Case No: CO/1709/2015

Neutral Citation Number: [2015] EWHC 2729 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 October 2015

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

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Between:

(1) VILLAGES ACTION GROUP
(2) MICHAEL TURNER

Claimants

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) ARUN DISTRICT COUNCIL
(3) HALLAM LAND MANAGEMENT LIMITED
(4) JOHN FROGATT
(5) DEBORAH ANN FROGATT

Defendants

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Ashley Bowes (instructed under the **Direct Access Scheme**) for the **Claimants**
Richard Honey (instructed by **The Government Legal Department**) for the **First Defendant**
Thomas Hill QC and Philippa Jackson (instructed by **Irwin Mitchell**) for the **Third Defendant**
The **Second, Fourth and Fifth Defendants** did not appear and were not represented

Hearing date: 17 September 2015

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Judgment

Mrs Justice Lang:

1. In this claim under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), the Claimants apply for an order quashing the decision of the Secretary of State for Communities and Local Government, dated 23 February 2015, in which he allowed the Third Defendant's appeal against the refusal of planning permission by Arun District Council ("the Council") for a residential development at a site west of Westergate Street and east of Hook Lane, Aldingbourne, Westergate, West Sussex PO20 3TE.

2. The First Claimant is an unincorporated residents' association group formed in 2003 to represent the views of the residents of the villages of Barnham, Eastergate and Westergate on planning matters. The Second Claimant is the Chairman of the association and brings the claim in that capacity.

3. The Second Defendant, Arun District Council, is the local planning authority.

4. The freehold title to the application land is vested in the Third, Fourth and Fifth Defendants.

5. The Third Defendant applied for planning permission for the erection on site of a residential development of up to 79 dwellings, with associated car parking, open space and children's play areas and demolition of a dwelling known as 'Oakdene'. The site comprised two plots: a large residential property known as 'Oakdene' in Hook Lane, and a grassland paddock to the rear, once used for grazing horses, but now unused. The proposal was to demolish 'Oakdene' to provide access from Hook Lane to the residential development. The site was surrounded by residential properties; Aldingbourne Primary School ("the School") with its playing field; and some small areas of open land.

6. The Second Defendant refused planning permission on 14 February 2014, on the following grounds:

   i) The site was located outside of the defined boundary of Westergate which demarcated the edge of the settlement and countryside. The proposal marked a significant encroachment into the countryside resulting in an adverse impact on the character of the area and loss of countryside, contrary to policies GEN2 and GEN3 of the Arun District Local Plan 2003, and core principles set out in paragraph 17 of the National Planning Policy Framework ("NPPF").

   ii) The proposed development was located in an unsustainable location, poorly related to existing services and facilities. Even following mitigation, it would therefore not be a sustainable form of development, contrary to policies within the NPPF.

   iii) No section 106 undertaking had been completed to secure the provision of affordable housing for the long term, contrary to policy DEV17 of the Local Plan.

iv) The development generated a need for increased public infrastructure for which financial contributions were required but had not been secured under section 106 undertakings, contrary to policy GEN9 of the Local Plan.

7. The Third Defendant appealed against the Council's refusal to grant permission under section 78 TCPA 1990.

8. On behalf of the First Defendant, a planning Inspector, Ms Katie Peerless, held a public local inquiry from 9 to 11 December 2014. She also made a site visit.

9. The Inspector allowed the appeal, and granted outline planning permission for the development. In summary, the reasons set out in the Appeal Decision ("the Decision") were as follows:

i) The Council accepted it had not demonstrated a 5 year supply of housing, and despite submissions to the contrary from interested parties, the relevant policies for the supply of housing in the Local Plan (Policies GEN2 & GEN3) were to be treated as out of date, in accordance with paragraph 49 of the NPPF.

ii) Although there would be intrinsic harm through the loss of land designated as countryside, the harm would be very limited and the setting of the village would only be marginally affected by the development of this area of "unremarkable grassland".

iii) The development would cause some environmental harm, with a loss of openness and a permanent alteration to the character of the land.

