Neutral Citation Number: [2016] EWHC 2736 (Admin)

Case No: CO/4273/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 November 2016

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN on the application of	
ANDREW MOORE	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
(1) WATFORD BOROUGH COUNCIL	
(2) THE NATIONAL ALLOTMENT SOCIETY	**Interested Parties**

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- -

Jason Coppel QC and Christopher Knight (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Zoe Leventhal (instructed by the **Government Legal Department**) for the **Defendant**
Robin Green (instructed by **Watford Borough Council**) for the **First Interested Party**
Yaaser Vanderman (instructed by **Buckles**) for the **Second Interested Party**

Hearing date: 21 October 2016

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Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of a decision ("the Decision") of the Defendant ("the Secretary of State") dated 26 May 2016 to grant consent to Watford Borough Council ("the Council"), under section 8 of the Allotments Act 1925 ("the AA 1925") and applying the 2014 "Allotment Disposal Guidance: Safeguards and Alternatives" ("the Guidance"), for the appropriation of 2.63 ha of allotment land at Farm Terrace, Watford ("the Allotments") for use as part of a redevelopment scheme known as the Watford Health Campus Scheme ("the Scheme").

2. The Claimant, among others, tends an allotment at Farm Terrace and is also Chairman of the Farm Terrace Community Association which has been set up to seek to protect the Allotments from development. The opposition to the appropriation by the Claimant and others was supported by the National Allotment Society ("NAS"), which was required to be consulted in accordance with the policy criteria in the Guidance.

3. On 24 August 2016, Holgate J. adjourned the application for permission to apply for judicial review to a "rolled-up" hearing, with the substantive application to be listed to follow immediately after the permission application. By agreement of the parties, I heard the application for permission together with the substantive application. The Council agreed not to take any steps to enforce the notices to quit the Allotments up to and including 25 November 2016.

History

4. The Allotments were established in 1882, on the site of sewage works. They consist of 128 plots. The number of plot-holders has dwindled over the past few years, as a result of the Council's decision to appropriate the land for development, and the subsequent closure of the waiting list in 2012. As at 26 January 2016, there were 24 tenants cultivating 31 plots. Most of the remaining plot-holders live within a mile of the allotments. Some have had their plots for several decades. Many of them are elderly. Long term cultivation of the plots has left the soil easy to cultivate, even by elderly and disabled plot-holders, and suitable for growing a wide range of crops. Many of the plot-holders visit their allotments several times a day on some days, and this can be essential during dry periods in order to ensure adequate watering. Some have irreplaceable and unmoveable crops, for example a well-established fig tree, of a variety that is no longer commercially available. The witness statements of the Claimant, Mr Wakeling and Mr Trebar described the importance of the allotments to the allotment holders.

5. The alternative allotment site initially offered by the Council – Paddock Road – is a newly-created addition to a current allotment site. It is located more than two miles away from the homes of most of the remaining allotment holders. The new allotments would have to be cultivated from scratch. The soil is not of the required standard and may take many years of careful tending to reach that standard. The Council have since offered additional alternative allotments at existing allotment sites (Brightwell and Holywell) which are closer to Farm Terrace.

6. Ms Bunting, Legal and Operations Manager of the NAS, set out in her witness statements the importance of allotments and the concern that there was growing pressure to redevelop allotment sites in city centres for housing developments. She considered that, if the circumstances of this case were deemed to be "exceptional" under the terms of the Guidance, then the policy which was designed to protect allotments would be denuded of its efficacy.

7. The Scheme is a major regeneration project, dating back to 2007, to redevelop approximately 27 ha of mainly brownfield, and partly contaminated, land in West Watford, including the area currently occupied by Watford General Hospital. It is a mixed used scheme comprising residential development (including 35% affordable housing), potential improvement/expansion of Watford General Hospital's facilities, new road access arrangements for the hospital, commercial office development, shopping, community, leisure facilities and open space. The area is allocated for the Scheme in the Council's Core Strategy as a Special Policy Area (SPA3). The Scheme has gone through a number of changes, which are too detailed to set out in this judgment.

8. Planning permission was initially granted in 2010 for a version of the Scheme which did not involve the redevelopment of the Allotments. Subsequently it was proposed by the developer and the Council that the Allotments should be incorporated within the Scheme, to make the Scheme more financially viable, as the Allotments could be used for residential development. Moreover, the development site was challenging in terms of topography, access and contamination, with various changes of level across the site. The Allotments lay outside the steep contours of the site in the intended "central zone" and so were relatively physically unconstrained.

9. The Council first decided to appropriate the Allotments for use for the Scheme by a decision of its Cabinet dated 3 December 2012.

10. The Council made its first application to the Secretary of State for consent to appropriate the Allotments on 8 February 2013, based upon the project proposals in existence at that time. The decision to grant consent was made by the Secretary of State on 8 May 2013. The Claimant contended that the Council's application was misleading. The decision was subsequently quashed by consent, on the basis that the Secretary of State conceded an arguable error of law in respect of the adequacy of the reasons given for departure from the earlier ministerial policy (set out in a letter to local authorities in February 2002). A consent order was made on 14th August 2013 on terms that the Secretary of State would undertake a full reconsideration of the application.

