Section 78 Town and Country Planning Act 1990

Town and Country Planning Appeals (Determination by Inspectors)
(Inquiries Procedure) (England) Rules 2000

LAND TO THE SOUTH OF MALLARDS LANE, BURSLEDON

OPENING SUBMISSIONS

On behalf of the Local Planning Authority

by

Paul Stinchcombe QC

Ned Helme

INTRODUCTION

1. The appeal proposal is for residential development on 2.81 hectares of open countryside within a designated Local Gap. Policies 1. CO and 3.CO of the extant Local Plan are therefore engaged. Both, moreover, are breached: none of the exceptions to Policy 1.CO apply to this proposal; and, so far as Policy 3.CO is concerned, the proposal can be located elsewhere and will diminish the gap, visually and physically, through replacing green fields with an urban estate. And the harms attendant upon a residential proposal in this location mean that Policies 18.CO and 59.BE are breached too.

2. The use of gaps, as a planning instrument, has a long and respectable provenance in South Hampshire, as recognised by the Bubb Lane Inspector[1] in relation to Strategic Gaps under Policy 2.CO (the sister policy to 3.CO). As Mr Wilmshurst will explain, gap policies such as Policy 3.CO are entirely consistent with the NPPF and have recently been adopted by other authorities, such as Test Valley[2]. The Council remains strongly committed to them, both under adopted and emerging policy. Indeed, the Council has recently undertaken a Gap Policy Review, which recommends (as a result of an extensive process of landscape and visual appraisal and policy analysis) the retention of gaps including in the area of the appeal site. That Review was endorsed by the Council's Cabinet on 15th July 2017 and the recommended gap designations were approved.

3. The inescapable truth is, therefore, that the appeal proposal breaches the Development Plan and breaches, so far as the most important policy relevant to this appeal is concerned, a policy which is fully consistent with the NPPF, which is consistent with the direction of travel under emerging policy, and which is justified by an up-to-date evidence base in the form of the Gap Policy Review. It is against that backcloth that I therefore turn to the approach that must be taken to the appeal proposal as a matter of determined law.

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[1] EBC 4.2 paragraph 30
[2] EBC 6.1 paragraphs 190-195

APPROACH

4. Many of the earlier Inquiries in Eastleigh (and elsewhere) have turned in part on the correct interpretation of the words "relevant policies for the supply of housing" in Paragraph 49 of the NPPF, and whether they embraced the gap policies in the Borough (so as automatically to be out-of-date in the absence of a five-year supply of housing land). We now know, however, that they are not such policies. The recent judgment of the Supreme Court in ***Suffolk Coastal v Hopkins Homes Ltd and another, Richborough Estates Partnership LLP and another v Cheshire East Borough Council*** [2017] UKSC 37[3] answered that question authoritatively.

5. It might, therefore, be thought that the 'tilted balance' provided for by Paragraph 14 of the NPPF (as referred to by Lord Carnwath in ***Suffolk Coastal*** at [54][4]) is not engaged in this case. That, however, is not right. It follows from [63] of Lord Carnwath's judgment that, contrary to previously decided case law[5], Paragraph 14 of the NPPF is necessarily engaged because the adopted Local Plan period ran only to 2011. However, even though it is engaged, Paragraph 14 of the NPPF does not modify or dis-apply the statutory framework established by section 38(6) of the 2004 Act (to decide planning applications and appeals in accordance with the Development Plan unless material considerations indicate otherwise), as confirmed by the Supreme Court in ***Suffolk Coastal*** at [29].

6. The issue of housing land supply still remains highly relevant to the Paragraph 14 exercise however, even if the policies here breached are not themselves policies for the supply of housing. That is because the proposal would make some contribution towards meeting any shortfall that does exist; and because Policies 1.CO and 3.CO will impact upon the ability to make up such a shortfall. Hence, the question of housing

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[3] EBC 5.15

[4] That is to say, the requirement when relevant policies are out-of-date, to grant planning permission unless the adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole.

