at risk of flooding or coastal erosion (see [12] above). For all of these interests of acknowledged importance—some of them also subject to statutory protection—the NPPF has specific policies. The purpose of the footnote, we believe, is to underscore the continuing relevance and importance of these NPPF policies where they apply. In the context of decision-taking, such policies will continue to be relevant even "where the development plan is absent, silent or relevant policies are out-of-date". This does not mean that development plan policies that are out-of-date are rendered up-to-date by the continuing relevance of the restrictive policies to which the footnote refers. Both the restrictive policies of the NPPF, where they are relevant to a development control decision, and out-of-date policies in the development plan will continue to command such weight as the decision-maker reasonably finds they should have in the making of the decision. There is nothing illogical or difficult about this, as a matter of principle.

40. …..Paragraph 215 is one of a series of paragraphs in Annex 1 to the NPPF dealing with the implementation of the policies it contains. These are, essentially, transitional provisions. They

do not affect the substance of the policies themselves. Under para.214 there was a period of 12 months from the publication of the NPPF—until 27 March 2013—within which decision-takers "may" continue to give full weight to policies adopted since 2004 even if they conflicted with the policies in the NPPF. After that, under para.215, "due weight" was to be given to relevant plan policies, "according to their degree of consistency" with the policies in the NPPF. These provisions for the implementation of NPPF policy do not touch the interpretation of such policy, including the policies for the delivery of housing in paras 47 to 55 and the policy explaining the "presumption in favour of sustainable development" in para.14…."

…..

42. The NPPF is a policy document. It ought not to be treated as if it had the force of statute. It does not, and could not, displace the statutory "presumption in favour of the development plan", as Lord Hope described it in *Edinburgh City Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447* (at 1450B–G). Under s.70(2) of the 1990 Act and s.38(6) of the 2004 Act , government policy in the NPPF is a material consideration external to the development plan. Policies in the NPPF, including those relating to the "presumption in favour of sustainable development", do not modify the statutory framework for the making of decisions on applications for planning permission. They operate within that framework—as the NPPF itself acknowledges, for example, in para.12 (see [12] above). It is for the decision-maker to decide what weight should be given to NPPF policies in so far as they are relevant to the proposal. Because this is government policy, it is likely always to merit significant weight. But the court will not intervene unless the weight given to it by the decision-maker can be said to be unreasonable in the *Wednesbury* sense.

…..

46. We must emphasise here that the policies in paras 14 and 49 of the NPPF do not make "out-of-date" policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 W.L.R. 759* at 780F-H). Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is "out-of-date" should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or dis-applied. That idea appears to have found favour

> in some of the first instance judgments where this question has arisen. It is incorrect.
>
> 47. One may, of course, infer from para.49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy—such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in para.49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment (see [70]–[75] of Lindblom J's judgment in *Crane*, at [71] and [74] of Lindblom J's judgment in *Phides*, and [87], [105], [108] and [115] of Holgate J's judgment in *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government and Mid-Sussex DC [2015] EWHC 1173 (Admin)*)."

Ground 1

23. The Council submitted that the Inspector erred in law treating the Council's grant of planning permission for a SUE outside Telford (Priorslee) as a material consideration supporting his conclusion that the policies on settlement boundaries were out-of-date. The Inspector treated it as a precedent, whereas each planning application ought to be considered on its individual merits. Moreover, a planned SUE, designed to maximise sustainability, was a very different matter from an *ad hoc* speculative development.

24. The Inspector said:

> "25. There is no firm evidence before me to indicate that the settlement boundaries applicable in 2006 are still appropriate today and are consistent with the Framework's objective of boosting significantly the supply of housing. Indeed, as became apparent at the inquiry, the Council's current 5 year housing land supply contains a number of sites which fall outside existing settlement boundaries. Moreover, the Council has

