In the Matter of Land off Anchor Road, Coleford, Somerset

ADVICE

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1. I am instructed by Mr Mark Reynolds, Director of Context Planning, on behalf of Coleford Parish Council to advise in respect of the prospects of success of a potential statutory review under s.288 of the Town and Country Planning Act 1990[1] of an appeal decision made by an Inspector appointed by the Secretary of State, dated 21 October 2021 (APP/Q3305/W/20/3265459) ("the appeal decision"), concerning the proposed development of land off Anchor Road, Coleford, Somerset ("the site").

2. Those instructing have provided a review of the appeal decision. This helpfully raises several issues, which I address below.

BACKGROUND

3. The site is a large single field adjacent to the northern end of Coleford.

4. By an application dated 25 September 2019, Gladman Developments Limited ("Gladman") applied to Mendip District Council ("the Council") for outline planning permission with some matters reserved for the erection of up to 63 dwellings (Ref 2019/2345/0TS).

5. An officer's report was completed, which recommended that planning permission should be granted subject to a s.106 agreement and conditions.

6. However, the relevant planning committee resolved not to grant planning permission. By a decision notice, dated 25 September 2019, the Council refused

[1] All statutory references are to the 1990 Act unless stated otherwise.

planning permission ("the Council's decision to refuse planning permission"). A single reason for refusal was given:

> "The development by virtue of the excessive number of dwellings proposed would have a significantly harmful visual impact on the character of the area and landscape contrary to the provisions of Policies DP1, DP4 and DP7 of the Mendip District Local Plan, in addition to guidance contained within the National Planning Policy Framework."

7. Gladman appealed to the Secretary of State against the Council's decision to refuse planning permission. By the appeal decision, the Secretary of State's Inspector allowed the appeal and granted planning permission for the proposed development.

SUMMARY

8. I have advised below that it seems to me that a challenge to the appeal decision under s.288 would be unlikely to succeed with prospects assessed as being poor.

LAW AND POLICY

Statutory Framework

Deciding a planning application

9. Section 70(2) provides that in dealing with a planning application, a local planning authority must have regard to various matters including the provisions of the development plan, so far as material to the application (s.70(2)(a)); a post-examination draft neighbourhood development plan, so far as material to the application (s.70(2)(aza)); and any other material considerations (s.70(2)(c)).

10. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") further provides that, where regard is to be hard to the development plan when making a decision under the planning Acts, the decision must be made in accordance with the development plan unless material considerations indicate otherwise.

Statutory review under s.288

11. An appeal decision in an appeal to the Secretary of State under s.78 may be challenged in the High Court by means of statutory review under s.288.

12. By s.4A, an application for permission must be made to the Court and by s.4B(b), such an application must be made within six weeks beginning the day after the relevant date on which the decision-maker takes action.

Public sector equality duty

13. Section 149 of the Equality Act 2010 ("EA 2010") sets out the public sector equality duty ("PSED") under the Act:

> **"149 Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

…

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

...

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.”

…”

Habitats Regulations

14. The Conservation of Habitats and Species Regulations 2017 ("Habitats Regulations") provide for a series of stages of Assessment which must be undertaken to determine if a plan or project may affect the protected features of a habitats site before deciding whether to undertake, permit or authorise it.

15. Under Part 6 of the Habitats Regulations, if a proposed plan is considered likely to have a significant effect on a protected habitats site (whether individually or in combination with other plans and projects), then it is necessary to undertake an appropriate assessment. This considers the implications for the site, in view of the site's conservation objectives. It does not apply to plans or projects that are directly connected to the conservation management of the features for which the site was designated.

Policy

Development Plan

16. The development plan for the district comprises:

    a. Mendip District Local Plan Part I: Strategy and Policies (December 2014);

    b. Somerset Waste Core Strategy.

17. An emerging Local Plan, the Mendip District Local Plan Part II is expected to be adopted by the Council in the near future.

