All England Official Transcripts (1997-2008)

R (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government and another

Town and country planning - Permission for development - Refusal - Claimant applying for planning permission to develop 'total care village' for elderly persons - Local planning authority refusing to grant permission - Secretary of State's inspector upholding authority's decision on appeal - Whether inspector erring - Town and Country Planning Act 1990, s 288

[2008] EWHC 2538 (Admin), CO/5244/2007, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

SULLIVAN J

13 OCTOBER 2008

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A Crean QC for the Claimant

J Maurici for the First Defendant

T Jones and J Smythe for the Second Defendant

Martineau Johnson; Treasury Solicitor; Alan McLaughlin

SULLIVAN J:

INTRODUCTION

[1] This is an application under s 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash a decision of an inspector appointed by the First Defendant to determine the Claimant's appeal against the decision of the Second Defendant to refuse planning permission for the development of what was described in the application form as a "total care village" for the elderly on land off Faraday Road, Hereford ("the site"). The Inspector's decision is contained in a decision letter dated 17 May 2007 and followed an inquiry held on 24 to 26 April 2007 and a site visit made on 26 April 2007.

THE DECISION LETTER

[2] In para 2 of the decision letter the Inspector identified three main issues:

> ". . . first whether the site should be retained for employment uses, secondly whether the proposal would provide satisfactory living conditions for future residents because of risk of odour and whether that factor might prejudice future operations at a nearby chicken processing plant, and thirdly whether the proposal should make any provision for affordable housing."

[3] The Inspector resolved the second issue in favour of the Claimant.

[4] In respect of the first issue, the Inspector concluded in para 15 of the decision letter:

> "... that the site should be retained for employment (Class B) development because of its suitability and the apparent demand, and that the proposal would therefore conflict with UDP policy E5. For the reasons given I do not believe that the site has no realistic prospect of employment development and so the proposal would also conflict with RPG proposal PA6."

[5] In respect of the third issue, the Claimant contended that the proposed development fell within Class C2 in the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order") and that there was therefore no need to make any provision for affordable housing. The Second Defendant accepted that the nursing home and residential retirement home elements of the "total care village" were not to be regarded as dwellings and so did not give rise to any policy requirement to provide an element of affordable housing. However, the Second Defendant contended that the remaining element of the total care village, 100 assisted living units, should be regarded as dwellings so that provision should be made for affordable housing. The Inspector agreed with the Second Defendant and concluded in para 33 of the decision letter that "... the proposal should make provision for affordable housing and, because it does not, it conflicts with policy H9, as well as national policy in PPS 3." The Inspector drew the threads together for the purposes of s 38(6) of the Planning and Compulsory Purchase Act 2004 in para 34 of the decision letter:

> "Although I consider that the proposal would provide satisfactory living conditions for future residents and that there would be no undue threat to future operations at the Sun Valley plant, I believe that the site should be retained for employment development and should make provision for affordable housing. Because the proposal does neither it would conflict with policies in the development plan. I have therefore considered the other factors cited by the Appellant which are said to be advantages of the proposal. These comprise the need for the facility, the creation of 145 jobs, and the visual improvement that would be brought to the area."

[6] Only the first of those factors is relevant for the purposes of this application. The Inspector dealt with it in para 35 of the decision letter, saying:

> "... I acknowledge that UDP policy CF7 generally permits residential nursing and care homes (in residential areas), though makes no specific site allocations. It is axiomatic therefore that any such proposal would be sited on an area allocated for other uses. I accept too the Appellant's evidence that there is a need for these kinds of facilities in Hereford (and this was not challenged by the Council) and that numerous planning and social objectives and strategies highlight the importance of health and social inclusion. Nevertheless there is no evidence that this is the only site in Hereford suitable for the proposal, or even that the Appellants had conducted a thorough but fruitless search for such a site. Conversely the Council pointed to three sites in the city which were allocated for residential development in the UDP (and listed in their residential land availability survey) which might be suitable. Because of these factors I cannot conclude that any demand or need for the facility is so weighty that it overcomes the objections I have identified ...."

[7] The Inspector's overall conclusion in para 37 was "In summary I do not consider that the need for the facility, the creation of 145 jobs, or the visual improvement of the site are sufficient, either in combination or individually, to overcome the harm I have identified."

THE CLAIMANT'S GROUNDS OF CHALLENGE

[8] In accordance with directions given by Collins J ([2008] EWHC 2143 (Admin)), the First Defendant filed her skeleton argument early, and before the Claimant's skeleton argument. Since the judgment of Collins J is the subject of an appeal to the Court of Appeal by the Secretary of State, I express no view as to the extent of the court's powers to make procedural directions in respect of s 288 applications, but I do endorse the Claimant's submission that this case is a very good illustration of the practical advantages for all parties of an early indication by the Secretary of State of her response to a s 288 application. In the light of the early filing and service of the First Defendant's skeleton argument, the Claimant abandoned one ground of challenge and part of another ground, thereby narrowing the issues between the parties and reducing the estimated length of the hearing.

