



Neutral Citation Number: [2024] EWHC 3223 (Admin)

Case No: AC-2024-LON-001206

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2024

Before :

MRS JUSTICE LIEVEN

Between :

DORCHESTER LIVING LIMITED

Claimant

and

**SECRETARY OF STATE FOR LEVELLING UP,
HOUSING AND COMMUNITIES**

Defendant

and

- (1) RICHBOROUGH ESTATES**
- (2) LONE STAR LAND LIMITED**
- (3) K AND S HOLFORD**
- (4) A AND S DEAN**
- (5) NP GILES**
- (6) A L C BROADBERRY**
- (7) CHERWELL DISTRICT COUNCIL**

Interested Parties

Mr Paul Tucker KC and Mr Philip Robson (instructed by **Eversheds Sutherland**
(International)) for the **Claimant**
Mr Josef Cannon KC and Mr Ryan Kohli (instructed by **Government Legal Department**)
for the **Defendant**
Ms Sarah Reid KC and Ms Stephanie Hall (instructed by **Lodders Solicitors LLP**) for the
First and Second Interested Parties
The **Third to Seventh Interested Parties** were not represented

Hearing dates: **27 November 2024**

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This claim is made under s.288 Town and Country Planning Act 1990 (“TCPA”) against the decision of the Secretary of State (“SoS”) to grant planning permission to the First and Second Interested Parties (“Richborough”) for the following development (“the Development”) at Heyford Park in Cherwell District Council’s administrative area: “Outline planning application for the erection of up to 230 dwellings, creation of new vehicular access to Camp Road and all associated works with all matters reserved apart from means of access to Camp Road.”
2. The Claimant is the developer and promoter of the redevelopment of the former RAF Upper Heyford allocation for 1600 houses in policy PV5 in the Local Planning Authority’s (“LPA”) development plan, which is now known as Heyford Park. The Development sits next to, but outside the boundary of, the Upper Heyford allocated site.
3. The Claimant was represented by Paul Tucker KC and Philip Robson. The Defendant was represented by Josef Cannon KC and Ryan Kohli. The First and Second Interested Parties were represented by Sarah Reid KC and Stephanie Hall.
4. Permission to bring the challenge was granted by Mould J on Ground 4 only: “*misinterpretation and misapplication of NPPF para 67 in determining the Housing Requirement*”. In summary, the issue is whether the Inspector was correct to include a figure from the Cherwell Partial Review 2020 (“PR”), which provided for Cherwell to meet some of Oxford’s unmet housing needs, in the Housing Requirement figure in paragraphs 67 and 77 of the National Planning Policy Framework (“NPPF”).
5. Both the Claimant and the LPA originally challenged the decision. The LPA withdrew its challenge shortly before the hearing. To a significant degree the Claimant’s case at the inquiry simply followed that of the LPA. Although neither the SoS nor Richborough take a locus point against the Claimant, it is relevant in understanding the Decision Letter (“DL”) that the relevant arguments at the inquiry were being advanced by the LPA.

The Background

6. The unusual complication in this case is that Cherwell’s housing need figures are set out in two Development Plan documents. The Cherwell Local Plan 2015 (“CLP”) sought to deliver 22,840 homes between 2011 and 2031 through policy BSC1. This figure was arrived at to meet Cherwell’s own needs.
7. However, in 2020 the PR was adopted. This was a review of the CLP expressly to meet a share of Oxford’s unmet housing needs, and made provision for an additional 4400 dwellings in Cherwell. As is well known, Oxford has a tightly drawn urban boundary and as such Oxford City Council has been found to be unable to meet its housing needs within its own boundaries. Although the PR and most of the documentation speak of meeting Oxford’s needs, in terms of Development Plan policies and how they are approached, this additional 4400 is now part of Cherwell’s housing needs.

The Partial Review

8. The terms of the PR policies are important. PR12a states as follows:

“Policy PR12a - Delivering Sites and Maintaining Housing Supply

The Council will manage the supply of housing land for the purpose of constructing 4,400 homes to meet Oxford’s needs. A separate five year housing land supply will be maintained for meeting Oxford’s needs.

