*124 R. (ON THE APPLICATION OF GAWTHORPE) v SEDGEMOOR DC

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
29 June 2012

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Queen's Bench Division (Administrative Court)

John Howell QC

June 29, 2012

Contaminated land; Highway authorities; Local authorities' powers and duties; Material considerations; Planning obligations; Planning permission; Residential development; Section 106 agreements;

H1 *Judicial review—contaminated land—officer's advice that development potentially contaminated—planning permission granted without conditions regarding contamination issues—whether failure to take into account material consideration—whether unreasonable to grant permission without imposing condition addressing need for site investigation and possible remedial matters*

H2. The claimant (G) was a local resident who sought judicial review, and, initially, to quash, the grant of planning permission for development of 14 dwellings. The grounds for the application were that the defendant planning authority (S) had: (1) failed to have regard to the fact that the land in question was likely to be contaminated, and acted unreasonably in failing to impose conditions requiring a site investigation and a scheme of remediation to be carried out before the carrying out of the development; and (2) acted unreasonably in having regard to a planning obligation that did not impose immediately effective obligations with respect to delivery vehicles. The advice of S's Environmental Health Officer had been that the site of the proposed development was located on the same site as a former works and industrial units and so the land might be contaminated, and stated that the developer should carry out detailed site investigation, and that a detailed scheme for any remediation works required should be submitted and approved before planning permission was granted. The Planning Officer's report recommended planning permission should be granted, but proposed no condition relating to contamination and no explanation why the Planning Officer thought that that recommendation in the absence of such a condition was appropriate in the light of the Environmental Health Officer's advice and the Secretary of State's policy on contaminated land, found in Annex 2 to PPS 23 and Circular 11/95. A preliminary site investigation and analysis were carried out subsequently and a unilateral undertaking entered into by the developer under s.106 of the Town and Country Planning Act 1990 that development would not be commenced until a site investigation had been carried out and any necessary remediation scheme approved and complied with. G submitted (i) that the site's potential contamination was a material planning consideration which S had been bound to take into account; (ii) *125 that it had failed to do so or had failed to give any reasons why the Environmental Health Officer's advice, supported by planning guidance, had not been followed; and (iii) that it had been unreasonable to grant planning permission without imposing a condition addressing the need for a site investigation and possible remedial matters in the circumstances. It was accepted that the unilateral undertaking provided at least the same protection as the condition, so that it would be futile to quash the planning permission on that ground alone. Instead a declaration was sought that the decision to grant planning permission had been flawed. S argued that members had been entitled to place some reliance on the fact that any developer would strive to avoid any claims from homeowners arising

from any adverse effects of contamination and that there were alternative statutory means under Pt IIA of the Environmental Protection Act 1990 for it to secure decontamination of the land if contamination was found and judged harmful, the advice in Circular 11/95 being that a condition should not be imposed which would duplicate other controls.

H3. **Held:**

H4. Although G had not shown that the Committee had failed to have any regard to what the Environmental Health Officer had advised, that did not mean that it had acted reasonably in resolving that delegated planning permission should be granted, without complying with the Secretary of State's guidance or imposing any condition in respect of that matter. The Secretary of State had stated in Annex 2 to PPS 23 that in his view Pt IIA "is not directed to assessing risks in relation to the future use of the land that would require a specific grant of planning permission. This was primarily a task for the planning system, which aimed to control development and land use in the future". Even in Circular 11/95, the Secretary of State had given more specific advice about contaminated land, indicating that conditions might be imposed in order to ensure that proposed development of a site would not expose future users or occupiers of the site to risks associated with contaminants present. That advice also made plain that merely relying on a developer's own self-interest to secure remediation before development was carried out was insufficient. In the Secretary of State's view, planning authorities were expected to exercise the powers of development control vested in them to deal with contamination issues. It was plain that no reasons had been given why the Planning Committee or officer with delegated powers decided to proceed contrary to the advice of the Environmental Health Officer and the guidance of the Secretary of State. The reasons for their grant of planning permission did not address this issue. The circumstances were such that no reasonable planning authority would have proceeded to grant planning permission without a condition addressing the contaminated land issues in the face of the advice of the Secretary of State and their own Environmental Health Officer absent a good reason for so doing. None had been shown in response to this claim. Accordingly, the decision to grant planning permission had been unlawful.