NPPF

The presumption in favour of sustainable development

18. Paragraph 11(d) of the National Planning Policy Framework ("NPPF"), states (so far as is relevant):

"d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[8], granting permission unless:

…

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[7]

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

19. Footnote 7 states:

"[7] The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 181) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 68); and areas at risk of flooding or coastal change."

20. Footnote 8 states:

"[8] This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 74); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years."

Case law

Standard of reasons

21. In *St Modwen Developments Ltd v SSCLG* [2017] EWCA Civ 1643, Lindblom LJ referred (at §6) referred to the "seven familiar principles" he set out for challenging planning decisions in *Bloor Homes East Midlands Ltd v SSCLG (Admin)* [2014] EWHC 754 (Admin) (at §19).

22. Lindblom LJ's second principle is concerned with the required standard of reasons.

> "(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration: see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 ["*South Bucks*"], 1964B–G."

23. In his speech in *South Bucks*, Lord Brown said:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important

matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

24. In *LB Tower Hamlets v SSHCLG* [2019] EWHC 2219 (Admin), Kerr J said that reasoning "need not be discursive" (§§40 and 74).

Weight to be attached to material considerations and planning judgment

25. Lindblom LJ's third principle in *St Modwen* is concerned with the weight to be attached to any material consideration and all matters of planning judgment:

> "(3) A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into W*ednesbury* irrationality' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) to give material considerations 'whatever weight [it] thinks fit or no weight at all': see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 , 780F–H ["*Tesco Stores*"]. And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision: see the judgment of Sullivan J in *Newsmith Stainless Ltd v Secretary of State for Environment, Transport and the Regions* (Practice Note) [2001]

EWHC Admin 74 at [6]; [2017] PTSR 1126 , para 5 (renumbered)) [("*Newsmith*")].

26. The courts have repeatedly expressed their reluctance to interfere with matters of planning judgment. In *Newsmith*, referred to above, Sullivan J (as he then was) said (at §§6 to 8):

> "6 An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision…
>
> 7 In any case, where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments….
>
> 8 Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task."

Interpretation of policy

27. Lindblom LJ's fourth and fifth principles in *St Modwen* are concerned with the interpretation of policy.

> "(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure

properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration: see the judgment of Lord Reed JSC in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983 , paras 17–22.

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question: see the judgment of Hoffmann LJ in *South Somerset District Council v Secretary of State for the Environment* (Practice Note) [2017] PTSR 1075, 1076–1077; (1992) 66 P & CR 83 , 85."

Out-of-date policies

28. Whether a policy is out-of-date for the purposes of paragraph 11(d)(ii) of the National Planning Policy Framework will be either a matter of fact or perhaps a matter of both fact and planning judgment (Lindblom J, as he then was, at §45 of *Bloor Homes East Midlands V SSCLG* [2014] EWHC 754 (Admin) ("*Bloor Homes*")).

Discretion not to quash

29. The court can exercise its discretion not to quash if it were satisfied that the same decision would be reached by the decision maker notwithstanding the error (*Simplex GE (Holdings) Ltd v SSE* [2017] PTSR 1041 ("*Simplex*").

PSED

30. The PSED was considered in *R (Stroud) v North West Leicestershire DC* [2018] EWHC 2886, HHJ David Cooke, sitting as a Deputy Judge of the High Court, said:

"It is important, in my view, that the courts in interpreting and applying this duty should not do so in a way that introduces unnecessary and cumbersome

formality and box ticking. A duty to have "due regard to matters does not require the decision taker in all cases to go looking for possible implications for any or all of the protected characteristics, but only to consider them properly where that are substantively raised on the facts."

31. In *R (Williams) v Caerphilly* CBC [2019] EWHC 1618 (Admin), the High Court confirmed that compliance with the PSED is a matter of substance rather than form and that, even where a formal assessment has not been undertaken, a decision-maker will have complied if they have considered the substantive issues.

