DERBYSHIRE DALES DC v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

Carnwath L.J.: July 17, 2009[1]

[2009] EWHC 1729 (Admin); [2010] 1 P. & C.R. 19

Alternative sites; Material considerations; Planning permission; Renewable energy; Wind turbines

H1 *Planning Permission—Material Considerations—Alternative Sites—Targets for Renewable Energy Generation*

H2 The second defendant (Carsington) applied to the first claimant (the Council) for planning permission for the erection of four wind turbine generators, substation, access track and ancillary equipment. The Council refused the application. Carsington appealed and an inspector was appointed to determine the appeal. He allowed the appeal and granted planning permission subject to conditions. The Council, supported by the Peak District National Park Authority, challenged the decision under s.288 of the Town and Country Planning Act 1990 (the 1990 Act). The inspector's decision letter identified a number of main issues, including: (a) whether as a matter of law and policy, there was a requirement to consider alternative sites for the proposal, and if so, whether that process had been adequately pursued and alternatives had been convincingly discounted, in all cases bearing in mind the aims of national and local policies (the alternatives sites issue); (b) the contribution that the proposals would make to achieving regional and national targets for renewable energy generation, bearing in mind extant and emerging national planning policy, and the extent to which any such contribution should be weighed against any adverse impacts in terms of the other issues (the strategic targets issue).

H3 The inspector rejected the argument that it was necessary to consider possible alternative sites. He stated that, on the evidence, he was not persuaded that the appeal proposal was one of the narrow range of cases where alternatives had to be considered as a matter of law; nor that there was any requirement in relevant planning policy to do so. He considered that the nature of any adverse impacts that the proposal would have was such that a decision could properly be made on the merits of the case, balancing any such impacts against other considerations. On the strategic targets issue the Inspector rejected the Council's argument (based on a sentence in a recent policy statement, *Planning and Climate Change: Supplement to Planning Policy Statement 1*) that renewable energy targets were immaterial to the determination of an individual planning application, and found the appeal proposal would make a valuable contribution to achieving regional and national

[1] Paragraph numbers in this judgment are as assigned by the court.

targets for renewable energy generation, bearing in mind extant and emerging national policies. He stated that an approach which sought to keep individual planning applications and regional targets entirely separate would be irrational not only in terms of the government's aims of securing substantially more renewable energy generation capacity but also of the whole basis of the plan-led system.

H4 The claimants submitted (a) that the inspector made a fundamental error in holding that it was not necessary as a matter of law or policy to consider whether the need on which Carsington relied could be met on some other site which caused less harm to development plan policy. By way of authority the claimants relied principally on the judgment of Sullivan J. in *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin); (b) that the inspector had misinterpreted the relevant policy that renewable energy targets were immaterial to the determination of an individual planning application.

H5 **Held, dismissing the application,**

H6 (1) It was one thing to say that consideration of a possible alternative site was a potentially relevant issue, so that a decision-maker did not err in law if he had regard to it. It was quite another to say that it was necessarily relevant, so that the decision-maker erred in law if he failed to have regard to it. In *Bovale*, not only did Sullivan J. make it clear that he was not laying down any general rule, but the issue before him was not the same as the present. The question was whether the inspector had erred in law by having regard to alternative sites, not (as here) whether he had erred by failing to do so. The legal analysis of the two propositions was materially different. In the present case, it was impossible to say that there was anything in the statute or the relevant policies which expressly or impliedly required the inspector to consider alternatives, particularly as none had been identified. The emphasis of s.78 of the 1990 Act was on consideration of the particular application in question. The statutory provisions and policies relating to the National Park and Conservation Areas required special regard to be paid to their protection, but they fell short of imposing a positive obligation to consider alternatives which might not have the same effects. That was left as a matter of planning judgment on the facts of any case. That was how the inspector had approached it, and he was entitled in law to do so.