11. On 20 September 2013, the Council made a second application to appropriate the Allotments, based upon the project proposals in existence at that time. It was granted by the Secretary of State on 18 December 2013, again applying the ministerial policy of February 2002. The Claimant (with two others) challenged that decision on the grounds that:

    i) the Secretary of State had misdirected himself in justifying his departure from criterion i) of his policy based on "exceptional circumstances", because the Secretary of State had proceeded on the basis that the Scheme would not be

economically viable without the allotments (and therefore would not proceed at all), which was incorrect;

ii) the Secretary of State had misunderstood or been misled as to the evidence regarding the allotments contribution to viability;

iii) the Secretary of State had taken the decision without knowledge of a number of material changes to the Scheme since the application had been made;

iv) the claimants' rights under Article 1 to the First Protocol of the ECHR ("A1P1") had been breached;

v) legitimate expectation.

12. In *R(Moore & Ors) v Secretary of State for Communities and Local Government and Watford Borough Council* [2014] EWHC 3592 (Admin), Ouseley J. allowed the claim on 31 October 2014. He found for the claimants only on one aspect of ground (iii), namely, that the Council had not notified the Secretary of State that the amount of housing proposed on the site (excluding the Allotments) had increased significantly by the time of his Decision (with the potential to impact upon the viability of the Scheme and thus the need for the allotments). Ouseley J. rejected the claimants' other grounds.

13. A planning application for the Scheme, excluding the allotments, was approved by the Council in September 2014.

14. On 17 December 2014, the Council made a third application for consent, comprising a detailed application form and 43 appendices. The Council's application for consent set out the following proposals for the 2.63 ha land comprising the Allotments as part of the Scheme:

i) 1.4 ha for use as 69 three-bedroom family houses with gardens (with the potential that 0.9 ha may instead be used as a primary school);

ii) 1.1 ha for the future expansion / redevelopment of hospital facilities;

iii) 0.2 ha as a replacement car park for the adjacent Watford Football Club.

15. The Council's proposals to provide alternative allotments and compensation were as follows:

i) 2.7 ha area of new allotment land to replace the 2.63 ha at Farm Terrace, by extending an existing allotment site at Paddock Road, Watford, involving £750k investment;

ii) all existing Farm Terrace allotment holders were offered a space at Paddock Road or, if they preferred, a space on one of two existing sites within ½ to ¾ mile of Farm Terrace - Brightwell and Holywell - which had space to accommodate the 27 remaining Farm Terrace allotment holders;

iii) financial compensation for all displaced allotment holders (whether relocating or giving their plots up) and practical relocation assistance.

16. The Council provided the Secretary of State with a series of updates over the course of the period before the Decision was made.

17. The Secretary of State consulted interested parties, including the Claimant and NAS, on the Council's application. Around 50 responses were received.

18. In January 2015, an inquiry was held into the Council's application for a compulsory purchase order ("CPO") for the Scheme, excluding the Allotments. The Inspector reported on 17 February 2015 stating he was minded to confirm the CPO subject to an outstanding objection related to the Croxley Rail link. That objection was subsequently resolved.

19. On 21 January 2016, the Secretary of State confirmed the CPO concluding that the purpose of the order "*facilitating the delivery of the Watford Health Campus Scheme, will significantly contribute to the achievement of the economic, social and environmental well-being of the area*" and "*there is a compelling case in the public interest to justify the interference with the human rights of those affected by the Order*".

20. The Secretary of State consulted with interested parties on the outcome of the CPO on 28 January 2016. Various responses (including from the Claimant and NAS) were received and considered.

21. The Council then submitted an update to the Secretary of State on 21 April 2016 which contained further viability information regarding the increased infrastructure costs of the Scheme. The Secretary of State consulted the interested parties on this further information on 29 April 2016 and received various responses including from NAS and the Claimant.

22. At the date of the Secretary of State's decision in May 2016, a planning application for the Scheme including the Allotments was under consideration.

The Secretary of State's Decision

23. The Secretary of State's Decision, in which he granted the Council consent to appropriate the Allotments, was issued on 26 May 2016. He concluded:

> "54. The Secretary of State has considered carefully the Council's representations, the CPO decision and the representations from NAS, the allotment holders and others to the effect that the basis for the inclusion of the allotments in the Scheme are inadequate to justify their disposal when they bring such benefits to the allotment holders themselves and the wider community. The Secretary of State has borne in mind in particular that, in light of the findings of the CPO inspector and his own decision to approve the CPO, the Council is committed to implementing the Scheme without the inclusion of the allotment land and there is a reasonable prospect this will occur.

55. However, the Secretary of State does consider that there are exceptional circumstances in the public interest in this case to allow the use of the Farm Terrace allotment land to be developed as part of the Watford Health Campus and that their use to support the regeneration initiative with its significant benefits to the population of Watford outweighs the benefits of the site remaining as statutory allotment land. This is for the following reasons.

56. First of all, the Secretary of State has recognised the importance of the Scheme and its wider regeneration benefits for Watford in confirming the CPO itself (see paragraphs 11-17). One of these benefits is the significant contribution the Scheme makes towards meeting Watford's housing needs (12.28% of Watford's total identified housing need, see IR50 and IR137).

