CO/12732/2011

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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 2 May 2013

B e f o r e:

CHARLES GEORGE QC
(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN ON THE APPLICATION OF HOUGHTON AND WYTON PARISH COUNCIL

Claimant

v

HUNTINGDONSHIRE DISTIRCT COUNCIL

Defendant

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(Official Shorthand Writers to the Court)

Miss S Hannett (instructed by Trowers & Hamlin) appeared on behalf of the **Claimant**
Mr P Goatley (instructed by Coling Meadowcroft) appeared on behalf of the **Defendant**

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

1. THE DEPUTY JUDGE: The Claimant, Houghton and Wyton Parish Council ("the Parish Council"), by claim form dated 29 December 2011, applies for judicial review of the decision on 20 October 2011 of the Defendant, Huntingdonshire District Council ("the District Council") to finalise and approve the St Ives West Urban Design Framework ("the Framework") "as planning guidance to inform Council policy and future decisions on potential development applications". Permission was given by Thirlwall J, following an oral hearing on 1 April 2012.

2. There are two Grounds. The first ground is that the Defendant has acted ultra vires by seeking to allocate land for a particular use or development otherwise than by the adoption of a development plan document ("DPD") ("the DPD ground"). The second, alternative, ground is that the Defendant has acted ultra vires in seeking to produce planning guidance otherwise than by way of a Local Development Document ("LDD") ("the LDD ground").

FACTUAL BACKGROUND

3. On 23 September 2009 the Defendant adopted a core strategy for the Huntingdon District ("the Core Strategy"). The Introduction to this states that the "Council has chosen not to include detailed development control policies or identify specific development sites", as these would be dealt with separately by, inter alia, a Planning Proposals DPD. Chapter 5 of the Core Strategy sets out the "spatial strategy". Paragraph 5.2 refers to a Key Diagram which "illustrates the locations and directions of growth for the new homes". On the Key Diagram an arrow points to the west of St Ives, indicating residential development. It is positioned slightly south of the A1123.The Key Diagram also indicates that there will be some residential development within the built up area of St Ives.

4. Policy CS2 of the Core Strategy states that "at least 500 homes will be provided" in the St Ives Spatial Planning Area (of which area no boundaries are indicated in the Key Diagram or elsewhere in the Core Strategy). It is said that, of these, at least 100 homes will be on previously developed land, about 400 homes will be on greenfield land and about 200 will be affordable. Policy CS2 also states:

> "Provision will be in the following general locations:
>
> In a significant Greenfield development to the west of the town..."

Table 6.2 (Performance Indicators and targets) states in relation to Policy CS2 that implementation would be:

> "Through Planning Proposals DPD, Huntingdon West AAP, development control decisions, SPDs and UDFs".

UDFs are non-statutory Urban Design Frameworks (a term unhelpfully undefined elsewhere in the Core Strategy).

5. The Defendant's intention at the time of the adoption of the Core Strategy was to "follow swiftly [the] Core Strategy with the Planning Proposals DPD in order to identify and allocate development sites to enable timely delivery", see its Response to Inspector's Questions (February 2009). Had the Defendant done what it said it would do, the present proceedings would have been avoided. However, no Planning Proposals DPD has been adopted, so that there is no DPD that allocates land for housing within the Defendant's area.

6. Instead, the Defendant prepared and published in draft in July 2011 a document described on its cover page as "Urban Development Framework, planning brief 2011, supplementary planning document". This draft identified within a red line a site to the west of St Ives, together with a "preferred option" for its development, including four areas notated as new potential housing areas.

7. The Claimant, in a letter dated 22 September 2011, responded to the consultation, setting out its objections to the adoption of the draft. The first ground of objection was that it would be ultra vires to adopt the draft Supplementary Planning Document ("SPD"), because it constituted a site allocation policy. The reasoning was the same as that which forms the basis of Ground 1 of the present challenge. The Claimant also raised a number of planning objections to the adoption of the draft (with which this court is not concerned).

8. The officer's report to Cabinet, whilst mentioning the Claimant's assertion that adoption would be ultra vires, did not specifically address the issue raised. The Report stated that the document was being promoted as an UDF, not an SPD, and that any reference to SPD would be removed from the final document. The Officer's Report contained no explanation why the change was made from SPD/UDF to solely UDF, and I was proffered no explanation by Mr Goatley, Counsel for the Defendant. It may be that the only reference in the draft to SPD (on the cover page) had itself been an error, but this leaves unanswered why the chosen format for the document that proceeded to adoption was that of a UDF rather than an SPD. The Report included that:

> "…Once approved, the [Framework] will provide the District Council's development guidance for the area. It is not necessary to delay the production of such guidance until the Planning Proposals DPD is completed. The [Framework] informs the development of the Local Development Framework policy deriving from the adopted Core Strategy, and this includes the emerging Planning Proposals DPD which deals with specific land allocations".