H7 (2) With regard to the strategic targets issue, the interpretation of policy was a matter for the inspector within the bounds of reasonableness. The inspector had grappled with the Council's submissions and had adopted what he regarded as a rational reconciliation of the apparent conflicts in the policy statements. There was no legal objection to that approach.

H8 **Cases referred to:**

(1) *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947) 63 T.L.R. 623 CA

(2) *Bolton MBC v Secretary of State for the Environment* (1991) 61 P. & C.R. 343; [1991] J.P.L. 241; [1990] E.G. 106 (C.S.) CA (Civ Div)

(3) *Creed NZ v Governor General* [1981] 1 N.Z.L.R. 172

(4) *Greater London Council v Secretary of State for the Environment* (1986) 52 P. & C.R. 158; [1986] J.P.L. 193 CA (Civ Div)

(5) *R. v Secretary of State for Transport Ex p. Richmond upon Thames LBC (No.1)* [1994] 1 W.L.R. 74; [1994] 1 All E.R. 96 QBD

(6) *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin)
(7) *R. (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154
(8) *Findlay, Re*
(9) *Rhodes v Minister of Housing and Local Government* [1963] 1 W.L.R. 208; [1963] 1 All E.R. 300; (1963) 127 J.P. 179
(10) *Secretary of State for the Environment v Edwards (PG)* (1995) 69 P. & C.R. 607; [1994] 1 P.L.R. 62 CA (Civ Div)
(11) *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65; (1971) 22 P. & C.R. 255 QBD
(12) *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636; (1995) 70 P. & C.R. 184 HL
(13) *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; (1986) 279 E.G. 680 QBD

H9 **Legislation referred to:**
(1) Environment Act 1995
(2) Planning and Compulsory Purchase Act 2004
(3) Town and Country Planning Act 1990

H10 **Claim** by the claimants, Derbyshire Dales DC and Peak District National Park Authority, under s.288 of the Town and Country Planning Act 1990 against the decision of an inspector appointed by the first defendant, the Secretary of State for Communities and Local Government to allow an appeal by the second defendant, Carsington Wind Energy Ltd, against the refusal of planning permission. The facts are as stated in the judgment of Carnwath L.J.

H11 *Anthony Crean Q.C.*, instructed by Head of Law, Peak District National Park Authority, for the claimants.
David Forsdick, instructed by Treasury Solicitors, for the first defendant.
Jeremy Pike, instructed by Bond Pearce LLP, for the second defendant.

JUDGMENT

CARNWATH L.J.:

Background

1 By a planning application, dated January 24, 2007, the second defendant (Carsington) applied to the first claimant (the Council) for planning permission for development described as "[e]rection of 4 no. wind turbine generators, substation, access tracks and ancillary equipment".

2 By a notice dated July 20, 2007 the Council, as local planning authority, refused the Planning Application. Carsington appealed and an Inspector (Mr Robin Brooks, BA, MRTPI) was appointed to determine the appeal on behalf of the Secretary of State. In July 2008 the inspector held a public local inquiry and undertook site visits. By a decision-letter dated September 27, 2008, he allowed the appeal and granted planning permission subject to conditions. The Council, supported by the

Peak District National Park Authority, challenges that decision under s.288 of the 1990 Act.

3 The decision letter identified five main issues that the inspector had to resolve (DL24):

> "• a. The impact of the proposal on the character and appearance of the surrounding landscape including the Peak National Park and its setting; and, in the latter respect whether approval would unacceptably harm the status of the National Park and undermine the objectives of its designation;
>
> • b. The impact of the proposal on the settings of the Carsington and Hopton, and Brassington Conservation Areas and whether approval would preserve or enhance the character or appearance of those Conservation Areas;
>
> • c. The effects of the proposal upon enjoyment of the countryside by members of the public, including those using the High Peak Trail, the Limestone Way and local paths, and those visiting Carsington Water; and whether approval would have significant adverse effects on the contribution made by tourism and recreation to the local economy;
>
> • d. Whether as a matter of law and policy, there is a requirement to consider alternative sites for the proposal; and if so, whether that process has been adequately pursued and alternatives have been convincingly discounted; in all cases bearing in mind the aims of local and national planning policies;
>
> • e. The contribution that the proposals would make to achieving regional and national targets for renewable energy generation, bearing in mind extant and emerging national planning policy; and the extent to which any such contribution should be weighed against any adverse impacts in terms of the other issues."