[5] ***Wynn-Williams v. SSCLG*** [2014] EWHC 3374 (Admin) at [34-36] [EBC 5.16]

land supply still, potentially, impacts on both sides of the necessary Paragraph 14 NPPF planning balance.

7. The approach to weighing the planning balance in such circumstances is a matter which has been considered in two further judgments of Lindblom J (now LJ): ***Phides Estates (Overseas) Limited v. Secretary of State for Communities and Local Government*** [2015] EWHC 827 (Admin); and ***Suffolk Coastal*** in the Court of Appeal[6]. I deal with each case in turn, looking at both sides of the planning balance.

8. In the first, the ***Phides*** case, Lindblom J (as he then was) made it clear at [60] that, so far as the 'benefit side' of the planning balance is concerned, Paragraph 14 of the NPPF did not prescribe the weight to be attached to a contribution towards meeting a housing shortfall. This was a matter for the decision-maker and would depend on not just the extent of the shortfall but on "how long the deficit is likely to persist". In other words, if action was being taken to meet housing needs in the medium to longer term, the weight to be attributed to the ability of a particular proposal to reduce a shortfall in the short term can properly be reduced.

9. This point was then re-iterated and elaborated upon in the second case, ***Suffolk Coastal*** in the Court of Appeal at [46-47], where Lindblom LJ (as he had then become) addressed the other side of the planning balance – the weight to be attributed to the breach by a housing proposal of development constraint policies which are to be deemed out-of-date by reason of housing shortfall. Lindblom LJ confirmed that determinative weight can properly be given to such out-of-date Development Plan policies, and that the breach of them can properly justify the refusal of housing proposals even when there is a housing shortfall.

10. Moreover, Lindblom LJ set out three considerations which can lead to attribution of such determinative weight: the first invokes consideration of the extent of housing

[6] Noting that both are cases in which a housing shortfall did exist – in other words they were decided upon the basis, as the Appellant here contends and which the Council disputes, that the Council could not demonstrate a five-year housing land supply as called for by Paragraph 47 of the NPPF.

shortfall; the second (which flows from ***Phides Estates***, albeit now looking at the other side of the planning balance) invokes consideration of the action being taken to address the shortfall; and the third invokes consideration of the particular purpose of a restrictive policy.

11. Although the Court of Appeal's approach in ***Suffolk Coastal*** was overturned with regards to the meaning of "policies for the supply of housing", there was no complaint about this aspect of its approach, as is clear from [29] of the judgment of Lord Carnwath in the Supreme Court. I therefore turn to housing land supply with the above legal framework in mind.

THE HOUSING LAND SUPPLY

12. The requirement of Paragraph 47 of the NPPF is for the Council to demonstrate a five-year supply of deliverable housing sites. This, in turn, depends on the answer to two antecedent questions: What is the housing requirement? And what is the supply of deliverable sites?

13. So far as the first is concerned, it is agreed that the overall five-year housing requirement for Eastleigh (including buffer) is 5,689 dwellings over the agreed 1st April 2017 – 31st March 2022 period (which equates to an annual requirement of 1,138 dpa) – see: Paragraph 2.11 of the Housing Land Supply Statement of Common Ground and the agreed Table which follows. Moreover, and so far as the supply side of the equation is concerned, just seven sites are disputed, and to the extent (overall) of just 947 units: Site 7 (300); Site 20 (190); Site 31(70); Site 42 (127); Site 49 (105); Site 50 (50); and Site 51 (105).

14. For all of the reasons which Mr Ireland will give you, we will invite you to endorse in its entirety the evidence and judgements of Mr Ireland on housing supply issues. As you will hear, his judgements are sound, based on thorough research and sourced in the best and most up-to-date evidence. The end result is tabulated below (taken from

the second Table within Section 4 of the Housing Land Supply Statement of Common Ground) and demonstrates that Eastleigh has a housing land supply of 5.21 years:

Housing Supply 1/4/2017-31/3/20122	Ireland
Small Sites – Outstanding Permissions	194
Large Sites – Outstanding Permissions	3,948
Large Sites – Resolution to Grant	1,356
Large Sites – Under Negotiation	260
Windfall Allowance Years 3-5	174
Expected Supply 1/4/2017-31/3/20122	5,932
Annual Requirement 1/4/2017-31/3/20122	1,138
Supply in Years	5.21

15. Moreover, and as Mr Ireland pointed out in Paragraph 7.13 of his Proof, even if one were (adopting an over-cautious approach) to exclude any contribution from the two County Council sites entirely, the housing land supply for Eastleigh would still be in excess of five-years (5.03).