> recently granted planning permission for a major, mixed-use development which includes the provision of some 1,100 houses on a site outside the existing boundary of Telford at Priorslee, a matter to which I return shortly. These points indicate to me that the former settlement boundaries cannot be viewed as inviolable and that this policy does not reflect Framework guidance."
>
> "34. The Council clearly recognises that development will have to take place outside existing settlement boundaries, as referred to in paragraph 25 above and as evidenced by its recent grant of planning permission at Priorslee, also referred to above. The Priorslee site lies outside the existing boundary of Telford and this indicates to me that Policy CS3 cannot be considered up-to-date. It is also the case that the Priorslee proposal is in conflict with TWCS Policy CS7, but whilst I understand that this area is being promoted as a Sustainable Urban Extension in the emerging TWLP, I have already noted that only limited weight can be given to this emerging plan at this stage. It appears that the sustainable nature of the development at Priorslee and its good connectivity to the major services at Telford weighed in its favour in that case, and overcame any conflict with Policy CS7. It seems to me that similar circumstances exist in the case of the appeal proposal."

25. In my judgment, the Inspector was entitled to have regard to other grants of planning permission in the recent past in determining the question whether the policies on settlement boundaries were out-of-date. It was plainly a relevant consideration as it supported the contention that current housing needs could not be adequately met within the settlement boundaries identified in the policies. The weight to be given to this consideration was a matter of planning judgment for the Inspector, not this court.

26. The Inspector mistakenly stated that the Council had decided to grant planning permission, whereas in fact at the time of his decision, the Council had only resolved to grant planning permission, and it only granted planning permission at a later date. However, it was accepted by the Council that nothing turned on this mistake.

27. The Council also challenged the Inspector's reliance upon the Priorslee development at Appeal Decision ("AD") 86 and 144, when reaching his decision on the application of NPPF 112 on the use of BMV agricultural land. I deal with this aspect under Ground 3.

Ground 2

28. The Council submitted that the Inspector erred in his approach to the WLP when he concluded that Policy OL6 was not intended to provide protection for large areas of agricultural land in the countryside, such as the appeal Site.

29. The Inspector found:

"65. Saved WLP Policy OL6, dealing with Open Land, is cited in both putative reasons for refusal, although I note that it did not feature at all in the original Officer's Report to Committee of May 2014. This policy seeks to protect from development "locally important incidental open land within or adjacent to built-up areas" where that land contributes to the character and amenity of the area, has value as a recreational space or importance as a natural habitat. The Council contends that this policy applies in the current case, and would be breached by the appeal proposal.

66. However, whilst there is no specific definition of "locally important incidental open land" within the policy or its supporting text, I find it very difficult to accept that the original purpose of this policy was to provide protection for large areas of agricultural land in the countryside, such as the appeal site. If that had been the case, there would clearly have been no need for WLP Policy OL7, which dealt specifically with Development in the Open Countryside and which, amongst other matters, stated that the Council will protect the open countryside from any development that is likely to have an adverse effect on its character or quality.

…

68. I share the appellant's view that it is unreasonable and unacceptable to seek to reintroduce a blanket protection of open countryside through use of Policy OL6, as appears to be the Council's intention here. With these points in mind, I am not persuaded that WLP Policy OL6 is applicable or relevant in this case. In these circumstances there can be no breach of this policy by the appeal proposal. Albeit for a different site, I note that Inspector Hand reached a similar conclusion in the Muxton appeal."

30. Saved Policy OL6, and its supporting text, provided:

"**OL6 OPEN LAND**

Throughout the District, the Council will protect from development locally important incidental open land within or adjacent to built-up areas where that land contributes to the character and amenity of the area, has value as a recreational space or importance as a natural habitat.

8.3.21 Open land without any special designation can often make a valuable and important contribution to the character of an area and can help to define the setting of surrounding development and adjacent buildings. It can relieve the sense of congestion and pressure that might be felt, particularly in the older traditional urban areas of the District. These areas can

provide green space, visual variety and very local recreational opportunities. The Council considers the retention of these sites to be most important.

8.3.22 Many of the sites to which the above policy will apply are within Newport. Important area of open land within Newport, including those marked on the proposals map, need protecting from inappropriate development. The Council may seek, through negotiation, planning benefits in order to fulfil the potential of open land where that land is an important and integral part of a development.

8.2.23 The character of many of the villages within the District is defined by the open land and spaces between and around individual properties. Playing fields and children's play areas are also important features in a number of villages and once lost to development may be difficult to replace in the locality."

