Neutral Citation Number: [2014] EWHC 4095 (Admin)

Case No: CO/3063/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2014

Before :

MR JUSTICE COLLINS

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Between :

THE QUEEN (on the application of LARKFLEET HOMES LIMITED)	**Claimant**
- and -	
RUTLAND COUNTY COUNCIL	**Defendant**
-and-	
UPPINGHAM TOWN COUNCIL	**Interested Party**

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Mr Charles Banner and Ms Heather Sargent (instructed by **Marrons Shakespeares**) for the **Claimant**
Mr Martin Carter (instructed by the **Head of Legal Services, Peterborough City Council**) for the **Defendant**

Hearing dates: 13th November 2014

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Approved Judgment

Mr Justice Collins:

1. The Claimant challenges the decision of the Defendant of 29 May 2014 to allow the Uppingham Neighbourhood Development Plan (UNP) to proceed to a neighbourhood planning referendum. Neighbourhood Development Plans (NDP) were introduced by the Localism Act 2011. Their purpose was to enable local communities to make a final decision on certain aspects of planning policies which directly affect them. There are a number of steps which have to be taken by planning authorities in drawing up plans setting out policies which will apply in their area. The statutory provisions are complex and as will become apparent, not always well drafted. They also involve relatively lengthy processes and inquiries which does nothing to reduce expense that has to be incurred. However, it is of obvious importance that all necessary procedures are followed and that powers are not misused.

2. The Claimant is a house-building company which has a commercial interest in 4.1 hectares of land situated to the north west of Uppingham. The Defendant's Core Strategy, adopted in July 2011, a Development Plan Document (DPD) within the meaning of the Planning and Compulsory Purchase Act 2004, provided for development in land to the west or north west of Uppingham. The location and details of future housing development was to be determined through the Site Allocations and Policies DPD (SAPDPD). The SAPDPD containing preferred options was published in October 2012. There had been inclusion of the site in which the Claimant was interested in the earlier SAPDPD proposals.

3. In April 2013 the Defendant published its SAPDPD proposed submission document. It was the final version which needed to be approved by an Inspector, who had to be satisfied among other things that it was sound. By then, the Localism Act 2011 had come into force so that NDPs were possible. In paragraphs 1.9 to 1.12 it is said:-

> "1.9 A separate Neighbourhood Plan for Uppingham is being prepared by Uppingham Town Council. This will cover Uppingham town and parts of the surrounding area and will be subject to separate consultation, examination and referendum under the Neighbourhood Planning process.
>
> 1.10 The Uppingham Neighbourhood Plan will consider proposals for residential, employment and other land use allocations in its area and allocate sites where appropriate. Consequently no sites are allocated for development in Uppingham in this Site Allocations and Policies DPD although all other policies of the plan will apply in this Area.
>
> 1.11 Sites for residential and employment development in Uppingham that were previously identified in the Preferred Options version of this Site Allocations and Policies DPD are not carried forward in this version of the plan but will be put forward to Uppingham Town Council together with the responses to consultation that have been received for consideration through the Uppingham Neighbourhood Plan.

> 1.12 In the event that the Uppingham Neighbourhood Plan does not address the need to allocate residential and employment sites in its area or if the Plan fails to pass the public examination and referendum processes, a review of the Rutland Local Plan (to commence in 2014) will consider the issues and may allocate sites if required".

4. The initial draft of the UNP was produced in May 2013. In the foreword it states that it gave a "unique opportunity for residents and businesses to influence the development of the town over the next thirteen years". Residential development was seen to be a key aspect of the plan. It identified three sites which had been selected for residential development to the west of the town none of which included the site in which the Claimant had an interest. The Claimant through Mr Banner submitted a document described as a skeleton argument in October 2013 which asserted that the adoption of the NDP would be unlawful. Essentially it included the matters relied on in this claim. The alleged unlawfulness was not accepted and the final draft to go to a local referendum was produced in December 2013. This maintained the three sites for housing, labelling them A, B and C and providing for at least 170 homes during the period up to 2026.

5. Directive 2001/42/EC (the SEA Directive) applies so that consideration of the impact of policies in plans on the environment was required. The Directive has been applied domestically by the Environmental Assessment of Plans and Programmes Regulations 2004/1633. Regulation 5 of the Regulations (which reflects Article 3(2) and (3) of the Directive) so far as material provides that any plan which is prepared for town and country planning or land use and which includes projects which are within the relevant definition, as this does, requires during its preparation and before its adoption the carrying out of an environmental assessment (Paragraph 5(1) and (2)). Paragraph 5(6) provides:-.