57. A major intended use of the allotment land is to provide c. 69 family houses with gardens and thus ensure a balanced housing mix (significantly increasing the ratio of houses, in comparison to flats/maisonettes, if the allotments are included) at a time when the Council reports an increasing need for family housing in the area. Further, in light of the Scheme's increased vulnerability to market conditions without the allotments, if risks materialise, there may be a need to increase the density of the flatted development further and potentially undermine the quality of the housing provided as part of the Scheme. Further, the use of the allotment land which supports its viability thereby improves the likelihood of the Scheme being able to achieve the 35% affordable housing ratio. The Secretary of State notes the potential that c.0.9 ha of the area intended for housing might need to be used for a new primary school (which would itself bring a public benefit) but that this is not yet a settled proposal.

58. In addition, although it is noted that the intentions of the hospital are not yet certain despite the recent update from the Trust (see paragraph 26 above), the Secretary of State is of the view that the allotment land would permit the best configuration of the future expansion of hospital facilities onsite in a cost effective way, including by permitting decant land for the reconfiguration process. The wider public benefits of ensuring cost effective yet optimum improvements at the hospital are clear. Further, the Secretary of State is also persuaded that the incorporation of the allotment land into the Scheme would assist in achieving the overall vision and objectives of the Scheme, and allow the opportunity for the best urban design solutions to be achieved to deliver a sustainable mixed community by regenerating contaminated and otherwise constrained land in Watford.

> 59. Further, without the allotment land, the Secretary of State accepts that the financial viability of the Scheme is at the lower end of the industry accepted viability scale due to a number of up front abnormal development costs to address including mitigation of the flood plain, access, contamination and topography, and it is thus vulnerable to market conditions. It is acknowledged nonetheless that the first phase of development is funded and underway, and subsequent stages are considered to be viable by the Council, as the CPO inspector found.
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> 60. The Secretary of State considers that the recent limited information from the Council on increased infrastructure cost does not enable him to draw any specific further conclusions on the impact of the Scheme's overall viability without the allotments, as consultees pointed out. However, in light of the overall evidence, the Secretary of state agrees with the view taken by the CPO Inspector (IR145) that the inclusions of the allotments would improve the Scheme's overall long-term viability. The Secretary of State considers that this would thereby reduce the risk of the quality of the overall scheme being undermined.
>
> 61. Accordingly, the Secretary of State considers that, in combination, the above benefits of the allotment land to the Scheme constitute exceptional circumstances justifying the granting of consent for the allotments despite the fact that policy criterion i) is not met. In reaching this view, the Secretary of State has kept in mind that the statutory criterion of adequate alternative provision for allotment holders is met, and that all other policy criteria are met."

The Council's decision to appropriate

24. On 4 July 2016, the Council decided to appropriate the Allotments and terminate the remaining 24 tenancies, on 3 months notice, with financial compensation which exceeded the statutory minimum (£1,000 for those giving up their tenancy; £750 for those moving to another site, together with help with the move). The report to Cabinet noted a significant amount of work had been made on other aspects of the Scheme since 2012.

Legal and policy framework

25. The Council has power to appropriate the Allotments under section 122 of the Local Government Act 1972, under which the Council may appropriate land it already owns. Section 123 of the Local Government Act 1972 confers power on the Council to dispose of its land.

26. However, the Council was required to obtain the prior consent of the Secretary of State to the appropriation of the Allotments, by virtue of section 8 of the AA 1925, which provides:

> "Where a local authority has purchased or appropriated land for use as allotments the local authority shall not sell, appropriate, use, or dispose of the land for any purpose other than use for allotments without the consent of the Minister of Agriculture and Fisheries and such consent may be given unconditionally or subject to such conditions as the Minister thinks fit, but shall not be given unless the Minister is satisfied that adequate provision will be made for allotment holders displaced by the action of the local authority or that such provision is unnecessary or not reasonably practicable."

27. In January 2014, the Secretary of State issued the revised Guidance which states, at paragraph 1.2, that its main purpose is "*to help councils decide whether to apply for consent to dispose of allotment land and to provide clarity on how disposal applications will be assessed*".

28. After setting out the statutory criteria in section 8 AA 1925, the Guidance states, at paragraph 1.7:

> "In addition to the mandatory statutory criteria, there is also policy guidance on the disposal of allotments. These policy criteria will be applied thoroughly to any application for disposal that the Secretary of State receives. In exceptional circumstances, the Secretary of State may be content to grant consent for disposal where the statutory criteria, but not all the criteria in the policy guidance, are satisfied."

29. Under the heading "*Allotment disposal: policy criteria*", the Guidance states:

> "**What are the policy criteria?**
>
> 3.1 There are four policy criteria:
>
> (1) The allotment in question is not necessary and is surplus to requirement;
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> (2) The number of people on the waiting list has been effectively taken into account;
>
> (3) The authority seeking consent has actively promoted and publicised the availability of sites and has consulted the National Allotment Society; and
>
> (4) The implications for disposal for other relevant local policies, in particular local plan policies, have been taken into account.

> **Will policy criteria be applied in the same way as statutory criteria?**
>
> 3.2 The policy criteria will be applied thoroughly to all applications received. However, it is recognised that there may be exceptional circumstances in which disposal can be granted even though not all policy criteria have been met. Information about how such exceptional circumstances will be considered can be found at paragraph 3.13."

