Neutral Citation Number: [2019] EWHC 1862 (Admin)

Case No: CO/371/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before:

MR JUSTICE GARNHAM

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Between:

Eastleigh Borough Council	**Claimant**
- and -	
Secretary of State for Housing Communities and Local Government	**1st Defendant**
	2nd Defendant
Mr Robert Janaway	
Mr Simon Bull	**3rd Defendant**

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Paul Stinchcombe QC (instructed by **Eastleigh Borough Council Legal Services**) for the **Claimant**
Leon Glenister (instructed by Government Legal Department) for the **1st Defendant**
Christopher Boyle QC & Andrew Parkinson (instructed by **Moore Blatch LLP**) for the **2nd & 3rd Defendant**

Hearing dates: 9th & 10th July 2019

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Approved Judgment

Mr Justice Garnham :

1. The Claimant Council ("the Council") applies, with the permission of Lang J granted on 19 March 2018, for statutory review of the decision of the First Defendant's Inspector, dated 20 December 2018, to allow the appeal of the Second and Third Defendant ("the Developers") against its decision to refuse planning permission for the development of up to 70 dwellings on land at Satchell Lane, Hamble-le-Rice, in Hampshire ("the Satchell Lane Proposal"),.

2. I had the benefit of detailed written and oral argument from Paul Stinchcombe QC for the Claimants, Leon Glenister for the Secretary of State and Christopher Boyle QC and Andrew Parkinson for the Second and Third Defendant. I am grateful to all counsel for their clear and economically expressed submissions.

Background

3. For several years up until 2018, the Council had a significant shortfall against the requirement in paragraph 47 of the 2012 version of the National Planning Policy Framework ("NPPF") to have a five-year housing land supply ("5YHLS"). At the time of the appeal into the Satchell Lane Proposal, however, the action taken by the Council to address its HLS shortfall (including on occasion granting planning permission for residential development in application of the 'tilted balance') had so boosted the HLS that the Council now had a 7-10YHLS.

4. The Developers applied for planning permission for up to 70 dwellings on a green field site in the Hamble Peninsula, outside the urban edge of Hamble and within the open countryside. The section of Satchell Lane adjoining the appeal site is rural in character (twisting, narrow and tree-lined) and has no footways or lighting in a northerly direction. That northern route provides the shortest, (lawfully available) pedestrian route to a local secondary school, health centre and railway station.

5. The Council refused the application for the following reasons:

> "1. The proposals represent an inappropriate and unjustified form of development which would have an unacceptably urbanising and visually intrusive impact upon the designated countryside, to the detriment of the character, visual amenity, and the quality of the landscape of the locality. The application is therefore contrary to Saved Policies 1.CO, 18.CO, 20.CO of … of the Eastleigh Borough Local Plan Review (2001-2011), and the provisions of the National Planning Policy Framework.
>
> 2. The site is considered to be in an unsustainable and poorly accessible location such that the development will not be adequately served by sustainable modes of travel including public transport, cycling and walking. The application is therefore contrary to the requirements of Saved Policy 100.T of the Eastleigh Borough Local Plan Review 2001-2011 and Paragraphs 17 and 35 of the National Planning Policy Framework."

6. Policy 1.CO provides that planning permission for development in a countryside location would not be granted unless it met at least one of four listed criteria – the Council decided that the proposed development did not meet any of the listed criteria.

7. Policy 18.CO provides that "development which fails to respect, or has an adverse impact on, the intrinsic character of the landscape, will be refused". The Council concluded that developing up to 70 dwellings on any site in the urban countryside, permanently urbanising, it would necessarily have an adverse impact on the intrinsic character of the landscape.

8. Policy 20.CO provides that development which would be detrimental to the quality of the landscape which had been identified for landscape improvements in the Local Plan (as part of the appeal site had) would not be permitted.

9. Policy 100.T provides that for development to be permitted it must meet certain listed criteria which included that it is, or could be, well served by public transport, by cycling and by walking.

