

Recent cases on s.38(6) compliance

Dan Kolinsky QC

Tension between.....



City of Edinburgh v SS for Scotland [1997] 1 WLR 1447

- Strand 1 - Understand and assess proposal against whole plan

VS

- Strand 2 - No universal prescription as to how this is done

City of Edinburgh [1997] 1 WLR 1447 - Strand 1



“necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them.... open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. ...consider whether the development proposed in the application before him does or does not accord with the development plan..... some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it”. (at 1459)

Strand 1 (continued)



Tesco Stores Ltd v Dundee City Council [2012] USCO 13 (at para 22):

- “necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.”

City of Edinburgh – strand 2



- “undesirable to devise any universal prescription for the method to be adopted by the decision maker..... Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. ... The precise procedure followed by any decision maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.” (1459-1460)

R (Hampton Bishop Parish Council) v. Herefordshire Council [2014] EWCA Civ. 878

C

- Strand 2 cannot undermine strand 1 (see para 28)
- Decision maker “must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan.” (32-33) (CA disagrees with observations of Hickinbottom J at first inst)
- But mixed messages (at para 41-2)

CA hold clear decision as to conformity apparent in materials officer’s report (even though D and IP’s Counsel “surprisingly.....not willing to be pinned down” on conformity question).

[single key policy; CA decide obvious breached but breach outweighed]

Overall conformity decision by implication.....



- Pragmatism as to what is required to satisfy stage 1 demonstrated in series of cases finding compliance by implication - eg

Dartford BC v Secretary of State for Communities and Local Government [2014] EWHC 2636 (Admin) , per Patterson J at paras 39-42;

Gill v Secretary of State for Communities and Local Government [2015] EWHC 2660 (Admin) , per Rhodri Price-Lewis QC, sitting as a deputy High Court Judge, at paras 22-24; and

R (Kverndal) v LB Hounslow [2015] EWHC 3084 (Admin) per Supperstone J at paras 63-64

Latest guidance from the Court of Appeal



- Secretary of State for Communities and Local Government v. BDW Trading Limited [2016] EWCA Civ. 493, Lindblom LJ summarises approach to s.38(6) at paragraph 21:
- 1. give primacy
- 2. understand and recognise pulling in different directions
- 3. no universal prescription of 2 stage process
- 4. decision required as to conformity or not
- S.38(6) remains central to planning decisions (not changed by NPPF)

BDW Trading Limited in CA [2016] EWCA Civ. 493



Single issue on appeal before Inspector as to whether traffic impact, noise and disturbance unacceptable

Insp find unacceptable; dismisses appeal – benefits not outweigh harm but no express discussion of s.38(6)

Hickinbottom J quashes – close call but – no express discussion and policy breached less central than Hampton; can't be confident s.38(6) properly addressed

CA reverse – “latitude to decision makers” (paras 25-27); fair reading of decision is that breach of development plan (para 33)

Limits on implication

R(Lensbury Limited) v Richmond-Upon-Thames London Borough Council [2016] EWCA Civ 814

- Implication defence had succeeded before Supperstone J
- But decision overturned by CA with much closer scrutiny of policy tension between MOL policies which needed to be addressed in Ipa's analysis; had not been addressed (and way of resolving tension could not be safely implied)

Drawing the threads together

- Need for overall judgment that takes account of how development plan bears on key planning issues
- NPPF does not remove need for this
- Genuine issues regarding competing strands must be addressed
- Overall conclusion necessary (how competing tensions are resolved)
- Courts' willing to imply conclusion where clear in circumstances
- pedantic gripes about the way exercise is conducted should fail

Drawing the threads together (2)

- *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government [2015] EWHC 2489 (Admin)* Patterson J at para 30
- “an evaluation of main policy areas within the development plan that are relevant to the proposal to be determined and an assessment of how the proposal [fares] against them. That can be shortly stated and the process to be followed is for the individual decision maker. But it needs to be clear at the culmination of the decision-taking process what the eventual judgment is against the development plan as a whole”.