

IN THE HIGH COURT OF JUSTICE
CARDIFF DISTRICT REGISTRY
ADMINISTRATIVE COURT
PLANNING COURT

CO/323/2022

IN THE MATTER OF A CLAIM PURSUANT TO SECTION 113 OF THE PLANNING AND
COMPULSORY PURCHASE ACT 2004

BETWEEN

NORTON ST PHILIP PARISH COUNCIL

Claimant

- and -

MENDIP DISTRICT COUNCIL

Defendant

- and -

- (1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND**
COMMUNITIES
(2) LOCHAILORT INVESTMENTS LIMITED

Interested Parties

SUMMARY GROUNDS OF RESISTANCE
ON BEHALF OF
LOCHAILORT INVESTMENTS LIMITED

References to the Core Bundle are in the form [Core/Page number]; to the Supplementary Bundle are in the form [Supp/Page number]; and to the Claimant's Grounds are in the form [CG/Paragraph].

INTRODUCTION

1. The Claimant seeks to challenge the Defendant's decision to adopt the *Mendip District Local Plan 2006 – 2029 Part II: Site and Policies* ("LPP2") on 20 December 2021.
2. Lochailort Investments Limited owns a site allocated under Policy NSP1 of LPP2 for residential development in the form of a minimum of 27 dwellings [Core/89].
3. This claim is an impermissible attempt to revisit the merits of the decision to allocate NSP1 and the other allocations, including BK1, for residential development.

4. The factual background to the claim is outlined at paragraphs 4 – 30 of the Claimant’s Statement of Facts and Grounds and paragraphs 9 – 33 of the Defendant’s Grounds of Defence. For the purposes only of these summary grounds of resistance and for the determination of leave, Lochailort is prepared to accept these accounts of the factual background, though not the commentary thereon.

RESPONSE TO GROUNDS OF CHALLENGE

Ground 1: Misinterpretation of LPP1

5. This ground of challenge blurs the issues of the interpretation of policy with issues of application and of planning judgment and is without merit.
6. LPP1 did not, as a matter of interpretation, identify where the further 505 dwellings must be allocated. This was left, as a matter of planning judgment, to the LPP2 to determine.
7. The LPP2 Inspector exercised that judgment and reached the conclusion at IR84 [Core/135] that:

“There is, therefore, a robust case, both in relation to the IR and LPP1, and supported by the economic, social and housing needs evidence set out above, that it is appropriate and sustainable for an additional 505 dwellings to be allocated within the north-east part of the District, primarily centred on the towns of Radstock/Midsomer Norton. This view is supported by the recent work undertaken by the Council in its 505 Dwelling Paper and its addendums to the SA and HRA. I therefore conclude that the decision to allocate 505 dwellings in the north-east of the District is justified, sound and consistent with the aims and objectives of LPP1.”
8. At IR58 [Core/132] the LPP2 Inspector directly faces up to the issue of whether the 505 additional units should be allocated in a particular geographical area of the Plan. He does not purport to find a direct answer to this question in LPP1 or the LPP1 Report. That he approached this matter with an open mind is reinforced by the broad nature of matters (i)-(v) in his Discussion Note ED30 [Supp/15].

9. Instead, having considered the LPP1 Report, at IR63 **[Core/132]** he observes that: “the LPP1 Inspector’s view was that this Plan should clearly consider the possibility of allocating housing sites on the edge of the towns of Midsomer Norton and Radstock” (emphasis added). He made the point that this had not initially been done by the Council in preparing the LPP2.

10. At IR71 **[Core/134]**, having considered LPP1, he again reaches the interim conclusion that: “the strategic direction in LPP1 requires the Council to consider development allocations to meet the needs in the north-east of the District” (emphasis added). Again, this is not a conclusion that the 505 dwellings must, as a matter of interpretation of LPP1, be located in the north-east of the District. Instead, he examines the “genesis of the LPP1 requirement” to inform his planning judgment as to where the 505 dwellings should be allocated.