30. Paragraph 3.13 of the Guidance states:

> "**What shall the council do if they are unable to comply with all the criteria?**
>
> 3.13 The statutory criteria for disposal of allotments must be met in all cases …. If the council is unable to show that it has complied with one or more policy criteria it will need to provide evidence of the exceptional circumstances that could justify disposal of the allotments. For example, it might need to demonstrate why the allotment site must be redeveloped for the proposed use and why it has not been possible to accommodate the proposed use on an alternative site. The Secretary of State will consider the evidence submitted in deciding whether to grant consent for the disposal, in accordance with the legislation and on a case by case basis."

31. The previous 2002 guidance contained similar criteria (see Ouseley J.'s judgment in *Moore* at [12]) but did not spell out the possibility of consent being granted in exceptional circumstances notwithstanding the criteria not being met. In practice, however, the Secretary of State did grant consent where there was, in his view, a sufficiently strong reason for departing from the policy that all criteria should be met (as in his second decision to consent to appropriation of the Allotments).

32. Once consent is given by the Secretary of State, it is for the Council to terminate the allotment tenancies by giving three months' written notice: section 1(1)(d) of the Allotments Act 1922. Section 2 of the Allotments Act 1922 makes provision for compensation to be paid in respect of crops, manure and rent.

Grounds of challenge

33. It was common ground that the statutory criteria in section 8 AA 1925 were met in this case. It was also common ground that policy criterion (i) in the Guidance ("*the allotment is not necessary and is surplus to requirement*") was not met, and therefore consent to the appropriation would only be given if the Secretary of State was satisfied that there were exceptional circumstances which justified the grant of consent.

34. The Claimant submitted that the Secretary of State erred in law in concluding in his Decision that there were exceptional circumstances which justified the grant of consent to the appropriation of the Allotments:

    i) The Secretary of State misunderstood his Guidance when applying an insufficiently high threshold to the circumstances required to qualify as "*exceptional*"; and/or

    ii) He failed to apply that high threshold such that the Decision was disproportionate and/or irrational at common law; and/or

    iii) The Decision constituted an unjustifiable breach of the Claimant's legitimate expectation that only truly exceptional circumstances would be used to grant consent; and/or

    iv) The Decision failed to achieve a fair balance between the A1P1 rights of the Claimant and the desire of the Council to pursue the Project.

35. The Claimant abandoned his submission that the Secretary of State failed to comply with his duty of enquiry in respect of the underlying local asset-backed vehicle contractual documentation.

Conclusions

The statutory and policy tests to be applied

36. The Secretary of State was required to apply mandatory statutory criteria, set out in section 8 AA 1925, to the application for consent to appropriation. Section 8 confers a broad discretion upon the Secretary of State to grant or refuse consent, subject only to the constraint that consent "*shall not be given unless the Minister is satisfied that adequate provision will be made for allotment holders displaced by the action of the local authority or that such provision is unnecessary or not reasonably practicable*". It is not disputed that adequate provision has been made by the Council and that the statutory criteria are met. I do not consider that section 8 gives rise to any statutory presumption: the words of the section are clear and they should be read and applied without any gloss placed upon them.

37. Consistently with principles of good administration, the Secretary of State has published a policy indicating the approach which he intends to adopt in determining applications under section 8 AA 1925.

38. As a general rule, a policy must not be inflexible: it ought not to fetter the exercise of a statutory discretion and it must envisage that the decision-maker has power to depart from its terms if the circumstances of the individual case so require. It is lawful for a policy to provide for exceptions only in "exceptional circumstances", leaving it to the decision-maker to decide, in the exercise of his discretionary judgment, what may amount to "exceptional circumstances" in any particular case (*Re Findlay* [1985] AC 315 HL, per Lord Scarman at 335H – 336F; *R v North West Lancashire Health Authority ex parte A* [2000] 1 WLR 977 CA, per Auld LJ at 991G-H; 992G-H; 993G-H – 994C).

39. A decision-maker must properly interpret and understand the policy which he applies, and if he does not, he will not have had proper regard to it. The proper interpretation of a policy is ultimately a matter for the court to determine, objectively in accordance with the ordinary meaning of the language used. A policy ought to be read flexibly and not be construed as if it were a statute. See *Tesco Stores v Dundee CC* [2012] UKSC 13; [2012] P.T.S.R. 983, per Lord Reed at [17] – [19].

40. In interpreting the term "exceptional circumstances", I was assisted by the words of Lord Bingham CJ in *Attorney General's Reference (No. 53 of 1998)* [2000] QB 198, at 208B-C:

> "We must construe 'exceptional' as an ordinary, familiar English adjective and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly or routinely, or normally encountered."

Although Lord Bingham was considering the term "exceptional circumstances" in the very different context of the Crime (Sentences) Act 1997, I consider that his description has a universality which makes it a helpful guide to the meaning of the term in the context of this policy too.

41. The term "exceptional circumstances" has to be interpreted in the context of section 8 AA 1925 and the Guidance. I agree with the Claimant that the underlying purpose of the AA 1925 is to control the disposal of allotment land and protect allotment holders. I also agree that the Guidance affords greater safeguards against appropriation of allotments than the Act, and that the likely explanation for that is the value placed on allotments by the Secretary of State, as described in paragraph 1.1 of the Guidance:

> "Allotments are valuable community spaces that provide people with the opportunity to enjoy regular physical exercise; meet new people in their neighbourhood; and benefit from a healthier diet, regardless of income. Therefore there are many legal and policy safeguards in place to make sure that their disposal is properly and thoroughly handled by the Secretary of State."

