Case No: CO/10759/2012

Neutral Citation Number: [2013] EWHC 1783 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Bristol Civil Justice Centre
2 Redcliff Street,
Bristol,
BS1 6GB

Date: 25th June 2013

Before:

HIS HONOUR JUDGE DENYER Q.C.
(sitting as a Judge of the High Court)

- -

Between:

HOPKINS DEVELOPMENT LIMITED

Claimant

- and -

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

1st Defendant

- and -

SOUTH SOMERSET DISTRICT COUNCIL

2nd Defendant

- -

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JEREMY CAHILL Q.C. and **SATNAM CHOONGH** (instructed by Ashfords LLP) for the Claimant

JAMES MAURICI Q.C. (instructed by the The Treasury Solicitor) for the Defendants

Hearing Date: 25th April 2013

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Judgment

His Honour Judge Denyer Q.C.:

1. On 8th day of July 2011, the applicants applied for outline planning permission in respect of a residential development of land in Wincanton. The land was adjacent to the local cottage hospital. On 12th October 2011, the application was refused. Six Grounds of Refusal were set out. (See page 284 of the bundle). Those grounds were as follows –

   (1) The proposal for 58 dwellings outside the settlement boundary of Wincanton was not necessary to meet or contribute to the relevant five year housing supply.

   (2) The proposal made insufficient provision for onsite public open space.

   (3) The proposed developed will have an adverse effect on the amenities of existing residents and users of the hospital.

   (4) The danger of noise and odours from the proposed pumping station.

   (5) Access to the development through the hospital site would generate traffic movements detrimental to highway safety.

   (6) Inadequate information as to how the development would have an impact on local educational and other facilities.

2. The Claimants duly appealed to the Secretary of State. An inspector was appointed and a local inquiry was to be held. That inquiry was held between 3rd July and 6th July 2012. The inquiry was governed by the Town and Country Planning Appeals Rules 2000. Certain of the Rules are relevant to matters with which I have to deal. They include –

   Rule 7

   (1) - An inspector may within twelve weeks of the starting date (of the inquiry) send to the parties a written statement of the matters about which he particularly wishes to be informed for the purposes of his consideration of the appeal.

   Rule 11

   (1) - The persons entitled to appear at an inquiry are –

      (a) the Appellant;

      (b) the local planning authority;

      (c) a county council;

      (h) any other person who has sent a statement of case.

(2) Nothing in paragraph (1) shall prevent the inspector from permitting any other person to appear at an inquiry.

Rule 14 – this deals with service of proofs of evidence.

Rule 15

(1) The local planning authority and the Appellant shall –

(a) together prepare an agreed statement of common ground; and

(b) ensure that the Secretary of State and any statutory party receives a copy of it not less than four weeks before the date fixed for the holding of the inquiry (see also Regulation 2 which defines a statement of common ground).

Rule 16(1), (2) and (3) –

(1) The inspector shall determine the procedure at an inquiry.

(2) At the start of the inquiry the inspector shall identify what are in his opinion the main issues to be considered at the inquiry and any matters on which he requires further explanation from the persons entitled or permitted to appear.

(3) Nothing in paragraph (2) shall preclude any person entitled or permitted to appear from referring to issues which they consider relevant to the consideration of the appeal but which were not issues identified by the inspector pursuant to that paragraph.

Rule 18

(3) If, after the close of an inquiry, an inspector proposes to take into consideration any new evidence or any new matter of fact 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 notifying the persons entitled to appear at the inquiry of the matter in question and affording them an opportunity of making written representations to him or of asking him to reopen the inquiry.

3. Both the Rules and the role of the inspector are explained and amplified in the Procedural Guidance Document produced by the planning inspectorate. This is set out at pages 246 and following of the bundle which is to be found behind divider twelve. I note in particular –

1.4.2 - This sets out a number of core principles, including in particular the critical importance of regular and continuing dialogue between the main parties to an appeal.

6.6.1 - The statement of common ground. A statement of common ground is essential to ensure that the evidence at an inquiry focuses on the material differences between the main parties.

6.8.2 - Proofs of evidence should not include matters which are not in dispute. They should focus on the issues of dispute remaining following the statement of common ground.

4. Against this background, let us look at what happened here.

5. It will be recalled that the original refusal outlined six matters of concern to the local authority. In June 2012, a statement of common ground was agreed between the applicants and the local authority. This is to be found at pages 41 and following of the bundle behind divider five. I note in particular –

6.6 - Given the enclosed nature of the site and its relationship to the existing urban edge of Wincanton, there is no objection to the site in landscaping terms and the consolidated area of public open space is now acceptable from a landscaping viewpoint. Therefore it is agreed that in terms of landscape impact the appeal proposal now meets favourably with the policy of the local plan.

