CO/13145/2009

Neutral Citation Number: [2010] EWHC 2551 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 4 October 2010

B e f o r e:

MR JUSTICE SALES

Between:
THE QUEEN ON THE APPLICATION OF HAYDEN-COOK

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

First Defendant

GUILDFORD BOROUGH COUNCIL

Second Defendant

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(Official Shorthand Writers to the Court)

Mr T Mould QC and **Mr Banner** (instructed by Barlow Robbins) appeared on behalf of the Claimant

Miss S Hannett (instructed by Treasury Solicitor) appeared on behalf of the First Defendant

The Second Defendant was not represented, did not attend

J U D G M E N T
(Approved judgment)

MR JUSTICE SALES:

1. This is an application brought pursuant to Section 288 of the Town & Country Planning Act 1990 (“the TCPA”) to quash the decision of the Secretary of State, taken by a planning inspector under delegated powers, set out in a decision letter dated 28 September 2009. By that decision, the inspector dismissed the claimant's appeal against refusal by the Second Defendant, Guildford Borough Council (“the Council”), of an application dated 2 December 2008 for development of a site known as Hogs Back Lodge and Hayden House, Hogs Back, Guildford, Surrey, GU10 1HA ("the Site").
2. The Site is located in a Green Belt area. Accordingly, the planning guidance in Planning Policy Guidance 2: Green Belts (“PPG 2”) provides the relevant planning policy context.
3. The Site is located next to the busy A31 road which runs along the Hogs Back. At present there are two semi-detached houses on the Site, which are located close to the A31. The position of these houses limits the options for placement of a driveway from the Site on to the A31. This means that the junction between the Site and the A31 is dangerous and difficult to use, particularly for large vehicles such as refuse lorries which have to have access to the Site.
4. According to the claimant's case before the inspector, the claimant and his wife have made considerable efforts to try to achieve a safe access solution for the Site. Their case was that they are desperate for a solution and that the only practical solution that had been found was to demolish the existing houses on the Site and to construct two new detached houses on the Site considerably further back from the road. This would both allow for construction of a more extended and better designed driveway from the Site on to the A31 which would go a considerable way to addressing the safety concerns regarding the junction between the Site and the A31 and would also improve the amenity for residents living in the houses, since they would be further from the noise associated with the road.
5. An original planning application was made to the Council as local planning authority in May 2008. An officer of the Council - Ms Taylor - indicated that the principle of development of the Site along these lines would be acceptable, but also raised concerns about the size of the proposed replacement houses. The claimant's application of 2 December 2008 was intended to address the concerns raised by the Council. However, the claimant's revised proposals were still for replacement houses significantly bigger than the existing houses on the Site. That continued to give rise to concerns on the part of the Council, particularly in the light of the location of the Site in a Green Belt. Accordingly, the Council refused permission for this development.
6. The claimant appealed under Section 78 of the TCPA. It is in relation to the dismissal of that appeal by the inspector that the present application is brought.
7. PPG 2 sets out the guidance regarding development on Green Belts which is relevant to this case as follows:

> "3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances. See paragraphs 3.4 … below as to development which is inappropriate.
>
> 3.2 Inappropriate development is, by definition, harmful to the Green Belt. It

> is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development.
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> ...
>
> *New buildings*
>
> 3.4 The construction of new buildings inside a Green Belt is inappropriate unless it is for the
> following purposes:
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> ...
>
> • limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6
> below);
>
> ...
>
> 3.6 Provided that it does not result in disproportionate additions over and above the size of the original building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces ... "

8. Where inappropriate development is proposed on a Green Belt there is a substantial onus on an applicant for planning permission to show that "very special circumstances" exist which provide a clear justification for that development (paragraphs 3.1 and 3.2 of PPG 2). Replacement of existing dwellings may not be regarded as inappropriate development provided the new dwelling is not materially larger than the one it replaces (paragraph 3.6 of PPG 2).
9. In the appeal to the inspector in the present case three issues arose. First, the claimant submitted that the proposed development was not inappropriate development for the purposes of PPG 2 and the Council's development plan. He lost on that issue. At paragraph 11 of the decision letter the inspector stated:

> "I am in no doubt that [the proposed development] would constitute a substantial increase and one that in its own right indicates that the proposed development would be materially larger than that which it would replace and, as such, inappropriate development in the Green Belt."