At least 1700 homes will be delivered for Oxford for the period 2021 to 2026 for which a five year land supply shall be maintained on a continuous basis from 1 April 2021. The remaining homes will be delivered by 2031.

For the period 2026-2031, the Council will maintain a land supply equivalent to the number of remaining years of that period taking into account any delivery surplus or shortfall and a 5% additional requirement. If there has been a record of persistent under delivery of housing in meeting Oxford’s needs, the Council will increase the buffer to 20%.

Permission will only be granted for any of the allocated sites if it can be demonstrated at application stage that they will contribute in delivering a continuous five year housing land supply (i.e. measured against the local plan housing trajectory). This will be achieved via the Delivery Plans required for each strategic development site.

In the interest of securing delivery, planning conditions will be used to place time restrictions on the unimplemented ‘life’ of planning permissions.

Should planning permission be granted for housing that will be delivered beyond 2031 and which results in the requisite 4,400 homes for Oxford being exceeded, this will be taken into account in meeting Cherwell’s housing need in the next Local Plan review.

Should the 4400 homes not be fully delivered by 2031, they will continue to be developed but will not contribute in meeting Cherwell’s housing need in the next Local Plan review.”

9. A number of sites are specifically allocated in the PR in locations which were considered to be suitable to meet Oxford’s needs. However, as is clear from Policy 12a the requirement to construct 4400 homes in Cherwell is not limited to only applying to those allocated sites, or to a specific part of Cherwell. It is not a geographically limited policy within the area of Cherwell.
10. Policy 12b states that applications for planning permission for the development of sites to meet Oxford’s needs that are not allocated in the PR will not be supported unless various criteria are met. The first criterion is that the Council has taken a formal decision that additional land beyond the allocated sites is required to meet “the requisite housing supply”.
11. I was told that no such formal decision by the LPA has been made. This is despite the fact that 0 dwellings within the allocated sites have been constructed and the LPA’s

position at the inquiry was that its 5 Year Housing Land Supply (“5YLS”) figure on the allocated sites within the PR (of deliverable homes) is only 80, a point to which I will return.

12. Policy PR13, upon which Mr Tucker relies, deals with monitoring and securing delivery of the PR. It is apparent from this policy that monitoring of the delivery of the 4400 dwellings in the PR will be done separately from the monitoring of the delivery of the dwellings in the CLP.
13. Paragraphs 5.159 and 5.160 of the supporting text to the PR13 state:

“5.159 The Partial Review of the Local Plan is a focused Plan to help meet the identified unmet needs of Oxford. We have developed a specific strategy to meet Oxford’s needs; to fulfil our objectives and achieve a defined vision that does not undermine the delivery of the separate strategy for meeting Cherwell’s needs.

5.160 Consequently, it is appropriate and necessary that the monitoring of housing supply for Oxford’s needs is undertaken separately from that for Cherwell and only housing supply that meets the vision and objectives for Oxford is approved.”

14. In order to understand how the Inspector addressed issues in the DL it is necessary to consider how the cases were put to her at the Inquiry. The LPA argued that the 5YLS assessment should be measured against the Local Housing Need (“LHN”) figure for Cherwell alone. The CLP was more than 5 years old, and therefore pursuant to NPPF paragraph 77 and footnote 42, it was appropriate to take the LHN figure and not the CLP figure. The LHN figure, by the time of the Inquiry, was agreed to be 710pa using the “standard method” set out in national policy.
15. The LPA were arguing for Oxford’s unmet need to be assessed “separately”, but it is unclear to me, and Ms Reid says unclear at the Inquiry, as to what the LPA said the Inspector should do with that element of policy based housing requirement.
16. Richborough argued that the 5YLS requirement should be the aggregate of the LHN (710) and the housing requirement in the PR. It was agreed at the Inquiry that the annual figure from the PR was 420 dwellings per annum.
17. The LPA’s position was that if the housing requirement is only 710 then pursuant to paragraph 11(d) of the NPPF the LPA has a 5YLS and the “tilted balance” in that paragraph does not apply. However, it was agreed that if the 710 is added to the requirement from the PR (420) then there is no 5YLS and the tilted balance does apply. This was the position of the Inspector in the DL.

