Neutral Citation Number: [2016] EWHC 2429 (Admin)

Case No: CO/978/2016

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

Bristol Civil Justice Centre
2 Redcliff Street
Bristol

Date: 04/10/16

Before :

MR JUSTICE HICKINBOTTOM

Between :

FOREST OF DEAN DISTRICT COUNCIL

Claimant

and

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

Defendants

Peter Wadsley and **Philip Robson** (instructed by **Forest of Dean District Council Legal Services**) for the **Claimant**
Gwion Lewis (instructed by the **Government Legal Department**) for the **First Defendant**
Peter Goatley (instructed by **Irwin Mitchell LL**) for the **Second Defendant**

Hearing date: 4 October 2016

Approved Judgment

Mr Justice Hickinbottom:

Introduction

1. This is an application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"), in which the Claimant local planning authority ("the Council") seeks to quash a decision dated 14 January 2016 of an inspector appointed by the First Defendant Secretary of State, namely George Baird BA (Hons) MA MRTPI ("the Inspector"), to allow an appeal under section 78 of the 1990 Act against its decision dated 10 December 2014 and to grant planning permission for up to 95 dwellings and associated development at land north of Gloucester Road, Tutshill, Chepstow, Gloucestershire ("the Site") on the application of the Second Defendant ("the Developer"). The Site is immediately adjacent to the village of Tutshill, being separated from other dwellings by Gloucester Road and Elm Road.

2. At the hearing before me, the Council has been represented by Peter Wadsley and Philip Robson, the Secretary of State by Gwion Lewis, and the Developer by Peter Goatley, all of Counsel. I thank them all for their focused, and helpful, submissions.

3. The Council originally sought to challenge the Inspector's decision on several grounds; but, on 10 June 2016, I refused permission to proceed on all but one. The application in relation to the other grounds has not been pursued.

4. The sole extant ground is straightforward, discrete and narrow. Briefly, the Council through Mr Wadsley contends that the Inspector erred in the manner in which he dealt with landscape. Paragraph 109 of the National Planning Policy Framework ("the NPPF") states that: "The planning system should contribute to and enhance the natural and local environment by… protecting and enhancing valued landscapes…". That requires a planning decision-maker to determine whether the relevant landscape is "valued"; and then, if it is, to recognise that enhanced planning status by taking into account the policy that such landscapes should be protected and enhanced. The Inspector erred (it is said) by equating "valued landscape" with a landscape that is designated to have a particular landscape quality. The landscape here is not the subject of any designation; but the Inspector erred in finding that, consequently, it was necessarily also not "valued". He ought to have assessed whether the landscape was a "valued landscape" for the purposes of paragraph 109 of the NPPF; and, had he done so, it cannot be assumed that he would definitely have concluded that it was not; and it cannot be assumed that his decision to grant the application for planning permission would have been the same. The Inspector's error was therefore material, and his decision ought to be quashed.

5. Mr Lewis for the Secretary of State concedes that the Inspector erred in law in eliding designation of a landscape area with an area being a valued landscape; but contends that, even if the Inspector not made that error, his decision to grant planning permission would inevitably have been the same; because the Inspector properly considered landscape value (finding it to be "medium") and, in the circumstances, even if he had not erred, it is inconceivable that he would have found the landscape to be valued, or concluded that planning permission ought not to be granted. Therefore, the Council should be denied any relief.

6. On the other hand, Mr Goatley for the Developer submits that, if the Inspector's Decision is properly construed, it does not err in law: the Inspector properly found the landscape not to be valued because it lacked the necessary attributes, and lawfully approached the issue of valued landscape, concluding that planning permission ought to be granted. Alternatively, he submits that, even if the Inspector err in law in eliding these two concepts as alleged, then the findings he made would inevitably have led him to the same conclusion in any event; and, so, again, relief ought to be denied.

The Relevant Law and Policy

7. The relevant law and policy is uncontroversial.

8. Section 70(2) of the 1990 Act provides that, in dealing with an application for planning permission, a decision-maker must have regard to the provisions of "the development plan", as well as "any other material consideration". "The development plan" sets out the local planning policy for an area, and is defined by section 38 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to include adopted local plans.

9. Section 38(6) of the 2004 Act 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."

Section 38(6) thus raises a presumption that planning decisions will be taken in accordance with the development plan, but that presumption is rebuttable by other material considerations.

10. The relevant adopted local plan for the Site was the Council's Core Strategy adopted in February 2012 ("the Core Strategy") together with saved policies from the Council's Local Plan 2005. There was also an emerging Allocations Plan.