4 The Inspector's treatment of these issues is meticulous and impressively comprehensive. The grounds of challenge are limited to his treatment of issues (iv) and (v). I shall refer to the issues respectively as "the alternative sites issue", and "the strategic targets issue". It is unnecessary therefore to review his reasoning in detail. It is sufficient to refer to the findings relevant to those issues.

5 There is no criticism of the Inspector's summary of the policy context in which the application had to be considered. He noted the statutory duty under ss.61 and 62 of the Environment Act 1995 "to have regard to the National Park purposes" in exercising functions "in relation to, or so as to affect, land in a National Park"; and corresponding policies in the Regional Spatial Strategy (RSS) and local plan, which (in his words):

> "… reflect the importance of safeguarding both the National Park and its setting. And in the case of the Peak Park protection of the setting is arguably of particular importance given the way in which it is surrounded by industrial towns and cities of no great distance from its boundary, and subject to particular development pressures …" (DL33).

6 He found that there would be some harm to the National Park and its setting viewed from the northwest (DL59), and a "significant" but "limited" impact on the setting of the Carsington and Hopton Conservation Area (DL64). However any

such harm "must be weighed in the balance" against "other aspects or benefits of the proposal", (DL59, 68).

7 He rejected the argument that it was necessary to consider possible alternative sites. Having reviewed the authorities on the relevance of alternative sites, and the detailed submissions of counsel, he said:

> "84 … on the evidence I am not persuaded that the appeal proposal is one of the narrow range of cases (as agreed by both main parties) where alternatives should be considered as a matter of law; nor that there is any requirement in relevant planning policy to do so. In any case I consider that the nature of any adverse impacts that the proposal would have is such that a decision can properly be made on the merits of the case, balancing any such impacts against other considerations. Accordingly it is unnecessary to consider further the second part of the issue as framed, namely whether the process of considering alternatives has been adequately pursued and alternatives have been convincingly discounted."

8 On the fifth issue, he rejected the Council's argument that renewable energy targets were immaterial to the determination of an individual planning application, and found instead that:

> "… that the appeal proposal would make a valuable contribution to achieving regional and national targets for renewable energy generation, bearing in mind extant and emerging national planning policy" (DL94).

9 His overall conclusion was:

> "120. As I have noted above, the appeal proposal conflicts with development plan policy in some respects, relating to impact on the setting of the National Park, on landscape elsewhere and on the setting of two Conservation Areas. However, as I have also noted, those conflicts are limited in nature and extent and in my view they are outweighed by the benefits of the renewable energy that would be supplied. That contribution would be modest in relation to targets set in extant and emerging regional policy, and Government targets and expectations, but it would be by no means trivial; and it is only by a succession of such individual proposals, of varying scales, that targets can be achieved. Although the RSS target for onshore wind generation is largely achieved, it is an indicative measure and only limited progress has been made towards overall regional targets. Targets in the emerging Regional Plan are even more challenging. On balance I have come to the conclusion that the considerations in favour of the development outweigh those contrary to it and that planning permission should be granted."

10 Against that background I turn to the two grounds of challenge.

The alternative sites issue

The argument

11 As I have said, the Inspector rejected the argument that it was necessary to consider possible alternative sites.

12 Mr Crean, for the authorities, points to the Inspector's clear finding that the proposal conflicted in some respects with the development plan. He submits that

the Inspector made a "fundamental error" in holding that it was not necessary as a matter of law or policy to consider whether the need on which Carsington relied could be met on some other site which caused less harm to development plan policy.