> "An environmental assessment need not be carried out:-
>
> (a) for a plan of the description set out in paragraph (2)…which determines the use of a small area at local level; …unless it has been determined under Regulation 9(1) that the plan …… is likely to have significant environmental effects…."

6. Regulation 9 provides, so far as material:-

> "(1) The responsible authority shall determine whether or not a plan…of a description referred to in….
>
> (b) paragraph 6(a) of [Regulation 5] is likely to have significant environmental effects….
>
> (3) Where the responsible authority determines that the plan…..is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it shall prepare a statement of its reasons for the determination"

Regulation 9(2) requires that criteria set out in Schedule 1 of the Regulations must be taken into account. It is not necessary for the purposes of this case to spell them out. Schedule 2 paragraph 6 is important. It provides for assessment of:-

> "The likely significant effects on the environment, including short, medium and long term effects, permanent and temporary effects, positive and negative effects….."

It then lists the issues which are material. The important requirement in the context of this claim is that there must be an assessment of both any positive and negative effects which are significant.

7. Three grounds are relied on by Mr Banner on behalf of the Claimant. First, it is said that the legislation on its true construction does not permit allocation of sites for particular development in NDPs. Secondly, it is said that there was a failure to apply the correct test in concluding that the UNP fell within Regulation 5(6)(a) of the 2004 Regulations in that it comprised a small area at local level. Thirdly, it is said that there was a failure to carry out the required environmental assessment process properly because of a failure to consider whether the proposals would cause any significant positive environmental effects.

8. The first ground requires consideration of a number of legislative provisions. Section 37 of the 2004 Act as amended by the Planning Act 2008 and the Localism Act 2011 provides so far as material:-

> "(2) Local development document must be construed in accordance with Section 17…..
>
> (3) A development plan document is a local development document which is specified as a development plan document in the local development scheme".

Section 38(3) provides that outside Greater London in England the development plan is, so far as material for the claim:-

> (b) the development plan documents (taken as a whole) which have been adopted as approved in relation to that area and
>
> (c) the neighbourhood development plans which have been made in relation to that area".

Section 38(3)(c) was added by the Localism Act 2011.

9. Section 17 of the 2004 Act is headed 'local development documents'. It has been amended by the Planning Act 2008. As amended and as far as material it provides:-

> "17(3) The local planning authority's local development documents must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area….
>
> (7) regulations under this section may prescribe:-

> (za) which descriptions of documents are, or if prepared are, to be prepared as local development documents….
>
> (8) A document is a local development document only in so far as it or any part of it:-
>
> (a) is adopted by resolution of the local planning authority as a local development document;
>
> (b) is approved by the Secretary of State under section 21 or 27".

It is not necessary to refer to the powers of the Secretary of State. Sections 19 and 20 contain details of the processes required in preparing local development documents.

10. Section 20 requires that any development plan document must be submitted to the Secretary of State. There will be an independent examination carried out by a person appointed by the Secretary of State who must be satisfied that it complies with the requirements of the Act and any regulations and is sound. That exercise was carried out for the SAPDPD. The inspector reported on it on 27 August 2014. He did not accept that to put site allocations into the UNP was unlawful thus rejecting Mr Banner's submissions. So far as the environmental assessment was concerned, he made the point in paragraph 40 of his report that, while there has been no assessment of the cumulative effect of the SAPDPD and the UNP taken together, the development proposal in the UNP was not additional to that already accounted for in the SAPDPD. Thus an assessment of the cumulative effect would have had little value.

11. Regulations made under s17(7) of the 2004 Act are to be found in the Town and Country Planning (Local Planning) (England) Regulations 2012. Regulation 5 is material for the purposes of this claim. It provides so far as material:-

> "(1) For the purposes of section 17(7)(za) of the [2004] Act the documents which are to be prepared as local development documents are –
>
> (a) any document prepared by a local planning authority individually or in co-operation with one or more other local planning authorities, which contains statements regarding one or more of the following –
>
> (i) the development and use of land which the local planning authority wish to encourage during any specified period;
>
> (ii) the allocation of sites for a particular type of development or use;
>
> (iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
>
> (iv) development, management and site allocation policies, which are intended to guide the determination of applications for planning permissions….