H5 Legislation referred to:

Environmental Protection Act 1990 Pt IIA
Town and Country Planning Act 1990 s.106

H6 Representation

Mr T. Leader , instructed by Corran Carey Barrington & Sons Solicitors, appeared on behalf of the claimant.
Ms M. Thomas , instructed by Sedgemoor DC , appeared on behalf of the defendant. ***126**

JUDGMENT

The Deputy Judge:

1. This is a claim for judicial review of the grant of planning permission by Sedgemoor District Council on March 10, 2011 in respect of land at the rear of Lanes of Cheddar, Station Road, Cheddar. The permission impugned was for the erection of 14 dwellings, for the formation of an access to the land and car parking, and for demolition of part of a commercial unit on that land.

2. Permission to make this claim was granted by Miss Geraldine Andrews QC, sitting as a Deputy Judge in this Court, on August 18, 2011. She also refused the claimant permission to impugn an earlier grant of planning permission on May 8,

2009. That permission was for a similar development to the development for which the planning permission is impugned in this case, save that it provided for 11 rather than 14 dwellings on a somewhat smaller site.

Introduction

3. The application site lies in centre of the village of Cheddar. It is in the heart of a conservation area. It comprises an industrial estate, to which access is gained off Station Road, the main route through the village centre. It also contains, at its southern end, an undeveloped and unused area. The access to the existing commercial premises is largely undefined, as are the parking and turning areas within it and for the Tesco Express store facing Station Road. These areas are also used for casual parking by the public.

4. Following the grant of planning permission in May 2009, the developer made a further application for planning permission on January 13, 2010.

5. The development for which planning permission was sought involved the construction of a proper internal access road with defined parking and loading areas off it. The new dwellings proposed were located in the underused rear area at the southern end of the site where, in addition, part of an existing commercial unit was to be demolished.

6. After consultation with the public and other bodies, the application was initially considered by the Council's Planning Committee on April 13, 2010. Consideration was deferred for further information to be provided on an Operators Manual, that the Highway Authority had requested, dealing with the management of commercial vehicles on the site.

7. The original report to the Planning Committee in April 2010 and a further report dealing with the Operators Manual was submitted to the Planning Committee on May 18, 2010. It was resolved, by nine votes to three:

> "[T]o grant delegated planning permission subject to the prior completion of a supplementary legal agreement in respect of the Operators Manual and in respect of the RTL2 and RTL3 financial contributions."

8. Mr Stephen Atkinson, who is the Council's Group Manager (Development) says that the Committee thus delegated to him the determination of the application and that he subsequently determined it. It was Mr Atkinson who, on March 7, 2011, signed the notice of the grant of conditional planning permission which was issued on March 10, 2011.

9. The summary reasons given for the grant of planning permission were as follows: ***127**

> "The application involves the partial development of an industrial estate lying within a village centre and conservation area for a residential scheme of 14 houses. The scheme will remove an unsightly industrial building plus unrendered concrete block enclosures and will screen views of the industrial estate from surrounding areas. The proposed buildings will provide an improved streetscape and

> will not cause significant adverse impacts to residential properties. The proposal also involves the improvement of the parking and turning arrangements within the adjacent yard [to the proposed residential development], which will aid pedestrian safety. As such the application accords with policies STR4, H3, BE1, BE8, BE11, RLT2, RLT3 and TM1 of the Sedgemoor District Local Plan."

