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CO/781/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday 3 July 2014

B e f o r e:

DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

Between:
THE QUEEN ON THE APPLICATION OF WYNN-WILLIAMS

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr D Stedman-Jones (instructed by Holmes & Hill) appeared on behalf of the Claimant

Ms E Dehon (instructed by Treasury Solicitor) appeared on behalf of the Defendant

J U D G M E N T
(As approved by the Court)

THE DEPUTY JUDGE (David Elvin QC):

1. This is an application to quash a decision of the Secretary of State's Inspector, dated 10 January 2014, pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA"). In that decision, the Inspector dismissed the claimant's appeal against a refusal of planning permission by Hart District Council for the change of use of a site from an equestrian manège to a tennis court at Sprat's Hatch Farm, Dogmersfield, Hook.

2. The appeal site is circa 595 sq.m in area and is located north of the residential curtilage of Sprat's Hatch Farm and lies outside any defined settlement boundary in the Local Plan. The proposal followed an earlier refusal of planning permission when the claimant had sought to amend his proposal to reach some form of compromise with a form of development which would be acceptable to the planning authority. No compromise was reached and permission was refused by the authority on 13 April 2013. The reason for refusal given by the authority was -

> "There is no policy which specifically allows for the change of use of equestrian land to residential land in the open countryside. It is considered that the development proposed would be detrimental to the character of the open countryside. As such, the proposal is contrary to Saved Policies RUR 2, RUR 3 and GEN 1 in the adopted Hart District Local Plan (Replacement) 1996 to 2006."

3. The appeal which Mr Wynn-Williams then brought under section 78 of the TCPA was conducted by written representations. The Inspector records the fact that he carried out a site visit on 8 October 2013. He refused planning permission, identifying at paragraph 2 of his decision the main issue as "the effect of the proposed development on the character and appearance of the countryside". No issue is taken with his characterisation of the issue.

4. The main parts of the decision letter setting out the primary reasoning of the Inspector in his decision to refuse permission are found at paragraphs 3 to 8:

> "3 The appeal site, which is currently a grassed area, is located in the countryside. It does not form part of the residential curtilage of Sprat's Hatch Farm. There is currently a clear distinction between the character of the appeal site which at the time of my site visit had the appearance of a paddock, commonly found within a countryside location, and the domestic garden of Sprat's Hatch Farm which includes features associated with a domestic garden such as a lawn, trees and shrubs and a swimming pool.
>
> 4 The proposed development for a hard surfaced tennis court with surround fencing is not a typical feature found within a countryside location.

Although a condition could be imposed regarding landscape treatment around the edge of the tennis court, and this may help to mitigate the impact of the proposal on the appearance of the countryside, it would fail to address the harm that would be caused to the character of the countryside. In addition the colour of materials, detailed design, existing hedging and any new planting would not prevent the proposal from being seen as an urbanising form of development.

5 The appellant makes reference to the current permitted equestrian manège use associated with the appeal site. However, I agree with the Council that the domesticated appearance of a tennis court and its associated fencing would be quite different to a manège which is typical in countryside locations and which is permissible under a development plan policy. Furthermore, I have no substantive evidence to indicate that there is a significant probability that the manège would be developed should this appeal be dismissed. This limits the weight I can attach to it as a fallback position.

6 Based upon the evidence in front of me it appears that the proposed tennis court would be for the private use of the appellant and his family and on this basis would be more akin to a domestic residential use than a recreational use for the benefit of the wider community. Thus whilst it is unfortunate there is no up to date development plan policy regarding recreational development in the countryside, given the domestic nature of the proposal, I do not consider such a policy is relevant to the determination of this appeal. Therefore the presumption in favour of sustainable development, as set out in paragraph 14 of the National Planning Policy Framework (the Framework), is not applicable in this instance.

7 For these reasons the proposed development would unacceptably harm the character and appearance of the countryside. As a result there would be a conflict with policies GEN 1, RUR 2 and RUR 3 in the Hart District Local Plan (Replacement) 1996-2006 and First Alterations to the Hart District Local Plan (Replacement) 1996-2006 Saved Policies document (2009). These policies seek to restrict development that would have a harmful impact upon the character and appearance of the countryside.