31. Policy OL7 (now expired) and its supporting text provided (so far as it material):

"**OL7 DEVELOPMENT IN THE OPEN COUNTRYSIDE**

The Council will protect the open countryside from any development that is likely to have an adverse effect on its character or quality and will protect the rural setting of settlements, buildings or features within the open countryside. In particular, the Council will not permit development which would contribute to the amalgamation of settlements.

8.3.24 …..

8.3.25 National advice, currently set out in PPG7, is that the countryside should be safeguarded for its own sake. Therefore as Telford, and to a lesser extent the other settlements around Telford, continue to develop, it is important that the undeveloped, rural 'gaps' between them are protected. Any development that could result ultimately in the coalescence of settlements will be strenuously resisted in order to help preserve the individual character that they each display.

8.3.26 The land around Telford is generally of good visual and agricultural quality. Some of the surrounding settlements are relatively close, and, although development will be directed towards the reuse of brownfield sites within urban areas, there is still likely to be pressure for development in fringe areas and in the "gaps" between settlements. Any proposals will be considered with great care."

32. In my judgment, the Inspector correctly interpreted Policy OL6, and applied it appropriately to the facts of this case. Policy OL6 protected "*incidental open land*", in

and around built-up areas, which was of importance and value to the local community, even though it had no special designation. Illustrations were provided in the supporting text. Although this Site was adjacent to a built-up area, it did not come within the natural meaning of the words "incidental open land" with no special designation, as it was a large tract of agricultural land, in use for that purpose. Moreover, the nature and character of this Site did not bear any resemblance to the illustrations in the supporting text. The public did not have access to it, other than along the public footpath, though naturally local residents appreciated the view and the sense of openness which it afforded. As part of the interpretative exercise which he had to undertake, I consider that the Inspector was entitled to take into account that the Site fell much more readily within the scope of Policy OL7, since it was "*open countryside*" beyond the settlement boundary of Telford. As the supporting text demonstrated, Policy OL7 was designed to protect the land around Telford which was "*generally of good visual and agricultural quality*", and to guard against development of fringe areas and gaps between settlements.

33. The Council rightly submitted that the Inspector's observation in AD 66 that, if large areas of agricultural land in the countryside fell within Policy OL6, then there would have been no need for Policy OL7, mistakenly overlooked the fact that OL6 was limited to land within or adjacent to built-up areas. Policy OL7 would still have been required to protect countryside situated away from built-up areas. However, I do not consider that this mistake undermines his interpretation of the policy, which was correct for the reasons I have given.

34. The Council did not argue at the Inquiry that parts of the Site which were situated close to areas used by members of the public, such as the cricket ground or the footpath or the residential roads, could be subject to Policy OL6, and it is not open to the Council to seek to attack the Inspector's decision for failing to consider this point. In any event, it is difficult to see how the policy could be applied in such a manner.

Ground 3

35. The Council submitted that the Inspector erred in law in rejecting the Council's submission that NPPF 112 ought to be treated as a policy which indicated that "*development should be restricted*" within the meaning of the second limb of the second bullet point on "*decision-taking*" in NPPF 14.

36. NPPF 112 provides:

> "Local planning authorities should take into account the economic and other benefits of the best and most versatile agricultural land. Where significant development of agricultural land is demonstrated to be necessary, local planning authorities should seek to use areas of poorer quality land in preference to that of a higher quality."

37. The Council relied upon the case of *Forest of Dean District Council v. Secretary of State for Communities and Local Government* [2016] EWHC 421 (Admin), where

Coulson J. held, at [23] – [42], that NPPF 134[1] was a policy which indicated that "*development should be restricted*" within the meaning of the second limb of the second bullet point under 'decision-taking' in NPPF 14. He treated the list of policies in footnote 9 was illustrative rather than exhaustive, but in any event, heritage assets were included in the list. He considered that the term "*restricted*" should be given a "*relatively wide meaning*"; in particular, "*restricted*" should not be interpreted to mean "*refused*", which was not the word used in the policy. The inclusion of NPPF 114[2] in the list of examples of restrictive policies indicated that "restricted" could encompass a policy, such as NPPF 134, which identified a situation in which the presumption in favour of development did not apply.