The Decision Letter

18. At DL4 the Inspector noted that a revised NPPF was published after the close of the Inquiry, on 19 December 2023, and a revised PPG on 5 February 2024 and she had invited written views upon these documents.

19. At DL13 she set out the main issues, the fourth one being “*Whether the Council can demonstrate a deliverable housing land supply as required by the Framework*”.
20. At DL30 she found that the proposal did not comply with policy ESD1 of the CLP in relation to the location of the site and also failed to comply with policies H18 and C8 of the Saved Local Plan 1996.
21. The key paragraphs for the purpose of this case are DL66-83 which deal with housing land supply. At DL66 she set out the two areas of dispute, “*Firstly, whether there should be separate calculations for Cherwell’s needs and one for Oxford’s unmet housing need.*” The second was the calculation of deliverable housing land supply, which in itself is not now challenged.
22. In DL67 she refers to the CLP figure of 22,840 across the Plan period. In DL68 she refers to the PR figure of 4400, and to the allocations in Kidlington, Yarnton and Begbroke on the A44 corridor. In DL69 she refers to the PR paragraph 5.160 and the separate monitoring of housing supply, to support the strategy in a way that does not undermine the delivery of the separate strategy of meeting Cherwell’s needs.
23. DL70 states:

“70. Accordingly, the Council argues that the five year housing land supply for Cherwell should exclude that of Oxford. However, the Partial Review was adopted under the 2012 Framework. This has been superseded.”
24. These paragraphs entirely reflect the way the LPA were putting the case for excluding the PR, Oxford unmet need figures, from the 5YLS calculation.
25. The Inspector then sets out her reasoning at DL71-75:

*“71. The revised Framework published in December 2023 states in paragraph 67 that strategic policy making authorities should establish a **housing requirement figure for their whole area**, which shows the extent to which their identified housing need (and any needs that cannot be met within neighbouring authorities) can be met over the Plan period. The requirement may be higher than the identified housing need if, for example, it includes provision for neighbouring areas. (Inspector’s emphasis)*

*72. The updated PPG also refers to a singular **housing requirement**. For example, in paragraph 68-002 it refers to a ‘housing requirement set out in strategic policies’. In paragraph 68-055 it states that ‘Both the 5-year housing land supply and the four year housing land supply that authorities should demonstrate for decision making should consist of deliverable housing site demonstrated against the authority’s five year **housing land supply requirement**. (Inspector’s emphasis).*

73. These changes are significant and indicate that the expectation is for one single housing requirement which includes the unmet need from a neighbouring authority.

74. The Council relies on several appeal decisions to support its case. The two most recent at Deddington and Milcombe endorse their position for separate calculations. The Inspector in the Milcombe decision referred to the fact that at that time, there had been no change in circumstances since the adoption of the Partial Review to justify a different approach. With the recent publication of the revised Framework, this is no longer the case. It is notable that the emerging Local Plan proposes to dispense with the separate calculation and have one single housing requirement.

75. Given the above, I conclude that there should be one housing requirement for the District as a whole.”

26. Having concluded that there should be one housing requirement, including both elements, she then turns to deliverable supply in DL76-83. She concludes that whether the LPA or Richborough’s supply figures are taken, there would be a less than 5YLS, see DL77. The supply side of the analysis is not challenged in this case. Because of the wording in NPPF paragraph 226 (as revised in December 2023) the LPA argued they only needed to show a 4YLS. However, this was irrelevant to the ultimate determination because the Inspector had found that the LPA did not even achieve a 4YLS, given her approach to the requirement figure.
27. In the planning balance section at DL91-101, the Inspector holds that because there was no 4YLS (or necessarily 5YLS), NPPF paragraph 11(d) applies and there is a “*tilted balance*”. The development does not accord with the DP (DL95), but the harm does not “*significantly and demonstrably outweigh the benefits*” (DL101) applying paragraph 11(d)(ii) and permission should be granted.
28. It can therefore be seen that the housing land requirement was a key element to the ultimate decision in the DL.