11. At IR72 **[Core/134]** the LPP2 Inspector reaches the planning judgment that the Council has provided “robust and convincing justification” for the view that “the 505 dwellings should be allocated in the north / north-east part of the District.” Importantly, in IR73-84 he then considers the economic, social and housing needs evidence to justify the allocation of 505 dwellings in the north-east of the District. That evidence includes consideration of functional links between that part of the District and Bath and Bristol; affordability evidence pointing to that part of the District being the least affordable; and the relatively few allocations in that part of the District, before the 505 dwellings, considered against a significant need.

12. At paragraph 56 of the Claimant’s Grounds the Claimant contends that the LPP2 Inspector erred in treating LPP1 as including a general requirement for consideration to be given to additional allocations in the north-east of the District, as opposed to limiting this to land abutting or adjacent to the towns of Radstock and Midsomer Norton. However, at IR87-88 **[Core/136-7]** the LPP2 Inspector considered how to define the north/north-east of Mendip District. He notes that “LPP1 does not define the precise area of the north-east part of the district, except by stating that it includes land adjacent to the towns of Midsomer Norton and Radstock”. He therefore does not read LPP1 as the Claimant contends. The definition of the north/north-east of the District stems from the Council’s 505 Dwelling Paper as the LPP2 Inspector records at

IR88 [Core/137]. He finds, as a matter of planning judgment, that “it is not unreasonable to include other settlements in the north-east of the District” and that “the Council’s definition is appropriate and fit for purpose.”

13. The Claimant’s attempt to characterise the LPP2 Inspector’s analysis as an exercise of interpretation of LPP1 is unsustainable:

- a. **First**, in so far as the LPP2 Inspector sought to interpret LPP1, he did not reach the view that the 505 dwellings must be located in the north-east of the District on the basis of either LPP1 or the LPP1 Report. Only that those documents indicated that the LPP2 should “consider” [IR63 and IR71] allocations in the north-east.
- b. **Secondly**, in considering where the 505 dwellings should be located, the LPP2 Inspector was free to consider the strategic expectations of LPP1 and the LPP1 Report. This was not an exercise of seeking to interpret the policies of LPP1, as to which see a. above, but considering those documents so as to inform his planning judgment as to where the further 505 dwellings should be allocated. The Claimant’s extreme assertion that he was not entitled to have regard to LPP1 Report in carrying out this exercise in seeking to inform LPP2 demonstrates the overly legalistic approach it has adopted and that it has mischaracterised what the LPP2 Inspector was doing.
- c. **Thirdly**, the LPP2 Inspector reached a planning judgment that there was a “robust case” for the additional 505 dwellings to be allocated within the north-east Part of the District. This planning judgment recognised the expectations of the LPP1 and LPP1 Report that allocations in the north-east would be considered but reached the overall conclusion by considering at length at IR 73-84 the “economic, social and housing needs evidence” which supported the allocations.
- d. **Fourthly**, at IR 95 [Core/138] he was satisfied that the overall distribution of housing in LPP2 is sound and in accordance with LPP1. He was entitled to conclude, as a matter of planning judgment, that the overall distribution of housing accorded with LPP1. That the broad spatial strategy of LPP1 could have led to a different distribution of housing does not mean that his analysis was flawed.

Ground 2: Failure to consider reasonable alternatives to allocating additional 505 dwellings in the north east of the District

14. In *Compton Parish Council & others v Guildford Borough Council & others* [2019] EWHC 3242 (Admin) Ouseley J considered the approach to updating a sustainability appraisal. At 110 he explained:

“There is no specific provision dealing with when an updated SA is required, or when material changes of circumstances require an update. The question will always be whether the likely significant effects on the environment of the adopted Plan had been evaluated, and whether reasonable alternatives have been evaluated. Whether the work done is sufficient is for the reasonable judgment of the decision-maker, here Guildford BC; that judgment is reviewable on normal public law grounds, and indeed was also assessed by the Inspector.”

15. Here, the Council carried out the Sustainability Appraisal for the LPP2 in four separate stages over five years. It was an iterative process and informed the development of the plan¹ and the approach it took was entirely rational and the challenge is without merit.