10. The claimant is the owner and occupier of 3 Parson's Pen in Cheddar. His home adjoins the southern part of the land in respect of which the planning permission which he now seeks to impugn was granted. He is now a parish councillor. His primary concern is with the traffic arrangements involved in the proposed development.

11. On his behalf, Mr Timothy Leader now contends that the planning permission falls to be quashed on two grounds. First, he submits that the Council failed to have regard to the fact that the land in question is likely to be (and indeed is) contaminated, and that it acted unreasonably in failing to impose to condition requiring a site investigation and a scheme of remediation to be carried out before the development permitted may be begun. Secondly, he contends that the Council acted unreasonably in having regard to a planning obligation that did not impose immediately effective obligations with respect to delivery vehicles.

Who took the relevant decision to grant planning permission?

12. It is first necessary to mention a preliminary point that this case gives rise to. Mr Leader submitted that the application was, in fact, determined by the Planning Committee on May 28, 2008, leaving Mr Atkinson the task only of satisfying himself about the terms of the planning agreement. On that basis, subject to whether the agreement required was completed and its terms met the problems it was intended to resolve, the focus of this application would be on the decision of the Planning Committee, not on what Mr Atkinson may have thought when he granted the planning permission impugned.

13. Mr Atkinson's evidence is that he treated the resolution as giving him delegated powers to determine the application if the agreement referred to was reached and that he did determine it. It appears that some officers at the Council may have taken a different view of what the Committee had decided than Mr Atkinson apparently took, although Miss Megan Thomas, who appeared on behalf of the Council, suggested that Mr Atkinson did not mean to convey what his witness statement suggests.

14. As Mr Leader correctly accepted, what task Mr Atkinson had to perform is a matter that must be determined by the terms of the resolution which the Committee passed. The minutes of the Planning Committee show that it did not simply adopt the recommendation in the report to it. That recommendation was to grant planning permission subject to the prior completion of a supplementary legal agreement and subject to the 15 conditions set out in the report. The agreement envisaged in the resolution did not embrace any reference to the Operators Manual. The resolution ***128*** passed was to grant delegated permission subject to the prior completion of a supplementary legal agreement, to which I have referred, including provisions in respect of the Operators Manual. No mention was made of any conditions which might be attached to any such permission.

15. The terms of the resolution are plainly unsatisfactory and its effect is equally plainly a matter on which there can be reasonable disagreement. The Planning Committee evidently intended to confer power to grant planning permission if any agreement was completed. It no doubt also intended that officers should exercise a judgment about whether the agreement completed was satisfactory. But, in my judgment, the resolution cannot realistically be read as an instruction to grant planning permission subject only to officers being satisfied about the legal agreement envisaged. If that had been the intention, there would have been no reason for the resolution to have referred to delegation at all. Moreover, and more significantly, it can scarcely be supposed that the Committee intended to instruct officers to grant permission in that event without, for example, imposing any conditions.

16. In my judgment, therefore, on balance, the decision whether or not to grant planning permission, and, if so, on what conditions, was delegated to Mr Atkinson, albeit with a clear indication that the Planning Committee thought that planning permission should be granted if an acceptable agreement was concluded. I shall, therefore, consider the case on that basis, although I shall also consider what the position would have been if the operative decision was that of the Planning Committee.

The contaminated land issue

i. background

17. When consulted on the application, the advice of the Council's Environmental Health Officer was recorded in the Officer's report (which was considered by the Planning Committee at their meetings in April and May 2010). It was as follows, so far as relevant:

> "• The site of the proposed development is located on the same site as a former works and industrial units and the land therein and close thereto may be contaminated.
>
> • The applicant should carry out detailed site investigation, in line with current UK guidance, to determine the nature, extant and level of contamination, both in the soil and underlying geology and the application should not be determined until the results are known and the associated risks assessed.
>
> • In cases were contamination is shown to exist, a detailed scheme showing the appropriate remedial measures to remove risks to future site users should be submitted and approved before planning permission is granted."