I do not consider that the statement by the Parliamentary Under-Secretary of State (Hansard HC Debs, 4 March 2014, col.358WH) added anything material to the terms of the Guidance.

42. However, I do not accept the Claimant's submission that it therefore follows that the "exceptional circumstances" criterion ought to be construed narrowly. This suggestion seems to place an unwarranted additional gloss on the words used in the Guidance.

43. I agree with Ms Leventhal's submission that, if the meaning of "exceptional circumstances" is limited only to the "most extraordinary cases", this is likely to

indicate a blanket policy which does not properly admit of exceptions: *R v Warwickshire CC ex p Collymore* [1995] ELR 217, per Judge J. at 227.

44. On my interpretation of the Guidance, the policy safeguards are intended to be achieved by the requirement that the four policy criteria ought generally to be met before consent will be granted. It is only in exceptional circumstances that consent will be granted if the four policy criteria are not met (paragraph 3.2) and the onus is on the applicant council "*to provide evidence of the exceptional circumstances that could justify disposal of the allotments*" (paragraph 3.13).

45. The Claimant's description of these provisions as a "strong presumption against the grant of consent" does not, in my view, accurately reflect the precise terms of the policy, and so is liable to confuse or mislead. Where the four policy criteria are met, in addition to the statutory criteria, there is no presumption against the grant of consent. Moreover, where the four policy criteria are not met, the Secretary of State has a discretion to grant consent in exceptional circumstances. In terms of legal analysis, this is not the same as a presumption which is capable of being rebutted.

46. I do not accept the Claimant's submission that the Secretary of State could not rely on the cumulative weight of individual factors in support of a finding of "exceptional circumstances" unless each factor amounted to an exceptional circumstance taken on its own. The policy does not include any such restriction on the Secretary of State's discretion, nor can it be implied. Sullivan J. rejected a similar submission in *R (Basildon DC) v First Secretary of State and Temple* [2004] EWHC 2759 (Admin) where he said:

> "9. Mr Perera submits the very special circumstances are not merely factors that weigh in favour of granting planning permission. Each factor relied upon must be a factor which is of a quality that can reasonably be called 'very special'. On this approach, it follows that if particular individual factors cannot each reasonably be described as very special, then they cannot cumulatively be described as very special circumstances. He submitted that, considered individually, none of the factors listed by the Inspector in para.58 of the decision letter could reasonably be described as very special. For example, the first factor, Government Policy, is common to all cases concerning gypsy caravan site provision. Expressed in numerical terms, the inspector listed seven factors in para.58, and seven times nought still equals nought.
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> 10. It is unnecessary to rehearse the detail since the defendants do not submit that, looked at individually, any one of the factors listed by the inspector is very special in character. They submit that the claimant's approach is fallacious since a number of factors, none of them 'very special', when considered in isolation *may,* when combined together, amount to very special circumstances. I agree. The claimant's approach does not accord with either logic or common sense. There is no reason why a number of factors ordinary in themselves cannot combine to create something very special. The claimant's

> approach flies in the face of the approach normally adopted to the determination of planning issues: to consider all relevant factors in the round. The weight to be given to any particular factor will be very much a matter of degree and planning judgment. To adopt the numerical approach above, whilst some factors may score nought, planning judgments are rarely so clear-cut or absolute, and seven times one seventh equals one.
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> ...
>
> 17 ... in planning, as in ordinary life, a number of ordinary factors may when combined together result in something very special. Whether any particular combination amounts to very special circumstances for the purposes of PPG2 will be a matter for the planning judgment of the decision-taker."

47. The Guidance does not purport to define or elaborate upon what may or may not amount to "exceptional circumstances". The example given in paragraph 3.13, that a council "*might need to demonstrate why the allotment site must be redeveloped for the proposed use and why it has not been possible to accommodate the proposed use on an alternative site*" is clearly just an example, and cannot be elevated into a requirement that there has to be an absolute need for the site before "exceptional circumstances" may be found. In my judgment, the correct interpretation of the Guidance is that the Secretary of State will exercise his discretionary judgment as to whether or not "exceptional circumstances" exist, on the individual facts of each application which comes before him.

48. Such an exercise of discretionary judgment, under the terms of a policy, can only be challenged on public law grounds, not merely on its merits. The Claimant submitted that the court should adopt a degree of scrutiny which was more intensive than rationality. I agree, since human rights (A1P1) are engaged, a proportionality assessment was also required: see *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, per Lord Mance at [95].

Did the Secretary of State correctly apply the policy?

49. The Claimant submitted that the Secretary of State erroneously balanced the competing considerations for and against the grant of consent, instead of applying a genuine "exceptional circumstances" test. I consider that this submission was based on an incorrect reading of the Secretary of State's Decision. His careful, structured Decision demonstrates that he was well aware of the correct test, and applied it.

50. At paragraphs 27 to 34, the Secretary of State considered the statutory criteria in detail and concluded that they had been met. At paragraph 35, the Secretary of State correctly directed himself that "*[i]n accordance with the guidance, the Secretary of State's consent will normally only be given if he is satisfied that the following policy criteria have been met*". He then went on to consider whether each criterion had been met, concluding that (i) had not been met whereas (ii), (iii) and (iv) had been met. At paragraph 50, he correctly directed himself, in accordance with paragraph 1.7 of the Guidance, that since policy criterion (i) had not been met, he had to consider

whether there were exceptional circumstances which would justify the grant of consent.