iv) Despite limited public transport, and reliance on private cars, the site was not so unsustainable as to warrant refusal of planning permission for this reason alone. There were obvious economic and social benefits to the provision of 79 new dwellings. These outweighed the disadvantages in sustainability terms of the limited transport network.

v) The emerging Local Plan was likely to allocate 2000 new dwellings to the villages of Westergate, Eastergate and Barnham, on the basis that the area had been assessed as "particularly sustainable". It was likely that greenfield land would be needed to fulfil this allocation. The Inspector agreed with the Council's view that the area was suitable for expansion and the proposed development would fit in with the emerging vision for the area.

vi) Section 106 agreements made provision for a percentage of affordable housing and financial contributions to public infrastructure and services, which the Council agreed had overcome reasons for refusal (iii) and (iv).

vii) The development was not premature in the light of the emerging Local Plan.

viii) It had not been shown that the development was undeliverable.

ix) The Inspector rejected the Claimants' objections based on flood risk as a reason for refusal of planning permission. Despite evidence of flooding in the area, the Environment Agency did not object to the proposal provided that

conditions were imposed to ensure a sustainable drainage system was introduced on the development.

x) The Inspector rejected the Claimants' objections based on highway safety as a reason for refusal of planning permission. The Highways Authority had withdrawn its objections about highway safety in Hook Lane, following modifications to the scheme and subject to measures introduced through the section 106 agreement.

xi) Applying the presumption in favour of sustainable development in paragraph 14 of the NPPF, the benefits of the proposed development clearly outweighed the disadvantages.

10. The Inspector did not refer to the School or the emerging Neighbourhood Plan in her Decision.

The Claimants' grounds of challenge

11. The Claimants' grounds of challenge related solely to the loss of potential space for expansion for the School. The Claimants submitted that the Inspector erred in:

i) failing to have regard to a material consideration, namely, the emerging draft Aldingbourne Neighbourhood Plan, which stated (in its January 2015 draft) that use of the proposed development site to increase educational provision at primary school in Aldingbourne "will be supported"; and

ii) failing to supply adequate reasons for dismissing the concerns of the Claimants, the Parish Council and other local residents about the restriction the appeal scheme would present to the future expansion of the School.

Legal framework

(1) Section 288 TCPA 1990

12. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and in consequence, the interests of the applicant have been substantially prejudiced.

13. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, a Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

(2) Material considerations

14. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate

otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"), read together with section 70(2) TCPA 1990.

15. Once a neighbourhood plan is in force, it comprises part of the development plan. However, in this case the Neighbourhood Plan was not in force.

16. An emerging Neighbourhood Plan may be a material consideration: see Planning Practice Guidance, paragraph 41-007. Paragraph 216 of the NPPF provides:

> "From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:
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> ● the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
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> ● the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
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> ● the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

17. A decision-maker will err in law if he fails to take into account a material consideration: *Seddon Properties Ltd v SSE* (1981) 42 P & CR 26, per Forbes J. at 27.

18. The tests to be applied in deciding whether or not a consideration was material and so ought to have been taken into account by a decision-maker were set out by Glidewell LJ in *Bolton MBC v SSE* (1990) 61 P & CR 343, at 352:

> "2. The decision maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision making process. By the verb "might", I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account.
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> 3. If a matter is trivial or of small importance in relation to the particular decision, then it follows that if it were taken into account there would be a real possibility that it would make no difference to the decision and thus it is not a matter which the decision maker ought to take into account.
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> 4. …there is clearly a distinction between matters which a decision maker is obliged by statute to take into account and those where the obligation to take into account is to be implied from the nature of the decision and of the matter in question. I refer back to the Creed NZ case.