[9] The skeleton argument of Mr Crean QC on behalf of the Claimant set out five grounds on which the Inspector's decision was challenged. It is convenient to deal with those grounds in reverse order.

[10] In his oral submissions, Mr Crean rightly accepted that the fifth ground, inadequate reasons, added nothing of substance to the other four grounds.

[11] In the fourth ground, the Claimant contended that the Inspector had failed to consider its submissions

that, whether or not the 100 assisted living units should rightly be regarded as falling within Class C3 rather than Class C2 of the Use Classes Order, the Second Defendant had assured the Claimant that the application for planning permission would be treated as an application for a Class C2 use and had subsequently changed its mind. It was submitted that this conduct by the Second Defendant was unfair and that the Inspector ought therefore, as a matter of discretion, to reject the Second Defendant's contention that an element of affordable housing was required.

[12] On the Claimant's appeal under s 78 the Inspector was required to form his own planning judgment, and his judgment that the 100 units were properly to be regarded as falling within Class C3 in the Use Classes Order has not been challenged in these proceedings. In these circumstances, it is difficult to see the relevance of this submission, even if there had at some point been unfairness by the Second Defendant. The short answer to this submission is, however, that there was no unfairness. The Claimant relied on an exchange of correspondence in May and June 2006 in which, after some debate as to whether the 100 assisted living units should be treated as Class C2 or Class C3 for the purposes of calculating the amount of the application fee to be paid, the Second Defendant agreed, on 12 June 2006, to treat the whole of the application as falling within Class C2.

[13] The Second Defendant reconsidered its position during the processing of the application and one of its reasons for refusing planning permission was:

> "The proposal does not provide for any affordable units and therefore the development is contrary to Policy H8 of the Hereford Local Plan and Policy H9 of the Herefordshire Unitary Development Plan (Revised Deposit Draft)."

Since the decision notice is dated 8 August 2006, less than two months after 12 June 2006 letter and more than eight months before the inquiry opened on 24 April 2007, it is impossible to conclude that there was any unfairness. In these circumstances, the Inspector was fully entitled to say in para 29 of the decision letter:

> "I appreciate that the whole planning application was registered as a Class C2 use . . . at the Appellant's request. However, the Council explained at the inquiry that on further consideration during the processing of the application they had formed the view that the proposal was for a mixture of Class C2 (the nursing and residential retirement homes) and Class C3 (the 100 assisted living units). Indeed the Appellant has said (in a letter dated 22 May 2006) that the registration of an application is an administrative exercise only, and implies that the Council can review a description when considering an application."

[14] The Second Defendant reviewed its position at a very early stage so the Claimant knew full well what the Second Defendant's position in respect of affordable housing was before it even appealed to the First Defendant. There is, therefore, no substance in this ground of challenge.

[15] Turning to ground 3, there was an issue at the inquiry as to whether employment-type development on the site would be financially viable. The Claimant contended that it would not be viable, whereas the Second Defendant contended that it would be viable. The Inspector heard evidence of rents of £4 per square foot in respect of the site at Moreton-on-Lugg, £4.95 per square foot in respect of the site at Harrow Park and £6.75 per square foot in respect of Hereford Trade Park, both of those two sites being within the City of Hereford.

[16] The Inspector resolved this aspect of the employment land dispute in para 14 of the decision letter:

> "Although it was suggested that employment-type development on the site would not be viable, this seemed to me to be based on an artificially low expectation for rental levels, comparing that to levels achieved at Moreton on Lugg. Instead I consider that a comparison with rental levels at Harrow Park would be fairer, because the units there and the site context seemed to me to reflect what might reasonably be expected at the appeal site. Similarly units might be built and the location and accessibility might be considered similar to Harrow Park, if not better. Rents there were quoted at £4.95 per square foot (compared with the £4 per square foot actually used by the Appellant for an appraisal for a single unit redevelopment). If that higher figure were used then the profit realised might be more than £1 million more than calculated. Because the use of a fairer rental figure produces a good rate of return I consider that the economic attractiveness of developing the site for employment use has been under-estimated."

In para 11 the Inspector had said:

> ". . . I am aware that there have been recent developments of Part B floorspace in the northern part of Hereford city (at the Hereford Trade Park and Harrow Park, both of which I visited) and that the units there are mostly occupied. This suggests to me that there is a vibrant demand for this kind of development in this area."

[17] When I asked Mr Crean what it was that the Inspector had failed to deal with in these paragraphs of the decision letter, he submitted that the Inspector had failed to deal with two aspects of the evidence of Mr Harris, a director of Harris Lamb Chartered Surveyors, who gave evidence on behalf of the Claimant on this topic. First, Mr Harris's evidence was that comparing the rental levels at the appeal site with those at Harrow Park was like comparing "apples and pears", because the two sites were not comparable. Secondly, that the sites at Harrow Park had taken a long time to let and there were still some vacant units available at that site as at the date of the inquiry.