51. At paragraphs 55 to 61, he set out the benefits of the proposal, namely, the significant benefits of the regeneration Scheme for the population of Watford; the increased viability of the Scheme once the Allotments were incorporated within it; and the public benefits of housing, and possibly a school, on the Allotment site. He concluded that these benefits constituted "exceptional circumstances" which justified the grant of consent, despite policy criterion (i) not being met. He rightly took into account that the statutory criteria had been met, as had the other three policy criteria.

52. In my judgment, the Secretary of State's assessment in these paragraphs does not disclose any misapplication of the Guidance. The reference, in paragraph 55, to the benefits of appropriation outweighing the benefits of retaining the existing allotment land was not an alternative approach which he adopted instead of the "exceptional circumstances" test. It was a legitimate part of his assessment into whether there were "exceptional circumstances". In considering whether the benefits of the appropriation did indeed amount to "exceptional circumstances", he had to take into account the disadvantages of the appropriation, which had been the subject of representations from the Claimant and others. At no stage did he either expressly state or imply that the correct starting point was merely to weigh the benefits of the appropriation against its disadvantages, as if the two were of equal weight.

53. In my view, the Claimant's submissions on the factors relied upon in paragraphs 56 to 60 of the Decision were, in reality, a challenge to the merits of the Secretary of State's Decision, with which he profoundly disagreed. The Claimant criticised the Secretary of State for granting consent when some elements of the proposed use of the Allotments were still uncertain. Given the scale (in physical extent and duration) of the Scheme and the fact that the Allotments could not be incorporated in the Scheme until the Secretary of State's consent had been granted, it is hardly surprising that there were uncertainties. However, there was nothing in section 8 AA 1925 or the Guidance which precluded the Secretary of State from having regard to potential future benefits. The weight to be given to those benefits was a matter for the Secretary of State: see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Keith at 764G-H and Lord Hoffman at 780F-H.

54. **Housing.** The Claimant submitted that the benefit of using the Allotments to construct c.69 family homes could not constitute "exceptional circumstances" as it would lead to the grant of consent in any metropolitan area which had a housing need. 69 dwellings were not a significant contribution to the total number of new dwellings (up to 750) within the Scheme. There was no explanation as to why local housing needs had to be met by development on the Allotments as opposed to elsewhere. This was not a situation where housing needs could only be met on the allotment site.

55. I accept Ms Leventhal's submission that the Claimant's criticisms were misplaced and there was a proper basis for the Secretary of State's conclusions. The Council's Local Plan Part 1 Core Strategy identified the Health Campus along with two other sites as meeting the main housing need in Watford (which is a district within Hertfordshire County Council, not a Greater London metropolitan area). In paragraph 57 of the Decision, the Secretary of State referred to the ability of the allotments to accommodate *family* housing and thus ensure a balanced housing mix by significantly

increasing the ratio of houses within the Scheme (which was predominantly flats). As the Council's application pointed out, the allotment land (being less physically constrained than the remainder of the site) was particularly well placed for houses with gardens. Without the allotments, only 73 houses were planned – so the 69 additional houses would make a "significant contribution" to this balance and mix (almost doubling it), as the Secretary of State concluded. This was not a commonplace situation, and so the floodgates argument raised by the Claimant was misplaced. A further factor was that the Allotments supported the viability of the Scheme overall and thus improved the likelihood of affordable housing at 35% being achieved, and reduced the risk that the density of the flatted development would be increased if risks to viability materialised. Moreover, housing was not the only factor relied on – the Secretary of State judged the combination of factors to be "exceptional" here.

56. **Alternative primary school proposal**. The Claimant submitted that the Council's case that the Allotments would make a valued contribution to housing was undermined by its acknowledgment that the Allotments might instead be used to build a new primary school, which would take the place of the majority of the family housing. The Secretary of State only briefly acknowledged this in paragraph 57, noting that the education use "*was not a settled proposal*". He failed to assess the need for a primary school on the Allotments, as opposed to elsewhere, even though the Council had proposed the expansion of an existing school elsewhere as an alternative.

57. In response, Ms Leventhal explained that the illustrative master plan and the 2014 planning application for the Allotments were premised on the housing use, which remained the Council's preferred option. However, the Council's application made it clear that even if the school proposal went ahead, it would not affect the financial return on the land, and the contribution to increased viability of the Scheme, including affordable housing, because the education authority (Hertfordshire County Council) had undertaken to pay higher residential values for the school site. I consider that the Secretary of State was entitled to proceed upon the basis that there was a possible alternative use for part of the Allotments as a new school which had not yet been settled, but which would in itself bring "*a public benefit*". It was a matter for him, in the exercise of his discretion, to decide whether, despite this uncertainty in respect of one aspect of the proposal, he ought to grant consent for appropriation. On the evidence before him, it was not unlawful for him to do so, bearing in mind all the other factors which led him to conclude that there were exceptional circumstances to justify appropriation. He was not required either to postpone his decision or impose conditions upon the grant of consent.

58. **Hospital use.** The Claimant submitted that the uncertainty about use of the Allotments by the West Hertfordshire Hospital Trust ("WHHT") meant that possible use of the Allotments for hospital expansion could not properly be relied upon. WHHT was placed in special measures in September 2015 and its ability to fund and enter into any major development projects was in doubt.