38. I agree with Coulson J.'s interpretation of the NPPF, but upon applying it here, I have concluded that NPPF 112 cannot be characterised as a policy which indicates that "*development should be restricted*" within the meaning of NPPF 14. I accept the Defendants' submissions that the policy is simply an instruction (i) to "*take into account*" the economic and other benefits of the best and most versatile agricultural land which does not confer any particular level of protection and (ii) to "*prefer*" the use of poorer quality land if significant development of agricultural land is necessary, which applies to all agricultural land, not just BMV land. It is not a prohibition on the use of BMV agricultural land, nor a restriction on development in principle; it does no more than to encourage the relocation of proposed development onto poorer quality agricultural land if available. The permissive language of NPPF 112 is very different to the language used in the "*specific policies*" of restraint identified in footnote 9, as Mr Buley demonstrated in his helpful table.

39. The Inspector's reasoning was at AD 85 & 86, where he said, inter alia:

> "85. …. there is no internal balancing exercise required by paragraph 112, nor is there any suggestion that planning permission should be refused if BMV land is to be lost. Rather, the loss of agricultural land is just one of the matters which has to be taken into the overall planning balance when a proposal for development is being considered.
>
> 86. That is how the Council approached this matter when it recently granted planning permission for the aforementioned major development at Priorslee, involving the loss of over 60 ha of agricultural land, some 24.5 ha of which is classed as high quality BMV agricultural land. Presumably the Council also adopted this approach insofar as TWCS Policy CS13 is concerned, as the loss of BMV agricultural land did not prevent the grant of planning permission. I have regard to this matter in undertaking the planning balance, later in this decision, but in view of the points detailed above I do not share the Council's

[1] "134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

[2] "114. Local planning authorities should ….maintain the character of the undeveloped coast, protecting and enhancing its distinctive landscapes, particularly in areas defined as Heritage Coast, and improve public access to an enjoyment of the coast."

view that loss of BMV land is a matter covered by footnote 9 to Framework paragraph 14."

40. Although I agree with Coulson J. that the correct test is "*restricted*" not "*refused*", I consider that the Inspector's ultimate conclusion was correct.

41. In my judgment, the Inspector was entitled to take into account the Council's approach to NPPF 112, when resolving to grant planning permission at Priorslee, in support of his interpretation of NPPF 112 and NPPF 14. The Council's decision to grant planning permission notwithstanding the loss of BMV agricultural land was capable of being a material consideration which the Inspector was entitled to take into account in assessing the planning balance and deciding whether to grant planning permission. Previous decisions raising the same or similar issues were potentially relevant. I refer to my reasoning under Ground 1 above.

42. The Inspector applied NPPF 112 in the overall planning balance, at AD 144, which is set out at paragraph 12 above, and accorded only "*a modest amount of weight*" to the impact of the loss of BMV agricultural land. Much of the agricultural land surrounding Telford was BMV; no alternative site comprising poorer quality land was put forward. So even if the Inspector had treated NPPF 112 as a policy which restricted development under NPPF 14, and applied it without the weighted presumption in favour of the grant of permission, it seems unlikely that, in the exercise of his planning judgment, he would have refused planning permission for that reason. So he would have then gone on to consider NPPF 112, together with the other relevant factors, as part of what he described as "*the second balancing exercise*" in AD 143, applying the weighted presumption in favour of granting permission as the development plan policies were out-of-date, just as he did in the decision under challenge. So, either way, the outcome would likely have been the same.

43. I consider that this two stage approach (which the Inspector adopted in respect of the restrictive policy in NPPF 134) was appropriate, even though somewhat repetitive. In a case such as this, with multiple factors and policies to be considered, it was an effective way of applying the differing requirements in NPPF 14. Support for such an approach was expressed in *R (Watermead Parish Council) v. Aylesbury Vale District Council* [2016] EWHC 624 (Admin), where HH Judge Waksman QC (sitting as a Judge of the High Court) considered the application of NPPF 14 to development in "*locations at risk of flooding or coastal erosion*", cited in footnote 9 as an example of policies which indicated that development should be restricted. The NPPF policies are at NPPF 100 – 108. The Judge held, at [45] – [48], that the presumption weighted in favour of granting permission for development, set out in the second bullet point, should be initially dis-applied, as it would run contrary to the presumption against development contained in the restrictive policy. However, if after application of the restrictive policy, the outcome was in favour of development, then the weighted presumption in favour of development "*resurfaces and can be applied*".