8 I acknowledge the appellant's points regarding the social and economic gains that would result from the proposed development, for the present occupiers and local businesses. In addition the benefit in terms of reduced greenhouse emissions as the occupants would no longer need to travel away from the site to play tennis. However, one of the core planning principles, as set out in paragraph 17 of the Framework, outlines the need for decision-takers to take account of the different roles and character of different areas including recognising the intrinsic character of the countryside. I consider the benefits identified by the appellant would be significantly and demonstrably outweighed by the environmental harm that would be caused to

> the character and appearance of the countryside. On this basis the proposal would fail to satisfy the presumption in favour of sustainable development."

5. The Inspector then rejected the relevance of other appeal decisions which he considered not to be directly comparable to the appeal proposals and found no other factors which ran against his conclusion that the proposals were unacceptable and ran contrary to the terms of the Development Plan.

6. In the claim form, his skeleton argument and oral argument, Mr Stedman-Jones, who appears on behalf of the claimant, put forward essentially two grounds of challenge. First, he said the Inspector had applied an out-of-date Development Plan Policy which was inconsistent with the National Planning Policy Framework ("NPPF") and had applied a Development Plan presumption not to develop in the countryside in preference to the presumption in favour of sustainable development in paragraph 14 of the NPPF which is what he ought to have done, praying in aid in this respect not only the provisions of the second part of paragraph 14 but also paragraphs 15, 17 and 215 of the NPPF.

7. It was contended by Mr Stedman-Jones that had the Inspector approached the issue by reference to the correct presumption under paragraph 14 then he might have reached a different conclusion on the merits and that that was sufficient in order to demonstrate grounds for quashing.

8. Mr Stedman-Jones did not suggest - though asked to identify any relevant aspects of the NPPF relied upon - that there were any specific inconsistencies with NPPF policies found in paragraphs 18 to 219. He focused on his submission that the approach applied by the Inspector under the Development Plan and the policy presumption in the Development Plan was inconsistent with the approach required by paragraph 14 of the NPPF read together with paragraph 215 of the NPPF.

9. Mr Stedman-Jones' second ground related to the "fallback" position. In paragraph 5 of the decision letter, he submitted, the Inspector wrongly dealt with the fallback position of the equestrian manège and failed to give adequate reasons for his decision on that issue. He accepted that this ground was, to some extent, secondary to that in his first ground and did not press the view that in the use of the language "significant probability" that the Inspector was necessarily applying a strict legal test. He submitted that in approaching the issue of the adequacy of reasons with regard to the fallback position, I should consider and apply the principles set out by Sullivan LJ in Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] JPL 1326 and the recent judgment of Mr Ian Dove QC (sitting as a Deputy High Court Judge) in Gambone v Secretary of State for as Communities and Local Government [2014]

EWHC 952 (Admin).

10. Ms Dehon, appearing on behalf of the Secretary of State, submitted that the decision letter had properly and lawfully dealt with the issues and that the application should be dismissed. On ground 1, she submitted that the way in which the issue was dealt with in the sixth paragraph of the decision was as a result of the way in which the appeal had been argued. The appeal had been put squarely on the basis that there was an absence of relevant policy, not that there was a relevant policy that was inconsistent or out of date. She submitted that this was clear from the Design and Access Statement (DAS) submitted with the application and with the written statement of appeal submitted by the claimant.

11. In any event, she submitted that section 38(6) of the Planning and Compulsory Purchase Act 2004 still confers primacy on the Development Plan notwithstanding the provisions of the NPPF and that the NPPF is simply another material consideration which falls to be considered in accordance with section 38(6) and with section 70(2) of the TCPA. See City of Edinburgh v Secretary of State for Scotland [1997] 1 WLR 1447 and Scrivens v Secretary of State for Communities and Local Government [2013] EWHC 3549 Admin. It is at the point of "other material considerations" that the NPPF should come into account. The question then arises as to whether the Development Plan Policy is inconsistent or out of date.

12. Secondly, Ms Dehon submitted that, having regard to paragraph 211 of the NPPF, a Development Plan policy was not to be taken to be out of date simply because it pre-dated the NPPF. She submitted that Mr Stedman-Jones had failed to identify any relevant respect in which it was said that the policy was inconsistent with the substance of NPPF policies given that both paragraphs 14 and 215 required inconsistency to be shown if the presumption in favour of sustainable development was to operate and the presumption in accordance with the Development Plan was not to be applied. Further, it was clear from the City of Edinburgh that a mechanistic approach is not to be taken to the issues even in the Development Plan context and that providing the decision maker is sufficiently clear that he or she has properly taken into account the relevant issues, has properly understood the relevant policies and taken account of all the material considerations, the manner in which the decision maker goes about the decision is a matter for the judgment of the individual decision maker.