The Appeal and the Planning Inspector's decision

10. The Developers appealed the Council's decision and a planning inquiry was held on 16-17 and 23-24 October 2018. The Council's position at the inquiry was that:

- The Developers were proposing a considerable housing development in the countryside contrary to Policy 1.CO of the extant Development Plan;
- The proposal would also permanently urbanise an open field causing harm to an area designated for landscape improvement contrary to Policies 18.CO and 20.CO of the Development Plan;
- The proposal also breached Policy 100.T in that the shortest route (walking) to the secondary school, health centre and railway station was unsafe and that children, the vulnerable and the frail would consequently be at risk;
- It had a considerable surplus above the 5YHLS called for by paragraph 47 NPPF 2012,
- The policies were not out of date by reference to the HLS nor could theybe rendered out of date because they predated the NPPF or because they were in a Plan which was time-expired;
- The countryside policies were all either broadly consistent or completely consistent with the NPPF, and that therefore, consistent with all recent Decision Letters ("DL"s) in Eastleigh, between considerable/significant and full weight had to be attached to the breaches of the countryside policies;
- It was irrelevant that, in the past and on certain sites, it had chosen to permit development in breach of countryside policies in order to secure its 5YHLS;
- So far as Policy 100.T was concerned it was fully aligned with Part 9 of the 2018 NPPF;
- The policies were being breached in circumstances in which the 'tilted balance' could not apply because an Appropriate Assessment was required and therefore the statutory presumption in favour of the Development Plan applied; and
- The appeal should be dismissed by straightforward application of the statutory presumption in favour of the Development Plan.

11. The Inspector allowed the appeal.

12. Under the sub heading "Sustainability/accessibility" in his decision letter, he addressed the possible routes, of which there were three, from the site to various facilities. At paragraph 40 of the decision letter ("DL40"), he said that no reliance could be placed on a route through fields as it did not appear to be legally established, and was unsurfaced, unlit, unattractive, and unwelcoming in inclement weather and in darkness. That conclusion is no longer in issue. There remained available two route to the facilities to the north of the site, notably the school and the healthcare facility, one is northerly along Satchell Lane, the other southerly.

13. The Inspector recorded that the Council's sole objection was that the northerly route to the school, health centre and railway station was unsafe for pedestrians [DL34]. He noted that the northerly route to the above facilities was the shortest [DL33]. He noted, having undertaken the journey himself, that walking the northerly route to the above facilities along Satchell Lane was neither safe nor acceptable: the road was unlit; possessed no footpaths for most of the route; included a number of tight bends; and in many places there were steep banks which limited the ability of pedestrians to avoid oncoming traffic [DL36].

14. However, he held that there was no policy requirement to use the northern part of Satchell Lane [DL38 and DL42] and there were alternative routes [DL38-39]. He held that the Council's case omitted the southern walking routes, the part walking and part bus option, and the agreed acceptability of cycling by either route [DL41]. Accordingly, whilst the northern route was unsafe for pedestrians, Policy 100.T was complied with [DL42].

15. Under the headings "Planning policy background and weight", "Other matters – housing land supply" and "Planning balance and conclusion", he dealt with the issues that found Ground 2 before me.

16. He said that whilst Policy 1.CO did not impose blanket protection in the countryside, the approach lacked the flexibility and balance enshrined in the NPPF, such that it should be accorded reduced weight [DL15-16]. He said that the fact that the Council could clearly demonstrate a 5YHLS was not relevant to the weight accorded to Development Plan policies [DL18]. It was, however, relevant in this regard that the Council had achieved its HLS in part by greenfield planning permissions outside settlement boundaries, from which it was reasonable to infer that the Council either considered that the settlement boundary carried reduced weight or that the policy harm was outweighed by other considerations [DL18].

17. Whilst a range, from considerable/significant to full weight, had been attributed to the countryside policies in other cases, given that "they were out of step with national policy" only limited weight should be attributed to them [DL19]. The change from an open field to a housing development would clearly have a permanently urbanising effect and a consequent change in the appreciation of the immediate landscape. This, however, would be the case in relation to any greenfield development proposal; and the conflict would be with policies which themselves have limited weight [DL26].

18. Despite the presence of significantly more than a 5YHLS, the provision of market and affordable housing weighed significantly in favour of the proposal in light of the national policy to significantly boost the supply of homes [DL47].

19. The Proposal had been the subject of Appropriate Assessment, and accordingly the presumption in favour of sustainable development in paragraph 11 of the NPPF did not

apply. The appeal therefore fell to be considered applying the balance provided for by section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA") and in accordance with the Development Plan, unless material considerations indicated otherwise [DL63].

20. As agreed by the Council, the economic and social benefits of the proposal were worthy of significant weight and, given the national objective of significantly boosting the supply of homes, the provision of market and especially affordable housing carries significant weight [DL64].

21. The proposal met Policy 100.T, which was neutral in the planning balance [DL65].

22. Hence the key factor to be set against the benefits of the proposal was the conflict with the countryside policies. As set out above, limited weight was attached to these matters, and this harm was substantially outweighed by the benefits of the proposal [DL66].

