Case Name: *Vistry Homes Ltd v Secretary of State for Levelling Up, Housing And Communities & Ors (Rev1)* [2024] EWHC 2088 (Admin) (07 August 2024)

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Commentary:
These were two conjoined claims for statutory review brought under s.288 of the Town and Country Planning Act 1990 ("the TCPA 1990") by Vistry Homes Limited ("Vistry") and Fairfax Acquisitions Limited ("Fairfax") respectively.

The claims concerned decisions by Inspectors on planning appeals relating to large residential schemes in the Green Belt. It was common ground that each constituted "inappropriate development" for the purposes of Green Belt policy in the National Planning Policy Framework ("the NPPF") and accordingly, each development was, by definition, harmful to the Green Belt and could not be approved unless "very special circumstances" ("VSC") existed.

Each claimant sought to challenge the weight given by the Inspector to particular benefits of the scheme. Vistry's grounds of challenge related to

i. The development of "previously developed land" ("PDL") as a benefit (para. 123 of the NPPF); and
ii. The provision of a net gain in biodiversity ("BNG") as a benefit (para. 180(d) of the NPPF). Vistry alleged the Inspector had wrongly applied the 10% requirement in Schedule 7A TCPA 1990 to the scheme.

Fairfax's grounds of challenge related to:

i. The provision of economic benefits from the construction and occupation of the proposed dwellings (para. 85 of the NPPF); and
ii. The provision of BNG as a benefit (para. 180(d) of the NPPF).

Vistry - The development of PDL as a benefit

Vistry alleged that in a case such as this one where the use of PDL fell outside para. 154(g) NPPF and so was inappropriate development, the Inspector read the NPPF as precluding the inclusion of that use of the PDL as a free-standing planning benefit in the VSC balance. The court held that the relevant section of the Inspector's decision letter involved the application, not interpretation, of policy in the NPPF. The Inspector did not use any language to suggest that he read the NPPF as precluding the inclusion of the use of PDL as a benefit in the planning balance. Instead, the Inspector was considering an issue of weight and was entitled to say as a matter of judgment that no weight should be given to the use of land of that nature for built development, given the harm to this part of the Green Belt it would cause.

Vistry also alleged that the issue of whether the proposal would conflict with Green Belt policy for the purposes of footnote 49 (so as to disapply the policy encouragement in para. 123 of the NPPF for the use of PDL) depended upon the application of the VSC test and that test required all forms of harm to be weighed against all other planning considerations which must include the benefit of using PDL in the Green Belt. The court held that there was an 'air of unreality' about this contention: namely, that some positive weight had to be given to the development of green, open pasture land in view of its description as PDL, notwithstanding the harm those buildings would cause. Mr Justice Holgate noted that this begged the question as to what this benefit would be exactly and how its weight would be assessed.

The court noted that para. 147 of the NPPF gives "first consideration" to the use of certain types of Green Belt land, not limited to PDL but also including land well-served by public transport. It does not suggest that PDL should be released from the Green Belt, irrespective of the nature and/or level of harm to the Green Belt that the release of any specific site would cause. Where the VSC balance would otherwise weigh against the proposal, the court did not see why that outcome should change simply because of the inclusion of the PDL factor as a benefit, when footnote 49 says that the policy support or the use of PDL does not apply if the scheme conflicts with another NPPF policy. There was no policy requirement that the use of PDL should be treated as beneficial in every case.

Fairfax - Economic Benefits

Fairfax alleged that:
a) it was irrational for the Inspector to reduce the weight to be given to the scheme's economic benefits on the grounds that the location of the proposed development was contrary to national and local planning policy, in the absence of evidence, or a finding, that the economic benefits could be delivered in a way which would not be contrary to those policies (i.e. on other sites); and
b) that by reducing the weight to be given to those benefits by reference to a factor which was also included in the harm scale of the VSC balance, the Inspector double-counted the same consideration. In the alternative, the Inspector's reasoning on this subject was legally inadequate because there was a substantial doubt as to whether his decision was based on relevant and rational grounds.

In dismissing Fairfax's arguments, the court held that there was no legal reason why the Inspector was not entitled to take into account the fact that the scheme was fundamentally contrary to local and national policy and the aim of the plan-led system to deliver sustainable development. There was also no legal requirement for the decision-maker to be satisfied that (or to consider whether) those benefits could be achieved elsewhere in compliance with those policies before he could take into account

conflict with those policies on the issue of weight.

The Inspector was also entitled to judge that where a local plan is out-of-date, and even where some development would inevitably need to take place on Green Belt land, issues of where such development should take place, and associated economic benefits realised, are matters for the local plan.

Mr Justice Holgate agreed with the Defendant's arguments that the NPPF emphasises the plan-led system for the delivery of inter alia economic priorities as well as meeting housing needs, he held that there was no reason why an Inspector could not give greater weight to benefits achieved in accordance with the plan-led system and lesser weight to those which are not.

The provision of BNG as a benefit

This was a ground that was common to both Vistry and Fairfax's challenges. At the time of both decisions the relevant national policy on BNG was set out in para. 180 of the NPPF and did not set any numerical targets for BNG. The court noted that the requirement to provide 10% BNG secured by condition on the grant of planning permission enshrined in schedule 7A TCPA 1990 (as inserted by Schedule 14 of the Environment Act 2021) did not apply to either the Vistry or Fairfax appeal as both applications had been submitted before the relevant date set out in the legislation (February 2024).

Mr Justice Holgate held that where a development is required to provide a measure in order to overcome or mitigate, or compensate for, a harm caused by that project, ordinarily that measure could not rationally be described as a benefit. But, in the case of BNG, this related to an improvement in biodiversity rather than simply offsetting the adverse impacts of a development scheme. He held that, on any view, that would be a benefit of the proposed scheme. However, the scale of that benefit and the weight to be attached to it were separate considerations.

The court noted that it was difficult to see how logically a decision-maker could give no weight at all to, for example, the provision of 10% BNG because that equated to the 10% legislative requirement. The fact that such a requirement was imposed by legislation was simply a mechanism for ensuring that a wide range of developments contribute to the collective effort of improving biodiversity in England. It did not alter the nature or purpose of the requirement, or its underlying justification. It followed that where a development would provide BNG of 20%, a decision-maker was not entitled to say that only that part of the BNG which exceeds 10% can qualify as a benefit in deciding whether to grant planning permission.

In terms of the question of weight, the court held that where the application for

permission was made before 14 February 2024 the statutory 10% requirement should not be treated as having been applicable, nor should that be the effect of the decision-maker's reasoning. However, it was common ground between the parties that the 10% BNG provision in sched.7A to the TCPA 1990 could be used in such cases, but only as a benchmark to assess the weight to be given to a BNG contribution. It should not be used to reduce the weight that the decision-maker would otherwise have given to the provision of BNG in a particular case.

Accordingly, there was no basis for criticising the Inspector as having wrongly treated the 2021 Act as applicable to Vistry's scheme. In the decision letter for the Vistry scheme, the Inspector assessed the weight to be given to the 10% BNG provided by the appeal scheme, using the requirement in the 2021 Act as a benchmark. That was entirely permissible. There was no legal flaw or inadequacy in the Inspector's reasons.

In terms of Fairfax's challenge, Mr Justice Holgate held that there was no basis for the Court to infer that the Inspector treated BNG of 10% and below as not being a benefit, or as having a discounted weight. Instead, he used the impending legislation as a benchmark as he was entitled to do.

Conclusion

For the reasons set out above, the claims brought by Vistry and Fairfax were dismissed.

Case summary prepared by Emma McDonald