Neutral Citation Number: [2019] EWHC 3476 (Admin)

Case No: CO/5007/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2019

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

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Between :

Clare Mills	**Claimant**
- and -	
The Secretary of State for Housing Communities and Local Government	**First Defendant**
-and -	
East Devon District Council	**Second Defendant**

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Richard Turney (instructed by **Foot Anstey LLP**) for the **Claimant**
Leon Glenister (instructed by **Government Legal Department**) for the **First Defendant**
No appearance (unrepresented) for the **Second Defendant**

Hearing date: 3 September 2019

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Approved Judgment

C.M.G. Ockelton :

1. Otterton is a rural village near East Budleigh in Devon. It lies well outside, but between, the tourist resorts of Exmouth and Budleigh Salterton (to the South West) and Sidmouth and Seaton (to the North East). Some 450 metres from the centre of Otterton is Hawkern House, a large detached dwelling in spacious grounds. It has an annexe, Hawkern Cottage, which has its own enclosed grounds but with which it shares a driveway. Hawkern Cottage was converted from a stable building, with planning permission granted in 1995. There is a condition limiting its use to that of an annexe to Hawkern House or as a holiday cottage with no individual or group permitted to stay for more than four consecutive weeks.

2. The Claimant applied to East Devon District Council ("the Council") the Local Planning Authority, for permission for change of use of Hawkern Cottage to use as a self-contained residential dwelling. Permission was refused in a decision dated 6 February 2018. The reasons given were as follows:

> "The change of use of this building from its permitted use as an annexe or holiday accommodation would result in an unrestricted dwelling within an unsustainable location which is remote from services and facilities and would therefore give rise to increased traffic movements from private vehicles. No evidence has been provided that there is no longer a need for tourist uses, and it is considered that the building is not located close to a range of accessible services and facilities to meet the everyday needs of residents. The proposal would therefore constitute unsustainable development in the countryside which conflicts with Strategy 7 (Development in the Countryside), D8 (Re-Use of Rural Buildings Outside Settlements), E18 (Loss of Holiday Accommodation) and TC2 (Accessibility of New Development) of the East Devon Local Plan 2013-2031; and guidance contained in the National Planning Policy Framework."

3. The Claimant appealed under s.78 of the Town and Country Planning Act 1990. The appeal was determined through the written representations procedure by an Inspector, Mrs Hollie Nicholls. The Inspector made a site visit on 1 October 2018 and dismissed the appeal in a decision dated 2 November 2018. By these proceedings the Claimant challenges the decision of the Inspector under s.288 of the 1990 Act. The claim is defended by the Secretary of State on behalf of the Inspector; the Second Defendant, the Council, put in an Acknowledgment of Service resisting the claim but has taken no further part in the proceedings. Permission was refused on the papers by John Howell QC sitting as a Deputy Judge of this Court, but was granted by Lieven J following a hearing.

4. Two principal reasons for the original decision are apparent from it. They are that the location of the property is unsuitable for development of the nature proposed, and that the change of use will conflict with policy relating to tourist accommodation. Those two factors were also dealt with by the inspector. In relation to the first of them, which the inspector headed "Accessibility of Local Services" the Inspector considered the

location of the appeal site, its transport links, and its relationship to neighbouring services. Her conclusion at para 9 of her decision was that:

> "Whilst there is a reasonable level of local facilities and services in Otterton, they are not sufficiently accessible in relation to an appeal site and the change of use would promote an undesirable pattern of development. The proposal therefore conflicts with Strategy 7 and Policies D8 and TC2 of the EDLP which, among other things, seek to ensure that development is conveniently located for the facilities required to meet the everyday needs of residents."

The Inspector's conclusion on that issue is not challenged.

5. Before setting out the Inspector's conclusions on the other issue, which she headed "Loss of Holiday Accommodation", it is convenient to set out the relevant parts of the East Devon Local Plan 2013-2031, which was adopted on 20 January 2016 after review and report by an Inspector. As a matter of context, Policy E17 protects and encourages holiday accommodation within the "Principal Holiday Accommodation Areas", which are defined as specified areas in Exmouth and Sidmouth. The text of the Local Plan then continues as follows:

> "Resisting the Loss of Holiday Accommodation
>
> 24.28 The Principal Holiday Accommodation Areas afford specific protection to holiday accommodation uses in specified areas in Exmouth and Sidmouth. Hotels elsewhere in these resorts and in Seaton provide holiday accommodation which is important to their tourism function. Holiday accommodation elsewhere in the district is also essential to maintain a viable tourism base and takes a range of forms, including hotels, chalets, camp sites, caravan sites and bed and breakfast establishments. The loss of holiday accommodation to non-tourism uses will generally be to the detriment of the tourism appeal of East Devon and therefore loss will be discouraged. In many instances planning permission granted on properties for holiday use will be conditioned to prevent changes of use to non-holiday uses. Policy sets the context for consideration of proposals involving the loss of holiday accommodation within the holiday resorts of Exmouth, Seaton and Sidmouth as a whole."