6.16 - Refusal reason number 4 which related to noise and odours from the pumping station no longer applied.

6.17 and 6.18 – refusal reasons numbers 2 and 3 no longer applied.

6.22 and 6.23 – an agreed undertaking had been provided by the developers in relation to relevant infrastructure such that refusal reason 6 no longer applied.

It followed therefore that as between the applicants and the local authority, so far as the matters in dispute were concerned only grounds 1 and 5 remained live, i.e. whether the existing plans over the next five years contain sufficient potential houses and if they did not, then whether the national planning policy framework was then arguably applicable. Also, considerations relating to traffic movements through the hospital grounds and in particular the potential effects of such traffic upon highway safety. These then were the only two issues remaining between the main parties.

6. At page 38 and following (behind divider four) we have the notes issued by the inspector prior to the inquiry. These were issued by her pursuant to Rule 7 of the Rules. Paragraph 6 is headed "matters to be addressed at the inquiry." It reads as follows –

Without inhibiting the case of either main party, on the basis of material seen to date, I consider that the inquiry should focus principally on the following matters –

(1) whether there is a need for housing in the area;

(2) the effect of the proposal on highway safety;

(3) the effect of the proposal on the safety and convenience of users of the hospital and future residents;

(4) the effect of the proposal on protected trees; and

(5) the effect of the proposal on the provision for affordable housing, education provision and sports, arts and leisure facilities.

I note also that the inspector confirms at page 39 that she has received six proofs of evidence. It is legitimate to infer therefore that when she set out the matters to be addressed at the inquiry that she had had the matters dealt with in the proofs of evidence clearly in her mind. I note as well at page 40 that she says that "closing statements should follow the issues set out and seek to provide a summary of the case."

7. At the outset of the inquiry, the inspector set out her views as to the main issue. This was in accordance with Regulation 16(2) of the 2000 Regulations. What she said is set out in paragraph 22 of the statement of Mr Kendrick of October 2012 at pages 29 and following. Paragraph 22 reads as follows (page 34) –

> "Two matters are still at contention –
>
> 1. Whether the release of the appeal site for the development would be justified. This requires the consideration of three matters –
>
> (a) whether the council can demonstrate a five year supply for housing such that development plan housing policies can be considered out of date;
>
> (b) if so is there an overriding need to develop and set aside the local plan policy of restraint in the countryside;
>
> (c) if not are the proposals in accordance with the NPPF.
>
> 2. The effect of the proposal on the safe running of the hospital."

8. At page 91 of the bundle we have the opening statement of the local authority. I note in particular paragraph 2 in which they say:

> "In our reasons for refusal we have not taken the highway authority point about the appeal site being too far away from the town centre because any significant new housing in Wincanton would have to be built at a similar or greater distance from the centre."

They do rely on the traffic ground, namely that the proposed development would prejudice the safety and amenity of hospital users (see paragraph 3). The remainder of the opening statement largely deals with the prospective adequacy or otherwise of the supply of housing in the area over the coming five year period.

9. At page 96 we have the closing submissions of the appellant. Paragraph 1 of that submission reads as follows –

> "These submissions will cover the main issues as identified in the inspector's opening statement which were as follows –

(i) Whether the release of the appeal site for development would be justified having regard to:

(a) whether the council can demonstrate a five year supply for housing such that development plan housing policies can be considered out of date;

(b) whether there is an overriding need to set aside the local plan policy of restraint;

(c) whether, if relevant policies are not up-to-date, the proposal is in accordance with policies in the NPPF (the framework).

(ii) The effect of the proposal on the safe running of the hospital."

10. On 29th August 2012, the inspector issued her decision letter. This is set out at page 118 and following of the bundle. She found against the local authority in respect of the availability of housing over the following five year period. She said, at paragraph 34 "I therefore conclude that the council cannot demonstrate a five year supply of deliverable housing sites and that the shortfall is substantial" and, at paragraph 35,

> "The framework advises that housing applications should be considered in the context of the presumption in favour of sustainable development. I have found that the local planning authority cannot demonstrate a five year supply of deliverable housing sites and in this circumstance the framework advises that relevant policies for the supply of housing should not be considered up-to-date."

However, she found against the applicants in respect of highway safety. She said, at paragraph 63 (page 129) that "I conclude the proposal would prejudice highway and pedestrian safety and would not facilitate the safe running of the hospital."

11. By virtue of her findings in respect of housing availability, she then went on to say as follows –

35. The framework advises that housing applications should be considered in the context of the presumption in favour of sustainable development. I have found that the local planning authority cannot demonstrate a five year supply of deliverable housing sites and in this circumstance the framework advises that relevant policies for the supply of housing should not be considered up-to-date. … .