9. The Framework, no longer entitled SPD nor planning guidance was adopted by Cabinet on 20 October 2011 and came into force on 28 October 2011. The court has not been informed of any further steps taken with regard to a Planning Proposals DPD.

10. The Minutes of the adoption meeting state that:

> "Members were specifically reminded that the planning guidance contained within the document was not intended to define, presume or

endorse the release of sites within the area, nor constitute any formal site allocation".

THE LEGISLATIVE BACKGROUND

11. In one of the few previous cases which have considered statutory language in relation to allocations (Bolton Cpn v Owen [1962] 1 QB 470), Lord Evershed MR referred at 479 to "the intricate legislation relating to town and country planning" and Wilmer LJ at 485 to "the bewildering maze of statutory provisions". Fifty years on, the statutory provisions are different, but those interpreting them can still be excused a measure of bewilderment. For skilled guidance through the maze I am indebted to Counsel, and in particular to the Claimant's Counsel, Miss Hannett.

12. The corner-stone of modern town and country planning is the requirement in section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") that determination of an application for planning permission must be made in accordance with the development plan unless material considerations indicate otherwise. That makes it essential to know in each case what the development plan is, though planning documents which do not form part of the development plan can still be relevant as material considerations.

13. The development plan is defined in section 38(3)(b) of the 2004 Act as "the development plan documents (taken as a whole) that have been adopted or approved in that area".

14. Section 15(1) of the 2004 Act provides that the local planning authority ("LPA") must prepare and maintain a scheme to be known as their local development plan. Pursuant to section 15(2), the local development scheme must specify the LDDs which are to be DPDs. Section 37(3) defines a DPD as "a local development document which is specified as a development plan document in the local development scheme"; and pursuant to section 17(3):

> "[The LPA's LDDs] must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area".

15. Section 17(7)(za) provides that regulations made under section 17 may prescribe "which descriptions of documents are, or if prepared are, to be prepared as local development documents". Section 17(7)(a) provides that regulations made under section 17 may prescribe "which descriptions of local development documents are development plan documents".

16. At the material time the relevant regulations were The Town and Country Planning (Local Development (England) Regulations 2004 ("the 2004 Regulations"). Regulation 6 sets out the documents which, if prepared, are to be prepared as LDDs. That includes, pursuant to regulation 6(2)(b), "any ... document which includes a site allocation policy". Regulation 7 sets out the documents which must be DPDs. . This includes "core strategies" (as defined in regulation 6(1)(a)) and "any

other document which includes a site allocation policy". A "site allocation policy" is defined in regulation 2(1) as meaning "a policy which allocates a site for particular use or development".

17. A "supplementary planning document" is defined in regulation 2(1) as meaning "an LDD which is not a DPD, but does not include the local planning authority's statement of community involvement". The National Planning Policy Framework (March 2012, and thus postdating adoption of the Framework), describes SPDs as:

> "Documents which add further detail to the policies in the Local Plan. They can be used to provide further guidance for development on specific sites, or on particular issues, such as design. Supplementary planning documents are capable of being a material consideration in planning decisions but are not part of the development plan."

18. Regulation 13 provides that:

> "(1) ..., an LDD must contain a reasoned justification of the policies contained in it.
>
> (2) ... those parts of an LDD which comprise the policies of the LDD and those parts which comprise the reasoned justification required by paragraph (1) must be clearly identified".

19. From all this it can be seen that LDDs divide into DPDs and SPDs, and that only DPDs give rise to the statutory presumption under section 38(6) of the 2004 Act, with SPDs having less weight than DPDs. Nothing is said in the 2004 Act or the Regulations about UDFs, which are therefore not DPDs, and are only LDDs if brought forward and adopted as SPDs (which was not the case with the Framework in question).

20. There being no suggestion in the present case that the Framework is an adopted DPD, it is not strictly necessary to set out the provisions for the preparation and adoption of DPDs. Suffice to say that section 20 of the 2004 Act requires the LPA to submit every DPD to the Secretary of State to ensure that it complies with various provisions in the 2004 Act and that it is "sound". Section 20(6) provides that any person who makes representations seeking to change a DPD must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination. In contrast, whilst an LPA must permit representations to be made in respect of an SPD, and must not adopt the SPD without having regard to those representations (regulation 18), there is no process by which an SPD is subject to an independent examination by a planning inspector. In short, because they carry greater weight, DPDs are subject to a more rigorous adoption process, and because SPDs carry reduced weight, they are not subject to a similar process. PPS12, Local Spatial Planning (2008), in force at the time of the adoption of the Framework, though revoked in March 2012 on the adoption of the National Planning Policy Framework, provided at paragraph 6.1 that "SPDs

should not be prepared with the aim of avoiding the need for the examination of policy which should be examined".