13 By way of authority, he relied principally on the judgment of Sullivan J. in *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin), handed down a few weeks after the Inspector's decision. I shall need to look at that judgment in more detail. However, before doing so it is necessary to set it in context of the earlier cases on this issue.

Alternative sites—the law

14 The cases reveal a long-running debate among planning lawyers (going back at least to *Rhodes v Minister of Housing and Local Government* [1963] 1 W.L.R. 208; [1963] 1 All E.R. 300; (1963) 127 J.P. 179) as to the relevance of alternative sites to the consideration of individual planning applications. There have been numerous examples of attempts to overturn decisions on the grounds that the decision-maker has refused permission on one site by reference to the merits of another; or alternatively has granted permission without regard to the merits of another. There has also been some debate as to how far, if alternative sites are deemed relevant at all, it is necessary for those relying on the argument to identify specific alternatives.

15 It is not surprising that such challenges have generally failed. Common sense suggests that alternatives may or may not be relevant depending on the nature and circumstances of the project, including its public importance and the degree of the planning objections to any proposed site. The evaluation of such factors will normally be a matter of planning judgment for the decision-maker, involving no issue of law.

16 A useful starting-point is the judgment of Simon Brown J. (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; (1986) 279 E.G. 680 QBD, where he sought to summarise the effect of the cases:

> "There has been a growing body of case law upon the question when it is **necessary or at least permissible** to have regard to the possibility of meeting a recognised need elsewhere than upon the appeal site … These authorities in my judgment establish the following principles:
>
> (1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.
>
> (2) Where, however, there are clear planning objections to development upon a particular site then **it may well be relevant and indeed necessary** to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.

(3) Instances of this type of case are developments, whether of national or regional importance, such as airports … coal mining, petro-chemical plants, nuclear power stations and gypsy encampments … Oliver LJ's judgment in *Greater London Council v Secretary of State for the Environment [52 P&CR 158]* suggests a helpful though expressly not exhaustive approach to the problem of determining whether consideration of the alternative sites is material …

> 'comparability is appropriate generally to cases having the following characteristics: first of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development or at least only a very limited number of permissions.'

(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices … and superstores …

(5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong …." (Emphasis added.)

17 I have highlighted the words "relevant or at least permissible" and "relevant and indeed necessary", because they signal an important distinction, insufficiently recognised in some of the submissions before me. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.

18 For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65; (1971) 22 P. & C.R. 255 QBD); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636; (1995) 70 P. & C.R. 184 HL at 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so.

19 Of the many cases referred to in argument before me, the only one in which an error of the latter kind was found by the courts was *Secretary of State for the Environment v Edwards (PG)* (1995) 69 P. & C.R. 607; [1994] 1 P.L.R. 62 CA (Civ Div). The facts illustrate the special circumstances which are necessary to support such an argument. The Department of Transport had accepted the need for a motor service-station on each side of the A47 trunk road. Mr Edwards owned

one of a number of competing sites, all of which were subject to planning applications. Following refusals by the local planning authority, appeals by Mr Edwards and another developer (RDL) came before the Secretary of State. The Secretary of State, having refused Mr Edwards request for the cases to be considered together at a joint public inquiry, granted permission on the RDL sites. Mr Edwards challenged the grant of permission, and his challenge succeeded in the High Court and the Court of Appeal.

20 In the leading judgment, Roch L.J. referred to the familiar requirement (under s.78 of the 1990 Act) to have regard to "the development plan …, and to any other material considerations". Having noted the judgment of Simon Brown J. in the Trust House Forte case, he referred to the four criteria proposed by Oliver L.J. in the *GLC* case, which he found to be satisfied. He also referred (at 614) to the judgment of Glidewell L.J. in *Bolton MBC v Secretary of State for the Environment* (1991) 61 P. & C.R. 343; [1991] J.P.L. 241; [1990] E.G. 106 (C.S.) CA (Civ Div) at 352, as setting out "the principles by which the question whether a relevant consideration was material should be judged". He quoted two passages of that judgment:

> "The decision maker ought to take into account a matter which might cause him to reach a different conclusion from that which he would reach if he did not take it into account.
> If the judge concludes that the matter was fundamental to the decisions, or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision is not validly made."