11. Policy CSP1 of the Core Strategy provides that the design and construction of new development must take into account important characteristics of the environment and conserve, preserve or otherwise respect them in a manner that maintains or enhances their contribution to the environment, including their wider context. Mr Wadsley emphasised the disjunctive nature of "maintained *or* enhanced", compared with paragraph 109 of the NPPF in which the terms are used conjunctively ("protected *and* enhanced"), such that the status conferred by paragraph 109 is the greater. In achieving that, Policy CSP1 sets out a number of matters that must be considered, including: "The effect of the proposal on the landscape including [Areas of Outstanding Natural Beauty] and any mitigation/enhancement that is necessary or desirable". Paragraph 6.5 of the notes to the Core Strategy states:

> "Overall the variety of landscapes is an outstanding feature of the Forest of Dean District and it is vital that development proposals take account of this, as well as any nature conservation or archaeological and/or historical interests. The impact on the landscape will primarily

> be evaluated using the Council's Landscape Supplementary Planning Document and the Landscape Assessment. It will be a key consideration in the evaluation of any development proposal."

12. "Material considerations" in this context include statements of central government policy which are now largely set out in the NPPF. The true interpretation of policy, including the NPPF, is a matter of law for the court to determine (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13).

13. A landscape area may be designated in a number of ways, including internationally, nationally or by a local authority. Whilst the principle landscape designations in England are as National Parks, Areas of Outstanding Natural Beauty and Heritage Coasts, these are supplemented by a host of non-statutory designations, mostly made by local authorities. Once designated, a landscape is the subject of identified protection.

14. I have already referred to the terms of paragraph 109 of the NPPF (see paragraph 4 above), which is at the heart of this application. "Valued landscape" is not defined in the NPPF itself; but its scope and definition were considered recently in Stroud District Council v Secretary of State for Communities and Local Government [2015] EWHC 488 (Admin) ("Stroud"). Ouseley J held that the NPPF is clear in distinguishing "valued landscape" from landscape which has a "designation" (see [13]); and he considered that "valued" meant something other than popular, such that landscape was only "valued" if it had physical attributes which took it out of the ordinary (see [14] and [18]). That reasoning was followed by Patterson J in Cheshire East Borough Council v Secretary of State for Communities and Local Government [2016] EWHC 694 (Admin); and, before both the Inspector and me, it has been uncontentious. It reflects, at least to an extent, the Landscape Institute's Guidelines for Landscape and Visual Impact Assessment ("the GLVIA"), which also makes clear that an absence of designation does not necessarily mean an absence of landscape value. The GLVIA identifies various factors that may be relevant in the assessment of landscape value, in something known as "Box 5.1".

15. I should also briefly refer to paragraphs 47 and 49 of the NPPF, which provide that, if the relevant authority cannot demonstrate a five-year plus buffer supply of housing land at the time of a decision for specific housing development, then that weighs in favour of a grant of permission. In particular, in those circumstances, relevant housing policies are to be regarded as out-of-date, and hence (i) they are of diminished weight; and (ii) there is a presumption of granting permission unless the adverse impacts of granting permission "significantly and demonstrably" outweigh the benefits, or other NPPF policies indicate that development should be restricted in any event. In this case, the Inspector found that the Council had failed to demonstrate a five-year housing supply, and therefore he applied the provisions in paragraphs 47 and 49 of the NPPF. That finding and approach is no longer challenged.

16. Although an application under section 288 is by way of statutory application, it is determined on traditional judicial review grounds.

17. Therefore, whilst a planning decision-maker must, so far as material, apply the law correctly and take into account all material considerations, the weight to be given to such considerations is exclusively a matter of planning judgment for the decision-

maker, who is entitled to give a material consideration whatever weight, if any, he considers appropriate, subject only to his decision not being irrational in the sense of Wednesbury unreasonable (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780F-G).

18. An inspector's decision letter cannot be subjected to the same exegesis that might be appropriate for a statute or a deed. It must be read as a whole, and in a practical, flexible and common sense way, in the knowledge that it is addressed to the parties who will be well aware of the issues and the arguments deployed at the inspector's enquiry, so that it is not necessary to rehearse every argument but only the principal important controversial issues. The reasons for an inspector's decision must be intelligible and adequate to enable an informed observer to understand why he decided the appeal as he did, including his conclusions on those issues. They must not give rise to any substantial doubt that he proceeded in accordance with the law, e.g. in his understanding the relevant policies (see Seddon Properties v Secretary of State for the Environment (1981) 42 P&CR 26 at page 28 per Forbes J; Bolton Metropolitan Borough Council v Secretary of State for the Environment [1995] 71 P&CR 309 at page 314; South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80 at pages 82H, 83F-G per Hoffmann LJ; and South Bucks District Council v Porter (No 2) [2004] UKHL 33 at [36] per Lord Brown).