6. Then follows Policy E18:

> "E18 – Loss of Holiday Accommodation
>
> The proposals for change of use or redevelopment of hotels and other holiday accommodation in the seaside resorts of Exmouth, Budleigh Salterton, Seaton and Sidmouth will not be permitted unless the holiday use is no longer viable and/or the new use will

> overcome clear social, economic or environmental problems associated with the current use.
>
> Permission for change of use will not be permitted unless it can be clearly demonstrated that there is no longer a need for such uses and that the building or site has been marketed for at least 12 months (and up to two years depending on market conditions) at a realistic price without interest."

7. It was and is the Council's position that Policy E18 applies to Hawkern Cottage, that is to say to holiday accommodation outside the named seaside resort, and accordingly that the proposed development conflicted with Policy E18. The inspector agreed. She said this:

> "Loss of Holiday Accommodation
>
> 10. Policy E18 of EDLP has also been cited by the Council as a reason for withholding permission. This policy seeks to protect existing holiday accommodation, although it emphasises the tourist destinations of Exmouth, Budliegh Salterton, Seaton and Sidmouth, the supporting text of the policy does however indicate that the principle is intended to apply outside of these areas as well.
> …
> Based on this, I consider that Policy E18 of the EDLP is of relevance to this proposal. I note that this supporting text was also referenced by my colleague in an appeal decision for a case in Harcombe (APP/U1105/W/15/3137366), which suggests that its wider application by the Council is reasonable and supports my view on this matter.
>
> 11. I have no decisive evidence before me in relation to the nature or levels of recent occupancy of the cottage. In the absence of such evidence, I cannot conclude that the holiday use is no longer viable.
>
> 12. I acknowledge that the cottage has a dual use which allows the appellant to use it as an annexe to the main dwelling indefinitely. Whilst this may be the case, the permanent removal of the potential for the cottage to be used for holiday accommodation purposes would still cause a degree of harm. As such, in relation to this main issue, I consider that the loss of the holiday accommodation would conflict with Policy E18 of the EDLP, which seeks to protect the supply of tourist accommodation in the district."

8. Put shortly, the parties' positions are as follows. The claimant submits that the Inspector was wrong in interpreting Policy E18 as she did, and applying it to the present site. It follows that her assessment of the extent to which the proposed development conflicted with existing policy was wrong, and that her decision accordingly cannot stand. The Defendant submits that the Inspector was right in her interpretation and

application of the policy; and that, even if she was wrong about that, her decision would have been the same because of her decision on the first of the main issues.

The Law

9. The law relating to a challenge of this sort is well known and I do not need to rehearse it in any detail. First, in making her decision, the Inspector was required to have regard to the Development Plan, and her determination had to be made in accordance with the plan unless material considerations indicated otherwise. That follows from the statutory duties in s.70(2) of the Town and Country Planning Act 1990 and s.38(6) of the Planning and Compulsory Purchase Act 2004. As Lindblom LJ said in SSCLG v BDW Trading Ltd [2016] EWCA Civ 493 at [21], "the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the Development Plan as a whole".

10. Secondly, the meaning of a policy in a Development Plan is a matter of law for the Court: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13. In interpreting policies the correct approach to supporting text is that set out by Richards LJ (with whom Underhill and Floyd LJJ agreed) in R (Cherkley Campaign Ltd) v Mole Valley DC [2014] EWCA Civ 567 at [16]:

> "[W]hen determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed policies for the development and use of land in the area. The supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the policies will be implemented."

11. The Court's approach to an Inspector's decision letter is that it should be read fairly and as a whole, not as though it was required to be a comprehensive answer to an examination question, nor with undue regard to the Inspector's choice of words. The central question is whether the decision leaves room for genuine (as opposed to forensic) doubt as to what was decided and why. That is the effect of all the decisions: if specific authority is required it may be found in the judgment of Sir Thomas Bingham MR in Clarke Homes Ltd v SSE (1993) 66 P & CR 263 at 271-2.

12. Finally, and perhaps most basic, matters of planning judgment are for the decision-maker, whether a local planning authority or an inspector, not for the Court.