21 Roch L.J. concluded (at 616):

> "Crucial in this case, in my judgment, was the fact that there were not merely alternative sites, but those sites had been the subject of planning applications and were, in the case of three other applicants, the subject of appeals to the Secretary of State. These other sites were material planning considerations in the circumstances of this case, account of which would have created a real possibility that the Inspector's decisions in the RDL appeal would have been different."

22 Although on the facts the decision is not at all surprising, it is helpful to look behind the reasoning to identify more clearly the nature of the legal error. Given that there was an acknowledged need for only two sites, that several competing sites were before the Secretary of State, but that there were clear planning objections to them all, it seems odd that the Secretary of State declined to adopt the obvious means of enabling the selection to be made on a comparative basis. It was arguably "irrational" or "*Wednesbury* unreasonable" for him not to do so. However, that was not how the case seems to have been presented or decided. Instead it was put as a failure to have regard to "material considerations", contrary to s.78. It is noteworthy that the Court regarded it as "crucial" that alternative sites had not only been identified, but were before the Secretary of State on appeal. The case does not bind me to reach the same conclusion in a case where no alternatives have been identified, and it is simply the possibility of such sites which is said to be material.

23 The principles by which a matter is to be deemed "material" or "relevant" as a matter of law have not been consistently stated in the cases or the textbooks. The

passages from the *Bolton MBC* judgment, cited by Roch L.J., might suggest a relatively low threshold. It would be enough for the court to decide for itself that consideration of some factor (for example, in this case, the possibility of less harmful alternative sites) "might realistically" have led to a different result. However, that approach is not supported by the textbooks, nor, in my respectful view, by other authorities.

24 There is a useful discussion in *De Smith's Judicial Review*, 6th edn, (London: Sweet & Maxwell), paras 5-110-9. In *Bolton MBC* (in which the factual context was unusual and quite different from the present), Glidewell L.J.'s main purpose was to rebut an argument by Mr Sullivan QC that failure to have regard to a matter could only invalidate a decision if it was one which "no reasonable Secretary of State would have failed to take into account" (p.351). A judicial statement to similar effect by Laws J., in relation to considerations not specified in the statute (*R. v Secretary of State for Transport Ex p. Richmond upon Thames LBC (No.1)* [1994] 1 W.L.R. 74; [1994] 1 All E.R. 96 QBD at 95), is criticised in *De Smith's Judicial Review* as ignoring the fact that:

> "… the (non-specified) considerations adopted by the decision-maker may be matters that are extraneous to the purpose of the statute, and therefore reviewable for illegality" (para.5-115).

25 *De Smith's Judicial Review* refers to an important statement of principle by Cook J. in the New Zealand Court of Appeal, in *Creed NZ v Governor General* [1981] 1 N.Z.L.R. 172 at 182. That was one of the cases cited by Glidewell L.J. in *Bolton MBC*, but without reference to the fact that the statement had been adopted by the House of Lords in *Findlay, Re* . As *De Smith's Judicial Review* points out (para.5-116), it has also been followed more recently by the Court of Appeal in *R. (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154.

26 Cook J. took as a starting point the words of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947) 63 T.L.R. 623 CA at 228:

> "If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

He continued:

> "What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …." (Emphasis added.)

27 In approving this passage, Lord Scarman noted that Cook J. had also recognised, that:

> "… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act" (*Findlay, Re* at 334).