16. On 10 September 2019, following the first two weeks of examination hearings, the LPP2 Inspector issued an interim note containing post hearing advice (ED20), albeit noting at paragraph 2 that he had reached no final conclusions [Core/239-249]. He identified, at paragraph 16, that the draft plan had failed to address the housing needs of the north-eastern part of the District, including land adjacent to the towns of Radstock and Midsomer Norton. At paragraph 17, he noted the need to consider allocations for development in this part of the plan area and gave a preliminary direction² that an additional 505 dwellings should be apportioned to sustainable settlements in the north-east part of the district. At paragraph 19 the LPP2 Inspector noted the need for further SA work in respect of the additional allocations.

17. It was in this context that the Council undertook the Second Addendum to the Sustainability Appraisal [Supp/150-226] in January 2020. In accordance with the direction of the LPP2 Inspector, it was rational that the focus of this work was on meeting the housing needs of the north-eastern part of the District. It was rational for

¹ See [Supp /152].

² At paragraph 61 of the Claimant’s grounds, the Claimant recognises that this was the direction of the Inspector.

the Council to seek land in the north east of the district to meet those needs and rational for the Council to limit consideration of alternatives, at this stage of the SA work, to those sites which met this locational specification. The 505 Dwellings Background Paper [Supp/227-272] identifies that as well as sites around Midsomer Norton and Radstock, the area of search included all primary and secondary villages in the northeast quadrant of Mendip [Supp/235].

18. The LPP2 Inspector considered the SA undertaken by the Council at IR37- 44 [Core 128-9]. At IR39 he found that the process had been iterative and influential from the start of the plan-making process. At IR40 - 41 the Inspector considers the additional SA undertaken in response to ED20. He notes that this considered the sustainability of all the additional sites proposed for development and concludes that the preferred option sites are sustainable. At IR41 the Inspector notes the Council's 505 Dwellings Background Paper which explains that realistic alternative sites were also considered around Midsomer Norton and Radstock, as well as assessing the suitability of villages within the north-east of the District, based on a set of criteria covering the key elements of sustainability. At IR44 he concluded that the SA used best practice methodology and had provided effective input into the preparation of LPP2.
19. As the SA Adoption Statement, having referred to the LPP2 Inspector's advice and direction by the LPP2 Inspector to seek allocations for a further 505 dwellings in the north/north east of the District, explains:

“In accordance with the locations directions set out within LPP2 [sic] Core Policy CP2 and the supporting text, land to accommodate 505 dwellings was sought in the north east of the district including sites adjacent to Midsomer Norton and Radstock. The SA undertaken was consequently a site assessment process. The alternatives were the individual sites promoted at the settlements that support delivery of the spatial strategy. In accordance with the approach taken at other settlements in pursuit of Option 2, all sustainable sites that met the locational specification were proposed for allocation.

Full details of the consideration of alternative approaches is set out in the 505 Dwelling Background Paper and the Second Addendum to the Sustainability Appraisal.”
[Supp/120]

20. The Council rationally exercised its judgment in approaching the Second Addendum to the SA as it did. It was not irrational for the Council to focus its search on sites in the north-east of the district to meet the housing needs of the north-east of the district. It did not need to start again with the SA work and was entitled to undertake the work in the iterative way it did and to respond in a targeted manner to the shortcomings as identified by the LPP2 Inspector in the Interim Note.

Ground 3: Failure to have regard to CP2.2(c) and the requirement for proportionate development in rural settlements and/or provide adequate reasons to explain how this have been taken into account

21. There can be no sensible suggestion that the LPP2 Inspector was unaware of the references in LPP1 to proportionate levels of growth, or the 15% growth figure for primary villages, or that growth in Norton St Philip and Beckington had exceeded that figure. Nor did he need expressly to refer to CP2.2(c). These matters were plainly taken into account in reaching the planning judgment that the allocation of NSP1 and BK1 were necessary and sustainable.
22. The LPP2 Inspector directly considered the issue of proportionate growth in rural settlements. Paragraph 3.37 and 3.38 of the pre-submission version of LPP2 [Core/262] read:

“Primary and Secondary Villages

3.37 An important part of the spatial strategy is that there should be a proportionate approach to growth in the designated Primary and Secondary villages. However, a number of villages have seen significant additional development built or granted permission. This reflects the impact of a period where the Council was not able to demonstrate a five-year housing land supply.