Policy E18

13. It is at first blush surprising that it is said that Policy E18 applies to a wider area than that specified in it. The Policy consists of two sentences, each of which is given a

paragraph to itself. The first sentence clearly applies only to the seaside resorts of Exmouth, Budleigh Salterton, Seaton and Sidmouth. The second follows, without any indication that it applies to a larger area. Although the heading "Loss of Holiday Accommodation" is general, that fact cannot realistically operate to extend the meaning of the second sentence beyond the geographical restrictions of the first. The Defendant relies on two factors, which it says points to the second sentence having a wider ambit than the first. These two factors are the supporting text, and the relationship between the two sentences of Policy E18.

14. As set out above, the supporting text is clearly relevant to the interpretation of the policy itself; but it cannot add to the policy. In my judgment there is nothing in the supporting text which suffices to show that, on its true construction, the policy has a wider ambit than the four places named in it. The supporting text says that in Exmouth and Sidmouth outside the specified areas, and in Seaton, holiday accommodation is important to the function of those three places. The text then deals with the holiday accommodation that is needed in order to maintain a viable tourism base in the rest of the District. It gives two indications of the way in which decisions in this area might be made. The first is that loss of accommodation to non-tourism uses will "be discouraged". The second is that conditions will be attached to grants of planning permission that will prevent loss to non-holiday use. This is not an indication that, throughout the District, changes of use to non-holiday use will not be permitted, or will be permitted only in certain specified circumstances. In particular, it carries none of the implications of the specific terms of the second sentence of Policy E18. It is general, vague and mild, whereas the second sentence of E18 is highly specific.

15. The observation that conditions will be attached to grants of planning permission, found in the supporting text, is, however, a specific instance of how loss of tourist accommodation will be discouraged. The condition imposed on the change of use to tourist accommodation will be likely to prevent its subsequent loss to that use.

16. The final sentence of para 24.28 in the supporting text is also in my judgment of considerable relevance. It specifically indicates that the policy (that is to say, the immediately following Policy, E18) is directed to "the holiday resorts of Exmouth, Seaton and Sidmouth as a whole". It does not say that the policy is directed to the District as a whole; and it does not suggest that the policy is intended to extend outside "holiday resorts". I appreciate that Budleigh Salterton, which is mentioned in the policy, is not mentioned in the supporting text. The supporting text cannot remove Budleigh Salterton from the policy, but Budleigh Salterton is a holiday resort and may perhaps have been regarded as part of "Exmouth… as a whole". I cannot see any proper basis upon which Otterton could fall within the phrase "the holiday resorts of Exmouth, Seaton and Sidmouth as a whole". I therefore reject the submission that the supporting text carries any implication that the second sentence of Policy E18 extends further than the resorts named in the first sentence.

17. The Defendant also submits that the second sentence of Policy E18 must refer to a wider area than that to which the first sentence is confined, because, if the second sentence is treated merely as supplementing the first, it either contradicts or detracts from it. The argument is that it would make no sense to provide that a change of use would be permissible if "a new use will overcome clear social, economic or environmental problems as associated with the current use" if compliance with the second sentence

also had to be demonstrated. There is, submits Mr Glenister, no "textual link" between the two tests.

18. If taking the two sentences together as applying to the same geographical locations caused a contradiction or absurdity, that would clearly be a pointer to the Defendant's proposed interpretation. In my judgment, however, there is no contradiction or absurdity; indeed the Defendant's interpretation would promote one or both.

19. Two concepts that appear in the first sentence are missing from the second. The first is redevelopment. The first sentence refers to "change of use or redevelopment"; the second sentence refers only to change of use. Secondly, the first sentence imposes a test based alternatively on non-viability or the overcoming of "clear … problems". The second sentence makes no specific reference to that alternative. The Defendant proposes that, given that the first sentence is limited to the named resorts (as it must be), the second sentence applies to some unspecified wider area, presumably the whole District. But, if that is so, the position is that, in the wider District, loss of holiday accommodation by redevelopment (without change of use) is not restricted by policy. Further, if the Defendant is right in saying that the second sentence refers only to viability, there is no policy provision relating to the wider District that would permit change of use in order to "overcome clear social, economic or environmental problems". Both those results would be very remarkable.

20. The truth of the matter, as it appears to me, is that the second sentence can readily be read with the first. The second sentence does indeed propose a test of economic viability; but there is no reason in principle why the market should not appropriately be used as an objective test of whether alleged "social, economic or environmental problems" are genuine, or are being urged simply in order to allow a change of use. Redevelopment (without change of use) is more likely to be associated with the presence of finances (from some source) rather than their absence. For that reason, the restriction of the test in the second sentence to change of use, rather than also including development, makes perfect sense in that context.

