

RE VALE OF AYLESBURY LOCAL PLAN – USE OF SUPPLEMENTARY PLANNING DOCUMENTS

ADVICE

INTRODUCTION

1. We are instructed to advise Aylesbury Vale District Council (“the Council”) on its emerging local plan, the Vale of Aylesbury Local Plan (“VALP”), in respect of the intended use of supplementary planning documents (“SPDs”). In particular, we are asked to address the implications of a recent decision by Gilbert J in the case of *R (William Davis Ltd) v Charnwood BC* [2017] EWHC 3006 Admin (“Davis”). This decision builds on the earlier case of *R (Skipton Properties Ltd) v Craven DC* (“Skipton”), a decision of Jay J. We therefore consider the implications for the VALP of these two cases together.

LAW

Legislative framework

2. The Planning and Compulsory Purchase Act 2004 (references to primary legislation relate to this Act unless otherwise stated) differentiates between “development plan documents” (“DPDs”) and “local development documents” (“LDDs”) – DPDs are a sub-category of LDDs.
3. LDDs comprise all the local planning authority’s policies relating to the development and use of land in its area (s.17(3)), but these do not acquire that status until adopted as such (s.17(8)).
4. By section 38(3)(b), “the development plan consists of the DPDs (taken as a whole) which have been adopted or approved in relation to the area in question”. Moreover, s.37 specifies that a DPD is “a local development document which is specified as a development plan document in the local development scheme”.
5. Section 17(7) provides the power for secondary legislation to prescribe those documents which are LDDs and those which are DPDs. The regulations in question

are the Town and Country Planning (Local Planning) (England) Regulations 2012 (“the Regulations”). Regulation 5 provides:

“5.— Local development documents

(1) For the purposes of section 17(7)(za) of the Act the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) the allocation of sites for a particular type of development or use;

(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b) where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted.

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

(i) relates only to part of the area of the local planning authority;

(ii) identifies that area as an area of significant change or special conservation; and

(iii) contains the local planning authority's policies in relation to the area; and

(b) any other document which includes a site allocation policy.”

6. Regulation 5 must be read in light of Regulation 2 which defines a “local plan” as “any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the Act these documents are prescribed as DPDs” (the same definition of a “local plan” is given by Regulation 6). Regulation 6 also defines a “supplementary planning document” (“SPD”) as “any document of a description referred to in regulation 5 (except an adopted policies map or a statement of community involvement) which is not a local plan”.
7. The distinction between these various categories of planning document matters in practice because of s.38(6). This requires applications for planning permission to be “made in accordance with the [development] plan unless material considerations indicate otherwise”. The implications of this section were explained by Gilbert J in *Davis* at [17]: “the existence of a policy in a properly adopted development plan is not

a mere material consideration. An up to date development plan policy will, in the normal course of events, attract significant weight, as s.38 PCPA 2004 shows.” In contrast, an LDD which is not a DPD is a material consideration.

8. This difference in treatment is linked to the consultation and scrutiny requirements which apply to each type of document. DPDs are subject to stringent consultation requirements, the duty to co-operate and independent examination by the Secretary of State (s.20). SPDs are subject to specific consultation requirements contained in Regulations 12 and 13 of the Regulations; however, there is no requirement for examination.

Case law

Skipton

9. In *Skipton* a local authority adopted a DPD entitled the “Interim approach to affordable housing requirements” which required 40% of housing on sites of five or more dwellings to be affordable. However, in 2016 an SPD was adopted entitled “Negotiating Affordable Housing Contributions.” This implemented a lower threshold for affordable housing contributions in designated rural areas or equivalent cash contributions from developers, and requirements that affordable housing contributions be made for developments of fewer than six dwellings with a combined floor space of over 1,000 square metres.
10. A developer challenged the SPD on the basis that it should have been adopted as a DPD such that the various regulatory requirements associated with DPDs would have applied. The claim succeeded and the SPD was quashed. Jay J considered that the SPD fell within the terms of Regulation 5(1)(a)(i) (i.e. it concerned the development and use of land which the local planning authority wish to encourage). The “development and use of land” in question was either “residential development including affordable housing” or “affordable housing”.
11. Some useful points are made about the way in which Regulation 5(1) should be applied at [90]:

“I mentioned in argument that there may be force in the point that the NAHC 2016 sets out social and economic objectives relating to residential development, and that

this might lend support to the contention that the more natural habitat for an affordable housing policy is regulation 5(1)(a)(iii) rather than (i). On reflection, however, there is no force in this point. There is nothing to prevent a local planning authority including all its affordable housing policies in one DPD. Elements of these policies may relate to social and economic objectives. However, these elements do not notionally remove the policy from (i) and locate it within (iii). The purpose of regulation 5(1)(a)(iii) is to make clear that a local planning authority may introduce policies which are supplementary to a DPD subject only to these policies fulfilling the regulatory criteria. The Defendant has made clear that it may introduce an SPD, supplementary to its new local plan, which sets out additional guidance in relation to affordable housing.” (Emphasis in the original).

12. Strictly *obiter*, Jay J also provided some helpful guidance at [93] on the correct interpretation of Regulation 5(1)(a)(iv):

“(1) despite the textual difficulties which arise (see paragraph 78 above), and notwithstanding the analysis in Miller (which addressed the claimant's formulation of its case), I cannot accept that it is necessary to identify a development management policy which is separate from the statements at issue. As I have already pointed out, the whole purpose of regulation 5 is to define LDDs qua policies, by reference to statements which amount to or include policies. A sensible, purposive construction of regulation 5(1)(a)(iv) leads to the clear conclusion that the NAHC 2016 could fall within (iv) if it contains development management policies (subject to the below).

(2) I would construe the “and” in regulation 5(1)(a)(iv) disjunctively. This is in line with regulation 5(1)(a)(iii) (see the first “and”, before “economic”) and the overall purpose of the provision. As Mr Howell QC has rightly observed, a conjunctive construction would lead to absurdity. It would have been better had the draftsman broken down (iv) into two paragraphs (“development management policies which ...”; “site allocation policies which ...”) but the upshot is the same.

(3) I agree with Mr Howell QC, for the reasons he has given, that it is possible to have LDDs which are outside regulation 5 but that it is impossible to have DPDs which are outside the regulation. This is another reason for supporting a disjunctive construction.

(4) I disagree with Mr Howell QC that regulation 5(1)(a)(i) and (iii) applies to particular developments or uses of land, whereas (iv) is general (see paragraph 79 above).

(5) The real question which therefore arises is whether the NAHC 2016 contains development management policies which guide or regulate applications for planning permission. It may be seen that the issue here is not the same as it was in relation to regulation 5(1)(a)(i) because there is no need to find any encouragement; this provision is neutral. (Emphasis added).

(6) I would hold that the NAHC 2016 clearly contains statements, in the form of development management policies, which regulate applications for planning

permission. I therefore agree with Stewart J's obiter observations at paragraph 37 of Miller."

13. The court also clarified that, however labelled by the local authority, whether a document is a DPD or a SPD is a point of law for the courts.

Davis

14. In *Davis* the local authority adopted its core strategy in 2015 which set targets for new homes and affordable housing. A SPD was published in 2017. The SPD contained Policy HSPD9 which set out in percentage terms the required mix of home sizes in any proposed housing development. That policy also provided that where a proposed development involved a different mix, the departure from the prescribed mix would have to be justified by evidence addressing a number of specified matters.
15. The court rejected the local authority's argument that Policy HSPD9 fell within the terms of Regulation 5(1)(a)(iii), finding instead that it was a statement regarding the development of land and would undoubtedly be used in the determination of planning applications such that it came within Regulation 5(1)(a)(i) and (iv). In so far as *RWE* and *Skipton* were inconsistent, Gilbert J preferred the reasoning in *Skipton* as it reflected the comprehensive nature of the planning legislative code, namely that the development plan was the place for policies regulating development.

Other cases

16. It is also worth noting that in *R (RWE Npower Renewables Ltd) v Milton Keynes BC* [2013] EWHC 751 (Admin) the Defendant's "Wind Turbines Supplementary Planning Document and Emerging Policy" was not an DPD within Regulation 5(1)(a)(i) in the view of Mr Howell QC (sitting as a Deputy High Court Judge) because, on the facts of that case, any statements of encouragement merely repeated the statements in the Defendant's DPD [69].
17. In *R (Miller Homes Ltd) v Leeds City Council* [2014] EWHC 82 (Admin), an interim policy had the aim of safeguarding some non-Green Belt land and was a departure from DPD N34. Stewart J found that Policy N34 was a "safeguarding" policy rather than a "development management policy" which regulated the development or use of

land. Therefore, statements in the interim policy were not regulating a development management policy within the terms of Regulation 5(1)(a)(iv) [36]-[37].