> 5. If the validity of the decision is challenged on the ground that the decision maker failed to take into account a matter in the second category, it is for the judge to decide whether it was a matter which the decision maker should have taken into account.
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> 6. If the judge concludes that the matter was "fundamental to the decision", 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 was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid.
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> 7. … Even if the judge has concluded that he could hold that the decision is invalid, in exceptional circumstances he is entitled nevertheless, in the exercise of his discretion, not to grant any relief. "

19. However, a decision-maker is not required to address every material consideration, however insignificant, in his decision. The decision-maker is only required to deal with the "main" or "principal important controversial" issues. It cannot therefore be assumed that if a material consideration is not mentioned, it has been overlooked.

20. These principles were explained by Lord Lloyd in *Bolton Metropolitan District Council and Others v Secretary of State for the Environment and Others* (1996) 71 P. & C.R. 309, at 313-314:

> "So the Secretary of State had to have regard to all material considerations before reaching a decision, and then state the reasons for his decision to grant or withhold planning consent. There is nothing in the statutory language which requires him, in stating his reasons, to deal specifically with every material consideration. Otherwise his task would never be done. The decision letter would be as long as the inspector's report. He has to have *regard* to every material consideration; but he need not mention them all…..
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> …in *Hope v Secretary for the Environment* (1975) 31 P & CR 120, Phillips J. said:
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> > 'the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues.'
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> What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion

> he has reached on the "principal important controversial issues". To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden…….
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> Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference will necessarily be limited to the main issues, and then only, as Lord Keith pointed out, when "all known facts and circumstances appear to point overwhelmingly" to a different decision."

21. This approach was applied by the Court of Appeal in *Secretary of State for the Environment, Transport and the Regions v MJT Securities Ltd* [1998] 75 P. & C.R. 188, per Evans LJ at 198:

> "The respondent contends that the judge also decided that the Inspector failed in his duty to have regard to what was admittedly a material consideration — "I simply do not know if the Inspector had regard to it or not". Logically, this conclusion would seem to follow from the fact that no reference is made to it. But it is implicit in the House of Lords' ruling in Bolton No. 2, that only the "main issues" need be referred to, that the failure to refer to other issues does not mean that they have been ignored…. The material consideration which the applicants say the Inspector failed to take into account was not a "main issue" and there are no grounds for inferring that he overlooked it when he reached his decision."

(3) The duty to place relevant material before an inspector

22. A party to a planning appeal must put before an inspector the material on which he relies and to make all the representations he wishes, and the inspector is entitled to reach his decision based on the material before him: *West v First Secretary of State* [2005] EWHC 729 (Admin), per Richards J. at [42 – 44].

23. If relevant considerations are not drawn to an inspector's attention, and he is not under a specific statutory duty to consider them, he will not have acted unlawfully if he does not have regard to them: *Cotswold DC v SSCLG* [2013] EWHC 3719 (Admin) per Lewis J. at [59].

24. The *Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000* ("the 2000 Rules") provide the procedural framework for the conducting of inquiries. Rule 18 provides a mechanism for further evidence or other documents received by any party after the close of the Inquiry to be taken into account by the inspector, at his discretion:

> "(2) When making his decision the inspector may disregard any written representations or evidence or any other document received after the close of the inquiry.

> (3) If, after the close of an inquiry, an inspector proposes to take into consideration any new evidence or any new matter of fact (not being a matter of government policy) which was not raised at the inquiry and which he considers to be material to his decision, he shall not come to a decision without first–
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> (a) notifying in writing the persons entitled to appear at the inquiry who appeared at it of the matter in question; and
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> (b) affording them an opportunity of making written representations to him or of asking for the re-opening of the inquiry,
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> and they shall ensure that such written representations or request to re-open the inquiry are received by the Secretary of State within 3 weeks of the date of the notification."

(4) The duty to give reasons

25. An inspector is required to give reasons for his decision: rule 19 of the 2000 Rules.

26. The standard of reasons required was authoritatively set out by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953:

> "36. 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."

Conclusions

27. Because of the overlap between Grounds 1 and 2, it is convenient to deal with them together.

28. At planning application stage, the Claimants submitted written representations to the Council, dated July 2013, objecting to the proposed development on a wide range of grounds, which included the potential use of the appeal site by the School. Whilst they referred to the fact that a Neighbourhood Plan was in the process of being drawn up, they did not submit that the draft Neighbourhood Plan had identified the appeal site for the purposes of School expansion.