The National Planning Policy Framework

29. The relevant version of the NPPF for the decision was that promulgated in December 2023. Paragraph 11(d) together with footnote 8 states:

“11. Plans and decisions should apply a presumption in favour of sustainable development.

For plan-making this means that:

...

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date (footnote 8), 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.

(footnote 8: This includes, for applications involving the provision of housing, situations where: (a) the local planning authority cannot demonstrate a five year supply (or a four year supply, if applicable, as set out in paragraph 226) of deliverable housing sites (with a buffer, if applicable, as set out in paragraph 77) and does not benefit from the provisions of paragraph 76; or (b) where the Housing Delivery Test indicates that the delivery of housing was below 75% of the housing requirement over the previous three years.)”

30. Paragraph 67 states:

“67. Strategic policy-making authorities should establish a housing requirement figure for their whole area, which shows the extent to which their identified housing need (and any needs that cannot be met within neighbouring areas) can be met over the plan period. The requirement may be higher than the identified housing need if, for example, it includes provision for neighbouring areas, or reflects growth ambitions linked to economic development or infrastructure investment. Within this overall requirement, strategic policies should also set out a housing requirement for designated neighbourhood areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations³³. Once the strategic policies have been adopted, these figures should not need re-testing at the neighbourhood plan examination, unless there has been a significant change in circumstances that affects the requirement.”

31. It is important to note that the sentence which is underlined was added in the December 2023 version of the NPPF and was not in earlier versions. The equivalent paragraph in the September 2023 version was at paragraph 66 and did not have this sentence. It is this change that the Inspector is referring to, and emphasising, at DL71.

32. Paragraph 77 of the NPPF states:

“77. In all other circumstances, local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide either a minimum of five years’ worth of housing, or a minimum of four years’ worth of housing if the provisions in paragraph 226 apply. The supply should be demonstrated against either the housing requirement set out in adopted strategic policies, or against the local housing need where the strategic policies are more than five years old. Where there has been significant under delivery of housing over the previous three years, the supply of specific deliverable sites should in addition include a buffer of 20% (moved forward from later in the plan period). National planning guidance provides further information on calculating the housing land supply, including the circumstances in which past shortfalls or over-supply can be addressed.”

33. Mr Tucker places particular emphasis on the underlined sentence which he says gives the LPA and the Inspector a binary choice, either use the adopted policies if they are up to date; or the LHN if they are more than five years old.
34. The PPG was revised on 5 February 2024 to cover the new 4YLS provisions. Nothing turns on this revision.

Submissions

35. Mr Tucker's submission is that the Inspector misinterpreted the NPPF by adopting a "mixed approach" to the housing requirement. Although the Claim Form focused on paragraph 67 it was clear from his submissions that his real focus was on the interpretation of paragraph 77 of the NPPF. He stated that he was not arguing the Inspector's approach was irrational, but that she had misinterpreted the NPPF and thus erred in law.
36. He submits that the CLP and the PR were two distinct strategies, which were intended to be distinct. He focused on the fact that the PR had a separate monitoring regime, suggesting that the housing to meet Oxford's needs should not be aggregated with that for Cherwell itself.
37. He says the Inspector erred by relying on paragraph 67, which is intended to guide plan making, whereas paragraph 77 is about decision taking, which should be treated differently. Paragraph 77 gives decision makers a binary choice, either apply the policies if they are up to date, or apply the LHN. To do otherwise, as the Inspector did, is to misinterpret the policy. She could have said that she was not following paragraph 77 and taken an entirely different route, but she could not apply paragraph 77 in the way she did. I have to say this came perilously close to being a reasons challenge, but Mr Tucker expressly said that he was not arguing the reasons were defective, doubtless because he would have faced a "no difference" submission.
38. He submits that the Inspector could have taken the PR figure for Oxford's unmet needs into account as "another material consideration", but she could not use it to find no 5YLS and thus apply the tilted balance.
39. It is argued that if the PR had been out of date, which it will be next year, then the LHN under the standard method would only be the 710 figure, and it therefore makes no sense that the housing requirement is higher now than it would be if the PR was out of date.
40. Mr Cannon refers to the well-known principles set out in *Tesco Stores v Dundee City Council* [2012] PTSR at [18] that the interpretation of development plan policies should not be undertaken as if they were a statute and should be read in their proper context, including the wider planning objectives.
41. The courts should respect the expertise of planning inspectors, and start from the presumption that they have understood the policy correctly, see Lord Carnwath in *SSCLG v Hopkins Homes* [2017] 1 WLR 1865 at [25].
42. In a case about how decision makers should treat an oversupply of housing in the calculation of 5YLS, where (as here) the NPPF and PPG are silent as to the correct