[18] I do not accept that submission. The Inspector clearly considered, but rejected, Mr Harris's evidence on those two points. One of the reasons why he concluded that a comparison with the rental levels at Harrow Park would be fairer was because the "site context" seemed to him to reflect what might be expected at the appeal site. Moreover, he considered that, in terms of location and acceptability, the appeal site "might be considered similar to Harrow Park, if not better". Having seen the Harrow Park site, the Inspector observed that the units there were mostly occupied and that suggested to him that there was "a vibrant demand for this kind of development in this area".

[19] Mr Harris clearly disagrees with the Inspector's assessment, but those conclusions were pre-eminently matters of planning judgment for the Inspector and they deal perfectly adequately with the viability issue.

[20] Ground 2 asserts that the Inspector failed to strike a balance between two outcomes, both of which were desirable in principle, namely the provision of residential and nursing care home facilities for which there was a need, and the preservation of the appeal site for employment land purposes.

[21] The Inspector very clearly did strike that balance in para 35 of the decision letter (see above), in which he concluded that the need for the facility was not "so weighty" that it overcame the two objections based on the conflict with policies in respect of employment land and affordable housing in the development plan.

[22] That leaves the principal ground of challenge, ground 1, in which it was submitted 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." That submission was said to be founded on the judgment of Laws LJ (with whom Aldous LJ and Blackburne J agreed) in *R (Jones and another) v North Warwickshire Borough Council* [2001] 2 PLR 59. Having considered a number of earlier authorities, Laws LJ said in para 30:

> ". . . it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking - and I lay down no fixed rule, any more than did Oliver LJ or Simon Brown J - such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

[23] The Claimant's submission illustrates the dangers inherent in treating a judgment in a particular case as though it was an enactment of general application. Laws LJ himself was at pains to emphasise that he was not laying down any "fixed rule". The judgment of the Court of Appeal that on the facts of that case "no reasonable council could have treated the Coventry Road site [the alternative site suggested by objectors to the grant of planning permission] as relevant" (para 33) must be understood against the factual background in that case that, in the local planning authority's view, "there were no clear planning objections here" (see para 32). Indeed, as Laws LJ noted in para 5 of the judgment ". . . the development plan included it [the site on which permission was granted] in an area where development was in principle acceptable and there was no policy against it."

[24] Although the predecessor of s 38(6)of the 2004 Act, s 54A of the Town and Country Planning Act 1990 had been introduced by s 26 of the Planning and Compensation Act 2001, the Court of Appeal was not concerned in the North Warwickshire case with a development that was in conflict with the development plan. It did not therefore address the question whether such a conflict was a "clear planning objection" to use the words of Simon Brown J (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293, [1986] 2 EGLR 185, 279 EG 680.

[25] It is also to be noted that all of the earlier authorities cited by Laws LJ, including the *Trusthouse Forte* case, preceded the enactment of s 54A and with it the introduction of what is usually called "the plan led system". Section 38(6) required the Inspector in the present case to determine the application in accordance

with the development plan unless material considerations indicated otherwise. Since the Inspector had concluded that the proposed development would conflict with the policies in the development plan relating to employment land and affordable housing, 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.

[26] One of those claimed advantages was that a grant of planning permission would meet a need. Mr Crean rightly submitted that this need was a material consideration which the Inspector was bound to consider. However, the need, which was not challenged by the Second Defendant, was a need for those kinds of facilities in Hereford (see para 35 of the decision letter). 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, and specifically whether it might be met on the three residentially-allocated sites which the Second Defendant had suggested might be suitable.

[27] While all of the earlier authorities should be applied with caution, because they all pre-date the plan-led system, perhaps the nearest analogy is the *Trusthouse Forte* case, in which there was a clear objection to the proposed development on both green belt and agricultural land policy grounds, and the Secretary of State accepted the Inspector's recommendation that the appeal should be dismissed on the basis that the commercial need for the proposed hotel would be met on some other but unspecified site. Simon Brown J (as he then was) upheld the Secretary of State's decision, saying at p 301 "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."

[28] In that case it was relevant to consider whether the need for a hotel could be met on some other site, because there was a "clear planning objection" to the development, because of conflict with green belt and agricultural land policies. Although the degree of conflict with development plan policies and the seriousness of any conflict may well vary from case to case, 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" to use the phraseology adopted in the *Trusthouse Forte* case.

[29] I emphasise that I am not intending to set down any general principle. Each case will turn on its own particular facts. In some cases it may not be necessary to consider the possibility of alternative sites. 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 that need might be met. I therefore reject ground 1 and it follows that this application must be dismissed.

Application dismissed.