23. For these reasons the appeal was allowed [DL67].

The Grounds

24. The Claimant advances two grounds of challenge:

25. First, it is said that the Inspector erred in law in finding that Policy 100.T was complied with. In particular, it is said that he failed properly to interpret and apply Policy 100.T which required the development to be well served by walking.

26. Second, it is argued that the Inspector erred when weighing the balance between housing land supply and breach of countryside policies.

The Law

27. It is common ground that the principles relevant to a challenge under s288 of the Town and Country Planning Act 1990 are authoritatively set out by Lindblom J (as he then was) in *Bloor Homes East Midlands Ltd v SSCLG*, [2014] EWHC 754 (Admin) at [19]:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-

under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for [Environment, Transport and the Regions]* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

> (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

Submissions and Discussion

Ground 1 - Unsafe Pedestrian Route

Submissions

28. In support of the First Ground, Mr Stinchcombe, for the Council, submits that the Inspector erred in law in finding that Policy 100.T was complied with. In particular, it is said that he failed properly to interpret and apply Policy 100.T which required the development to be well served by walking as well as by other modes of non-car transport; he failed to take into account a relevant planning consideration in application of this policy - viz. that schoolchildren residents of the proposed development who walked to the nearest secondary school would likely do so by the relatively short northerly Satchell Lane route (1.1km), which he had found to be unsafe, rather than the much longer southerly route (3.2 to 3.8km); and he gave no intelligible or adequate reasons for permitting a development which put future schoolchildren at this risk.

29. In response to Ground 1, Mr Glenister for the Secretary of State, submits the argument that the Inspector failed to properly interpret and apply Policy 100.T is fundamentally a rationality challenge. He says that the Inspector's conclusions were clear, rational and well-reasoned; that the Inspector did take account of the Council's argument that schoolchildren would be more likely to take the northern route. He noted the northerly route was shorter but unsafe, but still considered that appeal site was "well served". Mr Glenister argued that the Inspector's reasons in respect of accessibility met the requirements of *Dover District Council v CPRE Kent* [2018] 1 WLR 108.

30. Mr Boyle, for the Second and Third Defendants, contends that whether the development was "well served" by walking is quintessentially a matter of planning judgment for the Inspector. The Inspector found it was and that it complied with policy. That judgment was not arguably irrational in a situation where there was no policy requirement to be able to walk to the local secondary school by a particular route, or indeed at all; and in any event where there was a safe alternative route. As there was no policy requirement for a particular walking route to the local school to be available, it was not necessary for the Inspector to make a finding on this point. In any event, he expressly referred to the relative distances between the two alternative routes to the school, and therefore this was plainly taken into account. The Inspector did not permit a development which put future schoolchildren at risk, because an alternative route to the school was available. The reasons why the Inspector found this alternative route was suitable are abundantly clear from the DL.

Discussion

31. In my view, the Inspector did not err in his approach to this issue. The issue in question was the sustainability and accessibility of the site. The Council's refusal of permission, which was under appeal before the Inspector, had concluded that the site is "considered to be in an unsustainable and poorly accessible location such that the development will not be adequately served by sustainable modes of travel including…walking". It was said that the application did not comply with Policy 100.T and the local plan and paragraphs 17 and 35 of the NPPF 2012.

32. Policy 100.T requires that the development "is, or could be, well served by…walking". Paragraph 35 provides that:

> "plans should protect and exploit opportunities for the use of sustainable transport modes for the movement of goods and people. Therefore, developments should be located and designed where practical to …create safe and secure layouts which minimise conflicts between traffic and…pedestrians…."

33. There was no doubt that there was a safe, sustainable and short walking route from the site to many facilities to the south and west. The problem concerned facilities to the north, notably the school and the healthcare facility. I accept Mr Stinchcombe's submission that the adequacy of the route to the facilities in the north was one of the main issues in dispute before the Inspector; in fact, he describes it (at DL34) as the "Council's sole objection on accessibility/accessibility grounds".

34. However, in my view, on its proper construction, Policy 100.T is concerned with the provision of *means* of sustainable transport. Similarly, the focus of paragraph 35 of the NPPF is on providing *opportunities* for sustainable modes of transport, such as walking. Whilst it is undeniably the case that a development would not properly be regarded as "well served" by a walking route that was unsafe (and the contrary was not suggested before me), and that it is implicit in paragraph 35 that the opportunities to be provided are opportunities for a safe mode of transport, there is nothing, express or implied, in either policy that requires every possible route from the development to be safe. What matters is whether there was *a* safe route, and there was.