29. In their written representations on appeal, in July 2014, the Claimants relied upon the objections they had previously made to the Council. The Second Claimant then made a statement at the Inquiry in which he referred to the emerging Neighbourhood Plan, without providing a copy of it. However, he made no reference to the School, nor any connection between the Neighbourhood Plan, the site and the School.

30. After the Inquiry, the Claimants obtained advice from counsel who drafted further representations on their behalf, dated 9 January 2015, which were sent to the Inspector. These representations did not include any reference to the Neighbourhood Plan or the School.

31. The Claimants did not send the revised draft of the Neighbourhood Plan to the Inspector when it was sent out for consultation on 26 January 2015.

32. Aldingbourne Parish Council and other local residents sent written objections to the Council, on the grounds, inter alia, that the proposed development would prevent the site being used for expansion of the School. According to the Council's Officer's report, the Parish Council objected *inter alia* on the basis that the draft Neighbourhood Plan had identified the site as a location for the expansion of the School. This point was again made by Parish Councillor Sturgess in her written representations on appeal, though neither she nor the Parish Council sent copies of the draft plan to the Inspector at any stage.

33. Two other local residents made statements at the Inquiry, referring to the potential use of the site for the School, but making no reference to the Neighbourhood Plan, in that context.

34. The representations from the Parish Council and Councillor Sturgess were not entirely accurate since the draft Neighbourhood Plan, dated 18 November 2014, and approved by the Aldingbourne Parish Council on 2 December 2014, did not allocate the appeal site for School expansion. Policy LC8 merely stated that "*developments that lead to the provision or improvement of facilities for children to attend primary school in Aldingbourne will be supported.*" The supporting text then referred to the two primary schools in the parish, stating that Eastergate Primary School was to be expanded from September 2014. There was no mention of Aldingbourne Primary School being expanded. Nor was there any mention of the appeal site in the context of the School.

35. The draft Neighbourhood Plan was sent out for formal consultation on 26 January 2015. By this date, Policy LC8 had been revised to add the words "*Use of the land shown on the Proposal Map to increase educational provision will be supported*". The Proposal Map marked the appeal site with the word "Education". I accept the First Defendant's submission that use of the phrase "will be supported" was a cautious approval which fell short of an allocation, or a firm proposal, or resistance of any alternative use, in contrast to other references in the draft Neighbourhood Plan.

36. In response to the January 2015 consultation, the planning department of West Sussex County Council said that the expansion of Eastergate Primary School had been completed but that there were no plans to expand Aldingbourne Primary School.

37. This response was consistent with the stance taken by the education department of West Sussex County Council which stated, at planning application stage, that there was enough spare capacity in the Barnham area to accommodate increased pupil numbers from the proposed development. Therefore no financial contributions towards education were sought from the developer. This was recorded in the Officer's Report. I was also shown an exchange of emails between West Sussex County Council and the Third Defendant which explained that primary schools in the Barnham area were currently operating at 92% capacity.

38. The Inspector did not refer to the School or the draft Neighbourhood Plan in her Decision. Given the number of occasions upon which both were mentioned, I find it difficult to accept that the Inspector simply overlooked these points when making her decision. Judging from the manner in which the Decision was written, she appears to have had a sound grasp of the details of the appeal, and she had the benefit of a 3 day Inquiry, as well as a site visit. Because of her training and her experience as an Inspector, she would surely have been well aware of her duty to consider all the matters raised.

39. It seems to me that the reason why the Inspector did not refer to the School expansion issue in her Decision was because it was not a "main" or "principal important controversial" issue. Indeed, it must have been clear by that stage that it was a hopeless point. The unchallenged evidence before her was that there were no realistic proposals to expand the School into the appeal site. Whilst the residents of Aldingbourne may well have wished to expand the School (which is successful and so over-subscribed), the stance of the local education authority was that, in the wider area, there were spare school places, and so there was no need to expand the School. Moreover, there had just been a recent expansion of places in the other primary school in the parish. Probably because of this insuperable obstacle, the Claimants did not rely upon the possibility of School expansion at the Inquiry, focussing instead on other, stronger points. The two objectors who referred to the School in their statements confirmed in cross examination at the Inquiry that they did not dispute the education authority's assessment that there were sufficient primary school places in the area to cater for the development.