At paragraph 12 of the decision letter the inspector concluded that the proposal was inappropriate for the purposes of PPG 2 and development plan policy. That conclusion was clearly open to the inspector on the facts and is not challenged in the present application.

10. As a result of this conclusion, paragraphs 3.1 and 3.2 of PPG 2 provided the relevant planning policy guidance. The onus was on the claimant to show that very special circumstances existed so as clearly to outweigh the harm to the Green Belt.
11. Secondly, the inspector considered the effect of the proposal on the openness of the Green Belt and on the character and appearance of the surrounding area. He considered that "the additional size of the replacement buildings would result in development with a greater impact on openness" of the Green Belt, albeit the harm to the openness of the Green Belt would be "relatively limited" (see paragraphs 13 and 17 of the decision letter). Apart from this, he did not consider that there would be any material harm to the character and appearance of the surrounding area. The inspector's conclusions on this issue are not challenged.
12. Thirdly, since the proposal involved inappropriate development in the Green Belt the inspector considered, in line with the guidance in PPG 2, whether the harm arising from that was clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify the development. This is the issue to which the present application relates. The inspector dealt with this at paragraphs 18 to 26 of the decision letter.
13. The inspector accepted the claimant's case that relocating the dwellings on the Site away from the road and redesigning the driveway would represent a considerable improvement in the safety of the junction between the Site and the road (paragraphs 20 to 23 of the decision letter) and accepted his case that relocation of the dwellings would improve the amenity for those living in them (paragraph 25 of the decision letter).
13. The inspector pointed out, however, that these advantages of a redevelopment of the Site could be achieved by re-building dwellings away from the road which were smaller and closer in size to the existing houses and that proceeding in this way would avoid the harm to the Green Belt associated with construction of the larger buildings which were proposed in the claimant's application. In the light of that, the inspector concluded that it had not been demonstrated that very special circumstances existed to justify the proposed development - with materially larger houses - which was under consideration and he dismissed the appeal.
14. The inspector’s reasoning in relation to the highway safety issue is set out in paragraph 24 of the decision letter, as follows:

> "24. Notwithstanding [the benefits of relocation of the dwellings] there is a matter which greatly reduces the weight I attach to the highway safety consideration. To be a greatly material matter in my decision it would need to be shown that this consideration justified the size of the development proposed. However, this has not been done as it seems to me that a smaller development of a size that would not be inappropriate in the Green Belt could offer the same advantages. The appellant sought to show that development of the size applied for was required to make the proposal economically feasible. Figures initially provided show that a modest loss would be made, but these

were revised to show an approximately 8% return on expenditure if on the costs side the appellant's original cost of purchasing the existing houses rather than their current value was taken into account in determining expenditure to date. That, in my view, is clearly the correct approach. The appellant says that such a return on expenditure would be below what would be considered commercially viable were this a commercial enterprise. However, he is clearly prepared to proceed on that basis and in this case without more substantial evidence to the contrary I see no reason why a lower level of return from a somewhat smaller development would not be acceptable."

15. At paragraph 25 the inspector explained that the same reasoning applied in relation to the factor of improved amenity for those living in the new houses.
16. At paragraph 26 of the decision letter the inspector said:

> "26. The proposed development is inappropriate development which is by definition harmful to the Green Belt. PPG 2 requires that substantial weight must be attached to that harm. I have also found some, albeit modest harm to the openness of the Green Belt. For the appeal to succeed the combined weight of the other considerations must clearly outweigh the totality of the harm arising. There would be some small advantage to the character and appearance of the area and a more substantial advantage on living conditions from reduced noise and on highway safety. The substantial caveat on the last 2 considerations is that it has not been shown that development of the scale proposed is required to obtain these benefits. Having considered all the other considerations and having found that they do not clearly outweigh the totality of the harm that would be caused very special circumstances to justify the development therefore do not exist."