ANALYSIS OF THE PROPOSED SPDS IN THE VALP

Infrastructure delivery and S106 agreements SPD

18. Policy S5 on Infrastructure (p.48) sets out the general principles concerning provision of on and off site infrastructure by new development. It also provides: “A supplementary planning document will be produced regarding the delivery and use of Section 106 planning obligation agreements.”
19. The question is whether such an SPD is caught by any of the DPD definitions in Regulation 5 or whether it fall under Regulation 5(1)(a)(iii) and/or (b).
20. Clearly it will depend on the content of the intended SPD but it seems to us that the intended policy could legitimately be produced as an SPD rather than a DPD. This is because Policy S5 encourages the development/use of land in a particular way within the terms of 5(1)(a)(i) and similarly regulates development for the purposes of an application for planning permission within 5(1)(a)(iv). In contrast, the function of the SPD is to flesh out these principles and provide a mechanism for achieving them; it does not seek to impose fresh forms of encouragement or regulation. In this sense it is akin to the position in *RWE*.

Aylesbury Garden Town Design Guidance SPD, Strategic Infrastructure Delivery SPD and Place-Making SPD

21. Policy D1 on Delivering Aylesbury Garden Town (p.69) contains the principle that a Garden Town will be developed and the overarching principles that will apply to that project. Policy D1 explains that it will be supported by various SPDs as follows:
 - (a) “Detailed design guidance will be set out within the overarching Aylesbury Garden Town Design Guidance SPD and individual site-specific supplementary planning documents”;
 - (b) “The Aylesbury Garden Town Strategic Infrastructure Delivery SPD will set out in detail when infrastructure is required and how it will be delivered and funded”;

(c) “Site-specific supplementary planning documents...will be developed as required to set out clear and detailed requirements for place-making”.

22. Assuming these various SPDs are appropriately drafted, it seems to us that they fall within Regulation 5(1)(a)(iii) in that Policy D1 outlines desired development/use of land (ie creation of a Garden Town in a particular area) and then the SPDs set out the “environmental, social, design and economic objectives” relevant to achieving this. As above, it is the case of the SPDs providing further detail on a broader principle of development/use of land which has been determined by Policy D1; the SPD themselves do not establish these principles and therefore do not come within Regulation 5(1)(a)(i).

23. Further, the SPDs do not themselves allocate the land as they rely on Policy D1 (and other site allocation policies in the VALP) to do this. It follows that Regulation 5(1)(a)(ii) does not apply.

24. As relevant proposals will have to comply with the various SPDs to be granted planning permission, it could be said that Regulation 5(1)(a)(iv) is engaged. However, it seems to us – as supported by the approaches of Jay J and Gilbert J – that it is appropriate to take a broad, purposive approach to interpretation here rather than a narrow, literal one. On one level, any planning policy document (whether a DPD, SPD or residual LDD) is designed to guide the determination of applications for planning permission; if it did not do this it would serve no purpose. It is therefore important to read 5(1)(a)(iv) alongside (iii), which indicates that a document will be an SPD where it is setting out particular objectives, i.e. details, so as to achieve a broader development goal contained in the parent policy. In our view, this is the case here.

South Aylesbury Masterplan SPD

25. D-AGT1 is a site allocation for South Aylesbury – it is intended that a Masterplan SPD will be prepared for the site (p.74). D-AGT1 explains: development proposals must “comply with all other relevant policies in the Plan, including the principles of development for Aylesbury Garden Town” and “[p]roposals for development within the South Aylesbury Strategic Site Allocation will be expected to demonstrate how

they positively contribute to the achievement of the SPD and the Aylesbury Garden Town Principles as set out in Policies D1 and D2.”

