Stroud District Council v Secretary of State for Communities and Local Government v Gladman Developments Limited

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
6 February 2015

CO/4082/2014

High Court of Justice Queen's Bench Division the Administrative Court

[2015] EWHC 488 (Admin), 2015 WL 849499

Before: Mr Justice Ouseley

Friday, 6 February 2015

Representation

Miss J Wigley (instructed by Stroud District Council) appeared on behalf of the Claimant.
The Defendant did not attend and was not represented.
Mr P Goatley (instructed by Irwin Mitchell) appeared on behalf of the Interested Party.

Judgment

Mr Justice Ouseley:

1. This is a challenge under section 288 of the Town and Country Planning Act 1990 to a decision of an Inspector dated 21 July 2014 whereby he allowed an appeal against the decision of Stroud District Council refusing permission for a development of some 150 houses in land lying between King's Stanley and Leonard Stanley within the River Frome valley at the foot of the escarpment to the Cotswold Hills. It lay between 50 and 150 metres outside the boundaries of the Cotswold Area of Outstanding Natural Beauty ("AONB").

Three footpaths cross the site. From the footpaths, views towards the escarpment of the Cotswolds could be obtained. The Inspector defined the main issues as being the effect of the proposals on (a) the character and appearance of the area; (b) the natural beauty of the Cotswold's AONB; (c) coalescence between the two villages I have referred to; and (d) the balance between harm and benefit.

2. In paragraphs 10 to 12 he dealt with the first issue. He recognised that the development of the 8 hectares of agricultural land between the two settlements and outside the defined settlement boundaries would cause "some harm to the landscape". He said in 12:

> "From my visit, I agree that there would be some harm to the character and appearance to the immediate vicinity including much more restricted views from the footpaths crossing the site."

3. The next section of his decision turned to the AONB. He described the views that he had obtained of the site from the AONB. He referred to the popular Cotswolds Way running roughly parallel with the boundary to the AONB; the appeal site was easy visible from nearby advantage points within the AONB; houses would be seen in front of those in the two villages. He had viewed the site along this section of the Cotswold Way just below Stanley Wood:

> "In my assessment, initially at least, the new roofs and other finishes would be likely to stand out, and to jar, and have a significant impact on views across the valley from this section of the Cotswolds Way."

He went on, however, to say that with time and landscaping the development proposals would soften:

> "Consequently, from just below Stanley Wood I find that in time the

> scheme would not cause significant harm to views out of the AONB."

He referred to other viewpoints from which he concluded that harm would either be minimal or the assertion of harm not credible.

4. In paragraph 16 he said that around half of Stroud District was within the AONB. Of the remainder, most of the land in it can probably be seen in views from somewhere within the AONB. Given the need for additional housing, it followed that views from the AONB were very likely to be affected by new housing development wherever it went.

5. He then dealt specifically with two paragraphs of the National Planning Policy Framework, paragraphs 115 and 116. I shall return to the former. Paragraph 116 dealt with major developments "in" AONBs. That does not apply to this case because no part of the development is "in" the AONB.

6. He was referred in the post-Inquiry submissions to the decision of the Court of Appeal in *R(Cherkley Campaign Limited) v Mole Valley District Council [2014] EWCA Civ 567* and paragraph 44 in particular. In that case the Court of Appeal was concerned with the development abutting, and to a small extent actually falling within, an AONB. Richards LJ said at paragraph 44:

> "The *relevance* of the golf course as a whole for the AONB, including such matters as its impact on visual perspectives, is not in doubt. It forms an aspect of the landscape issues covered *inter alia* by paragraph 115 of the NPPF and Policy REC12 of the Local Plan. The question here, however, is whether the golf course as a whole can properly be regarded as a development to which paragraph 116 of the NPPF applies."

It is plain that the thrust of that judgment deals with an NPPF policy irrelevant in these proceedings. Accordingly, the Inspector rightly recognised that Cherkley was of limited relevance.

