Case Name: *Swindon Borough Council v Secretary of State for Levelling Up, Housing And Communities & Anor* [2023] EWHC 1627 (Admin) (30 June 2023)

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Commentary: This case concerns a statutory review, brought by Swindon Borough Council (the Claimant), of an inspector's decision to allow an appeal and grant planning permission following its decision to refuse planning permission due to lack of compliance with the Swindon Borough Local Plan 2026 (the Local Plan).

In 2015 the Claimant adopted the Local Plan, which included an allocation of around 700 hectares of mainly agricultural land (the Allocated Land) to the east of Swindon for the development of 8000 homes, in the form of interlinked but distinct new villages and expansion of 2 existing villages (the Allocation).

In February 2021 Danescourt (PCDF IV Swindon) LLP (the Developer) submitted an application for planning permission for up to 220 dwellings, together with associated infrastructure including a primary school (the Application) on part of the Allocated Land forming the north part of one of the villages known as Foxbridge. The Claimant refused the Application on the basis that it failed to deliver sustainable development and did not comply with several policies in the Local Plan as it did not secure an infrastructure package to meet the infrastructure needs arising from the development. The Developer appealed the decision, and the inspector allowed the appeal and granted planning permission for the Application, not including the proposed primary school.

At the inquiry, the parties agreed that the scheme could remain viable and deliverable whilst contributing 15% affordable housing, the primary school site and s.106 contributions of £1,122,000. The Developer maintained that any higher contribution would render the scheme unviable and undeliverable, and that the primary school was not necessary in practice in the north of Foxbridge. The Claimant maintained that 20% affordable housing should be provided in line with other permissions granted in respect of parts of the Allocated Land, as well as that the contribution offered by the Developer was only a third of the amount needed to meet the cost of necessary infrastructure and that the Developer should be bound by its unilateral undertaking to provide 2.2 hectares of land for the primary school. The inspector considered that the degree of non-compliance with relevant policies within the Local Plan was outweighed by the benefits of the Application, and granted permission.

The Claimant sought statutory review of the inspector's decision on three grounds:

a) That the inspector misinterpreted and misapplied policy IN1 of the Local Plan, which requires all development to meet the cost of new infrastructure made necessary by the development. The contribution offered by the Developer amounted to a significant shortfall of such cost. The inspector accepted this but

failed to consider how the shortfall would be made up or how the shortfall may impact the delivery of the remainder of the Allocation;

b) That the inspector acted irrationally or failed to give sufficient reasons in reaching the conclusion that his grant of planning permission despite the shortfall in the required infrastructure contribution would not set a precedent for future applications in respect of the Allocation; and
c) That the inspector acted irrationally or failed to give sufficient reasons in concluding that a primary school would not be necessary in the north part of Foxbridge.

In respect of the first ground, HHJ Jarman KC agreed that the inspector had dealt with Policy IN1 and its supporting text appropriately. He agreed that the policy's supporting text required no strict test of exceptional circumstances to justify a departure from the requirement for development to meet the cost of new infrastructure made necessary by the development, and that the qualification in the policy that it applies "where appropriate, and within the context of economic viability" means that a contribution which rendered a scheme unviable would not be appropriate. He also found the criticism of the inspector's failure to consider how the shortfall may be made up, or how the shortfall may impact the deliver of the remainder of the Allocation, to be unjustified as these were matters which were not put before the inspector in evidence or submissions and in the circumstances they were not sufficiently obvious for the inspector to be obliged to deal with them.

In respect of the second ground, HHJ Jarman KC found that the inspector did not act irrationally, and provided adequate reasons in coming to the conclusion that no precedent would be set by his decision. He found that as the issue was not dealt with in evidence and was only dealt with very briefly in the Claimant's closing submissions, and in the context that only around 15% of the Allocation remained to be granted planning permission and that there was agreement between the parties as to the viability of the particular scheme in question, the inspector acted rationally. In respect of the third ground, HHJ Jarman KC again found that the inspector had not acted irrationally, and had provided adequate reasons for his decision. He agreed with the inspector's decision that, despite the aim of the Allocation for there to be a primary school 'within the heart of [each village]', it was clear that pupil yields (which were not disputed) in each village may not support a school.

All three of the grounds failed, and the claim was dismissed.

Case summary prepared by Sophie Bell