32. In *LDRA Ltd v SSCLG* [2016] EWHC ("*LDRA*"), Lang J quashed a grant of planning permission for an office and warehouse building on a car park owned by the Council on the river Mersey because an Inspector had failed to have due regard to the duty under s.149. There had been clear evidence before the Inspector that the car park was an amenity much used and valued by disabled people because it gave access to the river. However, there was no evidence that the Inspector took this into account in his decision-making.

ANALYSIS

Landscape impact

33. Those instructing raise a number of issues concerning the Inspector's conclusions concerning the effect of the proposed development on the landscape character and appearance:

    a. the Inspector should have gone further in explaining the degree to which the intrinsic beauty of the countryside would be eroded and in particular he failed to characterise the harm, or explain the weight he attributed to it (§5);

    b. the Inspector misdirected himself when applying the relevant policies (§7);

    c. the Inspector was wrong to place reliance on the indicative plan to reach his conclusion that coalescence with Liyeate would not be a particular problem (§10);

d. there is no evidence to support the Inspector's conclusions that Lipyeate would retain a more rural and low-density character (§10);

e. the Inspector was wrong to take into account the mitigation that landscaping would offer as it was a reserved matter (§11);

f. the Inspector was wrong to conclude that the development does not fully comply with policies DP1, DP4, and DP7 as there is no compliance (§16).

Inspector's judgment reasoning

34. The Inspector's assessment of landscape harm is ultimately a matter of planning judgment and a court would be very reluctant to interfere. In *Newsmith*, Sullivan J, as he then was, said that it was "of crucial importance" that an Inspector's conclusions will be partly based "upon the impressions received on the site inspection".

35. As to whether the Inspector should have gone further in explaining the degree in which the intrinsic beauty of the countryside would be eroded, it seems to me that a court would accept that his reasoning was adequate.

36. At DL 5, the Inspector said: "As the proposed development would result in dwellings and internal roads, for example, on what is an open field, failed to characterise the harm, it seems to me that there would be a significant change in the character of the site." In my view a court would be very unlikely to expect the Inspector to have explained the harm in any more detail than this, bearing in mind the guidance of Lord Brown in *South Bucks*.

37. As to the weight that the Inspector placed on landscape harm, the Inspector described this as being "limited" (e.g. DL 16 and 56) and it seems to me that a court would again accept that this level of detail was adequate.

Inspector's application of policy

38. It seems to me that it could be argued that there is a degree of uncertainty as to the Inspector's conclusions as to the conflict between the proposed development

and policies DP1, DP4, and DP7. At DL 7, the Inspector said that "the proposal does not fully accord" with the policies and at DL 16, the Inspector similarly concluded that "the proposal does not fully comply" with these policies. At DL 56, the Inspector then said that the "development would be contrary" to them.

39. However, in my view, it seems reasonably clear from the decision overall, that the Inspector meant that there was some conflict with policies DP1, DP4, and DP7. While it might have been better for the Inspector to have explained this conclusion in a little more detail, it seems to me that a court would be unlikely to accept that it is irrational. The summary of the relevant policies at DL 6 does not include all aspects of the policies.

40. Even if I am wrong about that, the Inspector afforded limited weight to the conflict with the development plan and significant weight to the benefits to the proposed development when applying the tilted balance under §11d) of the NPPF at DL 60. In these circumstances, it seems to me that the court would likely exercise its discretion not to quash the decision on the basis that the Inspector would have made the same decision notwithstanding the error (*Simplex*).

Lipyeate

41. At DL 10, the Inspector said:

> "10. The development would also extend the built form of the village north towards Lipyeate, which is a very small settlement of several dwellings, mostly set in spacious plots. Whilst there would be an element of coalescence with Lipyeate I note that on the indicative plan there would be an area of open space towards the northern end of the site, which would provide some visual break between the dwellings proposed and the dwellings at Lipyeate. Furthermore, Lipyeate would retain a more rural and low density character which would appear distinct from the site development of up to 63 modern dwellings."