21. A further difference between DPDs and SPDs is that there is no requirement to undertake a sustainability appraisal of an SPD (or for that matter of a non-statutory UDF).

22. There being no express power under the 2004 Act to promulgate UDFs, other than as SPDs, and the Defendant accepting that the Framework was not adopted as an SPD, the only powers under which it can have been adopted are those in the general ancillary power, section 111(1) of the Local Government Act 1972 ("the 1972 Act"), or the more specific general power under section 2(1) of the Local Government Act 2000 ("the 2000 Act") (repealed by the Localism Act 2011 with effect from 4 April 2012, but in force at the time the Framework was adopted). I shall return to those powers when I come to the Claimant's Ground 2.

THE CONTENTS OF THE URBAN DESIGN FRAMEWORK

23. The Framework is a 75 page, illustrated document. Its purpose is set out at para 1.1:

> "The District Council's purpose in preparing the [UDF] is to establish the planning, urban design and development principles which *will* apply to the study area. This is important as the Huntingdonshire Core Strategy (the Council's planning framework) has established the principle of growth to the west of St Ives. The UDF *will* provide the District council's planning guidance for the area and *will* be a material consideration when determining any future planning on [sic] the area." (emphases added).
>
> Para 1.2 describes "The Study Area", which is then identified within a red line on Map 2. Map 5 (Wider planning context) includes a west-facing arrow, situated between two "2002 Housing allocations", and described as "Preferred direction of growth 2010-2026", and includes, further north, another west-facing arrow, described as "Discounted direction of growth".

24. The Study Area comprises four parcels of land:

a) The former golf course (15 hectares), the north-east corner of which has an extant planning permission for residential development.

b) The How (5.6 hectares), a large house with grounds.

c) The former Biotechnology and Biological Sciences Research Council ("BBSRC") laboratory field (18.3 hectares, including derelict laboratory buildings).

d) Houghton Grange (14.1 hectares), including a listed building and other buildings, which had a lapsed outline planning permission for approximately 100 homes. (Since the issue of this claim, planning permission has been granted for 90

houses at Houghton Grange).

25. Under the heading "What could be provided", appears the following:

> "1.7.1 As well as delivering a large area of strategic green space, a small shop could also be provided to serve the development and immediate surroundings.
>
> 1.7.2 Including the already committed Houghton Grange site (which has a capacity for around 100 homes) the overall area has a capacity for around 500 new homes. With the addition of the two sites currently under construction [Slepe Meadow and Green Acres, outside but adjoining the Study Area] this means that there will be approximately 700-750 new homes built in this area up to the year 2026".

26. Para 1.6.3 states that:

> "The District Council considers that the Study Area is an appropriate location for the further growth of the town".

and goes on to explain why this location was considered appropriate. Whether or not the Study Area is an appropriate location for residential development is not a matter for the court, nor raised as an issue in the present claim.

27. Para 3.1 states that:

> "The Council's vision is for a significant new area of publicly accessible open space to be provided as a major new amenity space for the town and the surrounding villages, as well as providing much needed new houses for the wider St Ives area".

There follow a number of "Place Making Principles". The bulk of the Framework lies in section 4 (Development of urban design objectives and design guidance), which states at the start that:

> "The Council consulted on a 'preferred option' development concept should development come forward to the west of St Ives"

This is presumably a reference to the consultation on the draft Framework. The section begins with a vision and design concept, followed up with more detail "*to provide greater clarity and guidance for the landowners and potential developers*" (emphasis added). Map 18 (A vision for the Study area) shows four "New potential housing area(s)", together with "Planting areas forming avenues", "Planting areas forming an edge/barrier", open space, and access points. The status of the "vision" is clarified by para 4.1.2:

> "This vision has been developed further into a preferred option, addressing the six key principles [thereafter highlighted]".

The prescriptive nature of the Framework can be seen in para 4.1.6 ("Determining the extent of development along the southern edge of the Study Area"), which includes the following:

> "4.1.6.2 For Houghton Grange, the southern extent of potential built development *will* be established along the building line of the Grange....
>
> 4.1.6.3 For the BBSRC field, the southern edge of potential development *is clearly defined* by the line of trees that cross the site about half way down, and by the concrete track that provides access from Houghton Grange...
>
> 4.1.6.4 ...Any buildings [in the garden to the east of The How] *must* also appear subservient to The How and not project beyond the existing building line.
>
> 4.1.6.5 For the former golf course, any potential development *must* have its southernmost edge of development defined immediately to the west and immediately south west of the clubhouse ... This is the most appropriate place to *define* the edge of development." (emphases added).