26. D-AGT2 is a site allocation policy for South West Aylesbury (p.78). For present purposes the proposed Masterplan SPD is set out in identical terms as above.
27. D-AGT3 is a site allocation for Aylesbury north of A41 (p.83). For present purposes the proposed Masterplan SPD is set out in identical terms as above.
28. D-AGT4 is a site allocation for Aylesbury south of A41 (p.88). D-AGT4 provides that proposals must comply with the Masterplan SPD to be prepared for the site. Further, “[a] Masterplan SPD for the whole site allocation should be prepared and adopted to inform the submission of design codes and reserved matters for these sites, and prior to the submission of any planning applications for the New Road site” and “[t]he SPD for the overall site allocation here should be prepared to ensure a comprehensively planned development as well as demonstrating how the allocation links to and contributes to the delivery of the AGT overall.”
29. D-AGT5 is a site allocation at Berryfields (p.92). D-AGT5 provides that proposals must comply with the Masterplan SPD to be prepared for the site.
30. D-AGT6 is a site allocation at Kingsbrook (p.96). D-AGT6 provides that proposals must comply with the Masterplan SPD to be prepared for the site. It goes on: “A concept masterplan/SPD for the third village should be prepared and adopted to inform the submission of a design code and reserve matters for that village. Design should take account of the over-arching Garden Town principles (policy D1) and details within the Garden Town Design SPD to ensure comprehensive development. The SPD should demonstrate how the village links to and contributes to the delivery of Aylesbury Garden Town as a whole.”
31. Policy D-HAL003 is a site allocation at RAF Halton. As above, the policy requires proposals to comply with the site’s Masterplan SPD. It also explains: “Proposals for development within the RAF Halton Strategic Site Allocation will be expected to demonstrate how they positively contribute to the achievement of the SPD and the Aylesbury Garden Town principles as set out in Policy D1.

32. The reasoning set out in respect of the Garden Plan SPDs are equally applicable here. The various site specific Masterplans simply provide the detail for achieving the development/land use set out in the DPD. As such, Regulation 5(1)(a)(iii) is engaged.

Affordable Housing SPD

33. Policy H1 deals with Affordable Housing (p.166). In particular, it sets out the thresholds at which affordable housing contributions become due and the proportion to be provided. It goes on to provide: “[t]he affordable homes will be expected to be integrated throughout the development site in accordance with the adopted Supplementary Planning Document”. In addition: “[f]urther details regarding the implementation of this policy will be provided in the Affordable Housing Supplementary Planning Document”.

34. It is clear from *Skipton* and *Davis* that policy documents which introduce new or vary existing affordable housing thresholds should properly be regarded as DPDs rather than SPDs because they are caught by Regulation 5(1)(a)(i) and/or (iv). In this instance, however, it seems that the regulation of development is set by Policy H1. The function of the SPD is to explain in greater detail how this will be done, in other words, the way in which Policy H1 will be implemented in practice. For example, H1(e) makes it clear that affordable homes will have to be integrated throughout the site. This constitutes regulation of development. In contrast, the function of the SPD is simply to provide detail on the type and manner of integration envisaged.

Design SPD (District Wide)

35. Policy H7 on Dwelling Sizes (p.180) requires new dwellings to provide “sufficient internal space for normal residential activities commensurate in size with the expected occupancy of the dwelling”. The supporting text explains that “[f]urther information about the Council’s expectations will be provided within a design SPD.”
36. Policy T5 on Vehicle Parking provides that development must provide an “appropriate” level of parking (p.207). It also explains that “Garages/internal garages/car ports will not be included within the allocation of parking spaces unless

they meet a minimum internal size as set out in the design SPD” and “Vehicle parking standards will be set out in the design SPD”.

37. Policy T7 deals with Electric Vehicle Infrastructure (p.209). It provides: “New developments of 10 dwellings/totalling 760 sqm floorspace or more will be required to provide electric charging points, at the rate set out in the design SPD.”
38. Policy BE1 on Heritage Assets (p.216) seeks to ensure that all developments conserve heritage assets in a manner appropriate to their significance. It goes on: “[d]evelopments affecting a heritage asset should achieve a high quality design in accordance with adopted SPD and the Council will encourage modern, innovative design which respects and complements the heritage context in terms of scale, massing, design, detailing and use.” (Although the VALP as currently drafted does not specify that the reference is to the Design SPD, from our instructions we proceed on the basis that this is the case).
39. Policy BE2 on Design of New Development (p.218) sets out general principles of design such as the fact that development should respect and complement the character of the locality. It also requires all new development to “follow the guidance set out within the Council’s design SPD”.
40. With the exception of Vehicle Parking Standards (discussed below), it seems to us that this is a case of an SPD falling within Regulation 5(1)(a)(iii) since the SPD seeks to expand on the broad design principles contained in the various DPD policies. In other words, the SPD contains statements on “design objectives” in order to facilitate the kind of development envisaged by the DPDs.
41. The position in respect of T5 on Vehicle Parking is less straightforward. The use of an SPD to address the internal dimensions of car ports etc should not be problematic because this simply fleshes out Policy T5. However, there is a real risk that Vehicle Parking Standards (ie the number of spaces required in respect of particular types of development) comes within Regulation 5(1)(a)(iv) on the basis that it is a development management policy. As it would set specific numerical thresholds, non-compliance with which could be used as a basis for refusing planning permission, it