19. Finally, in terms of the relevant law, before me, it is common ground that, in respect of an application under section 288 of the 1990 Act, section 31(2A) of the Senior Courts Act 1981 – under which the court must refuse to grant relief if it is highly likely that the outcome would not have been substantially different had the error not been made – does not apply, that provision being restricted to applications for judicial review. Therefore, where an inspector has erred, the court should only refuse relief if the inspector's decision would inevitably (i.e. necessarily) have been the same had the error not been made (Simplex GE (Holdings) Limited v Secretary of State for the Environment [1988] PLR 25).

The Issue

20. The Inspector had to consider a number of key issues, including the adverse impact of the proposed development on the character and appearance of the area. One element of that, raised by the Council for the first time in the appeal, was whether the Site was located in an area of "valued landscape" for the purposes of paragraph 109 of the NPPF.

21. It was not suggested by any party that a "valued" landscape was restricted to an area which had been the subject of some form of landscape designation; but, in its submissions to the Inspector, the Council contended that the Site, although not designated, fell within a "valued landscape" as defined in Stroud (see, e.g., paragraph 10 of the Council's Opening Statement and paragraphs 6-7 of its Closing Submissions). The Council's case on this issue was supported by expert evidence from Peter Radmall MA BPhil CMLI. His evidence was that the GLVIA makes clear that "highly valued landscapes are normally designated", but "the absence of designation does not necessarily indicate an absence of value (paragraph 6.3 of his July 2015 Report). He appended a copy of the Stroud judgment, to which he referred in his report; and he made an assessment of landscape value on the basis of the GLVIA criteria, before concluding that, in his opinion, "the Site and its surroundings

demonstrate sufficient physical attributes to suggest that they fall within a locally valued landscape" so that it was "worthy of a commensurate degree of protection and enhancement under NPPF paragraph 109" (paragraphs 6.10 and 6.11).

22. On the paragraph 109 issue, the Developer's stance was equally clear: supported by the evidence of another expert (Gary Holliday BA(Hons) MPhil CMLI), it contended that there was no proper basis for claiming that the Site is a "valued landscape", as "there is nothing especially distinctive about the appeal site" which is "a fairly commonplace landscape located on the edge of, and influenced by, the settlement of Tutshill" (paragraph 16 of the Developer's Opening Submissions). Mr Holliday also made an assessment on the basis of the GLVIA criteria. He concluded that there was "absolutely nothing in the Council's evidence or closing submissions… to support a conclusion that this Site has a demonstrable attribute taking it beyond mere countryside. To the contrary, as the [cross examination] of [Mr Radmall] demonstrated, this is a fairly commonplace landscape, located on and influenced by the settlement of Tutshill" (paragraph 15 of the Developer's Closing Submissions).

23. This issue as to whether the Site had relevant attributes sufficient to take it "out of the ordinary", and thus formed part of a "valued landscape", was therefore clearly set out before the Inspector, in the context of the broader issue as to the impact of the proposed development on the character and appearance of the area.

<u>The Inspector's Decision</u>

24. The Inspector identified "the effect [of the proposal] on the character and appearance of the area" as a major issue with which he had to grapple (paragraph 10 of his Decision). He dealt with it in paragraphs 11-19.

25. For the purposes of this application, the material parts of the Decision are as follows:

> "13. CS Policy CSP1 seeks to ensure that new development takes into account important characteristics of the environment and conserves, preserves and otherwise respects them in a manner that maintains or enhances their contribution to the environment. This policy is broadly consistent with the objectives of the [NPPF] which seek to ensure that planning decisions take account of and recognise the intrinsic character and beauty of the countryside (paragraph 17).
>
> 14. The Forest of Dean Landscape Character Assessment - November 2002 locates the site within Landscape Character Type (LCT) 6 - Unwooded Vale and more specifically within Landscape Character Area (LCA) 6a - Severn Vale - Stroat and Sedbury. The Unwooded Vale LCT is an extensive area whose overall character type is that of a soft rolling landscape that is distinctly small scale, intimate and domestic. LCA 6a is noted as being typical of the wider vale landscape with a gently undulating landform, a patchwork of fields defined by hedgerows, scattered farmhouses. A feature of this LCA is the urbanising influence of Tutshill/Sedbury.
>
> 15. Before and during the inquiry I had the opportunity to experience the nature of the surrounding and wider landscape as part of my