35. Nor, in my judgment, is there an obligation on the decision maker to assess whether residents of the development are likely to make use of unsafe routes between the site and particular facilities. It may well be the case that 14-year-old children living on the site would be tempted to use the shorter, northerly route to school, even though, in the Inspector's view, that is unsafe, rather than the markedly longer, but safer, southern route. But that does not mean that the site is not adequately *served* by a perfectly adequate, safe walking route. It is. The southern route is longer but safe. Nor does the existence of an unsafe alternative mean that there are no adequate *opportunities* for sustainable modes of transport, such as walking, which is entirely safe. There are. It just happens that, as regards the school and the health centre, those opportunities involve a longer route. I see no error of interpretation in the Inspector's approach.

36. Whether, on the facts, the site was "well served by …walking" involved a planning judgment. The Inspector clearly had in mind how residents of the development could and would access the relevant facilities from the site. In my view, he was plainly entitled to conclude that it was accessible by walking routes and well served by walking routes. His reasons were required to be "proper, adequate and intelligible but can be briefly stated" (see *R (CPRE Kent) v Dover DC* [2018] 1 WLR 108). In my judgment, they were all of

that. At DL36 and 37, he held that the northern route was not safe. At DL39, however, he held that "there is no necessity to use the northern route to access the school because the southern routes…is (sic) within a reasonable walking distance". At DL42, he concluded that "the appeal site is sustainable in locational terms having regard to the proximity of and accessibility to local services and facilities. It complies with LPR 100.T". In my judgment that reasoning is unimpeachable.

37. Accordingly, I reject this ground of challenge.

Ground 2 - Planning balance – Housing supply and countryside policies

Submissions

38. The Council argues that the Inspector erred when weighing the balance between housing land supply (HLS) and breach of countryside policies. Mr Stinchcombe broke this ground down into four sub-grounds:

    (i) the Inspector wrongly determined that the fact that the Council could clearly demonstrate a 5YHLS was not relevant to the weight which should be accorded to breach of the countryside policies;

    (ii) he wrongly determined that it was relevant to have regard to how such countryside policies had been applied in the past in order to obtain a 5YHLS, when attributing weight to such breaches;

    (iii) he wrongly reduced the weight attached to the breach of countryside policies by reason of their lacking the flexibility enshrined in the NPPF, in that this was contrary to decided authority; and

    (iv) he wrongly took into account that the harm occasioned by permanently urbanising the countryside "would be the case in relation to any greenfield development proposal" which was an irrelevant consideration where there was double the HLS requirement and no need to develop any greenfield site.

39. In relation to Ground 2, the Secretary of State argues that whilst the level of shortfall may be relevant to the weight of development plan policies where there is less than a 5YHLS, there is no duty to consider the level of shortfall when considering the weight of development plan policies where there is a 5YHLS. He says that the Inspector was entitled to consider the past application of the relevant policies in determining their "currency"; such consideration has been given by other inspectors and the relevance was conceded by the Council's witness at the inquiry. He argues that the Inspector complied with the principle identified in *Bloor Homes v SSCLG* [2014] EWHC 754 (Admin) and did not suggest that the lack of internal balance in Policy 1.CO meant that the policy was out of date. The observation that any greenfield development proposal would cause some limited harm to the existing landscape character is a matter of common sense, and the Inspector was entitled to make this observation.

40. The Second and Third Defendants argue that there was no policy requirement to take into account the existence of a 5YHLS when considering the weight to be attached to the relevant policies. As such, there was no legal obligation on the Inspector to take this into account. Whether or not he did so was a matter of planning judgment for him. It was not arguably irrational for him to do so where (i) the reason he found the relevant policies to be out of date had nothing to do with the Claimant's housing supply position and (ii) the existence of a 5YHLS had been achieved by the Claimant through the grant of planning permission in breach of those policies.

41. They say it was not irrational for the Inspector to have regard to the application of the policies in the past in a situation where the Claimant's own planning witness had agreed that this was relevant and previous inspectors had taken this approach. They argue that the Inspector applied, in terms, the approach required by *Bloor Homes*. It is trite law that the fact that a particular policy is not expressly mentioned does not mean that it has been disregarded and the Inspector did give reasons for any departure from previous appeal decisions.