21. I therefore reject the Defendant's argument that the two sentences cannot stand together as both referring to the named resorts.

22. Three other points relating to interpretation were made by the parties. The Claimant asks me to take into account the history of Policy E18. Specifically, the Claimant notes that the second sentence was added during the course of the Inspector's examination of the Local Plan. The second witness statement of Suzanne Walford, dated 16 April 2019, has exhibited to it a number of documents relating to this process, apparently as a result of comments made by Lieven J at the oral permission hearing. The Policy needs to be interpreted objectively in accordance with the language used in it. The fact that the current wording is found in a Plan which has been examined in this way tends to show (but does not prove) that there are no inconsistencies in the policies; but in my judgment it would not be right to use the supporting documents advanced by the Claimant to provide any gloss on the meaning of the words eventually chosen. The Claimant argues that the second sentence was introduced in order to clarify the first sentence, not to extend the geographical ambit of the policy. Whether or not that is right, it should not in my judgment be allowed to deflect from the task of reading the policy as it stands.

23. The Claimant also brings to my attention correspondence between her and Council Officers, in which the latter indicated that the development she proposed at Hawkern Cottage was not subject to Policy E18. Again, those communications cannot affect the objective meaning of the Policy as interpreted by the Court (as distinct from by the Council). No claim based on legitimate expectation is or could be made.

24. Finally, the Defendant draws attention to the other Inspector's decision, no. 3137366, to which the Inspector in the present case referred. Consistency in planning judgment is desirable, and for that reason the exercise of judgment in one case may be of some relevance to the exercise of judgment in another. But those considerations do not apply where the issue is not the exercise of planning judgment, but the correct interpretation of a policy. If the present Inspector's interpretation of the policy was wrong, the fact (if it be a fact) that another Inspector or Inspectors made the same mistake cannot be allowed to affect the interpretation.

25. In summary, I reject the Defendant's arguments that the second sentence of the Policy applies to a wider area than the first. Although the Claimant's arguments add little or nothing to the issue, the position is that the policy has to be read as it is written. It has no implicit contradiction or other difficulty; and if it is read in the way the Defendants suggest, there are difficulties or absurdities. The natural meaning of the second sentence is that it applies to the same area as the first, and in my judgment that is the correct reading.

26. It follows that Policy E18 does not apply to the proposed development at Hawkern Cottage. The Inspector thus erred in deciding that it did.

27. The Claimant argues that in those circumstances the Inspector's decision should be quashed. She was required to determine whether the proposed development was in accordance with the Development Plan, and that required an assessment of the Development Plan as a whole: City of Edinburgh Council v Secretary of State for Scotland [1997] 1WLR 1447 at 1459 E-F per Lord Clyde. There were two main issues before the Inspector, which required a balance of judgment. Even if she made no error on one of them, it cannot be said that her decision would have been the same in the absence of the error on the other.

28. The position in the present case is that the proposed development conflicted with Strategy 7 and Policies D8 and TC2. There is no interaction between those policies and Policy E18: there is nothing in either of the two main issues which could be regarded as having an impact on the other. The Inspector's decision in relation to the first main issue makes it inevitable that, even without the error in relation to E18, she would have found that the proposed development was not in accordance with the Development Plan. In those circumstances it is clear that she would have had to dismiss the appeal (thus producing a determination in accordance with the Plan) "unless material considerations indicate otherwise".

29. Only two possible material considerations have been identified at any stage in these proceedings. The Inspector noted at paras 14-15 of her decision, that it was said that the creation of an independent dwelling would provide "social benefits" through additional support to local services with resultant economic benefits to the area, and that there were environmental benefits from reusing previous developed land for housing purposes. There was also support from some of the residents. She concluded

that these factors did not outweigh the harm that she had identified. The second factor could have no relevance to the issue of the loss of holiday accommodation: the first would appear to apply to any proposal to change self-contained holiday accommodation to a self-contained dwelling.

30. In my judgment the Inspector's conclusion on the first main issue was not, and could not have been, affected by her error as to the meaning of Policy E18. She properly took into account in relation to the first issue all the factors that related to it and even if she had concluded that the development was not inhibited by Policy E18 she would inevitably have concluded that the development was not in accordance with the Development Plan and that there were no material considerations indicating that there should be a departure from the Development Plan. To put that in another way, the conclusion on the second issue did not contribute to the conclusion on the first issue: it was simply a further reason why the appeal fell to be dismissed.

31. For these reasons, although I have found that the Inspector erred in her interpretation of Policy E18, her decision does not fall to be quashed and this claim is therefore dismissed.