approach, Dove J held in *R (on the application of Tewkesbury BC) v Secretary of State for Communities, Housing and Local Government* [2022] PTSR 340 that it was a matter for the planning judgement of decision makers. He held at paragraphs 42-43:

“42. ...Whilst it is clear that the intention of the Framework is that planning authorities should meet the housing requirements set out in adopted strategic policies, that does not necessarily mean that any oversupply in earlier years as in the present case will automatically be counted within the five-year supply calculation. The text of the Framework is silent, or alternatively does not deal, with what account if any should be taken of oversupply achieved in earlier years when calculating the five-year supply.

43. In the absence of any specific provision within the Framework there is no text falling for interpretation, and it is not the task of the court to seek to fill in gaps in the policy of the Framework. It is far from uncommon for there to be gaps in the coverage of relevant planning policies: they will seldom be able to be designed to cover every conceivable situation which may arise for consideration. Again, that is perhaps unsurprising given the breadth of the potential scenarios which may arise in the context of a planning application on any particular topic, especially where it is a high level policy with a broad scope like the Framework which is being considered. When it arises that there is no policy covering the situation under consideration then it calls for the exercise of planning judgment by the decision-maker to make the necessary assessment of the issue to determine the weight to be placed within the planning balance in respect of it. In the absence of policy within the Framework on the question of whether or not to take account of oversupply of housing prior to the five-year period being assessed in the calculation of the five-year housing land supply the question of whether or not to do so will be a matter of planning judgment for the decision-maker, bearing in mind the particular circumstances of the case being considered.”

43. He submits that the DL has to be read as by an informed reader, see *South Buckinghamshire DC v Porter* [2004] UKHL 33. The parties were well aware that the Inspector was accepting the case as put to her by Richborough, as opposed to that of the LPA, and the DL is structured to set out the LPA's case, and then in DL71-74 why the Inspector did not accept it. The reference to paragraph 67 of the NPPF does not suggest that the Inspector was simply applying that to the decision making, but that she was considering the policy as a whole.
44. Ms Reid's case largely accorded with that of Mr Cannon. She said that the LPA at the Inquiry were wholly unclear as to how the failure to meet the terms of the PR played into the housing requirement figures and the tilted balance in paragraph 11 of the NPPF. The LPA had focused on the distinction between the two Plans, and the separate monitoring, but had no policy answer to the consequences in terms of housing requirement.
45. The Inspector had clearly rejected the LPA's case and thus stated at DL77 that there was only one single requirement figure.

46. Ms Reid submits that it is necessary to read paragraph 77 of the NPPF as a whole, and what it is trying to do is to take the most up to date assessment of need figures, whether from an up to date policy or LHN. Here, to achieve the most up to date assessment of need the Inspector was plainly right to aggregate the figures. Further, it would be incoherent for the supply side calculation to be assessed on a different basis from the need.