37. The framework also advises that where relevant policies are out of date permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the framework taken as a whole or specific policies in the framework indicate development should be developed. I take this into account in my conclusions below.

She then makes certain findings –

43. Although some concerns in respect of the protected trees, character and appearance of the area carry little weight or could be addressed by the imposition of suitable conditions, the introduction of a housing estate onto the site will unacceptably detract from the tranquil and rural character and appearance of the area and the setting of the hospital and settlement. I have found that saved local plan policy is not up-to-date. However the proposal would not contribute to protecting or enhancing the natural and built environment and would be contrary to the provisions of the framework which considers this to be part of the environmental role of the planning system which is aimed at achieving sustainable developments.

48. I conclude that given the location and lack of realistic alternative modes of travel, future occupiers of the proposed development are likely to be unduly dependent on the private car for access to employment and for many of their daily needs. Apart from policy ST3, which I have found to be not up-to-date, no reliance is placed on development plan policies in relation to this issue by the parties and nor do I. However the proposal is contrary to the provisions of the framework which aims to minimise the need to travel. I conclude that the site is not in a particularly sustainable location.

On this basis she dismissed the appeal.

70. I have considered the three dimensions of sustainable development, environmental, economic and social, as set out in the framework. The proposal would help meet the shortfall in housing land supply, contributing to the quality and choice of housing and providing market and affordable housing. I have also found that there is a district wide need for housing land and the provision of housing would support the Government's agenda for growth.

71. However, there are substantial environmental and social dis-benefits, such as the harm to the character and appearance of the area, the lack of opportunity to travel other than by use of the private car and the unacceptable effect on highway safety and the safe running of the hospital.

It is said that her decision raised new issues not previously properly adumbrated. The issues are set out in paragraph 6(119) of her decision. The new issues therefore are those in (ii) and (iii), namely "the effect of the proposal on the character and appearance of the area" and "whether the site is in a sustainable location."

12. It is accepted by the Secretary of State that (ii) and (iii) were not identified by the inspector prior to the hearing. I refer to paragraph 41 of the Respondents' skeleton argument. I set it out in full because it is important that I note the caveat attached to the admissions –

> "It is accepted that the main issues identified in the inspector's pre-inquiry 'inquiry procedure advice note' did not include the issues of the effect on character and appearance and whether the site was in a sustainable

location (the alleged new issues). However that note while identifying the six issues which she considered the inquiry should focus upon were said to be made 'without inhibiting the case of either main party.' A fortiori it was not able to inhibit the cases of any third parties.

…

It is also accepted that the alleged new issues were not pursued by the district council at the inquiry and that these were the subject, at least to some extent of a statement of common ground."

13. It is against this background that the challenge is brought pursuant to Section 288 of the Town and Country Planning Act 1990. The allegation is that there has been a breach of the Rules of natural justice. This is Ground 1 of the challenge as set out in paragraphs 15, 16 and 17 of the grounds (see page 6 of the bundle.)

14. It was agreed at the hearing before me that we would concentrate on this ground. If I was in favour of the applicants that would be decisive of the matter. If I was against them, they were not precluded from coming back and arguing their other grounds.

15. I have already set out the relevant Rules. The proper approach against that background is to be found in the judgment of Sullivan J (as he then was) in **Poole v Secretary of State [2008] EWHC 676 (Admin)**. The relevant passages are as follows –

    40. However it is most important when deciding whether the parties at an inquiry had had a fair opportunity to comment on an issue raised by an inspector of his or her own motion and whether they could reasonably have anticipated that an issue had to be addressed because it might be raised by an inspector, to bear in mind the highly focused nature of the modern public inquiry where the whole emphasis of the Rules and procedural guidance contained in circulars is to encourage the parties to focus their evidence and submissions on those matters that are in dispute.

    42. If a party to an inquiry reasonably believes that a matter which was in dispute has been dealt with by way of agreement in a statement of common ground, it may well be unfair to allow the apparently agreed issue to be reopened without giving the party a proper opportunity to address the issue, if necessary by calling appropriate expert evidence.

    43. The older authorities dealing with fairness in the context of public inquiries should now be read with the modern inquiry Procedure Rules in mind, where the parties are now not expected to cover every conceivable eventuality in their proofs of evidence in circumstances where, as used to be the case, the Procedural Rules did not require the issues in dispute to be identified or sufficiently identified well in advance of the inquiry.