13. With regard to ground 2, Ms Dehon submitted that this was a case where, although the Inspector in the fifth paragraph of the decision dealt with the two stages identified by Mr Dove QC in Gambone (paragraphs 26 to 27) in reverse order, it was nonetheless clear what the Inspector was deciding and why, namely he agreed with the planning authority

that the tennis court proposal was more harmful to the countryside than the permitted manège, and considered that there was no substantive evidence to lend weight to the manège fallback issue either.

Discussion

Ground 1

14. The provisions of the NPPF which bear on this ground are found in paragraphs 6, 14, 211 and 215. These provide, where relevant, as follows:

> "6. The purpose of the planning system is to contribute to the achievement of sustainable development. The policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system."
>
> "14. At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.
> .....
> For **decision-taking** this means:
> • approving development proposals that accord with the development plan without delay; and
> • where the development plan is absent, silent or relevant policies are out of date, granting permission unless:
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
> - specific policies in this Framework indicate development should be restricted."
>
> "211. For the purposes of decision-taking, the policies in the Local Plan (and the London Plan) should not be considered out of date simply because they were adopted prior to the publication of this Framework."
>
> "215. In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

15. The reference to the twelve-month period in paragraph 215 is to the twelve-month period from the date of publication given in paragraph 214, as a "period of grace" before full weight was given to NPPF policies to allow local authorities to consider their position

with regard to their plan policies which might not be in accord with the NPPF. That period expired in 2013.

16. It is also relevant to note that although it does not fall within the core sustainability policies referred to in paragraph 6, paragraph 17 sets out the "core land-use planning principles" which include:

> "17 Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:
>
> ....
>
> • take account of the different roles and character of different areas promoting the vitality of our main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it."

17. As Ms Dehon submitted and Mr Stedman-Jones accepted, the NPPF is not part of the statutory Development Plan and is simply a material consideration (albeit an important one) within the meaning of sections 70(2) and 38(6). It does not have a statutory significance given to the Development Plan by those provisions. Indeed, as Collins J. pointed out in Scrivens (paragraphs 6 to 7), the legal framework is unaffected by the NPPF. And, as he noted at paragraph 7:

> "7. The NPPF is not a plan nor is it to be regarded as a policy statement within the meaning of Part 2 of the Planning Act 2008 – see s. 5 of that Act. It is however a material consideration.... "

18. I respectfully agree. I do not read anything that follows those statements in his judgment, including his discussion at paragraph 10 and paragraph 14, to be intended to be inconsistent with paragraphs 6 and 7.

19. In my judgment it is clear that here, despite earlier suggestions to the contrary by the claimant in the DAS and in his appeal statement, that there were relevant and applicable plan policies which applied to his application and appeal, namely GEN 1, RUR 2 and RUR 3.

20. GEN 1 was a general policy for development which allowed for permission where it accorded with other proposals of the plan in which one of the criteria was that they should be "in keeping with the local character by virtue of their scale, design, massing, height, prominence, materials, layout, landscaping, siting and density".

21. RUR 2 was probably the most significant policy so far as concerned the decision under

challenge and dealt with development in the open countryside:

> "Development in the open countryside outside the defined settlement boundaries will not be permitted unless the Local Planning Authority is satisfied that it is specifically provided for by other policies in the Local Plan and that it does not have a significant detrimental effect on the character and assessment of the countryside by virtue of its siting, size and prominence in the landscape."