Conclusions

47. The NPPF should be interpreted by considering the proper context and the planning objectives it seeks to achieve, see *Hopkins Homes* at [81]. Further the NPPF is not a statute and interpretation should not be undertaken as if it was, see Lord Reed in *Tesco v Dundee CC* [2012] PTSR 983 at [18].
48. As Dove J said in *Tewkesbury* there will inevitably be situations that the NPPF does not specifically cover, where a decision maker will have to consider the planning objectives of the policy and then exercise planning judgement as to how the policy should be applied in that particular context.
49. Here the situation of an LPA having housing requirements set out in the two development plan documents, one of which was more than 5 years old (the CLP 2015) and one less than 5 years old (the PR), was not one expressly dealt with in the NPPF at paragraph 77. The Inspector was therefore necessarily in a situation where she had to exercise planning judgement as to how to apply the policy to a situation which was not precisely covered. In my view this was an issue of the application of the policy rather than its interpretation, but it might be viewed as an example of a situation where they are very closely related.
50. Looking at the wider context and objectives of the NPPF, those objectives are clearly that where an LPA is not meeting the development needs of its area then policy consequences follow in order to achieve “sustainable development”, see paragraph 11 of the NPPF.
51. Here the development plan as a whole had established Cherwell’s housing requirement as being in two parts – those that arose from Cherwell’s own needs in the CLP, and those from Oxford’s unmet needs which had to be met within Cherwell in the PR. The housing may have been to meet Oxford’s “needs”, but the planning policy requirement was for it to be met within Cherwell. As such, I agree with Ms Reid that it became part of Cherwell’s needs for the purposes of the planning regime.
52. It is manifest that the LPA was not meeting those needs, i.e. the ones that related to Oxford’s unmet needs. There is no sensible planning reason why those needs, as set out within the PR, should not fall within Cherwell’s housing requirement for the purposes of paragraph 77 and paragraph 11 of the NPPF. They are a policy requirement on Cherwell, see Policy 12a of the PR. The delivery so far has been 0, and the total 5YLS was calculated as being around 0.1 (the 80 houses in 5 years). On Mr Tucker’s case the LPA would avoid the effect of this lack of supply on paragraph 11 of the NPPF because the CLP was more than 5 years old and they could therefore rely on the LHN not the strategic policies. In planning terms this outcome makes no sense and is contrary to the planning objectives of the NPPF.

53. Mr Tucker submits that this conclusion can be avoided by the failure to meet the PR requirements coming back into the planning balance as “another material consideration”, rather than through the mechanism of the “tilted balance” in paragraph 11 of the NPPF. However, firstly, this ignores dicta of Dove J in *Tewkesbury* that where the NPPF is silent on a situation it is open to an Inspector to exercise her planning judgement as here, subject only to a rationality argument. Secondly, this argument would involve turning the Inspector’s task into an ever more complicated obstacle race, by which she erred in law by bringing in the unmet need under paragraph 11, but could have brought it in later in the analysis to achieve the same planning decision. I note that nobody at the Inquiry argued that she should have dealt with the matter this way.
54. There is nothing in paragraph 77 which forces a decision maker into a binary choice in a situation such as this. If the sensible solution, on the facts of the case, is to take LHN where one set of strategic policies are out of date, and the development plan policies where they are up to date, and aggregate the two, then there is no reason why the Inspector cannot do that.
55. That conclusion is strongly supported by paragraph 67, which the Inspector relied upon, which specifically envisages that housing requirement figures may be higher than identified need, where they take into account a neighbouring area’s need.
56. It would not be reading the NPPF as a whole to have reference to “the requirement” in these terms in paragraph 67, but when applying paragraph 77 to accept the LPA’s case that there were two requirements which could not be aggregated.
57. Further, the Claimant’s reliance on the monitoring policy, Policy 13 in the PR, is in my view wrong. It may make good planning sense to monitor the two requirements separately, because of the geography of Cherwell and the role of the allocated sites in the PR. But the policy requirement in the PR is not limited to allocated sites or particular parts of the District. The requirement to deliver 420 dwellings per annum falls on the District as a whole. Therefore a failure to meet that delivery should be part of the housing requirement of the LPA in paragraph 77. Otherwise paragraph 11 of the NPPF is robbed of its true effect, because it is not taking into account the true level of failure to deliver the development needed.
58. For these reasons I dismiss the Claimant’s application.