28 It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account "as a matter of legal obligation".

Bovale

29 Against that background I return to the judgment of Sullivan J., on which Mr Crean principally relies. In that case the inspector had refused permission for the development of what was called a "total care village". Two issues related to possible conflicts with the development plan: first, whether the land should be retained for its allocated employment use; secondly, whether in accordance with the plan the proposal should make provision for affordable housing. The inspector found against the applicants on both points. He accepted that there was a need for facilities such as those proposed; but he found no evidence that this was the only site in Hereford suitable for the purpose, and conversely the Council had pointed to three sites, allocated for residential use, which might be suitable. The decision was challenged on the grounds that:

> "The existence or non-existence of an alternative site to accommodate the Claimant's proposal was an immaterial consideration at this Inquiry as a matter of law."

30 Sullivan J. referred to some of the earlier cases, including Trust House Forte, but noted that they had preceded the enactment in 2001 of s.54A of the 1990 Act (s.38(6) of the 2004 Act), introducing the so-called "the plan led system". Applications had now to be determined in accordance with the development plan, unless material considerations indicated otherwise. Accordingly, said the judge ([26]):

> "… since the Inspector had concluded that the proposed development would conflict with the policies in the development plan … he was required by statute to dismiss the appeal unless he concluded that what were said by the Claimant to be the advantages of the proposal outweighed those objections."

31 Noting that the material consideration relied on by the applicant to overcome the objection had been the need for such a facility within the Hereford area, the judge commented:

> "In deciding what weight to attribute to that need, it was, as a matter of common sense, relevant for the Inspector to consider whether the need for certain facilities in Hereford could be met only on the appeal site or whether it might be met on other sites in Hereford …." ([27])

32 He referred to the summary of the principles in Trust House Forte, in which Simon Brown J. had highlighted cases where there were "clear planning objections to the development on a particular site", and had said:

> "In a case where planning objections are sought to be overcome by reference to need, the greater those objections, the more material will be the possibility of meeting that need elsewhere."

Sullivan J. commented:

> "Under the plan led system there can be no doubt that conflict with the development plan is capable of amounting to a "clear planning objection." ([29])

Having emphasised that he was not seeking to lay down any general principle, and that "each case will turn on its own particular facts", he concluded:

> "However, in the present case, where the Claimant was contending that there was a need within a particular geographical area, Hereford, which outweighed the development plan objection to the use of this site for the proposed development, it was plainly relevant to consider whether there were other sites within Hereford on which the need might be met." ([30])

33 In the light of that judgment, Mr Crean submits, the Inspector in the present case should have adopted the following process of reasoning:

> "(i) that the proposals conflicted with relevant policies in the Development Plan;
> (ii) that the conflict with the Development Plan policies which seek to protect the National Park from harm was of national significance and are therefore a consideration of the utmost importance;
> (iii) that section 38(6) of the Planning and Compensation Act 2004 imposed a statutory duty to refuse the appeal unless material considerations indicated otherwise;
> (iv) that the appellant had cited need for renewable energy in Derbyshire as such a consideration, and that, therefore;
> (v) an investigation should be made as to whether that need might be met elsewhere without giving rise to such conflict."

34 Since the inspector had failed to conduct such an investigation, his decision was erroneous in law.

Discussion

35 I am unable to accept Mr Crean's submission, or his interpretation of *Bovale*. Not only did Sullivan J. make clear that he was not laying down any general rule, but the issue before him was not the same as the present. The question was whether the Inspector had erred in law by having regard to alternative sites, not (as here) whether he had erred by failing to do so. As I have explained, the legal analysis of the two propositions is materially different. Furthermore the need relied on was for a particular facility in a defined area, in circumstances where the authority had identified three other potential sites.

36 Returning to the present case, it seems to me impossible to say that there is anything in the statute or the relevant policies which expressly or impliedly required the Inspector to consider alternatives, particularly as none had been identified. The emphasis of s.78 is on consideration of the particular application in question. The statutory provisions and policies relating to the National Park and Conservation

Areas required special regard to be paid to their protection, but they fell short of imposing a positive obligation to consider alternatives which might not have the same effects. That is left as a matter of planning judgment on the facts of any case.