28. Later paragraphs explain that the Council has considered and discounted other options for "additional development" within The How and the former golf course.

29. In para 4.1.8 the Framework addresses the need to prevent coalescence of the town with the neighbouring village of Houghton. Para 4.1.8.1 states that:

> "The Council considers the strategic green separation between St Ives and Houghton to be located to the west of Houghton Grange".

It was explained to me by Miss Hannett that this is controversial, since the Parish Council (whilst valuing that particular gap) attaches much importance also to the gap presently existing further east, between Houghton Grange and the town (which is considered appropriate for residential development under the Framework).

30. Para 4.5 ("Density and mix") and Map 28 (Density) show a suggested arrangement of density across the site. Para 4.5.5 advises that some 200 homes can be developed on the former golf course, 210 on the BBSRC land and about 90 on the Houghton Grange site, whilst there may be an opportunity for a limited number of houses within the grounds of The How.

31. Finally, para 4.11 deals with implementation:

> "It is important that if the area is developed, it is built out as a

comprehensive extension to the town, with ease of access between and throughout the area.

The three separate parts of the study area do not need to be developed in any particular phased manner. However they *must* all be integrated, and the proposed access loop road and proposed central pedestrian and cycle route that crosses the How's access drive *must* be delivered by developers on both sides of the drive and be connected..." (emphases added).

GROUND 1 ("the DPD ground")

Submissions

32. It is common ground that a document which contains a site allocation policy must, pursuant to section 17 of the 2004 Act and regulation 6 of the 2004 Regulations, be prepared as a DPD; and that where a local planning authority adopts a document which is required by the 2004 Act and 2004 Regulations to be a DPD without following the required procedure, that decision is ultra vires the LPA. But is the Framework a document containing a site allocation policy?

33. The Claimant contends that the Framework does contain a site allocation policy, and therefore ought to have been adopted as a DPD, for the following reasons:

(i) Regulation 2 of the 2004 Regulations defines a "site allocation policy" as "a policy which allocates a site for a particular use or development".

(ii) The Framework identifies a specific site, described as "the study area".

(iii) The Framework identifies the study area as the site at which 500 dwellings and strategic green space will be located (paras 1.6.3 and 1.7.2), to be completed by 2026.

(iv) The Framework purports, therefore, to allocate a specific site for a particular use or development. It therefore contains a site allocation for the purposes of regulation 2 of the 2004 Regulations.

(v) The Core Strategy did not allocate the residential development proposed for St Ives to a specific site or sites, leaving open the question of the balance between houses on previously developed and greenfield land, and leaving open the proper width of the gap between St Ives and Houghton. These were matters now fixed by the Framework.

(vi) The reference at table 6.2 of the Core Strategy to UDFs was irrelevant, since at the time of adoption of the Core Strategy there was no suggestion that a UDF would be used to allocate land for housing; on the contrary at that time the Defendant stated that a Planning Proposals DPD would be brought forward.

34. The Defendant contends that the Framework does not contain a site allocation policy, for the following reasons:

(i) Nowhere does it state that any site is "allocated" for any particular use or development. In the absence of any express policy in the Framework clearly stating that an identified site is being allocated for a particular use or development, it should not be construed as a site allocation policy.

(ii) The Framework is simply "planning guidance for the area" (para 1.1). It is a Masterplan (a term used only in Mr Goatley's Skeleton Argument), and the Defendant has repeatedly made clear that it has no intention of treating it as though it contained a site allocation policy or was a DPD.

(iii) The Inspector who examined the Core Strategy had agreed that separation between St Ives and Houghton should be retained, but the Core Strategy did not identify any strategic green space between St Ives and Houghton to the west, and had, on the key diagram, indicated that the area to the west of St Ives, south of the A1123, was that to which residential development should be directed.

(iv) The Framework, whilst entirely consistent with the Core Strategy, does not preclude other proposals coming forward such that they may be considered (on their merits) having regard to, inter alia, the Core Strategy. The Council has merely sought in an open and consultative way to arrive at some principles for the consideration of the study area to the west of St Ives.

(v) The Framework identifies many of the specific factors which would inevitably fall for consideration if any application for planning permission were made. Any decision to quash the Framework would be at most of limited value.

Analysis

35. The question is simple, though the answer much less so. Is the Framework "a policy which allocates a site for a particular use or development" (Regulation 2)? If so, this allocation can only be done in a DPD, and the Framework is ultra vires.