40. Despite somewhat ambiguous pleadings, Mr Bowes confirmed to me that the Claimants' criticism of the Inspector for her failure to refer to the Neighbourhood Plan was limited to the School expansion issue, and not any wider issues.

41. The draft Neighbourhood Plan produced in November 2014 made no reference to the appeal site in the context of the School expansion issue. It was therefore of little relevance. Moreover, the School expansion issue was plainly not a strong point for the objectors. It seems to me that these are the probable reasons why the Claimants and the other objectors did not disclose it to the Inspector at the Inquiry.

42. The revised draft sent out for consultation in January 2015 had greater relevance since it identified the appeal site and supported its use for education, whilst falling short of allocating it for this purpose. However, neither the Claimants nor any of the other objectors saw fit to draw it to the attention of the Inspector in the post-Inquiry period. In my view, the most likely explanation for this omission is that, by that stage, they had come to realise that the School expansion issue had little prospect of success. It is revealing that the Claimants were seeking counsel's advice on other issues but apparently did not even ask him about the School expansion issue or the draft Neighbourhood Plan.

43. The Claimants now seek to blame the Council for not submitting the January 2015 draft to the Inspector, on the basis that the Planning Inspectorate guidance advises a local planning authority that it "*must alert us in writing … if it becomes aware of any material change in circumstances which have occurred since it determined the application (e.g. a newly adopted or emerging policy) that is directly relevant to the appeal…*". However, there is no indication that the Claimants believed that the Council was submitting the revised draft to the Inspector, or that they were even aware at the time of this Planning Inspectorate guidance, so this does not explain or excuse their own failure to do so.

44. The Council's statement of case on appeal stated:

> "46. The Neighbourhood Plan for Aldingbourne is currently being drafted, a working draft was submitted to the LPA on 7th November 2013 and informal comments were provided. The Neighbourhood Plan group are currently working on the supporting documents, engaging with the local community and working with landowners to ensure that they can meet the minimum housing requirements for the parish as well as land for community uses. To date it has not been subject to informal or formal public consultation.
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> 47. Whilst the Neighbourhood Plan is a material consideration in the determination of the application, given that it is at such an early stage of permeation, minimal weight can be given to this as a planning policy document."

45. I do not consider that the Council was under an obligation to update the Inspector in relation to the draft Neighbourhood Plan, pursuant to the Planning Inspectorate guidance. The January 2015 draft was still at a very early stage in the adoption process, and so the Council's view that it should only attract minimal weight would probably have remained the same. Moreover, the Council was aware that the local education authority had no proposals for expanding the School into the appeal site, and so the support for such a development in the revised draft made no difference to the main issues before the Inspector. The Council was entitled to take the view that it

was not a material change in circumstances of which the Inspector ought to be made aware.

46. In my view, the Inspector was not required to refer to the draft Neighbourhood Plan in her Decision since (1) it was at a very early stage of development and she was entitled to accept the view of the Council that minimal weight should be accorded to it as a planning policy; (2) in so far as it was relied upon in support of the School expansion issue, that objection was hopeless and School expansion was not a main or principal important controversial issue; (3) the document/s were not provided to her, the relevance of the draft Plan to the issues was doubtful, and scant reliance was placed upon it by the Claimants and other objectors at the Inquiry.

47. Applying the principles set out at paragraphs 19 to 21 above, it cannot be inferred from the absence of a reference to the draft Neighbourhood Plan in the Decision that the Inspector failed to have any regard to it.

48. In conclusion, therefore, the Claimants have failed to establish any error on the part of the Inspector and so the application is dismissed.