59. I accept Ms Leventhal's submission that the Secretary of State was sufficiently apprised of the position in relation to the WHHT going into special measures, and its current intentions, to be entitled to reach the conclusion in paragraph 58 that "*....although it is noted that the intentions of the hospital are not yet certain ....the*

allotment land would permit the best configuration of the future expansion of hospital facilities onsite in a cost effective way, including by permitting decant land for the reconfiguration process. The wider public benefits of ensuring cost effective yet optimum improvements at the hospital are clear."

60. At paragraph 26 of the Decision, the Secretary of State referred to a letter from WHHT dated 9 January 2016 which:

> "explained that the Trust had now published its Strategic Outline Case which identified a short-list of 3 options for the Watford General Hospital redevelopment: (i) provide acute care at a new location; (ii) centralise acute care at Watford and (iii) emergency/specialised care at Watford and planned care/complex diagnostics at St Albans, the latter being identified as the "preferred option", with further feasibility work ongoing on the various options. Both options (ii) and (iii) would involve use of the allotment land and therefore the Trust's position was that "*some or all of the allotment land is very likely to be required by the Trust to support our strategic development plans.*" As to the timeline, the Trust expected to "*have a fairly definitive view of the planned way forward by the summer of 2017.*""

61. I consider that the Secretary of State was entitled, in the exercise of his discretion, to make an informed judgment about the likelihood and the extent to which the Allotments would benefit the redevelopment of Watford Hospital, bearing in mind WHHT's financial difficulties of which he was fully aware. The degree of uncertainty did not prevent him from relying upon this factor, if he considered it appropriate to do so, nor did it require him to postpone his decision or impose conditions upon the grant of consent.

62. **Vision and design**. The Claimant submitted that the Secretary of State erred in placing reliance, in paragraph 58, on "*the achievement of the overall vision of the Project*" and the "*opportunity of the best urban design solutions to be achieved*" as these considerations were too nebulous and unexceptional.

63. I agree with Ms Leventhal's submission that the Secretary of State was entitled to take these considerations into account, in the exercise of his discretion. The Council's application explained that retaining the allotments would remove part of the public square from the Scheme (including landscaping) which was of importance given the Allotments' "*central and strategic position*" on the site, and the need for activity and footfall (rather than a fenced off Allotment site) to achieve a successful public space. These factors were capable of contributing to his finding of "*exceptional circumstances*".

64. **Viability.** The Claimant submitted that there was nothing exceptional about the fact that inclusion of the Allotments in the Scheme would improve its viability, to an extent that could not be precisely determined. Exceptional circumstances could only arise where the project would be unviable without allotment land. This Scheme would proceed even without the Allotments.

65. I accept Ms Leventhal's submission that the Claimant was merely expressing his disagreement with the Secretary of State's judgment that i) improving the viability of the Scheme overall (which was at the lower end of the industry accepted viability scale), ii) permitting the Scheme to be more robust in the face of fluctuating market conditions including in respect of affordable housing or housing density and iii) thus offsetting the risks that the quality of the overall Scheme would be undermined, were benefits capable of being taken into account in determining exceptional circumstances. The Secretary of State expressly noted that this did not mean that the Scheme would not proceed without the Allotments, at paragraphs 54 and 59.

66. As to the Claimant's criticism that the improvement in viability was unquantified, the Council submitted detailed financial appraisals as part of its application confirming the marginal viability of the Scheme and in an update on 30 March 2015, specifically quantified the difference which the inclusion of the allotments would make to its viability. The CPO Inspector also made findings on the evidence that the Allotments would support the Scheme's future viability which were then considered by the Secretary of State himself in confirming the CPO. I do not consider that he was required either to postpone his decision or impose conditions upon the grant of consent.

67. I note that Ouseley J. accepted in *Moore* that improved viability was a benefit capable of being taken into account in determining exceptional circumstances.

68. **Previous Decisions.** Finally, the Claimant referred to data showing that between 2007 and 2013 the Secretary of State had granted consent in the vast majority of applications, which demonstrated an unlawful application of the "exceptional circumstances" test. At the request of the Claimant, the Secretary of State disclosed appropriation decisions made in the last 2½ years, which applied the "exceptional circumstances" provision in the 2014 policy. These decisions did not demonstrate any discernible pattern. Different policy criteria were met, depending on the facts of each case. The reasons for the proposed appropriations varied; some related to housing but others did not. Some applications for consent were granted, but others were refused. In my judgment, this up-to-date evidence did not support the Claimant's contention of persistent unlawful application of the Guidance in favour of granting consent.

69. My conclusion is that the Claimant has embarked upon a merits challenge to the Secretary of State's Decision, repeatedly substituting his assessment of "exceptional circumstances" for that of the Secretary of State. I consider that the Secretary of State was entitled to reach the conclusions which he did, exercising his discretionary judgment within the statutory and policy framework, which was correctly applied. He took into account all relevant considerations, did not take into account any irrelevant considerations, and his conclusions were rational. I consider proportionality below.