36. The normal meaning of "allocate" is to place, locate or apportion; but in the context of Regulation 2 I take the statutory phrase to mean the same as "provides that a particular use or development should take place on a piece of land". Under these statutory provisions, the purpose (and consequence) of allocating a site for development is that its development should proceed (subject to detailed design), not merely that it could appropriately do so.

37. In R (Wakil) v Hammersmith and Fulham LBC [2012] EWHC 1411 (QB); [2013] Env.LR 3, one of the issues was whether a document described as an SPD was in fact an Area Action Plan, which was a DPD and so was required to follow a different procedure before adoption, including submission to the Secretary of State for independent assessment (as in this case would an allocation policy). At para 81 Wilkie J said:

> "….[W]here as here, the question is whether a document satisfies or does not satisfy all of the conditions identified in a statutory document, that is an application of fact to legal requirements and, as such, a matter

> where the Court has to make the judgment. It is not limited to reviewing a decision made by the local planning authority, subject only to intervention only on *Wednesbury* grounds".

At para 87, the judge said that the provisions of the statute required him to consider:

> "whether, looking at the document as a whole and as a matter of substance, it satisfies all of the requirements of an area action plan so as to be a DPD not an SPD".

On the facts before him, the judge found that the document was an Action Area Plan and that the LPA had erroneously failed to characterise the document as such (paras 89-90).

38. It is plain that the District Council did not regard itself as formally allocating any site when it adopted the Framework. That is clear from the officer's Report to Cabinet, which referred to the Planning Proposals DPD, and described the draft Framework as having "no policy making role in relation to principle, scale and location of development"; see also the reference in the Minutes to the Framework not constituting "any formal site allocation". I find great difficulty in understanding how officers considered that the Framework had "no policy making role in relation to… scale and location of development". It was policy guidance in relation to precisely those matters. Furthermore it is rather strange for an LPA to produce a Masterplan at a stage when, according to the Defendant, the principle of development and any related site allocation had not yet taken place. I was initially attracted by Miss Hannett's argument that the Framework was a specific proposal that the study area be developed primarily for housing, and developed in a very specific way through the development of a "preferred option"; and that this was in reality, if not in words, an allocation.

39. But, first impressions notwithstanding, I do not find in the Framework any indication that the study area *would*, as opposed to *could*, be developed. Critically, as it seems to me, para 1.6.3 stated that the Study Area was considered "an appropriate location for the further growth of the town", rather than "*the* appropriate location..." (emphasis added). The Framework was "planning guidance for the area, and will be a material consideration when determining any future planning applications in the area" (see para 1.1), but it was not establishing the principle of development in that area, which had been done very broadly in the Core Strategy and was not being further developed into a specific allocation through the Framework. The Framework was a "how" document rather than a principled allocation. The Framework came very close to being an allocation, but it was not such.

40. It is item (iv) identified above in the Claimant's reasoning which is misconceived. The Framework did not "allocate a site for a particular use or development"; and it did not "therefore contain a site allocation for the purposes of regulation 2 of the 2004 Regulations".

41. Since the bringing forward of the allocations DPD was delayed, there was good sense in trying to plug the gap, in a way which was consistent with the housing numbers in

the Core Strategy and the direction of growth in its Key Diagram. The Framework cannot have the weight which would be accorded to a DPD as part of the development plan, but that is not claimed for it by the Defendant. It is, in my opinion, a step too far to conclude that plugging the gap in this way was de facto to allocate the Study Area.

Conclusion

42. The application on Ground 1 fails.

GROUND 2 ("the LDD ground")

43. The LDD ground only arises if Miss Hannett is wrong (as I have held) on the DPD ground.

44. Just as in there is agreement between the parties that the Framework is not a DPD, so there is agreement that it is not an SPD (though the draft Framework was so entitled). Does this matter?

Submissions

45. The Claimant contends that is does matter, because:

(i) Section 17(3) of the 2004 Act requires that a local planning authority's LDDs "must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area". Therefore it is not open to an local planning authority to adopt policies relating to the development and use of land in their area other than by adoption of LDDs.

(ii) The Framework, even if it is not an allocation policy, is setting out policies relating to the Study Area. That is clear in particular from para 1.1 ("the planning, urban design and development principles that will apply to the study area").

(iii) The Defendant cannot rely on section 111 of the 1972 Act or section 2 of the 2000 Act. Both powers are subject to limitations in other legislation, namely in this case section 17(3) of the 2004 Act: see the phrase "subject to the provisions of this Act and any other enactment passed before or after this Act" in section 111(1) of the 1972 Act and the terms of section 3(1) of the 2000 Act ("...does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made)".