> (2) For the purpose of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are –
>
> (a) any document which –
>
> (i) relates only to part of the area of the local planning authority;
>
> (ii) identifies that area as an area of significant change or special conservation; and
>
> (iii) contains the local planning authority's policies in relation to the area; and
>
> (b) any other document which includes a site allocation policy."

12. Mr Banner submits that regulation 5 makes clear, in particular in 5(2)(b), that any document which includes a site allocation policy must if prepared be prepared as an LDD. He supports this argument by the absence in 5(2) of the identification in 5(1)(a) of any "document prepared by a local planning authority". Thus he submits regulation 5(2)(b) must refer to any document which includes a site allocation policy. Mr Carter contends that regulation 5 is concerned with documents which are prepared by a local planning authority and the absence in 5(2) of the words relied on by Mr Banner makes no difference to that.

13. It is necessary to consider some of the amendments made to the 2004 Act by the Localism Act 2011. Section 38A defines a neighbourhood development plan to mean "a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan" (s.38A(2)). The NDP must be made in accordance with the proposal if more than half of those voting in the required referendum have supported it (s38A(4)). In this case, that support has been forthcoming. A Schedule 4B is inserted in the Town and Country Planning Act 1990 to deal with the process of making NDPs (s.38A(3)). A proposed NDP must be submitted to an independent examiner who must consider whether it meets what are described as 'the basic conditions' set out in paragraph 8(2). These include what can be regarded as standard planning considerations, but 8(2)(e) provides that the order must be "in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area)". It must also be appropriate to make the order having regard to national policies and advice contained in guidance issued by the Secretary of State (paragraph 8(a)).

14. Section 38B of the 2004 Act deals with what provisions may be made in a NDP. Section 38B(3) and (4) provide:-

> "(3) If to any extent a policy set out in a [NDP] conflicts with any other statement or information in the plan, the conflict must be resolved in favour of the policy.
>
> (4) Regulations made by the Secretary of State may make provision –

> (a) restricting the provision that may be included in [NDPs] about the use of land…."

Further, s.38B(1)(b) precludes NDPs from including provision about development which is excluded development. S.38B(6) applies s.61K of the 1990 Act to define excluded development. Section 61K(a) to (d) covers developments such as are 'county matters', waste, within Annex 1 to Council Directive 85/337/1-2-2 or a nationally significant infrastructure project. All are obviously likely to be developments of considerable significance. But s.61K(e) covers 'prescribed development or development of a prescribed description'. Also s.61J(2) of the 1990 Act prohibits a NDP from providing for the granting of planning permission for any development that is excluded development within the meaning of s.61K(s61J(3)).

15. The Secretary of State has made the Neighbourhood Planning (General) Regulations 2012 (2012 No.637). These contain no prescribed restrictions on what may be included in a NDP. Mr Carter relies on this absence in support of his argument that site allocation can be contained in a NDP. Since it seems an obvious provision which is suitable for local consideration, and it must be surprising if it really was Parliament's intention that it should be excluded, he submits that if it really was to be excluded a positive restriction would have been contained in the 2012 Regulations.

16. The Claimant in his claim sought to rely on Paragraph 16 of the NPPF to support the argument that NDPs cannot contain housing allocation provisions. While not abandoning the argument, Mr Banner in his skeleton argument, recognising that ministerial guidance in statements could not determine the correct construction of legislative provisions, did not pursue it. No doubt he appreciated, as will become clear, that there are positive assertions both in the NPPF and the relevant policy guidance that NDPs can contain housing allocation provisions. However, I should consider NPPF paragraph 16 since I do not accept that it in any way supports Mr Banner's submissions.

17. Paragraph 15 of NPPF requires that policies in local plans should follow the presumption in favour of sustainable development. Paragraph 16 so far as material provides:-

> "The application of the presumption will have implications for how communities engage in neighbourhood planning. Critically, it will mean that neighbourhoods should:
>
> Develop plans that support the strategic development needs set out in local plans, including policies for housing and economic development.
>
> Plan positively to support local development, shaping and directing development in the area that is outside the elements of the local plan……".