3.38 The approach of this Plan is that further growth in these villages through planned site allocations does not reflect the adopted spatial strategy. The proposed site allocations reflect this principle by not identifying allocations in villages which have already fulfilled the requirements set out in Local Plan.

23. The LPP2 Inspector commented on these paragraphs at paragraph 21 and 22 of ED20 [Core/242]:

“21. Other areas/ caps on development: The identification of Primary and Secondary Villages, which have a number of necessary community facilities to

take a proportion of the District's growth, accords with the LPP1 strategy and is therefore supported.

22. It is essential, however, that the Council does not place arbitrary caps on development, which would be contrary to the aim of national policy to *"boost significantly the supply of housing"* [Paragraph 47 of *the Framework*] Clearly, in some areas, Green Belt, landscape designations, flood risk and other infrastructure constraints will limit future housing growth to zero or close to zero. However, the fact that a specific area has reached its housing target as set out in LPP1 should not, of itself, be a reason for placing a cap on future development within the plan period. A MM to paragraph 3.38 is therefore required to ensure the Plan accords with national policy in this regard." [Core/242]

24. The MM proposed was as follows:

"MM4 Add the following sentence to para 3.38: "However, small residential development schemes on sustainably located sites within all Primary and Secondary Villages, will in principle be acceptable, subject to environmental and infrastructure considerations and impact on the living conditions of neighbouring residential occupiers." [Core/248]

25. The LPP2 Inspector returns to this issue in the LPP2 Report where at IR51 [Core/131] where he explains:

"51. MM5³ is necessary to ensure that small residential schemes on sustainably located sites within Primary and Secondary Villages will, in principle be acceptable, subject to environmental, infrastructure and living conditions (amenity) considerations. This will avoid the negative and artificial capping of new development once a total for a settlement has been exceeded, a practice which runs counter to national policy. It would enable a modest measure of organic growth within many settlements over the plan period. This will ensure the Plan is positively prepared and accords with national policy." [Core/131]

26. This modification is reflected in the adopted version of LPP2 at paragraphs 3.27 and 3.28 of the supporting text [Core/59].

27. The LPP2 Inspector therefore addressed the issue of artificial capping of new development once a level of growth had been exceeded in a particular settlement. The Council's 505 Dwellings - Background Paper⁴ provided that the growth figures for

³ Because of additional modifications this becomes MM5 – see [Core/166].

⁴ See **Supp/249, 254 and 264**.

Norton St Philip and Beckington had been exceeded. However, the LPP2 Inspector was satisfied at IR116 [Core/141] that both settlements have sufficient facilities and services to satisfactorily accommodate the quantum of housing proposed. Detailed consideration is then given to each allocation in IR117 – 138 [Core/141-145] with the conclusion reached that each allocation is necessary and sustainable.

28. These conclusions should also be read in the context of the LPP2 Inspector's preceding analysis as to the economic, social and housing need evidence at IR73 – 86 which indicated a need for the allocations. First, at IR75 he identifies the significant functional links between the north-east of Mendip, including specifically the village of Norton St Philip, and the cities of Bath and Bristol. Secondly, he recognises that the housing affordability evidence, including again by specific reference to Norton St Philip at IR77, indicates that the north-east of the district is the least affordable part of the district. Thirdly, despite the significant levels of need, there are relatively few allocations in that part of the District. Fourthly, the sustainability considerations support the additional housing allocations.

29. Finally, the LPP2 Inspector responds to the criticism of over provision at IR86. He recognises this issue but finds the further provision to be appropriate. The allocations provide flexibility for the plan in the event other allocations are delayed; give the plan a measure of future proofing against increased housing need figure set by the standard method; support the government's objective of significantly boosting housing land supply; and help to address affordability issues in the District. In the LPP2 Inspector's judgment, the allocations can be implemented sustainably and without impacting harmfully on the localities where the new allocations are proposed.