37 I accept that, if there had been specific national or local policy guidance requiring consideration of alternatives, failure to have regard to it might provide grounds for intervention by the court. However, Mr Crean was unable to point to any such requirement. For example, Planning Policy Statement 22 on "Renewable Energy", which sets out "key principles" for planning authorities (para.1) makes no such reference. Mr Crean pointed to principle (viii), which requires proposals to demonstrate how environmental and social impacts "have been minimised through careful consideration of location, scale, design and other measures". I accept that the reference to "careful consideration of location" may be said to imply a need for the developer to be able to demonstrate the particular merits of the selected site. But it is far from requiring the decision-maker in every case to review potential alternatives as a matter of obligation. It is left as matter of planning judgment on the facts of the case. That is how the Inspector approached it, and he was entitled in law to do so.

The strategic targets issue

38 The Inspector noted the importance that national policy attached to encouraging renewable energy generation, made clear in particular in PPS22 and other more recent statements of policy. He noted also that the Council accepted "the thrust of this policy", as a matter to be balanced against any harm the appeal proposal might cause. The Statement of Common Ground between the parties had acknowledged that the renewable energy output from the proposal should be given "significant weight" in determining the planning application (DL85).

39 However, the Council had argued that targets set out in the RSS were not relevant to individual planning applications. This submission was based on a sentence in a recent policy statement, "Planning and Climate Change: Supplement to Planning Policy Statement 1". Under the heading "Managing performance", para.16 reads:

> "Strategic targets, including any developed for cutting carbon dioxide emissions, and trajectories used to identify trends in performance form part of the framework for planning decisions provided by the RSS. They should be used as a strategic tool for shaping policies and contributing to the annual monitoring and reporting expected of regional planning bodies. They should not be applied directly to individual planning applications …."

40 The inspector was unimpressed by this argument. He said:

> "88. My interpretation of para 16 of the PPS Supplement is that it proscribes assessing individual proposals directly by reference to regional targets, perhaps in the sense that a planning application should necessarily be refused because a particular target has been met, or allowed because there is a shortfall against a target. RSS policies, including Policy 41 of the extant RSS and Policy 39 of the draft Regional Plan, on renewable and low carbon energy respectively, are aimed at those preparing development plans rather than those assessing planning applications. However, it seems to me that regional targets, and the extent to which they have been or might be achieved, must be a relevant

consideration when considering individual proposals simply because it is only through an accumulation of those individual proposals that any target will be achieved.

89. An approach which sought to keep individual planning applications and regional targets entirely separate would be irrational not only in terms of the Government's aim of securing substantially more renewable energy generation capacity but also of the whole basis of the plan-led system …."

41 Mr Crean challenges the Inspector's interpretation, which he says ignores the clear words of para.16. He acknowledges that this might appear to conflict with PPS22, but points to the introduction to the Supplement which indicates that, in case of conflict with other policy statements, PPS1 is to prevail.

42 I confess, with respect, to some difficulty in understanding Mr Crean's position on this point. He accepts that the interpretation of policy is a matter for the Inspector, within the bounds of reasonableness. He also accepts that his own interpretation of the policy produces a surprising, even irrational result. It also appears to have been common ground that there is a shortfall of renewable energy sources judged by reference to regional targets, and also that the renewable energy output from this development had to be given significant weight in the planning judgment. The Inspector grappled with his submission based on para.16, and understandably adopted what he regarded as a rational reconciliation of the apparent conflicts in the policy statements. I cannot see any legal objection to that approach.

Conclusion

43 For these reasons, I find no error of law in the Inspector's reasoning. The application must accordingly be dismissed.

44 I understand that it is accepted that in these circumstances the authorities must pay the Secretary of State's costs, and that there should be no order in relation to Carsington's costs. If not agreed, any issues as to the form of assessment (summary or detailed), and if summary as to their amount, should be made in writing within one week of the handing-down of this judgment, with three days thereafter for any reply.

Reporter—Janet Briscoe