17. Mr Mould QC, for the claimant, advances two main criticisms of the inspector's decision on this issue. First, he submits that the inspector did not properly consider and weigh up the fact that refusal of planning permission would create uncertainty and further delay in addressing what was a pressing road safety issue regarding the junction between the Site and the road. He submits it was speculative whether a scheme involving construction of smaller houses on the Site than those proposed in the application would be brought forward and approved and that in any event development and consideration of alternative proposals would involve delay in resolving the road safety issues. He contends that there is no indication that the inspector gave proper consideration to these relevant factors in arriving at his conclusion that permission should be refused.
18. Secondly, Mr Mould submits that in any event the inspector's reasoning set out in the decision letter is defective, in that it does not properly explain how the inspector had addressed these points, with the result that the decision letter falls to be quashed for that reason.
19. In support of his first submission, Mr Mould places particular reliance on the decision of the Court of Appeal in First Secretary of State and West End Green (Properties) Ltd v Sainsbury's Supermarkets Ltd [2007] EWCA Civ 1083, [2008] JPL 973. The substantive judgment of the court was given by Keene LJ. The case concerned an application for

redevelopment of a site in London. The proposed development involved detriment to a conservation area nearby. Sainsbury's opposed the application, maintaining that an alternative design approach was possible which would avoid such detriment. According to Sainsbury's argument, therefore, the application then under consideration should be refused so that such an alternative proposal might be brought forward. The Secretary of State in that case decided that planning permission should be granted upon the application. That decision was quashed by the High Court and the Secretary of State appealed. The Court of Appeal allowed the appeal.

20. Keene LJ considered the approach to be adopted where there could be an alternative proposal for redevelopment of the site according to a better design, as Sainsbury's argued was available. Sainsbury's submitted that in those circumstances planning permission should be refused, leaving the developer to come back with an improved scheme. Sainsbury's contention was that this was the only logical conclusion open to the Secretary of State in such circumstances. Keene LJ rejected that argument. At paragraphs [37] to [38] he said:

> "37. I do not accept that that is the logical outcome, and certainly not the only logical outcome. Like so many aspects of planning judgments, it is a matter of degree. There may well be cases where the degree of harm which would result from a proposal is such that it is decided that the benefits which the proposal would bring must await a new scheme with an improved design. The decision-maker may properly and lawfully reach that conclusion in appropriate cases. Conversely, there may also be cases where the degree of harm is not judged to be so great that it warrants rejecting the proposal and sending the developer away, on the basis that he will come up with an improved scheme. There may well be disadvantages from the public standpoint in terms of delay and uncertainty in rejection of a current proposal. Certainly there is nothing inherently illogical or unlawful in the decision-maker concluding that a scheme is acceptable, even though a yet better scheme could be devised. Into which of these two categories a proposed development falls is a matter of planning judgment for the decision-maker, only to be impugned on the usual Wednesbury grounds.
>
> 38. There is certainly no legal principle of which I am aware that permission must be refused if a different scheme could achieve similar benefits with a lesser degree of harmful effects. In such a situation, permission may be refused but it does not have to be refused. The decision-maker is entitled to weigh the benefits and the disbenefits of the proposal before him and to decide (if that is his planning judgment) that the proposal is acceptable, even if an improved balance of benefits and disbenefits could be achieved by a different scheme. As Miss Lieven pointed out and as is obvious, certainly to anyone with experience of the planning system, a refusal of permission will inevitably lead to delay and may mean considerable uncertainty about what results. A fresh application to the local planning authority would be required, by which time circumstances may have changed. The economics of redevelopment may be different, the attitude of the local planning authority

> may not be exactly the same as before, and so on. Fresh planning judgments would have to be made on a new scheme. Inevitably the benefits of redevelopment would be later in coming. I therefore reject any proposition that the Secretary of State could logically only decide to refuse permission."