Legitimate expectation, A1PI and proportionality

70. The Claimant submitted that the Claimant had a legitimate expectation that the Secretary of State would apply the terms of the Guidance. In my view, this submission adds little to the Claimant's primary point that the Secretary of State had to decide the application for consent in accordance with the applicable statutory and policy provisions. As I have indicated above, the Secretary of State did lawfully

apply the relevant statutory and policy provisions, and so the Claimant's legitimate expectation was not breached.

71. At paragraphs 63 to 65 of the Decision, the Secretary of State considered whether the interference with the allotment holders' rights as tenants of the allotments under A1P1 was justified and proportionate. He found as follows:

> "63. Although current plot holders are being deprived of their existing allotments which have been tended over many years, alternative sites are being offered in the Borough within 0.75 miles of Farm Terrace. Plots on two active allotment sites (Holywell and Brightwell), located within 0.5 miles of Farm Terrace, could also be used for the relocation of current Farm Terrance allotment tenants if required. Compensation is being offered to affected plot holders and assistance given to relocate.
>
> 64. The loss of the existing provision for current plot holders and the alternative provision and assistance available to them must be balanced against the wider public interest in terms of the benefits to be gained by the wider community by including the allotment land in Watford Health Scheme.
>
> 65. Having taken into account the rights of the current plot holders under Article 1 of the First Protocol and having balanced this against the wider public interest, the Secretary of State considers that the interference with the allotments holders rights is justified by the advantages to the wider public interest by proceeding with the Scheme as a whole, as outlined above."

72. It was common ground between the parties that there was a four stage test, applying *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016, per Lord Mance at [45]:

    i) whether there is a legitimate aim which could justify a restriction of the relevant protected right,

    ii) whether the measure adopted is rationally connected to that aim,

    iii) whether the aim could have been achieved by a less intrusive measure,

    iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

73. The legitimate aim was the enhancement of the Scheme (with its wide economic and social benefits to Watford), in particular by increasing the viability of the Scheme, and offering benefits in design, housing, and hospital uses, as well as possibly use for a school. The grant of consent to appropriation was rationally connected to the legitimate aim. The Claimant did not dispute that the first two stages of the test were met.

74. In respect of the third stage, the Claimant submitted that the Secretary of State did not give sufficient consideration to the question whether using the Allotments was the least restrictive means of pursuing the objectives of the Scheme and he ought to have postponed the Decision, or imposed conditions upon the grant of consent, until the potential hospital and/or school uses were finally decided upon.

75. In respect of the fourth stage, the Claimant relied upon the adverse impact upon the Claimant, which I have summarised at paragraphs 4 and 5 above. He submitted that since the Scheme could go ahead without the Allotments, and the school/hospital use was uncertain, the benefits to the public were uncertain and controversial. A fair balance had not been struck.

76. I accept Ms Leventhal's submission that Secretary of State was not presented with an alternative, less restrictive measure. On the facts of this case, the choice was either to consent or not to consent to the appropriation of the entirety of the Allotments. I do not consider that postponing the decision, or imposing conditions on hospital/school use, amounted to a "less intrusive measure" as it would just be a temporary stay until a final decision was made.

77. As to the proportionality of the proposed interference, I agree with the approach taken by Ouseley J. in *Moore*, where he said:

> "130. In the absence of the unlawfulness which I have found, I would have regarded the interference with the allotment holders agreed Article 1 Protocol 1 rights as justified and proportionate. I requested details of the tenancy, since that is germane to the argument on proportionality. The tenancy is normally terminable on 12 months' notice; s1(1) of the Allotment Act 1922, as amended. There are various obligations to cultivate, and the tenancy will be terminated after two years non-cultivation, putting it simply. The rent is £4.40 per 25 sq ms, increased annually by RPI.
>
> 131. I approach this as a deprivation rather than as a control of use case, though it has characteristics of the latter. That issue is debateable, but even if taken in favour of the allotment holders as a deprivation of property case, there was a perfectly sensible and sufficient public interest justification for taking the allotments, and there was adequate re-provision, although I accept that that would not have been taken up by some allotment holders, for reasons of travel, age, and starting again the years of toil to bring the plots to the standard of their existing ones. All would lose the benefits of their efforts which they could otherwise have reasonably expected to continue to enjoy. For these purposes, the Secretary of State had to ask himself whether the removal of the tenancies was justified by the public interests achieved. Recognising that there were human rights involved would not have altered the substance of the question he had to answer, and did. The balance was struck by him, but even without allowing any margin of discretion, I would have come to the same conclusion on proportionality as

> he did. Understanding the facts and arguments as did the original decision-maker, I would have concluded that the inclusion of the allotments made it more likely that the scheme would be implemented, and that, if implemented with the allotments it would be a better scheme, and that the appropriation was proportionate."

78. I take into account that there have been some changes in circumstances since Ouseley J.'s judgment, and, of course, the Secretary of State has made a fresh Decision, under revised Guidance. As I understand it, the improved offer of alternative allotments on existing sites, nearer to Farm Terrace, was not taken into consideration by Ouseley J. as it had not yet been made.

79. In my judgment, the Secretary of State was correct to hold that the interference with the A1P1 rights of the allotment holders was justified and proportionate because of the wider public benefits to be gained by incorporation of the Allotments into the Scheme. Given the allocation of new allotments nearby, the assistance to re-locate, and financial compensation to the allotment holders, I consider that a fair balance has been struck.

80. For the reasons given above, I grant permission to apply for judicial review but dismiss the substantive claim.