46. The Defendant contends that:

(i) Section 17(3) is not as far-reaching as the Claimant contends. A local planning authority may (and will) carry out technical and other work intended to guide subsequent planning decisions. Such work, when published, does not without more "set out the authority's policies...relating to the development and use of land in their area".

(ii) The powers under section 111 of the 1972 Act and section 2 of the 2000 Act

are broad. They allow the production of planning guidance, such as the Framework, designed to facilitate the task of the Defendant in considering planning applications, and to help to achieve the economic, social and environmental well-being of the area.

(iii) The limitations on use of section 111 of the 1972 Act and section 2 of the 2000 Act are not of relevance in the present case, because neither the 2004 Act nor the 2004 Regulations contain any prohibition, restriction or limitation on the promulgation of planning guidance. There is no provision in either this Act or those Regulations, nor in any other enactment, which states that a planning authority must not adopt planning policy other than as a DPD or SPD. The fact that the 2004 Act and Regulations provide a procedure for adopting statutory DPDs and SPDs is an insufficient basis upon which to find that the 2004 Act and Regulations contain some implied limitation to the effect that an LPA cannot adopt planning guidance otherwise than through the procedures prescribed by this legislation.

(iv) The existence of other powers to fulfil similar objectives is not a sufficient basis upon which to find that the powers under the 2000 Act are restricted, see, for example, R (J) v Enfield LBC and the Secretary of State for Health [2002] EWHC 432; [2002] HLR 38 and R (W) v Lambeth LBC [2002] EWCA Civ 613; [2002] HLR 758.

(v) There were prior to the 2004 Regulations no procedures prescribed for the adoption of what was known as supplementary planning guidance ("SPG"). Accordingly SPGs were always a form of non-statutory planning guidance with a recognised role, see R (JA Pye (Oxford) Ltd and Others v Oxford City Council [2002] EWCA Civ 116. The mere fact that SPDs had now been given a statutory basis in the planning legislation did not preclude the use of non-statutory guidance.

(vi) There is no evidence of ulterior motive by the Defendant. The Defendant has sought to engage in a wide public consultation exercise which will assist in determining planning applications in the less than ideal world of not having its full suite of DPDs in place. The consultation process mirrored the statutory consultation process mandated for SPDs in the 2004 Regulations.

(vii) If there were no scope for documents such as the Framework to be adopted save as LDDs, one would have expected some transitional provisions to safeguard existing non-statutory planning documents whilst they were re-prepared as LDDs.

(viii) All the matters set out in the Framework would constitute material planning considerations if the Defendant were considering planning application. Therefore in its discretion the Court should decline to quash, even were there no power to have produced the Framework in a single document.

Analysis

47. I do not accept Miss Hannett's contention that the only documents which an LPA can produce in connection with the planning of its area (including development control) are LDDs (consisting as they do of DPDs and SPDs, each with their own adoption procedures). To give but a few examples, an LPA can (under section 111 of the 1972

Act) produce research documents and analyses, as well as good practice guides in relation to, say, trees, shop fronts and advertisements without these being produced as LDDs. The weight which attaches to them will be reduced if they are not contained in LDDs, but that is another matter; indeed Mr Goatley readily concedes this.

48. I accept that there is, or may be, a fine line between the point at which these "set out the authority's policies ... relating to the development and use of land" (in which case they can only be included in LDDs, to ensure compliance with section 17(3) of the 2004 Act) and the less-than-policy area where they are merely background, non-policy documents.

49. If, on a proper analysis, documents do set out the LPA's relevant policies, then (however much public consultation may take place, and whether or not the consultation mirrors that which is statutorily afforded to SPDs), they can only be adopted as LDDs (which means as SPDs - as was originally envisaged with the draft Framework). I do not consider the absence of transitional provisions to be sufficient to override the mandatory terms of section 17(3), especially since that provision is not expressed to have retrospective effect.

50. Contrary to what is urged by Mr Goatley, I have no doubt at all that the Framework does contain policies. It is much more than a mere Masterplan. It is "the District Council's planning guidance for the area", containing "the planning, urban design and development principles that will apply to the study area" (para 1.1). Its language is highly prescriptive, as indicated in the passages I have set out above, including the selection of a "preferred option" and the rejection of forms of "additional development". I doubt that there is a clear division between planning policies and planning guidance. Much of the government's National Planning Policy Framework derives from Planning Policy Statements which used to take the form of Planning Policy Guidance. I do not think it arguable that the original Planning Policy Guidance was not itself a principal part of the government's planning policy. If such a division between policy and guidance exists, this particular document, the Framework, or at any rate significant parts of it, fall on the policy side of the line.