22. The supporting text to that policy is helpful in understanding the context in which that policy was brought forward:

> "The Local Plan proposals map distinguishes the built-up areas of towns and villages from the surrounding open countryside by means of settlement policy boundaries. The whole of the area outside these boundaries is classified as countryside.
>
> In addition to the areas designated for their landscape or ecological value, much of the countryside of the district is of a small scale and intimate enclosed character: this should be respected by any new development. This countryside is of strategic significance in controlling the sprawl and separation of the built-up areas of the Blackwater Valley towns, Reading and Basingstoke. It is also a valuable informal recreation resource for the residents of these urban areas.
>
> The council's aim is to protect this countryside for its own sake by minimising the impact of new developments on agricultural and forestry land, mineral resources and areas of historic landscape or nature conservation interest. Pressures for development are in conflict with the protection of the countryside resource and policies of restraints are required to protect its character .....
>
> The countryside can normally accommodate some small-scale economic development without detriment provided that it is sensitively related in design and location to the existing settlement pattern and landscape ..... "

23. RUR 3 set out the criteria for permitting developments in the countryside which are provided for by other policies in the plan in accordance with the general principles set out in RUR 2. There are four criteria which include the protection and maintenance of the countryside through the retention, creation or enhancement of features of nature conservation or landscaping importance and other matters such as adequate landscaping and the like.

24. There are other policies in the same chapter of the same policies of the Local Plan which - also saved by the 2004 Act - link to RUR 2 and its reference to other specific policies. It is not necessary for me to recite them all; they are listed helpfully in

paragraph 17 of Ms Dehon's skeleton argument but they include policies for informal recreational activities, equestrian activities, camping, business development and telecommunications installations.

25. It was not suggested by Mr Stedman-Jones that any of the policies applicable, particularly RUR 2 and RUR 3, were inconsistent with paragraph 17 or the range of the NPPF policies mentioned in paragraph 6 of the NPPF as being the touchstone of what the Government regards as sustainable development. The way the claimant's case was put in the DAS and on appeal was conducted, as Ms Dehon pointed out, in similar terms. In the appeal statement reference was made to the key policies of the Local Plan which had been saved and, following a discussion of GEN 1, the following was stated:

> "Similarly, Local Plan policies RUR 2 and RUR 3 seek to ensure that development of the countryside does not have a significant detrimental effect on the character and setting of the countryside by virtue of its siting, size and prominence in the landscape.
>
> Policies RUR 2 and RUR 3 refer to the need for development to be specifically provided by other policies in the plan. Policy RUR 29 was previously the council's policy dealing with recreational developments in the countryside but this policy was not saved and an update is yet to be adopted. Paragraph 215 of the NPPF explains if a policy is adopted prior to 2004 the weight given to such policies is dependent on their consistency with the NPPF. Indeed, the recent publication of the council's Core Strategy 2011 to 2029 for public consultation includes Policy CS1 which states:
>
> > 'Where there are no policies relevant to the application or relevant policies are out of date at the time of making the decision the council will grant permission unless material considerations indicate otherwise.'.
>
> In the absence of a relevant up to date Local Plan policy, the proper test of this proposal is to apply the presumption in favour of development from the NPPF and to look at the site's specific circumstances to assess whether the tennis court would result in an adverse impact on the countryside. On this basis the development of the proposed tennis court is supported by the planning framework."

26. The local authority responded to the appeal submissions, clearly understanding what was being said to be a submission that there was an absence of relevant policy. This is clear from paragraph 6.1 of the council's comments on the appellant's ground of appeal in which it pointed to the policies which it said were relevant, specifically RUR 2 and RUR 3. No doubt they did not deal with the issue of inconsistency because it had not been raised by the appellant in the appeal statement or the DAS. Indeed, I note that even considering the response to the planning authority's written statement, in the Final Comments document (at IV) the claimant did not, even at that stage, raise the issue of

inconsistency but simply referred to "the inadequacies of the increasingly redundant 2002 Local Plan" referring to the terms of CS1 which had already been quoted.

27. Having been given the opportunity to test the local authority's assertion that there were relevant applicable policies, the claimant chose not to dispute that but simply to make the statement that I have indicated.

28. It is clear that both in his application and on appeal the point being made by the claimant by reference to paragraphs 14 and 215 of the NPPF was the absence of relevant policy; not that there was relevant policy but such policy was inconsistent. Though Mr Stedman-Jones pointed to the specific reference to paragraph 215 in the appeal statement and its noting that the weight to be given to policies is dependent on consistency with the NPPF, nothing specifically flowed from that in terms of the case put before the Inspector. I take it simply to have been a reference to 215 and to its provisions without fully quoting it. It is certainly clear that the point which follows it is one relating to the alleged absence of policy rather than inconsistency. No issues of inconsistency were raised in the appeal documentation.