42. The indicative plan was plainly capable of being a material consideration and the Inspector was entitled to give it what weight he thought fit subject to *Wednesbury* irrationality (*Tesco Stores*). In my view, a court would be unlikely to conclude that the weight placed on it by the Inspector was irrational. It is further difficult to see how approval would be given at the reserved matters for a layout that did not include an area of green space in light of his comments.

43. As to the Inspector's comment at DL 10 that Lipyeate would retain a more rural and low-density character, this is a matter of the planning judgment for the Inspector. There is nothing before me to suggest that the judgment is irrational and it seems to me that a court would be very reluctant to interfere with it (*Newsmith*).

Mitigation

44. At DL 11 the Inspector said:

> "11. A further mitigation would be the proposed landscaping and the retention of much of the existing vegetation. This would help the development visually integrate with the surrounding rural landscape over time, adding to the existing boundary hedgerows which already provides some level of visual containment for the site."

45. It is normal for Inspectors in appeals such as this to consider the mitigating effect of landscaping, notwithstanding that it is for consideration at the reserved matters stage. In my view it is most unlikely that a court would accept that the Inspector was not entitled to take it into account, or that his consideration of it was irrational.

<u>Five-years housing land supply</u>

Inspector's reasoning

46. At DL 28 the Inspector said:

"28. However, as discussed at the Hearing, the Council cannot currently demonstrate a five-year rolling supply of deliverable housing sites. The level of supply that the Council can demonstrate I would consider as a significant shortfall. There may be improvements in the near future, and I acknowledge the likely imminent adoption of the Local Plan Part 2. However, from the evidence submitted this would not result in the Council being able to demonstrate a sufficient level of housing land supply. Furthermore, the impact of the need for nutrient/phosphate neutrality with developments, connected to the Somerset Levels RAMSAR site, is likely to have an impact to housing delivery in the District for some time."

47. Those instructing suggest that the Inspector should have considered the reasons for the shortfall in more detail.

48. The Inspector accepted that evidence was submitted which suggested that there "may" be improvements, but concluded that it would not result in the Council being able to demonstrate a sufficient level of housing supply. It seems to me that a court would likely accept that this level of reasoning is adequate and that the Inspector's conclusions were not irrational.

49. Those instructing further state that the Inspector's conclusions on the effect of the need for nutrient/phosphate neutrality was unsupported by evidence and that the Inspector should not have given weight to this issue.

50. In *South Bucks*, Lord Brown said (at §36) that decision letters "must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced." While the Inspector did not explain the evidence for his conclusions, there was evidence on the impact of the need for nutrient/phosphate neutrality before the Inspector. Further, weight is a matter for the decision-maker subject to *Wednesbury* unreasonableness (*Tesco Stores*). In these circumstances, it seems to me that it is very unlikely that a challenge based on the Inspector's conclusions on this issue would succeed.

Assessment of the shortfall

51. The Inspector considers the conflict with development limits policies at DL 57:

> "57. There is also the fact that the development would be located outside the defined development boundary limits of Coleford or any other settlement in the area. It is instead on a 'greenfield' site adjacent to this village. Policies such as Core Policy 1 seeks that proposed development outside the development limits, will be strictly controlled. However, in the absence of a demonstrable five year housing land supply, I give the conflict with the Development Plan with these policies limited weight. Furthermore, the site is adjacent to the village rather than being in a remote location. Occupants of the development would also be able to benefit from being part of this 'primary' village."

52. Those instructing refer to the judgment of Holgate J in *Gladman Developments Ltd v SSHCLG* [2020] EWHC 518 (Admin). That judgment was appealed to the Court of Appeal in *Gladman Developments Ltd v SSHCLG* [2021] EWCA Civ 104. In his judgment, Lindblom LJ referred to the relevant part of Holgate J's judgment for present purposes at §27, which he approved:

> "27. In coming to that conclusion, Holgate J observed that when the policy in paragraph 11(d)(ii) is "triggered" because a five year supply of housing land cannot be demonstrated, "the decision-maker will still need to assess the weight to be given to development plan policies, including whether or not they are in substance out-of-date and if so for what reasons". In these circumstances "the NPPF does not prescribe the weight which should be given to development plan policies". The decision maker "may also take into account, for example, the nature and extent of any housing shortfall, the reasons therefor, and the prospects of that shortfall being reduced (see eg [*Crane*])" (para 82)."

