Neutral Citation Number: [2015] EWHC 2728 (Admin)

Case No: CO/277/2015

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

- -

Between:

JOHN TURNER

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) EAST DORSET DISTRICT COUNCIL

Defendants

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- -

Michael Rudd (instructed by **Hawksley's Solicitors**) for the **Claimant**
Sasha Blackmore (instructed by **The Government Legal Department**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 15 September 2015

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Approved Judgment

Mrs Justice Lang:

1. In this claim under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), the Claimant applies for an order quashing the decision of the Secretary of State for Communities and Local Government, dated 9 December 2014, in which he dismissed the Claimant's appeal against the refusal of planning permission by East Dorset Council on 10 February 2014.

History

2. On 19 September 2013, the Claimant applied for planning permission to replace an existing mobile home and commercial storage yard with a 3 bedroom bungalow, and associated residential curtilage, on land adjoining a property known as The Retreat, Barrack Road, West Parsley, Ferndown, Dorset, BH22 8UB.

3. The site is included within a larger site which is lawfully used for a vehicle business.. There is also a static mobile home on site which is in residential use, and for which a certificate of lawful use has been granted. The proposed development would replace the static mobile home and take over part, but not all, of the area currently used for vehicle storage.

4. The site is in the countryside in the Green Belt and within 400 metres of a site of special scientific interest.

5. A similar though not identical application was refused in 2004, and an appeal was dismissed.

6. On this occasion, the Council's reasons for refusal were:

   i) The proposed development was inappropriate development which was harmful to the openness of the Green Belt and contrary to the guidance in the National Planning Policy Framework ("NPPF").

   ii) The proposed new dwelling was in the countryside, outside any settlement, and therefore contrary to Local Plan Policy CSIDE1.

   iii) The site was not suitable for residential use and was not sustainable as it was not located close to facilities and services and it was over 1700 metres from an urban area. The proposal was therefore contrary to Local Plan Policy CSIDE1 and the NPPF.

7. The Claimant appealed under section 78 of the TCPA 1990. The appeal was dealt with, by way of written representations, by an Inspector (Mr P. Wilmer) on behalf of the Secretary of State.

8. In his Decision, at paragraph 3, the Inspector set out the main issues in the case:

   i) whether the proposal constitutes inappropriate development in the Green Belt having regard to the effect on the openness of the Green Belt;

ii) whether the proposal would, given the site's countryside location, be a sustainable form of development; and

iii) if it is inappropriate development, whether the harm by reason of inappropriateness, and any other harm to the Green Belt, is clearly outweighed by other considerations, so as to amount to very special circumstances to justify the development.

9. The Inspector dismissed the appeal for the following reasons:

i) The proposed development would have a harmful impact on the openness of the Green Belt.

ii) It would also have a considerably greater impact on the openness of the Green Belt than the existing lawful use of the land. Therefore the proposal did not come within the exception at bullet point 6 in paragraph 89 of the NPPF, permitting construction of new buildings in the Green Belt, and was to be regarded as inappropriate development, and thus harmful to the Green Belt. The Inspector gave substantial weight to the harm.

iii) The proposed development was not a sustainable form of development complying with the objectives of the NPPF, because of its isolated countryside location. However, as it would replace an existing mobile home, the Inspector gave only limited weight to the harm arising from its location. As agreed by the parties, Local Plan Policy CSIDE1, adopted in 2002, had reduced weight in so far as it conflicted with the NPPF.

iv) The potential harm to the Green Belt, by reason of inappropriateness and other harm, was not clearly outweighed by other considerations. The very special circumstances, required by paragraph 87 of the NPPF, did not exist.

Legal framework

10. 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.

11. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the 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.

12. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6] – [8]:

> "… An allegation that an Inspector's conclusion on the planning merits is *Wednesbury* perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.
>
> In any case, where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ..."

13. 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, read together with section 70(2) TCPA 1990. The NPPF is a material consideration for these purposes.

14. In *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, the House of Lords held that the proper interpretation of planning policy is ultimately a matter of law for the court, and a failure by a planning authority to understand and apply relevant policy will amount to an error of law. However, as Lord Reed explained at [19]:

> "19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set

> of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)."

15. These principles apply equally to the application of national planning policy, both by planning authorities and Inspectors.

16. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

17. Two citations from the authorities listed above are of particular relevance to the disputed issues in this case.

a) *South Somerset District Council*, per Hoffmann LJ at 84:

> "...as Forbes J. said in *City of Westminster v Haymarket Publishing Ltd*:
>
> > "It is no part of the court's duty to subject the decision maker to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph"
>
> The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy."

b) *Clarke Homes*, per Sir Thomas Bingham MR at 271-2:

> "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."

18. An Inspector is required to give adequate reasons for his decision. 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."

National Policy Planning Framework

19. Section 9 of the NPPF, entitled "Protecting Green Belt land", includes the following paragraphs:

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 80. Green Belt serves five purposes:

- to check the unrestricted sprawl of large built-up areas;
- to prevent neighbouring towns merging into one another;
- to assist in safeguarding the countryside from encroachment;
- to preserve the setting and special character of historic towns; and
- to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

……

87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:

- buildings for agriculture and forestry;
- provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
- the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
- the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
- limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
- limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether

> redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.
>
> 90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:
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> - mineral extraction;
> - engineering operations;
> - local transport infrastructure which can demonstrate a requirement for a Green Belt location;
> - the re-use of buildings provided that the buildings are of permanent and substantial construction; and
> - development brought forward under a Community Right to Build Order."

Grounds of challenge

20. The Claimant's grounds of challenge were that the Inspector had materially erred when making his decision by:

    i) Failing to apply paragraph 89 of the NPPF lawfully;

    ii) Eliding the impact on the openness of the Green Belt and visual impact;

    iii) Failing to give adequate reasons for finding that the proposed development would not represent a sustainable form of development.

Grounds 1 and 2

21. It is convenient to consider grounds 1 and 2 together, as they overlap to some extent.

22. The Inspector directly addressed paragraph 89 of the NPPF in paragraph 8 of the Decision, correctly setting out the general principle that new buildings are regarded as inappropriate unless they come within one of the specified exceptions. He correctly identified the final exception (bullet point 6) as the relevant one. In my judgment, Ms Blackmore was right in saying that, on a proper interpretation of the NPPF, the development envisaged in the entirety of paragraph 89, including bullet point 6, is the construction of new buildings (see also *Timmins & Anor v Gedling BC & Anor* [2014] EWHC 654 (Admin), per Green J. at [23]; [2015] EWCA Civ 10, per Richards LJ at [29]).

23. It was common ground between the parties to the appeal that the site did constitute "previously developed land", within the meaning of paragraph 89, bullet point 6. The term is defined in the NPPF Glossary. Although ideally the Inspector should have recorded this point in his Decision, his failure to do so does not amount to a material error of law, since it is clear that he proceeded upon the basis agreed by the parties, and that he was correct to do so.

24. In paragraph 9 of the Decision he concluded that the development would not be limited infilling as the buildings did not amount to a continuously built up frontage on the road. It was proper for him to consider this point, particularly since it was raised in the Council's submissions at paragraph 6.4.

25. The Inspector then went on to consider whether the proposed development met the test in bullet point 6, namely, that it "would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development".

26. "Openness" is not defined in the NPPF. The Inspector, at paragraph 11, described it as "essentially freedom from operational development". I agree with the Claimant that the meaning of openness is freedom from any development, not just operational development. However, in my view, this was a slip by the Inspector which did not materially affect his reasoning, so as to give rise to an arguable ground of appeal. It is apparent from paragraph 79 of the NPPF that openness is an "essential characteristic" of the Green Belt which the policy protects.

27. The other purposes of the Green Belt are set out in paragraph 80, none of which were relied upon by the Inspector in making his decision.

28. In my view, the Inspector was entitled to distinguish between (1) a proposal in which one building was replaced with another and (2) this proposal which would entail the replacement of a mobile home and a truck yard with a building.

29. In paragraph 89 of the NPPF, the replacement of one building with another is provided for in the exception in the fourth bullet point: "the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces". Bullet point 4 could not apply here because the mobile home which was to be replaced was not a "building". Bullet point 4 primarily focuses on the use and the size of the replacement building, although, as Carnwath L.J. explained in *R (Heath and Hampstead Society) v Camden LBC* [2007] 2 P. & C.R. 13, at [37]:

> "The Surrey Homes case illustrates why some qualification to the word "larger" is needed. A small increase may be significant or insignificant in planning terms, depending on such matters as design, massing and disposition on the site. The qualification provides the necessary flexibility to allow planning judgment and common sense to play a part, and it is not a precise formula." (at [37]).