21. In that case, the Secretary of State concluded that planning permission should be given for the proposed development notwithstanding that there might be a superior alternative development proposal which could be worked out. Mr Mould submitted that that is what the inspector should have decided, or at least considered more fully as an option, in the present case.
22. In my judgment, however, there is no error of law on this ground in the inspector's decision in the present case. As the passage cited from the judgment of Keene LJ makes clear, at paragraph [37], a decision-maker in the planning context may, in an appropriate case, decide that the degree of harm which would result from a proposal in an application for planning permission is such that the benefits associated with that proposal must await realisation until the applicant brings forward proposals for a new scheme with an improved design. As Keene LJ says, such an assessment will be a matter of planning judgment for the decision-maker, only to be impugned on the usual Wednesbury grounds. That was the nature of the assessment at which the inspector arrived in the present case. In my view, that conclusion was lawfully open to the inspector and cannot be impugned on Wednesbury grounds.
23. The policy set out in PPG 2 meant that there was a considerable onus on the claimant to show that there were very special circumstances to justify development on the Site in the Green Belt with houses significantly larger than those already located there. The fact that the same benefits from the development relied upon by the claimant could be achieved with reduced detriment to the openness of the Green Belt was, in my view, a factor which was obviously material to the assessment to be made by the inspector and one which he was fully entitled to take into account. The claimant could not realistically suggest that his proposal for the building of two larger houses was the only viable way to meet the road safety and amenity concerns on which he relies. The Council had accepted that in principle redevelopment would be possible, subject to the issue of the size of the houses, and the inspector's own reasoning on the planning merits made it clear that there would be a serious prospect of planning permission being granted for a less ambitious development.
24. The inspector also properly assessed (at paragraph 24 of the decision letter) the question whether one could, in practice, expect the claimant to come forward with an alternative proposal. No criticism was advanced of the inspector’s reasoning in that regard. Particularly in light of the emphasis the claimant gave in his own submissions to the inspector of his desire to find a solution to the road safety issues, it was reasonable for the inspector to conclude that alternative, less ambitious, proposals could be brought forward if permission for the present application was refused.
25. So far as concerns the inevitable delay and uncertainty associated with that process, I consider that those factors were obvious to the inspector and to the parties to the appeal before him. They did not need to be spelled out by anyone. In my view it is clear, on a proper reading of the decision letter, in the context of the case before the inspector, that he had in mind and was well aware that refusal of planning permission would result in a degree of uncertainty and delay in resolving the road safety and amenity issues but legitimately considered that those matters were outweighed by the weight to be given to

the protection of the openness of the Green Belt as set out in PPG 2. That was classically a matter of planning judgment for the decision-maker and there is no basis for impugning his decision in this respect.

26. I turn to consider the reasons challenge advanced by Mr Mould. It is closely bound up with the first ground of challenge. In Sainsbury's there was also a reasons challenge. The Secretary of State in his decision letter in that case did not spell out that he considered the merits of the proposal before him - which could be proceeded with promptly - to be sufficient to outweigh the possible advantages of an alternative, perhaps more appealing but less certain and less promptly available, solution.

27. The Court of Appeal rejected the complaint about the adequacy of the reasons given in that case, relying on the usual leading authorities dealing with what is required by way of reasons from a decision-maker in the planning context. Keene LJ said as follows:

> "43. The judge [who heard the challenge to the Secretary of State's decision] referred to this aspect in the final sentence of his decisive paragraph, when he observed that:
>
> > 'At least the reasoning of the Secretary of State did not explain why those disadvantages [of Option A - the relevant planning application before him] had to be accepted.'
>
> Both appellants challenge that proposition. The Secretary of State relies upon the leading case of South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953, where Lord Brown of Eaton–under–Heywood summarised the principles applicable to this well-worn topic. At paragraph 36 he said:
>
> > 'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only

> succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.'