18. This advice appears to have replicated the Environmental Health Officer's advice in respect of the application which was subsequently granted planning permission in 2009. In that grant the advice was then included as a note to the applicant, not as a condition imposed on the grant of planning permission. Why no condition was then imposed has not been explained. ***129**

19. The advice given by the Environmental Health Officer reflected the guidance by the Secretary of State in Annex 2 to PPS 23. That advice recognises, as Miss Thomas pointed out, that the primary responsibility to deal with contamination issues is that of the developer. But the advice given (at para.[2.33]) is that, where development is proposed on land that is or may be affected by contamination, an assessment of risk should be carried out by the applicant for the local planning authority before the application is determined; that any existing or new unacceptable risks should be identified and proposals made to deal with them effectively as part of the development process; and that local planning authorities should satisfy themselves that intending developers have addressed effectively the issue of potential contamination in bringing forward their proposals.

20. The further advice (at para.[2.49]) is that:

> "In determining applications, the local planning authority will need to be satisfied that development does not create or allow the continuation of unacceptable risk from the condition of the land in question."

It is also stated (at para.[2.59]) that, where it is satisfied the development proposed will be appropriate having regard to the information currently available about contamination of any of the site and the proposed remediation measures and standards, the local planning authority shall grant planning permission subject to any conditions requiring such further investigations and remediation (including verification as would be necessary, reasonable and practicable).

21. In this case, the Officer's report recommended planning permission should be granted. It proposed no condition relating to contamination. It contained no explanation why the Planning Officer thought that that recommendation in the absence of such a condition was appropriate in the light of the Environmental Health Officer's advice and the Secretary of State's policy.

22. There is no explanation in the evidence about what consideration, if any, was given to this issue by members of the Planning Committee at their meetings in April and May 2010; why this advice was not followed, or why a condition requiring investigation and any necessary remediation before the development was begun was not recommended or imposed.

23. Mr Atkinson has filed two witness statement. In neither statement does he suggest that he considered the question of contamination prior to the grant of planning permission.

24. It appears that the preliminary site investigations and analysis have, in fact, been carried out subsequently. A report on these investigations, dated July 2011, states that it is not possible to make more than preliminary comments on the likelihood of remnant contamination of the site. But it states there is a risk posed by remnant hydrocarbon contaminates on the site and that it is likely that it will be necessary to consider either further environmental assessment or remedial measures to remove the risk.

25. On June 8, 2012, the owner of the land, EE Lane & Sons (Holding) Ltd, entered into a unilateral undertaking under s.106 of the Town and Country Planning Act 1990 that development under both the 2009 and 2011 planning permissions would not be begun until a site investigation had been carried out; any necessary remediation scheme had been prepared and approved by the Council; and any necessary remediation scheme works had been carried out or complied with to the Council's satisfaction. ***130**

ii. submissions

26. On behalf of the claimant, Mr Leader submitted (i) that the site's potential contamination was a material planning consideration which the local planning authority was bound to take into account; (ii) that it had failed to do so or had failed to give any reasons why the Environmental Health Officer's advice had not been followed, supported as it was by the Secretary of State's planning guidance, and (iii) that it was unreasonable to grant planning permission without imposing a condition addressing the need for a site investigation and possible remedial matters in the circumstances. Mr Leader accepted that the unilateral undertaking now belatedly entered into provides at least the same protection as the condition which he contends should have been imposed. In those circumstances, he realistically accepted that it would be futile to quash the planning permission on this ground alone but he invited me to grant a declaration that the decision to grant planning permission was flawed.