29. In this context it is important to note that paragraphs 14 and 215 as well draft Policy CS1 approach the issue in a similar fashion, namely by considering whether there is relevant policy and, if so, whether it is up to date and consistent with the NPPF.

30. Those statements do not answer the question: they merely set the questions to be asked, namely whether there a relevant policy and, if so, is it consistent and up to date? Whether that question is answered in the positive or negative will depend on the specific circumstances of the case. Paragraph 14 of the NPPF does not determine that question but sets out consequences under “decision-making” which depend on the application of judgment by the decision-maker.

31. In my judgment it is plain that, as Ms Dehon submitted, submissions to the Inspector proceeded on the basis of an asserted absence of policy. This, in my view, confused the significance of the loss of the old recreation policy RUR 29 given the existence of other general and applicable policies which did not support this form of development. This was an issue which the Inspector clearly understood since he referred to it expressly in paragraph 6 of his decision. Indeed, Mr Stedman-Jones rightly conceded that GEN 1, RUR 2 and RUR 3 were relevant policies. It is therefore not surprising that the Inspector approached the matter as he did. He drew attention in paragraph 6, to the lack of a specific recreational policy, and this was the context in which he said (at the end of paragraph 6) that paragraph 14 was not applicable. Read in context, he was clearly referring to the submission that there had been an absence of policy. Clearly, he was

correct in that respect. He then made that clear by setting out in paragraph 7 the policies which were breached by the proposals.

32. Ms Dehon also drew to my attention to the judgment of Sullivan J (as he then was) in Newsmith Stainless v Secretary of State for Environment, Transport and the Regions [2001] EWHC 74 Admin (paragraph 16) in submitting that it is only in very rare cases that it is appropriate for the court to allow new issues to be argued, noting that this would be particularly the case if new argument required further findings of fact and/or the exercise of planning judgment. Mr Stedman-Jones pointed out that this issue had been raised by the reference to inconsistency in the appeal statement and that, in any event, there was no additional material that was needed on the issue of inconsistency. The material was already before the Inspector.

33. It is necessary in my view to exercise due caution with new material and new points taken, especially with respect to written representations appeals which are intended to be short and for straightforward cases. It is not to be expected as a general rule that inspectors should seek to find new points though there are bound, from time to time, to be some cases where there may be obvious errors or omissions, for example, the failure to consider a plainly applicable policy. Equally, there is a need for care when what arises may involve the proper construction of policy which is a matter of law for the court pursuant to Tesco v Dundee [2012] PTSR 983 in which case it may give rise to a challenge if a key Development Plan policy has been plainly misunderstood such as in Islington London Borough Council v Ashburton Trading [2014] EWCA Civ 378. However this is not such a case since there has been no suggestion of a misinterpretation of a key Development Plan policy.

34. Moreover I am unable to see how the policies here are inconsistent with the NPPF, rejecting, as I do, the suggestions that the mere age of the policy is sufficient to render it out of date or inconsistent given the provisions of paragraph 211 of the NPPF. Plainly, the references to out of date policy in the NPPF must be considered in the light of paragraph 211.

35. Examining the relevant part of paragraph 14 of the NPPF, which is the core of the claimant's case, it requires the policy presumption to be applied either where development proposals accord with the Development Plan or where there are relevant policies and they are out of date unless their adverse effects significantly outweigh the benefits assessed against the policies in the NPPF and in other limited circumstances. It is therefore clear that the starting point in the NPPF is the same as that in section 38(6), namely whether the development proposals accord with the Development Plan. An answer to that question is a necessity if paragraph 14 is to be applied properly. If the

proposals are not in accordance with the Development Plan, the NPPF clearly requires that consideration be given to whether the relevant policies are out of date, there being no automatic presumption applying in favour of the development unless the second part of paragraph 14 is met. Paragraph 14 is therefore not of substantive effect to the extent that the process to be followed before the presumption applies requires the exercise of judgment as to whether relevant policies with which the proposals conflict are "out of date". In considering whether policies are "out of date", that requires consideration of inconsistency as paragraphs 211 and 215 make clear.