Miss Lieven emphasises the propositions that the degree of particularity required depends entirely on the nature of the issues and that decision-letters are addressed to parties well aware of the issues involved and the arguments advanced. She also refers us to a passage from Clarke Homes Ltd v Secretary of State for the Environment [1993] 66 P and C R 263, cited with approval in the South Bucks case. In Clarke, another case involving a reasons challenge, Sir Thomas Bingham, M.R., observed at page 271 – 272:

> 'I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication.'

44. It is submitted on behalf of the Secretary of State that his reasoning is sufficiently clear. He regarded the 'benefits of the scheme in the form of regeneration of a brownfield site and the provision of affordable housing' as outweighing such concerns as he had about Option A: see paragraph 35 of the decision letter. Miss Lieven acknowledges that there is no express reference to the delay in regeneration that would result from a refusal of permission or the uncertainties which would then result, but she submits that the parties would have been well aware of that. It was unnecessary for the Secretary of State to spell it out. Sainsbury's would have known full well that any different design would require a fresh planning application to be submitted to the local planning authority, with all the inevitably attendant drawbacks. West End Green adopts the same argument.

45. Sainsbury's supports the judge's position on this. Mr Hicks argues that the decision fails to explain why the acknowledged harm to the conservation area was seen as acceptable. Any redevelopment scheme would achieve the benefits referred to by the Secretary of State, and a redesigned scheme could avoid or lessen the harm. Therefore there is a gap in the Secretary of State's reasoning. The decision leaves a substantial doubt as to why it resulted in a grant of permission for Option A.

46. I disagree. The principal parties involved in the planning appeals were all ones familiar with the planning system and with the fact that the regeneration of this site had been seen as desirable by the planning authorities for many years. Despite that, nothing had been achieved. West End Green had expressly argued at the planning inquiry that the need for regeneration was urgent. It is, after all, a largely derelict site in a prominent location in Central

> London. I accept Miss Lieven's argument that all these parties, including Sainsbury's, would have been well aware that any refusal of planning permission on design grounds would have led to delay and uncertainty. That did not need spelling out in the decision letter. It was obvious and must have been implicit in the Secretary of State's reasoning. He must have taken the view that such adverse impact of Option A as there was did not warrant the disadvantages inherent in a refusal of permission. It seems to me that this is a case which comes into Sir Thomas Bingham's category of 'forensic doubt' as to why the Secretary of State decided as he did, not into that of 'genuine doubt.'
>
> 47. For my part, therefore, I do not share Crane J's view that the decision letter was legally flawed in either of the respects he identified ..."

28. In my view, such reasoning applies *mutatis mutandis* in the present context. Both parties before the inspector, as well as the inspector, were well aware that refusal of planning permission would lead to a degree of delay and uncertainty. The claimant in his submissions to the inspector had emphasised that the road safety problem was a pressing one. Applying the standards laid down in the authorities to which I have referred, it is in my judgment clear from the decision letter why the inspector dismissed the appeal and refused the grant of planning permission. The weight to be attached to the protection of the Green Belt in the light of PPG 2 is very considerable and, since a viable, less obtrusive development could be brought forward, the claimant had not sufficiently demonstrated why very special circumstances existed to justify the grant of permission for his more ambitious application.
29. For these reasons I dismiss the application before me.

MISS HANNETT: I am grateful. I have an application for the Secretary of State's costs. I think you indicated earlier that you had a copy of the schedule of costs.

MR JUSTICE SALES: I did.

MISS HANNETT: The total there on page 2 of that document is the sum of £5,216. I would invite you to assess the costs summarily in that amount.

MR MOULD: I do not resist the application for costs and I do not say anything about it.

MR JUSTICE SALES: An application is made by the Secretary of State for his costs in this matter, to be summarily assessed in the sum of £5,216. In my judgment that application is properly made and I summarily assess the costs to be paid in the sum of £5,216.