Paragraphs 184 and 185 provide:-

> "184. Neighbourhood planning provides a powerful set of tools for local people to ensure that they get the right types of

> development for their community. The ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area. Neighbourhood plans must be in general conformity with the strategic policies of the Local plan. To facilitate this, local planning authorities should set out clearly their strategic policies for the area and ensure that an up-to-date Local Plan is in place as quickly as possible. Neighbourhood plans should reflect these policies and neighbourhoods should plan positively to support them. Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies.
>
> 185. Outside these strategic elements, neighbourhood plans will be able to shape and direct sustainable development in their area. Once a neighbourhood plan has demonstrated its general conformity with the strategic policies of the Local Plan and is brought into force, the policies it contains take precedence over existing non-strategic policies in the Local Plan for that neighbourhood, where they are in conflict. Local planning authorities should avoid duplicating planning processes for non-strategic policies where a neighbourhood plan is in preparation."

18. The Planning Practice Guidance (PPG) states that neighbourhood planning enables communities to exercise direct power which can enable them "to choose where they want new homes, shops and offices to be built". Paragraph O42 answers the question "Can a neighbourhood plan allocate sites for development" by saying:-

> "A neighbourhood plan can allocate sites for development. A qualifying body should carry out an appraisal of options and an assessment of individual sites against clearly identified criteria. Guidance on assessing sites and on viability can be found here."

19. Mr Banner's contention that the cited paragraphs in the NPPF show that housing policies are strategic in nature and so cannot be dealt with in a NDP is in my judgment clearly wrong. The requirement in paragraph 16 is for NDPs to "support the strategic development needs set out in the local plan". It does not say that housing policies are to be regarded as strategic, merely that the strategic elements in any housing policy must be applied in a NDP. Thus the reference to development being 'outside the strategic elements' simply indicates that strategy in the local plan must be applied in any NDP. Paragraphs 184 and 185 confirm that this is what is intended

20. The Core Strategy of July 2011 leaves location and details of future development to the SAPDPD. But it provides in policy CS4 that future housing development is to be directed to the most sustainable locations and that Uppingham would be 'a focus for more moderate growth mostly on allocated sites to the west or north west of the town". Uppingham was seen to have the capacity to accommodate about 16 dwellings per annum up to 2026. Policy CS9 provided that the figure of about 16 houses per annum should be applied with about 25% of new development to be on previously

developed land. The SAPDPD initially gave specific allocations, but that was before the decision that there should be a neighbourhood plan. The UNP allocates in accordance with the strategy contained in the Core Strategy and the SAPDPD.

21. In the light of all this material, I must now seek to construe s.17(7)(za) and regulation 5 of the 2012 Regulations. Both counsel submitted that s.17(7(za) dealt with documents which had to be prepared and those which could be prepared as local development documents. I can see no other sensible construction. Regulation 5(1) thus deals with documents which need to be prepared as local development documents. These include in 5(a)(ii) allocation of sites for a particular type of development or use. There is an obligation to deal with strategic considerations in LDDs and this as it seems to me is what 5(a)(ii) is concerned with. It does not mean that precise sites within the scope of the required policy approach need to be identified so that local communities have no say in that. The UNP is limited in this case to the sites being to the west or north west, to a provision of about 16 per annum to 2026 and to 25% being if possible on previously developed sites.

22. However, it is regulation 5(2)(b) which creates, it is submitted, the problem since it is not limited to documents prepared by a local planning authority. Section 17 is concerned with local development documents and what they must contain so that even without the specific reference in regulation 5(1) the regulation is aimed at documents which are to be or may be prepared by local planning authorities. However, there is in my view no reason to construe regulation 5(2)(b) in wider terms than 5(1)(a)(ii). The language is not the same, but a 'site allocation policy' is wider than an identification of a particular site within a policy. The regulation is badly drafted, but it would be surprising, indeed contrary to what a neighbourhood plan is supposed to achieve, if allocation of precise sites were not able to be dealt with in a neighbourhood plan. Accordingly, I have no doubt that Mr Banner's submission on his first ground must be rejected.

23. Ground 2 relies on an alleged failure in the screening report prepared in connection with the proposed UNP of January 2014 to give consideration to whether the UNP determines the use of a small area at local level. I can dispose of this ground since in Table 1 headed "establishing the need for SEA" box 5 states:-

> "Does the [plan or programme] determine the use of small areas at local level."

to which the answer given is 'Yes' because it "identifies specific uses for sites within the UNP area, including housing, retail, employment and community uses". This shows that the author did indeed consider whether the UNP determined the use of a small area at local level. Mr Banner recognised that a decision that it did was unassailable.