would, to some extent at least, be similar to the housing mix and affordable housing policies that were quashed in *Skipton* and *Davis*.

42. It follows that to avoid the risk of breaching the Regulations, the Vehicle Parking Standards should be included in the Policy itself (they would therefore be contained in a DPD rather than an SPD). It seems to us that the best way of doing this would be to produce an Appendix (containing the relevant Vehicle Parking Standards) to the VALP which would link to Policy T5. This could then be the subject of a proposed Main Modification. Alternatively, if it is not possible to complete this work before the VALP is submitted, the matter could be addressed during the examination with a Main Modification suggested at that stage. In either scenario, we do not consider that this issue is fatal to the VALP and should not ultimately result in any failure to have it adopted in due course.

Biodiversity SPD

43. Policy NE2 addresses Biodiversity and Geodiversity (p.225). Part (a) provides: “On greenfield sites, a net gain in biodiversity will be sought and on other sites no net loss and a net gain where possible in biodiversity will be sought by protecting, managing, enhancing and extending existing resources, and by creating new resources. These gains must be measurable using best practice in biodiversity and green infrastructure accounting and in accordance with any methodology set out in a future Supplementary Planning Document”. The supporting text at [9.17] gives some further clarification: “In order to achieve criterion (a) of the policy below, a supplementary planning document (SPD) will be prepared, working with the other Buckinghamshire councils, on a mechanism to achieve “no net loss and net gain”. The SPD will consider the possibilities of adopting a biometrics calculator to quantify gains and losses and consider the threshold of development this should apply to, how the system be managed and monitored.”

44. In this instance the principle of a net gain in biodiversity (or no net loss depending on the site) is established by the DPD. The SPD will then be used to provide a methodology for measuring compliance with the overarching principle. It seems to us that this amounts to the SPD establishing “environmental objectives” envisaged in

Regulation 5(1)(a)(iii). It is not the SPD itself which is encouraging particular use/development or regulating it.

Trees SPD

45. Policy NE9 on Trees, Hedgerows and Woodlands (p.239) is aimed at new development enhancing and expanding the district's tree and woodland resource. The explanatory text at [9.59] provides that an SPD "will be prepared with more information and guidance on the importance of trees, policy and legal context, considerations when incorporating trees into development. The SPD may be combined into one covering design, landscape, biodiversity and the wider natural environment."
46. As above, there is no reason that this SPD could not fall within Regulation 5(1)(a)(iii) through the provision of environmental objectives to secure the key principles in Policy NE9. However, we note that the scope of this SPD is described in particularly vague and broad terms by the VALP. Clearly, it is important that care is taken in drafting the SPD to ensure that it complements the principles in NE9 rather than imposing new and unrelated regulatory burdens.

CONCLUSION

47. It follows from the above that, as long as the VALP's proposed SPDs are appropriately drafted, there is no reason that their status as SPDs should be open to challenge on the basis of the arguments deployed in *Skipton* and *Davis*. The key is to ensure that the SPDs develop the policies in the VALP by providing detail on the way in which they will be implemented in practice. They should not seek to impose new or additional policy requirements because these must be made by way of a DPD.
48. The one exception to this is the SPD proposed to contain Vehicle Parking Standards. In our view there is a risk that this would be unlawful on the basis that it breaches the Regulations. To avoid this the Vehicle Parking Standards should be appended to the VALP with text that links them back to Policy T5.

49. We hope this answers the Council's questions in relation to its proposed SPDs. However, please do not hesitate to contact us with any queries the Council may have about this Advice.

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