    44. Counsel referred to the inspector's obligation, whatever may or may not have been agreed between an Appellant and a local planning authority, to

take account of representations made by third parties. I accept that an inspector is bound to take into consideration arguments raised by third parties, but the imperative in the Rules requiring the principal parties to focus their attention on the issues that are in dispute would be wholly frustrated if Appellants and local planning authorities are unable to place any degree of reliance on matters that had been apparently resolved in a statement of agreed facts. It would be entirely unsatisfactory if, having agreed such matters, the principal parties to an inquiry would still have to prepare their evidence on the basis that the inspector might wish to pursue a particular line of reasoning that departed from the agreed statement. While of course it is open to an inspector to do so, whether of his or her own motion or in response to third party representations, if there is not to be a return to the bad old days where proofs were prepared to cover every conceivable eventuality, it is essential that inspectors recognise that if they do intend to depart from what is the agreed position between the principal parties, it may be necessary to accede to applications for adjournments to enable the parties to address the (now disputed) issue or issues properly by way of expert evidence.

16. On the face of it, this suggests to me that the failure of the inspector in this case to indicate whether before, during or after the hearing that she was minded to rely upon the "fresh grounds" did constitute a breach of a basic natural justice requirement, namely that a party should have a reasonable opportunity of addressing the issues which are going to be determinative of a judicial proceeding – in other words a party should have a reasonable opportunity of meeting and dealing with the case against him. However, Counsel for the Secretary of State cautions against what he says is a too simplistic view of the matter. One has to bear in mind that the applicants and the local authority are not the only persons involved in the process. There are the objectors. One also has to consider whether the issue is truly new or whether a party could reasonably foresee that an issue might be raised such that he could be expected to deal with it. A number of cases were cited in support of this proposition. I shall now deal with some of them, bearing in mind always that they are all "fact specific." **Castleford Homes [2001] EWHC 77 (Admin)** is a decision of Ousley J.

    52. Did the Claimant have a fair crack of the whip? Was the Claimant deprived of an opportunity to present material by an approach on the part of the inspector which he did not and could not reasonably have anticipated? Or is he trying to improve his case subsequently having been substantially aware of or alerted to the key issues at the inquiry? Did he simply fail to realise that he might lose on an aspect which was fairly and squarely at issue and hence failed to put forward his fallback case. These are the sort of questions which can be used to guide a conclusion as to whether the manner in which a particular issue was dealt with at an inquiry, involved a breach of natural justice and was unfair.

    53. It is always difficult for parties to an inquiry to know how far it is necessary to go in order to deal with the contingent ramifications of the process yet to be undertaken by an inspector of analysing the arguments,

accepting some in whole or in part and rejecting others. It is obviously helpful if an inspector does flag up issues which the parties do not appear to have fully appreciated or explored. The point at which a failure to do so amounts to a breach of the Rules of natural justice and becomes unfair, is a question of degree, there being no general requirement for an inspector to reveal any provisional thinking. It involves a judgment being made as to what is fair or unfair in a particular case.

65. Whilst an inspector can reasonably expect parties at an inquiry to explore and clarify the position of their opponents, if an inspector is to take a line which has not been explored, perhaps because a party has been under a misapprehension as to the true position of its opponents, fairness means that an inspector give the party an opportunity to deal with it. He need not do so where the party ought reasonably to have been aware of the material and arguments presented at the inquiry that a particular point could not be ignored or that a particular aspect needed to be addressed.

Tatham [2005] EWHC 3538 (Admin) is a decision of Mr Justice Sullivan. And in particular relevant paragraphs are paragraphs 14 to 17. The case is relevant to the question of the need to remember that the issues are not necessarily entirely determined by the main parties. Interested members of the public may well raise different issues and of course are not bound by the statement of common ground between the applicants and the local authority.

Gates Hydraulics [2009] EWHC 2187 (Admin) was a case in which the agreed statement accepted that noise was not an issue. However it featured in the decision of the inspector. It was held that it was procedurally unfair for the inspector not to have raised the issue with the main parties. This was particularly so as the technical issue about noise was really the only basis for the decision of the inspector and precisely because it was technical the applicant should have had an opportunity of dealing with it.

17. In my view given what had been agreed between the principal parties it was wrong for the inspector to raise and take into account the effect of the proposal on the character and appearance of the area and whether the site was in a sustainable location. I do not believe that any other evidence filed in the case really raised in any substantial way these issues and given the agreement that had been arrived at I do not think that the applicants should properly be regarded as being in some way on notice that character, appearance and sustainability were in issue such that they should have produced evidence about it. In my view therefore the failure of the inspector to notify the parties that these were significant issues as far as she was concerned and her failure to give in particular the applicants the opportunity of dealing with the points amounted to a failure to allow the applicants "a fair crack at the whip." Accordingly I quash the decision.