51. It follows therefore that the LPA's policies within the Framework ought to have been contained in an LDD (in this case an SPD) to ensure compliance with section 17(3) of the 2004 Act. I do not find the Defendant's case assisted by reference to old cases where the lawfulness and materiality of non-statutory SPGs to planning decisions was accepted. In those cases not merely was the lawfulness of the SPGs not in question, but more importantly there was then no equivalent of section 17(3) of the 2004 Act. In such cases, section 111(1)of the 1972 Act provided a statutory basis for SPGs.

52. I am not persuaded by Mr Goatley's argument that an LPA can avoid the plain words and implication of section 17(3)of the 2004 Act by praying in aid its powers under section 111 of the 1972 Act or section 2 of the 2000 Act. Reliance on the 2000 Act is surely a non-starter, in the absence of any evidence that the Defendant has ever addressed the question whether the proposals in the Framework would help in achieving the economic, social and environmental well-being of its area or part of it. This may be implicit, but I doubt that is enough. More importantly, I agree with Miss

Hannett that the requirement in section 17(3) of the 2004 Act is a limitation on the use of other powers, and that therefore the express wording of section 111(1) of the 1972 Act and section 3(1) of the 2000 Act prevents reliance on these other statutory powers.

53. I readily accept that there can be cases where there are two or more statutory powers enabling a particular goal to be achieved, and that in such cases the fact that one such statutory power - maybe even the one most commonly used - is subject to restrictions will not constitute an implied limitation on the use of the other powers, including section 2 of the 2000 Act. That was so in the two cases on which Mr Goatley relied, see the Enfield case at para 57 and the Lambeth case at para 75. But I do not think that the Framework (which I have held to contain planning policies) can be saved by reliance on the 1972 Act or the 2000 Act. To do so would fundamentally undermine section 17(3) and the scheme of the 2004 legislation.

Conclusion

54. Therefore the challenge under Ground 2 is made out, subject to consideration of the court's discretion not to quash.

55. Had the Framework continued to be entitled an SPD, it could, without any greater consultation than the Framework did have, and with few other statutory procedures (including separation of policies and justification to comply with regulation 13(2) of the 2004 Regulations), have been adopted as an SPD, so as to be an LDD in compliance with section 17(3). And it would then, of course, have achieved greater weight as a material consideration than could ever attach to a mere non-statutory document. In these circumstances, would it not be more sensible not to quash the Framework, thus allowing it to continue its limited policy role?

56. I do not think that would be an appropriate use of the court's discretion. Unless formally quashed, the Framework will be invoked, possibly by developers and/or third parties, as well as by the Defendant as LPA, in respect of planning applications, both those within the study area and possibly elsewhere. On each such occasion it will be necessary to explain to the decision-maker (be it the LPA itself or an Inspector) that the Framework is not merely not an SPD, but also that it ought not to have been adopted in its present form. I regard this as an unnecessary complexity, and that if unquashed the Framework will inevitably mislead.

57. If I were in the Parish Council's position, I might actually prefer to have the continued protection of the Framework, rather than be left in a planning wilderness until the District Council finds a lawful way of resolving a problem which is very much of its own making. But that is speculation. Here the court has been requested by the Parish Council to quash the Framework, and (whatever may be my own views on the wisdom of this request) it is one that the Claimant is entitled to make and which the court ought not to refuse.

58. Nor is a different conclusion reached merely because much, indeed probably most, of the content of the Framework can constitute expert evidence provided by the Defendant's officers to its planning committee or at Public Inquiries. Of course it can.

And it may have added weight because it is the same as what was formerly contained in the Framework which was the subject of public consultation. But critically that particular document, the Framework, ought never to have been produced in that form and it would be wrong to keep it alive just because much of its content will remain relevant and usable.

59. Therefore the application succeeds on Ground 2 and the Framework must be quashed.

OTHER ORDERS

60. The parties are at liberty to address the court on any other relief, orders or directions sought and in due course I shall look to the Claimant to submit an agreed form of Order.

61. MISS HANNETT: Thank you my Lord. I do have an application for the claimant's costs. My Lord, those costs that the claimant has incurred are in the sum of just over £28,000. But on 18 April 2012 Thirlwall J made a reciprocal protective costs order, limiting both parties to claiming the sum of £15,000 should they be successful in the claim. My Lord, in those circumstances I ask for an order the defendant pay the claimant's costs to be summarily assessed in the sum of £15,000.

62. THE DEPUTY JUDGE: Have you put in the costs order. You are asking me to summarily assess them?

63. MISS HANNETT: My Lord, I can certainly hand up the costs schedule.

64. THE DEPUTY JUDGE: In effect you are asking for the £15,000.

65. MISS HANNETT: My Lord, yes. Mr Goatley will address you in due course but I do not understand there to be any dispute that both of us have incurred costs in excess of £15,000. In those circumstances rather than taking my Lord's time up by looking through a schedule we could cut things.