36. Mr Stedman-Jones' only answer to the question of inconsistence, is what I regard as a circular argument that the paragraph 14 presumption should override the Development Plan presumption relating to development in the countryside when, in fact, in my judgment, the paragraph 14 presumption cannot be applied until the questions posed by paragraph 14 itself, which include consideration of the Development Plan Policies, have first been answered. There is no automatic application of paragraph 14 to set against the presumption in RUR 2. That could only happen, according to the terms of paragraph 14, if the exercise required by paragraph 14 had first been undertaken, had reached a conclusion that the policies were out of date and that the adverse impacts would significantly and demonstrably outweigh the benefits. No issue arises with regard to adverse impact and significantly and demonstrably outweighing benefits here. The question is one of out of date and inconsistent policies. As I have already made clear, Mr Stedman-Jones' only argument to support his case in this respect is the circular argument regarding the presumption itself, which ignores the very requirements of paragraph 14. In my judgment that argument cannot be accepted.

37. With regard to the question of inconsistency between the relevant plan policies applied by the Inspector and the NPPF, paragraph 6 makes quite clear that what sustainable development means in terms of the NPPF is that which is set out in the substance of paragraphs 18 to 219. Neither in respect of those paragraphs, nor of the core principles in paragraph 17, has the claimant been able to identify any inconsistency.

38. For the reasons I have already given it seems to me that the relevant policies are not only applicable but are also consistent with the NPPF. In this respect it is necessary to have regard again to Lord Clyde's judgment in City of Edinburgh (at 1459D to 1460D) which is as apposite to the issue of conflicting presumptions, in my judgment, as it is to the resolution of conflicts between the Development Plan and other material considerations. Lord Clyde said:

> " ..... in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that

> he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case ..... The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."

39. This guidance with regard to the operation of a statutory presumption in section 38(6) holds good also in the policy context of paragraphs 14 and 215 providing the decision maker has properly understood the issues, has not misunderstood the meaning of policy and has taken account of all material considerations, then there is no prescription the court should apply to the process undertaken by the decision-maker which is a matter for his or her own good judgment.

40. It is perfectly clear in my judgment from the terms of the decision letter that the Inspector properly understood Development Plan policy, considered the provisions of the NPPF and paragraph 14 in particular (see paragraph 6) and had conducted his decision-making consistently with the requirements of paragraph 14, including identification of the apparent balance of benefits and disadvantages (as required by the latter part of paragraph 14) at paragraph 8 of his decision where he referred to paragraph 17 of the Framework which I have already quoted.

41. It follows even if it would be right correct in this case to allow consideration of an issue of inconsistency not raised on appeal by the claimant, in my judgment there is nothing in such a submission and, for the reasons I have given, ground 1 must fail.

Ground 2

42. This ground raises the question whether one of the material considerations said to exist in this case (a fallback position) was dealt with properly by the Inspector and whether adequate reasons were given for his rejection of it as an overriding issue. I adopt the established approaches to construing decision letters and to reasons in planning cases, which do not need repetition by me: see Clarke Homes v Secretary of State for the Environment (1993) 66 P & CR 283, Seddon Properties v Secretary of State for the Environment (1981) 42 P & CR 26 and (in the case of reasons) paragraph 36 of Lord Brown's judgment in South Bucks v Porter No 2 [2004] 1 WLR 1953.

43. In this case the alleged fallback position was the possibility that the manège might be brought into operation with, it was said, more damaging effects to the locality than the proposed tennis court. The approach to the significance of a fallback position is explaned

by Sullivan LJ in Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] JPL 1326 at paragraphs 21 to 22. At paragraph 21, Sullivan LJ noted that the materiality of the fallback position did not turn on precisely calculated nuances of probability. He said:

> "In order for a prospect to be a real prospect it does not have to be probable or likely: possibility will suffice. It is important to bear in mind that fall back cases tend to be very fact-specific."

44. Sullivan LJ then went on to state there were a number of examples of how the application of a fallback position might vary from case to case. At paragraph 22 he made the significant point that the issue was a broad discretionary one, sensitive to the specific circumstances of the case:

> "It is important in my judgment not to constrain what is or should be in each case the exercise of a broad planning discretion based on the individual circumstances of that case by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but of themselves simply the judge's response to the facts of the case before the court."

45. As he noted in respect of fallback position at paragraph 24, the conclusions as to significance and weight are matters for the planning judgment of the decision maker.