16. Hence, and remembering Lindblom LJ's three indicators as to when determinative weight might be given to a breach of policy even in the absence of a five-year supply: there is, now, no housing shortfall at all – the Council has a five-year supply; that is because of the action taken by the Council (about which you will hear more from Councillor House); and the purpose of Policy 3.CO is precisely that which Lindblom LJ held can, properly, carry determinative weight – to preserve the separation between settlements. It is to that Policy that I therefore turn in order to identify how its breach translates, on this particular appeal site, to harm in planning terms and on the ground.

THE HARM TO COUNTRYSIDE, GAP AND LANDSCAPE

17. Gaps are planning designations, not landscape designations. They are designed to contribute to a perception of leaving one settlement before entering another, to maintain the individual identity and character of settlements, and to avoid

coalescence; and their importance is afforded simply by their being undeveloped. They do not need, therefore, to be of any special landscape quality to warrant protection.

18. The reason for designating the "Hamble – Bursledon – Netley Local Gap" in the extant Local Plan is briefly explained in Paragraph 10 of Appendix I[7]. As noted above, that is now supported by the Gap Policy Review, which led to the 15th July 2017 Cabinet decision to retain the gap in the area of the appeal site.

19. The Gap Policy Review provides an up-to-date evidential basis not only for the emerging gap policy but also Policy 3.CO in this particular location, building on the long heritage of Gap Policies not just in the Borough but in the PUSH area more generally, reflecting the unusual settlement pattern in the area and the imperative of protecting individual settlements, their character, and their identity.

20. The Local Gap would be clearly harmed by the appeal proposal, and there would be harms to the countryside and landscape too. In the event of the appeal site not being developed, the "baseline" in landscape terms would be unchanged, with the appeal site left as open countryside. Approaching the appeal site from the north, along Hamble Lane, there would still be a clear perception, when passing Mallards Road, that one was leaving the urban edge of Bursledon. Equally, when arriving from the south along Hamble Lane, there would still be open views into the site and a sense of arrival at the urban edge of Bursledon.

21. That would, of course, all change if development were to take place pursuant to this appeal, and these green, open fields largely replaced with an urban housing estate. It is quite plain that the proposed development would, if permitted and built out, erode the separation between those settlements. The change from countryside to housing would bring about major and adverse changes to the countryside, gap and landscape and to people's perception of them. Open fields would be lost and the replacement

[7] EBC 2.10

landscape would be of housing, lighting and roads across the majority of the site. Moreover, none of these harms could be mitigated. The proposed development would completely, and permanently, change the character of the appeal site for the worse.

22. The appeal proposal is, therefore, precisely the form of development which Policy 3.CO is there to prevent, and precisely the form of development that the emerging Replacement Local Plan will prevent also.

WEIGHING THE TILTED BALANCE

23. For all of the above reasons, I will in due course respectfully submit that since the Council has a five-year housing land supply, there is nothing whatsoever to stand in the way of the straightforward application of section 38(6) of the 2004 Act against the appeal proposal. It breaches the Development Plan and there is no material consideration that justifies that breach and indicates anything other than a refusal: the Council has a five-year housing land supply; there is no shortfall. And even if the Council is wrong on that, it cannot be by much, and is likely to remedied in the near future. Even in that event, in the light of the analysis set out above the tilted balance still weighs compellingly against permission being granted.

OVERALL CONCLUSION

24. The case against this appeal proposal is, therefore, overwhelming and, as you will hear over the coming days, it should be refused permission and this appeal dismissed.

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