30. This was a classic exercise of planning judgment and involved no error of law.

Ground 4: Decision to allocated NSP1 and BK1 through main modifications to LPP2 was irrational

31. Notwithstanding the Claimant's assertion to the contrary at paragraph 85, ground 4 is, in reality, parasitic on the other grounds of challenge and raises no freestanding issues and is in any event also without merit.

32. Paragraph 83(a) concerns the same issue as ground 1. Paragraphs 83(b) and (c) concern the same issues as ground 3. Paragraph 83(d) concerns the same issue as ground 2.
33. Paragraph 83(e) makes passing reference to the draft Norton St Philip Neighbourhood Plan but provides no freestanding ground of challenge. The LPP2 Inspector and the Council were both plainly aware of the draft Neighbourhood Plan, indeed it is expressly referenced at 11.20.2⁵ of LPP2 and was the subject of evidence at the examination hearings. The fact that the draft neighbourhood plan did not allocate NSP1, did not prevent LPP2 from doing so.
34. The allocations were, as noted above, fully considered and justified in the IR and made as a result of the exercise of the Inspector's planning judgment.

INTERIM RELIEF

35. The Claimant seeks an interim order suspending the operation of NSP1 whilst the claim is determined. That application is resisted, irrespective of whether leave is granted.
36. The approach to s.113(5) of the Planning and Compulsory Purchase Act 2004 was considered by Sullivan J in *The Queen on the Application of Capel Parish Council v Surrey County Council* [2008] EWHC 2364 (Admin); Cranston J in *Lisle-Mainwaring v Royal Borough of Kensington and Chelsea* [2015] EWHC 1814 (Admin) and Holgate J in *IM Properties Development Limited v Lichfield District Council* [2015] EWHC 1982 (Admin).
37. The claim does not have a real prospect of success for the reasons set out above. However, even if for the purposes of considering the application for interim relief the claim is treated as arguable, the balance of convenience is firmly against granting interim relief. The Claimant has not identified any prejudice which it would suffer if interim relief were not granted. Considerable weight in terms of the public interest

⁵ Core/87.

must be attached to the juridical basis of the policy. The balance of convenience is against granting interim relief.

38. In terms of direct prejudice to Lochailort: an application for planning permission for residential development on NSP1 was submitted in 2020 in accordance with the, then draft, allocation. Lochailort has since been working with the Council to progress that application and is in the process of preparing amendments to it following consultation responses. These amendments are likely to be submitted in March 2022. The application remains with the Council for determination and Lochailort are hopeful of a swift determination of the application following the submission of the revised information. To date, Lochailort has spent in the region of £80,000 progressing the application. This is in addition to the approx. £30,000 spent promoting the allocation of the site through the LPP2 process. This is a significant investment for Lochailort. Further delays to the progress of this application, which might result from a suspension of policy NSP1, would plainly prejudice Lochailort. Lochailort are in a position to commence development on site soon after the grant of planning permission. This would have a relatively quick impact on much needed housing delivery.

39. In terms of wider prejudice: regardless of the outcome of this claim, Lochailort intend to progress its application for planning permission on this site. The Council cannot currently demonstrate a 5 year supply of deliverable housing sites, despite the recent adoption of LPP2.⁶ There is therefore a significant and urgent need for more housing sites to come forward in the district. This site has already been assessed by the LPP2 Inspector as a sustainable location for housing which would make an important contribution to the housing crisis in the district and also to meeting affordable housing needs. The LPP2 Inspector identified these issues as being particularly acutely felt in this part of the district.

40. For these reasons, the balance of convenience is firmly against granting interim relief.

⁶ A recent appeal decision on 10 February 2022 (APP/Q3305/W/21/3280802) confirmed that the Council can only demonstrate a 3.5 year supply of deliverable housing sites.

CONCLUSION

41. The application for interim relief and permission to bring the claim should be refused.

James Findlay QC

Ben Du Feu

21 February 2022