Ground 5

44. The Council submitted that the Inspector erred in concluding that Policy CS7 on development in rural areas did not conform with the NPPF and so was not up to date. It avoided the absolute restrictions in the policy which preceded it, WLP Policy H9.

It adopted a three tier approach, focusing growth in three sustainable villages; allowing limited development in other villages, and imposing strict controls (but not an absolute ban) on development in the open countryside.

45. Policy CS7 provided, so far as material, as follows:

> "**CS7 Rural Area**
>
> Development within the rural area will be limited to that necessary to meet the needs of the area. It will be focused on the settlements of High Ercall, Tibberton and Waters Upton. New housing development will be expected to deliver affordable housing to the level of 40% of all such development. Outside of these settlements development will be limited and within the open countryside will be strictly controlled."

46. The Inspector said:

> "32. It is against this backdrop that I have to consider whether TWCS Policies CS1, CS3 and CS7 can be considered up-to-date and, if not, what weight should reasonably be given to them. I agree with the main parties that Policy CS1 is out of date as it refers to housing figures which were based on now-revoked Regional Guidance. The relevance of Policies CS3 and CS7 to the current proposal is that they seek to restrict development to existing urban areas, in particular Telford. Policy CS7 deals explicitly with the rural area, stating that development within that area will be focussed on the same 3 settlements which feature in saved WLP Policy H9, but goes on to say that outside these settlements development will be limited and, within the open countryside, will be strictly controlled.
>
> 33. However, this latter point, in itself, demonstrates that this policy is not up-to-date and in conformity with the more recent planning policy context established by the Framework, where there is no blanket protection of the open countryside and where there is a requirement to boost significantly the supply of housing. I consider it also of relevance that although the appeal site does lie outside the current settlement boundary, there was general agreement between the parties that, if allowed, the proposed development would function as an urban extension to Telford, and would not be considered as a rural settlement…
>
> 35. In view of all the above points, and notwithstanding the fact that the TWCS remains part of the statutory Development Plan, I have to conclude that Policies CS1, CS3 and CS7 are out-of-date, and should not be given full weight in this appeal, when assessed alongside the guidance in paragraph 215 of the Framework. Insofar as this conclusion differs to that reached by Inspector Hand, I have set out my reasons, above. Overall,

> these matters lead me to conclude that the appeal proposal should be assessed using the approach set out in the second bullet point of the decision-taking section of paragraph 14 of the Framework, regardless of whether the Council is able to demonstrate a 5 year supply of deliverable housing land."

47. In my judgment, the Inspector did not err in law in concluding that Policy CS7 was not in conformity with the NPPF and so was out-of-date. It is a core planning principle, set out in NPPF 17, that decision-taking should recognise "*the intrinsic character and beauty of the countryside and supporting thriving rural communities within it*". This principle is reflected throughout the NPPF e.g. policy on the location of rural housing (NPPF 55); designation of Local Green Space (NPPF 76); protection of the Green Belt (NPPF 79 – 92) and Section 11, headed "Conserving and enhancing the natural environment" (NPPF 109- 125). However, NPPF does not include a blanket protection of the countryside for its own sake, such as existed in earlier national guidance (e.g. Planning Policy Guidance 7), and regard must also be had to the other core planning principles favouring sustainable development, as set out in NPPF 17. The Inspector had to exercise his planning judgment to determine whether or not this particular policy was in conformity with the NPPF, and the Council has failed to establish that there was any public law error in his approach, or that his conclusion was irrational.

Conclusions

48. Despite Mr Jones' excellent submissions, permission is refused on Grounds 1, 2 and 5 and the Council's application to quash the decision on Ground 3 is refused.