46. Whilst in Gambone v Secretary of State for as Communities and Local Government [2014] EWHC 952 (Admin), the Deputy Judge considered the principles in some detail applying them to the issues before him. His approach was, as it must have been, directed by Sullivan LJ's judgment in Samuel Smith and I do not read anything in his judgment as intending to detract from the approach in that case. The identification of two stages in the process at paragraphs 26 to 27 of his judgment is a helpful analysis of the issues which are likely to arise, i.e. is there a fallback position as a material consideration and, if so, what is its significance to the application before the decision maker. However it is not intended to be a prescriptive formulation as the claimant appeared to suggest: see Sullivan LJ in Samuel Smith at paragraph 22. It is not necessary to adopt a mechanistic approach to that analysis given that it is merely judicial explanation of the approach to be taken, not a statutory prescription (see Lord Clyde in City of Edinburgh).

47. The contentions in respect of the alleged fallback in this case was put simply in DAS in the following terms:

> "The extensive soft landscaping and sensitive design will mean that the court is very inconspicuous. This should be compared with the existing permitted

> use as an equestrian manège area. If the applicant wished to bring the existing manège back into use he would be entitled to put down the standard black rubber surfacing for a manège as show in figure 6.
>
> Given that the primary concern of the Local Planning Authority is to avoid any significant impact on the open countryside, it seems clear from the images shown in figure 6 that the current permission for a significantly larger manège area would potentially have a greater impact than the proposed sensitively designed tennis court (incorporating a green surface, reduced high fencing and soft landscaping). In summary, the careful attention to the size and design of the court, along with the proposed screening, will ensure the court has no material adverse impact on the surround open countryside."

48. The reference to figure 6 was to a photograph of a manège showing black rubber surfacing which, it was said, "could be used at Sprat's Hatch Farm" as compared to a photograph of a tennis court with green-painted, porous macadam.

49. It is clear that the issue of the manège and the possibility of the use of black rubber surfacing were only raised as a possibility. They were advanced to support the case on appeal in that if they were to be brought about they would be more damaging to the appearance of the countryside than the proposed tennis court.

50. There was no evidence presented to the Inspector with regard to the actual intentions of the owners, whether it was intended to bring the manège into use if permission were refused, still less any evidence which indicated that there was such in fact such an intention and, if there was, that there was any probability of its occurrence. It is the lack of support of any real intention to bring about the construction of the manège, other than its being raised as a bare possibility as a point of comparison with a tennis court, to which the Inspector referred at the end of paragraph 5 of the decision letter as "no substantive evidence to indicate that there was a significant probability that the manège would be developed should this appeal be dismissed". This was prefaced by the word "furthermore" which made it clear that it was an additional point to the one which had preceded it.

51. The first point the Inspector made was to agree with the planning authority's characterisation of the tennis court and to conclude that it would be domestic in appearance, unlike the manège which was typical of countryside locations and was permissible under Development Plan policy. Accordingly, in my judgment the Inspector was concluding, first, that a manège was preferable to the tennis court in terms of countryside policy and, secondly, there was little evidence to substantiate the possibility of it being brought into existence in any event. As I have already noted in another context, the Inspector then found in paragraph 7 that there would be a harmful impact on

the countryside and that there would be breaches of Development Plan policy and that the benefits alleged would not outweigh the harm he described in paragraph 8.

52. It is plain therefore that the Inspector did deal with the issue of fallback position correctly although he may have reversed the order of the two-stage analysis in Gambone. I see nothing impermissible in that since the Inspector nonetheless considered the relevant issues. It is clear that the Inspector regarded the proposals as more harmful to the countryside than the fallback position and furthermore that only limited weight could be given to the fallback position given the lack of substantive evidence to support its likely implementation.

53. The reasons given by the Inspector were comparatively short but in my judgment they were adequate, applying established principles and they required no further elaboration. For those reasons, ground 2 also fails.

Conclusion

54. For the reasons I have given, I dismiss the claimant's application.

MS DEHON: I am grateful. The Secretary of State seeks his costs in defending this appeal. Has your Lordship seen a summary assessment?

DEPUTY JUDGE: Yes. I have - £5,484.

MS DEHON: Yes.

MR STEDMAN-JONES: My Lord, the costs are agreed.

DEPUTY JUDGE: In that case I dismiss the application and order that the claimant should pay the Secretary of State's costs assessed and agreed at £5,484. Is there anything else?

MS DEHON: No.

DEPUTY JUDGE: I thank you both for your concise but nonetheless efficient and helpful submissions.