27. On behalf of the Council, Miss Megan Thomas did not suggest that the views of the Council's Environmental Health Officer did not relate to a material planning consideration. However, she submitted that members had had regard the views of the Environmental Health Officer, as they must be assumed to have read the report in which they were contained, and that it cannot be said that they were acting unreasonably in granting planning permission without imposing any condition dealing with contamination. She submitted (i) that members were entitled to place some reliance on the fact that any developer of the site would strive to avoid any potential and future claims from homeowners arising from any adverse effects of contamination and (ii) that there were alternative statutory means open to the Council under Pt IIA of the Environmental Protection Act 1990 to secure decontamination of the land if contamination was found and judged harmful, and that (in accordance with the advice in Circular 11/95) a condition should not be imposed which would duplicate other controls. She also submitted that the fact that the owner's agents had tried to make contact with the Environmental Health Officer before the Committee considered the reports in April and May 2010 was a relevant background fact, although she accepted there was no evidence to show that members were aware of that fact.

iii. Whether the grant of planning permission was flawed

28. I accept that the claimant has not shown that the Committee failed to have any regard to what the Environmental Health Officer had advised. I am prepared to assume that they did indeed read the report written for them by the Planning Officer, and read it with care.

29. But that, of course, does not mean that the Committee acted reasonably in resolving that delegated planning permission should be granted, without complying with the Secretary of State's guidance or imposing any condition in respect of that matter.

30. Miss Thomas relied on para.22 of Circular 11/95 which advises that a condition that duplicates the effect of other controls will normally be unnecessary, and one whose requirements conflicts with the requirements of other controls would be unreasonable.

31. Part IIA of the Environmental Protection Act 1990 instituted a regime under which local authorities are responsible for causing their area to be inspected from ***131*** time to time for the purpose of identifying contaminated land, and for the relevant enforcing authority in respect of such land to serve remediation notices on appropriate persons. Requiring a developer to investigate whether a site is contaminated and to carry out remediation before any development is begun is plainly not regarded by the Secretary of State, however, as conflicting with the advice in paragraph 22 of Circular 11/05. On the contrary, in para.[2.12] of Annex 2 to PPS 23, the Secretary of State stated that in his view Pt IIA of the 1990 Act:

> "[I]s not directed to assessing risks in relation to the future use of the land that would require a specific grant of planning permission. This is primarily a task for the planning system, which aims to control development and land use in the future."

32. Indeed, even in Circular 11/95, the Secretary of State had given more specific advice about contaminated land, indicating that conditions may be imposed in order to ensure that the development propose of the site would not expose future users or occupiers of the site to risks associated with contaminants present. In particular, the advice at para.75 of that Circular was:

> "In cases where there is only a suspicion that the site might be contaminated, or where the evidence suggests there may be only slight contamination, planning permission may be granted subject to conditions that the development will not be permitted to start until a site investigation and assessment have been carried out and that the development itself will incorporate any remedial measures shown to be necessary."

33. That advice was, it appears, strengthened by PPS 23, which was issued in 2004. That advice also makes plain that merely relying on a developer's own self-interest to secure remediation (if required) before development is carried out is insufficient in the view of the Secretary of State. In his view, planning authorities are expected to exercise the powers of development control vested in them to deal with contamination issues.

34. It is plain that no reasons have been given why the Planning Committee or Mr Atkinson decided to proceed contrary to the advice of the Environmental Health Officer and the guidance of the Secretary of State. Planning authorities are obliged to give summary reasons for their grant of planning permission. Those which I have set out above do not address this issue. No complaint is made about that by Mr Leader, on behalf of the claimant. But, in my judgment, the circumstances are such that no reasonable planning authority would have proceeded to grant planning permission without a condition addressing the contaminated land issues in the face of the advice of the Secretary of State and their own Environmental Health Officer absent a good reason for so doing. None has been shown in response to this claim. Accordingly, in my judgment, the decision to grant planning permission was unlawful and I will so declare.

The planning obligation ground

i. background

35. Two of the points raised by the Highway Authority in its initial response to consultation on the application were (i) that it would be necessary to ensure that ***132*** there were appropriate service areas to allow for delivery vehicles without prejudicing the safety of users, and (ii) that access might be restricted unacceptably if vehicles had to wait within the access road to load and unload.