42. Finally, Mr Boyle contends that it was open to the Inspector to conclude that this aspect of landscape harm identified by the Claimant was not site or development specific, but rather would occur any time development took place contrary to Policy 1.CO.

Discussion

43. I address each of the four sub-grounds advanced by Mr Stinchcombe in turn.

Ground 2 (i)

44. Mr Stinchcombe argued that the Inspector wrongly determined that the fact that the Council could clearly demonstrate a 5YHLS was not relevant to the weight which should be accorded to breach of the countryside policies. He said it was plainly relevant and that had been "authoritatively decided".

45. The Council's arguments here did elide somewhat with their arguments as to the overall planning balance, more properly the subject of analysis under the third element of this ground. In my view, it is important to address them discretely if they are properly to be understood.

46. The assertion under challenge, "…*the fact that the authority could clearly demonstrate a five-year housing land supply is not relevant to the weight which should be accorded to development plan policies*" is found in DL18. That paragraph falls in the section of the decision letter dealing with planning policy, background and weight. It relates to the weight to be attached to the countryside policies, policies 1.CO, 18.CO and 20.CO.

47. It is common ground that where there is *no* 5YHLS, the NPPF, in both its 2012 and 2018 forms, deems such policies out of date. Footnote 7 to Paragraph 11 of the NPPF 2018 provides that "…where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73)" the plan is deemed to be out of date. As is again common ground, being out of date has consequences for decision-taking. Paragraph 11 provides that:

> "Plans and decisions should apply a presumption in favour of sustainable development. … For decision-taking this means:
>
> > c) approving development proposals that accord with an up-to-date development plan without delay; or
> >
> > d) where there are no relevant development plan policies, or <u>the policies which are most important for determining the application are out-of-date</u>, granting permission unless:
> >
> > > i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole" (emphasis added).

48. Furthermore, where there is no 5YHLS an inspector is obliged to consider the *extent* of the shortfall (*Hopkins Home v SSCLG* [2016] EWCA Civ 168).

49. However, as Mr Glenister put it, in the context of the NPPF, there is a 'one-way consideration' for 5YHLS. As Mr Boyle submits, there is nothing in statute or policy which expressly or impliedly required the Inspector to take into account *the existence* of a 5YHLS when deciding the weight to be attached to countryside policies. Accordingly, it was for the Inspector to determine the weight to be attached to the fact that there was more than 5YHLS, subject only to a *Wednesbury* challenge.

50. In my judgment, a failure to give weight to the fact that the Council could demonstrate more than a 5YHLS in determining the weight which should be accorded to development plan policies was not irrational. When the Inspector came to consider the overall planning balance, at DL47, he did consider the weight to be attached to the provision of housing. That was the proper place in the analysis for that consideration. I see no basis for saying he should have *increased* the weight, prior to conducting the balancing exercise because of the absence of a negative, namely that there was no shortage of housing land.

Ground 2 (ii)

51. It is argued that the Inspector wrongly determined that it was relevant to have regard to how such countryside policies had been applied in the past in order to obtain a 5YHLS, when attributing weight to such breaches. It is said that it was plainly irrelevant when the Council did have a 5YHLS.

52. This argument did have a superficial attraction. At first blush, it might be thought wrong to compare the position now, when there is an adequate supply of housing land, with the situation earlier when there was not, and when the Council was required to find ways of meeting the shortfall.

53. However, this can only be a rationality challenge. As Mr Boyle correctly submitted the range of considerations capable of being material are broad: any consideration which relates to the use and development of land is capable of being material: see *Stringer v Minister for Housing and Local Government* [1971] 1 WLR 1281 at p 1294G to H. The history of the application of the countryside policies was *capable* in law of being material for planning purposes.

54. As to the rationality of the Inspector's reasons, in my judgment, Mr Glenister has a complete answer. He submits that the Inspector's "consideration of the past application of the policy … revealed that the current compliance with the 5YHLS was achieved "in part by greenfield planning permissions outside settlement boundaries – in some cases on sites which were within Strategic Gaps". This indicates that the development plan policies were not consistent with the NPPF, which goes to their "currency". Consideration of this was clearly rational". I agree.

Ground 2 (iii)

55. Mr Stinchcombe argued that the Inspector wrongly reduced the weight attached to the breach of countryside policies by reason of their lacking the flexibility enshrined in the

NPPF. He says he failed to take into account the consistency of those policies with paragraph 170 of the NPPF through recognising the intrinsic character and beauty of the countryside; and he gave no intelligible or adequate reason for disagreeing with previous Eastleigh DLs in this regard and therefore breached the principle of consistency in planning decisions established by case law.