24. Ground 3 depends on considering the screening report as a whole. The Core Strategy and the SAPDPD were subject to a full SEA assessment which ensured that there were no likely significant effects which would be produced by their implementation. No attack is made on that assessment and its conclusions. What is submitted is that the screening report fails to consider any positive effects which the UNP might have on the environment and the failure renders it unlawful. If there was indeed such a failure, Mr Carter did not argue that I should exercise discretion to refuse relief

because the failure could not have affected the decision that a full SEA report was not needed. He submitted that, albeit the language used is not entirely satisfactory, it was clear that regard was had to the obligation to consider whether both positive and negative effects could be regarded as significant.

25. In paragraph 4.4, it is said:-

> "The UNP allocates sites for residential development. The sites allocated are in conformity with the Core Strategy policies as they are located to the west/north west of Uppingham (as identified in Core strategy para 2.17) and the total number of potential dwellings does not exceed the 250 figure stated in policy CS9. The sites were originally assessed through the Sustainability Appraisal/Site Appraisals for the Site Allocations and Policies DPD at the preferred options stage. The evidence base work to support the Site Allocations and Policies DPD and the site appraisals have been used to form the assessment and allocation of sites in the UNP. The site allocated to the south of Leicester Road was not a preferred option in the Site Allocations and Policies DPD, due to its location outside of the settlement limits and several physical constraints to sustainable development identified. However the site has been reassessed by the Uppingham Town Council following its inclusion within the settlement limits and found that the site scored green on Topography, Biodiversity, Cultural Heritage, Townscape, Public Open Space, Water Conservation, Contamination, Proximity to services, Access to Public Transport, Availability, Transport and Available Infrastructure. It was concluded as an appropriate site for allocation and no significant negative effects were identified as a result of its allocation. The other sites allocated for development in the UNP were found to be suitable and no significant negative effects were identified when assessed through the Site Allocations and Policies DPD preferred options Sustainability Appraisal and Site Appraisals. **Following these findings it is therefore concluded that the implementation of the UNP would not result in any likely significant effects upon the environment**".

The reference to 'green' indicates no negative effects. This paragraph clearly concentrates on and rules out any significant negative effects.

26. The conclusion was as follows in paragraph 6.1:-

> "A screening assessment to determine the need for a SEA in line with regulations and guidance was identified and can be found in Chapter 4 of the report. The assessment found no negative significant effects will occur as a result of the UNP. The assessment also finds many of the policies are in conformity with the local plan policies which have a full SA/SEA which identified no significant effects will occur as a result of the implementation of policies".

27. I should also refer to Table 1.8 which poses the question "Is it likely to have a significant effect on the environment (Art.3.5)" to which the answer given is that there were no likely significant effects. The conclusion in 4.7 is again unhappily worded. It reads:-

> "As a result of the assessment in Table 1, it is unlikely there will be any significant environmental effects arising from the UNP. The UNP is in conformity with the Core Strategy (2011) and the proposed SAPDPD which have both had a full sustainability appraisal, incorporating a SEA, finding no negative significant effects. The assessment of the UNP policies identified no significant negative effects and as such the UNP does not require a full SEA to be undertaken".

28. Mr Carter submits that it would be remarkable if the author of the report was unaware of the need to consider both positive and negative effects, particularly as he was aware of the previous reports on the Core Strategy and SAPDPD. In paragraph 1.4 of his report, having referred in 1.1 to the relevant directions, he says:-

> "The legislative background set out in the following section outlines the regulations that require the need for this screening exercise. Section 4 provides a screening assessment of both the likely significant environmental effects of the UNP and a need for a full SEA".

This, submits Mr Carter, shows that he was aware of what needed to be considered in the assessment.

29. It is, I think, not surprising that possible 'significant' negative effects should have been at the forefront of the author's mind, particularly as he was aware of the previous reports and their findings. As I have said, it is unfortunate that he has given the opportunity in the way he has expressed himself to the contention that he failed to consider whether there were any positive significant effects. But I am not persuaded that on an overall reading and knowledge of the author's clear recognition of what the legislation required of him and his familiarity with the previous reports on the Core Strategy and the SAPDPD he did not, however badly he expressed himself, fail to consider positive when he concluded that there were no significant effects.

30. Accordingly, I dismiss the claim.