36. In its subsequent letter, dated March 17, 2010, the Highway Authority stated that the service areas might not constitute a safety issue if the operator of the site was content to have lorries loading and unloading on the access road but that it hoped that they would not do so. It suggested that the production of an Operators Manual specifying how the site was envisaged to operate, that all operators adhered to, might be sufficient to overcome these concerns.

37. Subsequently, in an email on April 8, 2010, the relevant officer of the Highway Authority informed the Council that it had received a supporting statement (highways) from the developer which stated that an Operators Manual would be provided to instruct users of the site in the appropriate way for delivery vehicles to park and turn within the site. The officer recommended that, if an appropriate condition was attached to the consent which would secure and enforce this document, the content of which should be approved by the local planning authority, then there would be no reason for the Highway Authority to have concerns. At that stage, it is apparent that the Highway Authority had not seen the relevant proposals.

38. As I have mentioned already, the Planning Committee deferred consideration of the application for permission at its meeting in April 2010 for further information about the Operators Manual. At its meeting in May 2010, it was provided with a report on it. That report, which was produced by the developers, stated that:

> "To ensure that the parking and residential areas can co-exist Somerset Highways have suggested the preparation of an Operators Manual, enforceable, where possible, by the Landlord as a condition in any new Leases or Lease renewals and operating meanwhile on a voluntary basis, it being in the best interests of the 5 tenants to operate safely and efficiently. (Lanes have agreed to the Manual being attached to their Lease as an enforceable condition) …
>
> As the site owner is also the Landlord of the 5 businesses operating on the site he will be able to ensure that the regulations contained in any Operators Manual are included in any new Leases or renewals (immediately in the case of Lanes) and in the interim to ensure compliance on a voluntary basis it being in the best interests of the tenants to ensure that vehicle movements and pedestrian safely are operated in the terms of the Operators Manual."

The report also set out what were intended to be the contents of that Manual.

39. The meeting of the Planning Committee on May 18, 2010 was attended by the relevant officer from the Highway Authority. The Planning Committee were told by their own planning officer that an Operators Manual had been submitted and included within the updated report for the agenda and that the Highway Authority was happy with the information provided. The Highway Authority's Officer addressed the Committee. She did not indicate that the mechanism prosed for giving effect to the Manual would not be sufficient to meet the concerns of the Highway Authority. As I have mentioned, the Planning Committee granted delegated permission subject to the prior completion of a supplementary legal agreement in respect of an Operators Manual. ***133**

40. An agreement was subsequently entered into on March 3, 2011 with the owners of the site and with a subsidiary company of the owners, who are the lessees of part of it. Clause 5 of that agreement provides:

> "After the date of this Agreement in the grant of any new lease of a commercial unit within the Premises the Owners will include a lessee's covenant to observe and perform the restrictions and stipulations [which constitute, in effect, the Operations Manual]."

ii. Consideration

41. On behalf of the claimant, Mr Leader submitted that no reasonable authority could have been satisfied that such a mechanism for getting the tenants to comply with the Manual met the concerns raised by the Highway Authority and that it was, accordingly, unreasonable to grant planning permission.

42. In my judgment, that submission suffers from two main defects. First, the Highways Authority's representative at the Planning Committee meeting was plainly aware of the mechanism proposed: it was contained in the report. She raised no objections to its sufficiency. Secondly, the Committee were entitled to take an overall view of the highways/road safety issues. They were entitled to take into account the advice that the proposal involved the improvement of parking and turning arrangement within the area, aiding pedestrian safety. The fact that further improvements make take some further time to secure does not, in my judgment, make it unreasonable to proceed with a scheme that is, on balance, in the planning authority's view, beneficial. For those reasons, this ground of challenge, in my judgment, fails. ***134**