> accompanied and unaccompanied visits to the site and the wider area. Whilst the appeal site shares similar characteristics to the wider LCT, there are no particular landscape features, characteristics or elements that demonstrate that the appeal site is in GLVIA terms representative of the wider landscape i.e. a particularly important example which takes this site beyond representing anything more than countryside in general. I have no reason to disagree with the [Council's] and [Developer's] assessments that the landscape value and sensitivity of the area to change are medium.
>
> 16. The [Council] refers to [NPPF] paragraph 109, which refers to 'protecting and enhancing valued landscapes'. Given that all landscapes are valued by someone at some time, the words 'valued landscape' must mean a landscape that is considered to be of value because of particular attributes, that have been designated through the adoption of a local planning policy document. The landscape around Tutshill/Sedbury is not the subject of any statutory landscape designation or emerging AP designation. The [NPPF] has to be read as a whole and paragraph 17 refers to recognising the intrinsic character objective of enhancing the natural environment, which I take to mean the countryside in general and then it goes on to refer to valued landscapes, which must mean something more than just countryside in general. Thus, in this case, I consider that the reference in [NPPF] paragraph 109 adds nothing to the exercise I need to undertake or the weight to be attached to the landscape and visual impact of the scheme.
>
> 17. Given the distinctly small scale, intimate and domestic nature of the landscape and the existing mature screening on the southern and eastern margins of the site, which would be retained and reinforced by new planting, the landscape and visual impact of this scheme would be highly localised. The loss of the fields where built development would occur would result in harm to and impact on landscape character. However, given the localised nature of this impact the effect would be Minor/Moderate Adverse."

26. After dealing with visual impact, the Inspector thus concluded that:

> "On this issue, I conclude that there would be highly localised harmful landscape and visual impacts that would conflict with the objectives of [Core Strategy] Policy CSP1."

27. He found that a five-year housing and supply had not been demonstrated; and that "taken in the round,… the adverse impacts of this proposal would not significantly and demonstrably outweigh the benefits of this housing scheme, when assessed against the policies in the [NPPF] as a whole". He thus allowed the appeal, granting outline planning permission subject to appropriate conditions.

The Ground of Challenge

28. As I have already indicated, there is a single ground of challenge; and it is simply put.

29. In paragraph 16 of the Decision, the Inspector proceeded on the basis that a "valued landscape" must be a landscape that is "considered to be of value because of particular attributes that have been designated through the adoption of a local planning document" (paragraph 16). Mr Wadsley submits that, in the context of landscape, the Inspector erred in interpreting paragraph 109 of the NPPF, in effectively eliding, or otherwise failing to distinguish between, designation and value. As a result of that failure, he made no proper assessment of whether the landscape was valued; as the landscape was not designated, he simply proceeded on the basis that it was also not valued. Mr Wadsley makes no complaint about the planning balancing exercise performed by the Inspector on the basis that landscape did not have the enhanced status given by paragraph 109; but, he submits, if it was properly a "valued landscape", then, in the planning balance exercise, it ought to have been granted the enhanced status given by paragraph 109 of the NPPF. Therefore, his failure to consider whether it was "valued landscape" could have resulted in a different determination of the planning application.

30. I am unpersuaded by that submission.

31. As I have indicated, it was common ground between the parties before the Inspector that the relevant landscape was not designated; and, following Stroud, the issue for the Inspector was whether the landscape was "valued" in the sense that it had physical attributes which took it out of the ordinary. On the basis of the submissions made to him, that was quite clearly an issue that required determination.

32. I accept that the wording of paragraph 16 of the Decision is less than optimal; and, in particular, the allusion to "designated… attributes" in that paragraph is unhappy. However, looked at as a whole, as Mr Goatley submitted, I am satisfied that the Inspector did properly consider and determine that issue. Before he turned to paragraph 109 of the NPPF, in paragraph 15 of his Decision, having referred to the fact that he had had the opportunity of experiencing the surrounding and wider landscape as part of his site visits, the Inspector concluded that "there are no particular landscape features, characteristics or elements that demonstrate that the appeal site is in GLVIA terms representative of the wider landscape, i.e. a particularly important example which takes this site beyond representing anything more than countryside in general". Both experts had relied upon the GLVIA criteria in making a landscape value assessment; if not the exclusive analysis they each relied upon, that was the foundation of the assessment of each expert. On the evidence before him, the Inspector was clearly entitled to arrive at that conclusion. Indeed, Mr Wadsley frankly – and, if I might say so, quite properly – accepts that, subject possibly to making an overt finding that the landscape was not "valued" – had the Inspector stopped there, the Council could have had no complaint.

