Case Name: *Basingstoke and Deane Borough Council v Secretary of State for Levelling Up, Housing and Communities & Anor* [2024] EWHC 1916 (Admin) (25 July 2024)

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Commentary: This was an unsuccessful claim for planning statutory review under section 288 of the Town and Country Planning Act 1990. The Council (the "Claimant") had refused permission for a hybrid application for mixed-use development on a large site. The Second Defendant, being the applicant for the planning permission, appealed against the Council's decision and permission was granted by an Inspector on behalf of the Secretary of State. The Council challenged the Secretary of State's decision to grant permission.

The Claimant's case concerned the application of section 38(6) of the Planning and Compulsory Purchase Act 2004, which requires that determination [of a planning application] must be made in accordance with the development plan, unless material considerations indicate otherwise. In the judgment, Holgate J characterises this as a two-limbed test: firstly whether the scheme is in accordance with the development plan, and secondly, whether material considerations indicate that a decision should be made other than in accordance with the development plan. The case was concerned primarily with the first limb. Also relevant was paragraph 11 of the National Planning Policy Framework 2023 ("NPPF"), which requires that where the policies most important for determining an application are out of date, permission should be granted unless "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits".

The Inspector had meticulously considered each of the relevant policies, identifying whether in his view the proposed development complied or conflicted with them. He identified conflicts with the landscape, scale and distribution of housing and countryside policies. The Inspector considered that the spatial strategy was out of date, it having failed to deliver the amount of housing needed over the plan period. This being so, and the conflict with the landscape policy attracting only moderate weight, the Inspector's planning judgment was that the scheme complied with the development plan taken as a whole (i.e., notwithstanding some identified conflict).

The Claimant and the Second Defendant had been in agreement at appeal that the spatial strategy within the adopted local plan was out of date. The Claimant now said that whether or not the policies within the development plan are out of date should have no bearing on the planning judgment as to whether the scheme accords with the development plan. The development plan had a policy which essentially reproduced paragraph 11 NPPF, so that the Inspector's judgment compliance with the development plan made in relation to that policy was necessarily carried forward to limb 1 of the section 38(6) exercise. Much of the judgment rehearses the factual background, local policy and relevant sections of the Inspector's decision. The judge helpfully, however,

went on to consider the circumstance in which there was no such local policy. Holgate J confirmed that his judgment as to the relevance of what he termed "out-of-datedness" to a finding relating to compliance with the development plan (per limb 1 of section 38(6)) stands in general.

The court was invited to consider whether the Inspector's decision would have been the same if he had found differently in relation to the compliance of the proposals with the development plan. The judge was prepared to accept that if the Inspector had not considered the outdatedness of the policies under limb 1, he would have found that the proposal did not comply with the development plan. That argument led the Claimant nowhere, however, since the Inspector would inevitably have concluded under limb 2 that the outdatedness of the policies was a material consideration that meant that the application should be determined other than in accordance with the plan. Accordingly, Holgate J was satisfied that the Inspector would still have granted permission.

Interestingly, although of no relevance to the issues before the court, the description of development includes the term "severable" – the clear intention being that the full and outline elements of the hybrid permission are, in the Supreme Court's formulation in Hillside Parks, "severable into separate permissions applicable to discrete parts of the site". A not dissimilar attempt at a clear express provision for severability was admonished by Holgate J in Dennis v LB Southwark late last year, though that case concerned an outline permission rather than a hybrid and the mechanism by which the word "severable" was added to the description. The structure of this particular permission may be of interest to planners grappling with this issue.

Case summary prepared by Aline Hyde