30. The test to be met in bullet point 6 is not formulated as an assessment of the relative sizes of the existing and the proposed development, although size will of course be

material. The test focuses on the comparative impact of the proposed development on openness, and the other purposes identified in paragraph 80.

31. In my judgment, the Inspector was entitled not to adopt the Claimant's volumetric approach, which calculated the volume of the mobile home and 11 trucks currently on the site, and concluded that the proposed development would be 242.53 sq. metres less in volume. From the perspective of openness, the Clamant was not comparing like with like, as the Inspector explained in paragraphs 12 to 14. The proposed development would have a greater impact on openness because the mobile home and trucks were moveable, and therefore the volume in any particular part of the site could vary at any time, whereas the building would be a permanent feature in one location. Moreover, as the Inspector found in paragraph 14, the trucks were of more limited height than the front façade and high pitch roof of the proposed new building, which would close off views into the site and have a harmful effect on openness.

32. I consider that this was quintessentially a planning judgment which the Inspector was best-placed to make, having had the benefit of a site visit.

33. The Claimant submits that the Inspector wrongly elided the concept of openness with the concept of visual impact in paragraph 14. These are two different concepts, though often closely related: see per Green J at [67] – [78] in *Timmins & Anor v Gedling BC & Anor*. I cannot accept that criticism of the Inspector's reasoning. On my reading of the Inspector's decision, he was properly addressing the issue of openness at paragraphs 12 to 15, not visual impact. The Council had refused the application because of its adverse impact on openness, not its visual impact, and openness, not visual impact, was identified by the Inspector as a 'main issue' in paragraph 3. Importantly, the Inspector went on to consider visual impact at a later stage in his decision, at paragraph 21, where he addressed the Claimant's submissions on the visual character of both the existing and the proposed developments.

Ground 3

34. The Claimant submitted that the Inspector failed to give adequate reasons for finding that the proposed development would not represent a sustainable form of development.

35. The Inspector began, in paragraph 16, by correctly identifying the three aspects of sustainable development in the NPFF: economic, social and environmental. These gains should be sought jointly.

36. In relation to sustainable transport, the Inspector referred to paragraph 37 of the NPPF which refers to minimising journey lengths for employment, shopping, leisure, education and other activities.

37. In relation to housing, he referred to paragraph 55 of the NPPF on sustainable development in rural areas, which advises that housing should generally be located in existing communities, not in isolated locations in the countryside.

38. The Inspector found that the site was "in a relatively isolated countryside location" (paragraph 18). He accepted the Council's submission that the site was located in a

remote position in relation to the services that occupants would regularly use, and so they would be dependent on a car. He did not accept the Claimant's submission that overall there would be a positive effect on environmental sustainability because of the reduction in the number of trucks on site.

39. The Inspector also rejected the Claimant's submission that proposal would enhance the natural environment and improve biodiversity,

40. The Inspector then concluded, at paragraph 15, that he was not persuaded that "the proposal would represent a sustainable form of development that comply with the objectives of the Framework".

41. However, because residential occupiers were already on site living in the mobile home, using a car to reach facilities, the development would have a neutral impact. This was why he only gave limited weight in the balancing exercise to the harm such journeys would cause.

42. In my view, these reasons were both adequate and intelligible, and met the requirements set out in *Porter (No. 2)*. Having summarised the relevant NPPF objectives for sustainable development, the Inspector explained that this development was not in accordance with them because of its remote rural location, but that he accepted that the harm was limited because of the existing residential use on site. I consider that the reasons were sufficiently clear for the Claimant to understand the extent to which he had won and lost on the main issues. The Claimant also had the benefit of the Inspector's decision refusing the Claimant's application for costs, issued on the same date, in which he said:

> " … I found the development would not have any beneficial impact on the environmental sustainability and at best …it would only have a neutral effect on both economic and social sustainability."

43. Finally, the Claimant has not demonstrated any prejudice caused to him by the alleged inadequacies in the reasons.

Conclusion

44. Despite Mr Rudd's able submissions, I am not satisfied that there are any grounds upon which to quash this decision and so the application is dismissed.