56. Mr Stinchcombe relies on [186] in the judgment of Lindblom J in *Bloor Homes* where he said:

> "186 I do not think Mr Cahill's argument gains anything from Kenneth Parker J's analysis of the particular policies of the development plan that he had to consider in *Colman's* case, in which he compared of those policies with government policy in the NPPF. In any event I do not read Kenneth Parker J's judgment in that case as authority for the proposition that every development plan policy restricting development of one kind or another in a particular location will be incompatible with policy for sustainable development in the NPPF, and thus out-of-date, if it does not in its own terms qualify that restriction by saying it can be overcome by the benefits of a particular proposal. That is more than I can see in what Kenneth Parker J said, and more than I think one take from the NPPF itself. The question of whether a particular policy of the relevant development plan is or is not consistent with the NPPF will depend on the specific terms of that policy and of the corresponding parts of the NPPF when both are read in their full context. When this is done it may be obvious that there is an inconsistency between the relevant policies of the plan and the NPPF. But in my view that was not so in this case."

57. That certainly makes good the submission that a policy is not out of date simply because it does not include an internal cost-benefit analysis. Instead, what is required is a comparison of the policy and the relevant parts of the NPPF. That is precisely what the Inspector set out to do at DL14. He said there that "What is important is the degree of consistency of a particular policy or policies with the 2018 Framework. This will depend on the specific terms of the policy/ies and of the corresponding parts of the Framework when both are read in their full context."

58. At DL16, he concluded that 1.CO and related policies lacked "the flexible and balanced approach…enshrined in the Framework" and as a result accorded "reduced weight" to the countryside policies. At DL19, he gave them only limited weight because, in his view, they were out of step with national policy. That was consistent with [213] of NPPF 2012 which states that "due weight" should be given to development plan policies in light of their consistency with the NPPF.

59. It follows that his approach was entirely correct. The test he applied was correct. What remained to him was a matter of planning judgment, which can only be challenged on the grounds of rationality.

60. In my view, the Inspector was entitled to reach the view that there was an inconsistency between Policies 1.CO, 18.CO and 20.CO, on the one hand, and paragraph 170 of the NPPF on the other.

61. Policy 1.CO provided that planning permission would not be granted for development in the open countryside unless it met at least one of four listed criteria. Policy 18.CO provided that "development which fails to respect, or has an adverse impact on, the intrinsic character of the landscape, will be refused." Policy 20.CO provided that development which was detrimental to the quality of that landscape would not be permitted.

62. NPPF 2018 [170] adopts a much more nuanced approach. Instead of the blanket refusal of development subject to limited and specific exceptions, it requires that planning decisions should contribute to and enhance the natural and local environment by meeting a series of objectives. The Inspector rightly described the latter as a "flexible and balanced approach". In my judgment, the Inspector was fully entitled to conclude that this led to reduced weight being attributed to the retained policies.

63. Mr Stinchcombe would quibble with the precise descriptor of the reduction in weight. The Inspector concluded that the countryside policies should attract "limited weight". In other Eastleigh Borough Council decisions inspectors have used different adjectives indicating, perhaps, a lesser weight reduction. Mr Stinchcombe says other inspectors, who recognised a difference between Policy 1.CO and [170] NPPF, still attached "considerable" or "significant" weight to breaches of Policy 1.CO in earlier decision letters. In my judgment, this is classically a matter of planning judgment, involving as it does a subjective judgment of the significance of differences between policies. I detect no error of law here.

Ground 2 (iv)

64. Finally, Mr Stinchcombe argues that the Inspector wrongly took into account (at DL26) that whilst the development would cause landscape harm, this "would be the case in relation to any greenfield development proposal." He says that was an irrelevant consideration where there was a substantial excess of the HLS requirement and no need to develop any greenfield site.

65. As set out above, any consideration which relates to the use and development of land is capable of being material (*Stringer*). This consideration clearly relates to the development of land and accordingly is capable of being material. Accordingly, it was a matter of planning judgment for the Inspector to decide whether this factor was material in this case.

66. In my judgment, all the Inspector was doing was stating that this development, like any other greenfield development, would have an "urbanising" effect. That might not be a very remarkable observation, but it was certainly not an irrational one. As Mr Boyle put it, it was open to the Inspector to conclude that this aspect of landscape harm was not site or development-specific, but rather would occur any time development took place contrary to Policy 1.CO.

Conclusion

67. For all those reasons, this review is dismissed.