53. I note that Holgate J did not suggest that it was compulsory for a decision maker to take into account the points in the last sentence quoted above.

54. It seems to me that there is little doubt that the development limits policies are out of date. As to the weight that should be afforded to these policies, this remains a matter of planning judgment (as in *Crane v SSCLG* [2015] EWHC 425).

55. As discussed above, the Inspector detected a significant shortfall and indicated that he did not anticipate the Council being able to demonstrate a sufficient level of housing land supply in the near future.

56. In these circumstances and bearing in mind the considerable reluctance of the courts to interfere in matters of planning judgment, it seems to me unlikely that a court would interfere with the Inspector's judgment.

PSED

57. Those instructing refer to the Inspector's reasoning at DL 30 and suggest that the Inspector failed to take into account the PSED. At DL 30 the Inspector stated:

> "30. As mentioned previously, Coleford is considered as a 'Primary Village', based on factors such as the community facilities it can offer villagers. From the evidence before me and from my observations when in the village, this is a relatively large rural settlement and does include a range of facilities and services. I acknowledge that there is no full-time Post Office now and that a pub has closed. However, what remains I would regard as sufficient in terms of facilities and services for the occupiers of the proposed dwellings, even if some would need a longer walk or cycle through the village, for example. Indeed, the future occupants could help support and safeguard the future of community facilities…"

58. Those instructing state that representations were made "about the significant walking distances from the site to services and facilities and the impracticability" of this for a proportion of future residents".

59. There is no explicit reference in the appeal decision to compliance with the public sector equality duty, nor is it immediately obvious to me that that the Inspector took it into account. However, in my there is no obvious failure to consider the needs of those with particular protected characteristics either.

60. At DL 30 the Inspector stated that "what remains I would regard as sufficient in terms of facilities and services for the occupiers of the proposed dwellings". Further the Inspector said that while the bus service was infrequent and did not run every day, it could be used by future occupiers of the proposed dwellings especially as the bus stops would be so close to the site.

61. In my view, the decision can be distinguished from that in *LDRA*, where the Inspector clearly failed to take into account the particular needs of disabled people. In the present appeal, the Inspector considered the needs of occupiers of the dwellings. While he did not explicitly consider occupiers with protected characteristics, it is not clear to me that he failed to consider these either.

62. Consequently, it seems to me that, on balance, a court would be unlikely to conclude that there had been a failure to comply with the PSED.

Traffic and highway safety

Collisions and other incidences

63. Those instructing note a potential conflict between statements made by the Inspector in DL 33 and 34. At DL 33, the Inspector said that: "I am aware from evidence provided by interested parties that there have been a number of traffic collisions and other incidences in the roads near the site."

64. He then said at DL 34:

> "Passing other vehicles, especially larger trucks, can be difficult on these narrow roads, but I have no substantive evidence to demonstrate that such issues cause significant congestion or that such incidents result in unacceptable highway safety consequences. These are roads which are long established and already used by many motorists and the evidence (including

my own on site observations) does not convincingly demonstrate to me that the additional traffic generated by the proposed houses would make the surrounding road network materially more dangerous than existing."

65. It seems to me that a court would be unlikely to conclude that this reasoning is irrational. The Inspector does not doubt that there have been a number of collisions and other incidences, but takes the view that these do not amount to "unacceptable highway safety consequences".

Visibility splays

66. The Inspector considered visibility splays at DL 36:

> "36. In terms of the visibility splays as proposed, I note there has been no objections from the highway authority. From my observations on site also, these splays would provide sufficient safety levels for traffic entering or exiting the site. There should also be sufficient parking provided within the development to ensure there would be no significant overspill of parking elsewhere."