33. However, Mr Wadsley submits, that paragraph cannot be considered in a vacuum. The Inspector did not stop there; he proceeded in the terms of paragraph 16.

34. Mr Wadsley takes particular exception to the second sentence in that paragraph which, he says, betrays the Inspector's error of approach. That sentence reads:

> "Given that all landscapes are valued by someone at some time, the words "valued landscape' must mean a landscape that is considered to be of value because of particular attributes…".

Pausing there, there can be no complaint about that passage so far as it goes: it is a paraphrase of Ouseley J in Stroud. The sentence, however, continues:

> "… because of particular attributes *that have been designated through the adoption of a local planning policy document*" (emphasis added).

These are the words at the focus of Mr Wadsley's complaint, and the Council's challenge. The Inspector then immediately goes on in paragraph 16 to say that the *landscape* here is not the subject of any actual or proposed designation.

35. The words of which Mr Wadsley complains are, on any basis, difficult to construe. No one before me suggests otherwise. On their face, they refer to "designated attributes", in circumstances in which only areas of land, and not attributes, are designated. Mr Wadsley submitted that the Inspector was here referring to attributes which have resulted in the relevant landscape area being designated, a construction supported (he said) by (i) the fact that the Inspector immediately proceeded to say that there was no such designation here; and (ii) the Inspector gave no detailed reasons for rejecting the evidence of Mr Radmall that the Site did lie within a valued landscape area.

36. However, although of course it is vital that a planning decision-maker properly construes policy – that construction, of course, being a matter of law for the court – it is also important that an inspector's decision such as this is read in the light of the key issues before him or her, and broadly and in a common sense way. When the Decision in this case is so construed, I am persuaded that, whatever the Inspector precisely meant by the words in paragraph 16 upon which Mr Wadsley has focused, this application should be dismissed.

37. First and foremost, I am not persuaded that the Inspector did err in his approach to paragraph 109. As I indicated in the course of debate, it would have been surprising if he had misunderstood his task in relation to "valued landscape", given the written and oral evidence and submissions on the point: whether the Site had physical attributes such as to take its landscape outside the "ordinary" countryside was, quite clearly, an issue that the Inspector was required to consider and determine.

38. And, in paragraph 15 of his decision, he did determine that issue. There, the Inspector found that there were no attributes that took the Site "beyond mere countryside". I do not accept that, in the second sentence of paragraph 16, the Inspector had some passing aberration so that, having made the Stroud finding in paragraph 15, he erred in eliding designation and valued landscape in the very next paragraph. The finding in paragraph 15 can be linked to the passage later in paragraph 16, in which the Inspector said that "valued landscape" must mean more than just countryside in general; and, so, paragraph 109 adds nothing to the planning balance exercise that he (the Inspector) went on to perform. Whatever the Inspector meant by "particular attributes that have been designated through the adoption of a local planning policy document", I am satisfied that he did not mean that, simply because the area was not designated, it did not and could not comprise valued landscape. If he had meant that, he could easily have said so. In my judgment, paragraph 15 clearly indicates that that is not what he meant.

39. Therefore, gratefully the terminology of Ouseley J in Stroud (at [14]), whilst it is clear that there is some form of verbal infelicity in paragraph 16 of the Inspector's Decision, it is not something which persuades me that he adopted an unlawful approach to the meaning of "valued" or to paragraph 109 of the NPPF.

40. However, even if I am wrong in that – and the Inspector did have the aberration in law to which I have referred – I am very confident that that made no difference to the outcome, either in his finding that this was not "valued landscape" or, consequently, in his conclusion that planning permission ought to be granted.

41. On the basis that the Inspector did err in law in eliding designation and valued landscape, Mr Lewis submitted that, because the landscape value is a continuum and the Inspector had made an assessment of such value (assessing it as "medium"), I could and should be satisfied that the Inspector would have found this was not "valued landscape" for paragraph 109 purposes, if he had brought his mind to bear upon the matter. I find some difficulties with that as a proposition; but it is unnecessary for me to grapple with it, because, in my respectful view, the answer to the issue concerning discretionary relief is much simpler. As I have explained, the Inspector was satisfied – and expressly found – that there were no attributes here that took the Site beyond mere countryside, a finding for which there was eminently sufficient evidence. On the basis of that finding and Stroud, the Inspector was bound to find that the Site was not "valued landscape", even if, contrary to my firm view, his legal approach was wrong.

42. Although it is unnecessary for me to make a finding as to whether, alone, it would make that same decision inevitable, the Inspector's treatment of landscape impact in paragraphs 17 and 18 of his Decision at least supports that analysis.

Conclusion

43. For those reasons, this application is refused.