66. THE DEPUTY JUDGE: Mr Goatley, what do you say on costs?

67. MR GOATLEY: My Lord, in respect of costs, I do not resist my learned friend's application for costs in the sum of £15,000 and I accept what she says that the amount of costs that have been incurred have at least met or exceeded that figure, so I am not going to quibble about that. That was the nature of the reciprocal costs capping order.

68. THE DEPUTY JUDGE: Had you applied for some different costs order, I might have only granted part of her costs. Even so, at the end she would be getting up to £15,000 and so if I may respectfully say so your approach is a very sensible one.

69. MR GOATLEY: My Lord, thank you.

70. THE DEPUTY JUDGE: That will therefore be the costs order, Miss Hannett which you are going to draw up in due course.

71. MISS HANNETT: My Lord, of course.

72. THE DEPUTY JUDGE: Yes Mr Goatley?

73. MR GOATLEY: My Lord, always as ungracious as it seems after your Lordship has delivered a reasoned judgment is to make an application for permission to appeal to the Court of Appeal. The grounds upon which I do so are those set out in CPR 52.3(6). Two grounds (a) and (b): (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard. I make an application under both grounds my Lord. So exclusively directed to the second ground, the LDD ground upon which your Lordship found against the authority. The point of that one was whether or not it is possible to produce guidance otherwise than an LDD. Your Lordship has accepted under ground 1 that this is not a site allocations document, and secondly, the power exists under section 111 to produce documents otherwise than as SPDs. Your Lordship also indicated that there is or maybe a fine line between policy and less than policy areas as to what is a wrong policy document.

74. Your Lordship has also found that the UDF, or any rate a significant part of it falls on the policy side of that line. That is a matter upon which a defendant would wish to explore by way of challenge in the Court of Appeal. Your Lordship has also indicated that there can be reliance on the 2000 Act powers as well as those under the 1972 Act and that reliance upon that maybe implied. You doubt that in respect of this case. That is also a matter which the defendant would wish to pursue further.

75. Your Lordship has also found in respect of section 17(3) of the 2004 Act that that is not in itself a limitation on the use of the 2000 Act or the 1972 Act powers, but indicated that in respect of this case, we consider that would not be applicable to the terms of the UDF. Your Lordship has also accepted the principle that one statutory power --

76. THE DEPUTY JUDGE: I said it was a limitation on the use of the 2000 Act to make planning policies. However it may be that is not critical.

77. MR GOATLEY: Indeed. In terms of whether it is or is not a planning policy and how that is construed in context of the UDF, that is again a matter upon which the defendant authority would wish to explore matters.

78. There is a wider issue as well that arises from this and that is the circumstances in which a document maybe adopted otherwise as an SPD and irrespective of the matters which I have raised through your Lordship in respect of subsection (a) in respect of subsection (b) compelling reason, that is a matter which has a wider systemic consequence for local planning authorities promulgating and producing documents otherwise there is an SPD. On those matters I respectfully ask you Lordship to grant permission and the matter to be referred to the Court of Appeal.

79. THE DEPUTY JUDGE: Miss Hannett, do you want to say anything?

80. MISS HANNETT: My Lord, no, only to indicate that I oppose the application for the reasons my Lord has given in his judgment.

81. THE DEPUTY JUDGE: I think that this is a case where it is unusually right to grant permission to appeal. I think it is a case which has got implications for a number of other cases and therefore it would fall under the second head (some other compelling reason), and in any event I confess I did not find the matter entirely straightforward and the matter would probably benefit from consideration by those with much greater expertise than I have myself.

82. So far as the time for doing anything, time will not begin to run until a transcript of the judgment is available to the parties. That can be included in the order.

83. MISS HANNETT: My Lord, of course. I will draw that order up. Shall I e-mail it to my Lord's clerk. Is that a sensible way forward or to the Admin Court itself?

84. THE DEPUTY JUDGE: I think it should be sent in to the Admin Court and then asking that the matter be placed before me as soon as possible and I would hope that I might receive it this afternoon or tomorrow, but I do not think there is any great complication.

85. MISS HANNETT: My Lord, I am sure that can be arranged.

86. THE DEPUTY JUDGE: Can I express my gratitude to both counsel for what were not only very good skeleton arguments but also remarkably concise presentation of the cases. It was anticipated by the learned judge that this was a one-day case but because of their expertise we got through it in only just over half-a-day, the case having been listed for half-a-day. That is a matter for congratulation to you both.