67. Those instructing are critical that the Inspector did not refer specifically to evidence submitted to the appeal. As indicated previously, an Inspector is not under a duty to discuss all the evidence before him (*South Bucks*).

68. At DL 36, the Inspector made clear that he considered the issue of visibility splays and that he concluded that they would provide sufficient levels of safety. That he had discussed visibility splays at all reveals that they were a controversial issue in the appeal. Consequently, it seems to me that a court would be unlikely to accept that the Inspector's reasoning was inadequate.

Habitats

69. At DL 40, the Inspector set out the need for an appropriate assessment:

> "40. A likely significant effect cannot be excluded, so as the competent authority I must undertake an appropriate assessment. Without

> mitigation the proposal could have an adverse effect on the bats associated with the SAC due to the development of what is an open field. At this stage I can consider measures that could be delivered which would avoid these effects. There are mitigation/compensation measures set out in the Ecological Appraisal. This includes the retention of hedgerows (or replacement hedgerows), the implementation of a sensitive lighting scheme, and the creation of new on-site habitats given the current usage of the site by SAC bats. Agreed conditions also include the requirement for a detailed Landscape and Ecological Management Plan. Such mitigation suitably addresses the loss of foraging habitat, the severance of flight lines and lighting disturbance, for example."

70. Those instructing are critical of the Inspector's reference to "mitigation/compensation measures" and are concerned that he incorrectly took into account compensatory measures when carrying out the appropriate assessment.

71. It seems to me that a court would conclude that he did not do so, but was simply noting that the ecological appraisal included compensatory measures. This is the only reference to compensatory measures in DL 40. The repeated references to mitigation in DL 41 further suggests that the Inspector's focus was on mitigation:

> "41. As concluded by the Council in the completed Habitat Regulation Assessment (which I consider still robust and not outdated), with such suitable mitigation measures it is unlikely that there would be an adverse effect on the integrity of the Mells Valley SAC. This can be secured via condition and planning obligations. I am satisfied that the mechanisms for securing the mitigation measures are appropriate."

72. Overall, it seems to me that a challenge based on the Inspector's application of the requirements of the Habitats Regulations would be unlikely to succeed.

Heritage

73. The Inspector considered heritage issues from DL 46 to 51. Those instructing disagree with the Inspector's assessment that there would be no harm to the significance of the Grade II former farmhouse through the proposed development being within its setting.

74. This is a planning judgment and a court would be most reluctant to interfere with it (*Newsmith*). Further, I note that the Inspector agreed with the assessment carried out by the Council and that his reasoning is set out at DL 48.

75. In any event, the Inspector further stated at DL 51that even if he had found some limited harm, it would be less than substantial for the purposes of §202 of the NPPF and it would be outweighed by the public benefits of the proposed development.

76. Thus, even if a court could be persuaded that this was one of the very rare occasions when it should interfere with a matter of planning judgment, it seems to me that the court would be very unlikely to quash the appeal decision as the Inspector would have reached the same decision overall (*Simplex*).

Further documents

77. Finally, those instructing note that the Inspector made no reference of the Mendip Local Plan Part 2 Inspector's report and two recent appeal decisions in the district. In South Bucks, Lord Brown said that the reasons for a decision "need refer only to the main issues in the dispute, not to every material consideration."

78. It seems to me that a court would be unlikely to accept that these documents were of such significance that the Inspector was required to consider them explicitly.

79. While I note that those instructing observe that the appeal decisions illustrate that in the absence of a five years housing land supply, it does not necessarily follow that an appeal should be allowed. Nevertheless, this is uncontroversial and each appeal must be considered on its own merits.

CONCLUSION

80. For the reasons above, it seems to me that a challenge to the appeal decision under s.288 would be unlikely to succeed with prospects assessed as being poor.

81. If I can be of any further assistance, please do not hesitate to contact me.

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16 November 2021

In the Matter of Land off Anchor Road, Coleford, Somerset

ADVICE

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