7. He recorded in paragraph 17 that the Council had argued with reference to the statutory purpose and duty of the Cotswold's Conservation Board that the scenic beauty of the AONBs can also include their settings and views out and that Cherkley could be relevant in this context. He continued:

> "I accept that, in extreme circumstances, a major development outside an AONB which caused a considerable harmful impact to its immediate landscape could have an adverse impact on the landscape and scenic beauty of an adjoining AONB. However, I have found that the impact would be less than significant in views out of the AONB and therefore give limited weight to this concern."

The penultimate sentence of that quote finds an ally in paragraph 11 of the Cotswold Conservation Board position statement, which is not a policy document with any statutory status.

8. The statutory duty to which he referred is section 85 of the Countryside and Rights of Way Act 2000 , which provides that (for example in relation to planning decisions) a planning authority, and for that matter the Secretary of State, "shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty".

9. The Inspector then considered an argument in relation to another paragraph, paragraph 109, of the NPPF:

> "The planning system should contribute to and enhance the natural and local environment by:
>
> • protecting and enhancing valued landscapes … "

It had been argued, as he recorded it, that the site is a valued landscape "as it is valued by neighbouring residents". He continued:

> "I accept that, currently, there is no agreed definition of valued as used in this paragraph. In the absence of any formal guidance on this point, I consider that to be valued would require the site to show some demonstrable physical attribute rather than just popularity. In the absence of any such designation, I find that paragraph 109 is not applicable to the appeal site. Similarly, I have studied footnote 9 to the NPPF but again note that it refers to land designated as an AONB which the appeal site is not."

10. Local Plan Policy NE8 only permitted development affecting the setting of the AONB if a number of criteria, including nature, siting and scale being in sympathy with the landscape, were satisfied. The policy has as a tailpiece the following:

> "Major development will not be permitted unless it is demonstrated to be in the national interest and that there is a lack of alternative sites."

He said of this in paragraph 19:

> "Although the proposed houses would undoubtedly have some impact, as detailed design and facing materials would be subject to reserved matters, landscape features and trees would be retained, and as the scheme would not cause significant harm to views out of the AONB, it would comply with the above criteria. Even if it were deemed to amount to major development, given the Council's lack of a 5 year HLS, there is a lack of alternative sites. On this issue, I conclude that the proximity of the

> AONB to the site should not be a bar to development."

He rejected next the coalescence argument. On sustainability, which included the question of the environmental role of the site, he said:

> "…There would be some harm to the landscape, including immediate views, and this harm counts against the proposals."

In paragraph 28:

> "Looked at in the round, I conclude that the moderate harm to the character and appearance of the area, the limited harm to the AONB, and the moderate harm (on balance) through wider accessibility difficulties, would not outweigh the economic and social benefits of new housing."

Overall, and returning to paragraph 14 of the NPPF, he concluded that the adverse impacts of granting permission would not "significantly and demonstrably outweigh the benefits" and he affirmed that in paragraph 40.

11. Miss Wigley appeared for the Council to argue four grounds. Ground 1 related to the Inspector's approach to valued landscape. Ground 2 related to the policy basis for the consideration of views towards the AONB but from outside it. Ground 3 related to the way he had described harm as moderate having found it as significant, initially at least. Ground 4 concerned the Inspector's approach to a major development in the setting of the AONB in Development Plan Policy NE8.

12. The Secretary of State did not appear, having indicated his willingness to concede that the decision should be quashed because of the way the Inspector had dealt with Policy NE8. He said he accepted that the decision should be quashed on the ground "that it is not evident

on the face of the decision letter that the defendant's Inspector fully considered all elements of Local Plan Policy NE8". I take that as a reference to ground 4.

13. I deal first with ground 1. It is important to understand what the issue at the Inquiry actually was. It was not primarily about the definition of valued landscape but about the evidential basis upon which this land could be concluded to have demonstrable physical attributes. Nonetheless, it is contended that the Inspector erred in paragraph 18 because he appears to have equiparated valued landscape with designated landscape. There is no question but that this land has no landscape designation. It does not rank even within the landscape designation that is designed to protect the boundaries of the AONB and apparently its setting, which is NE9, a policy derived from the Structure Plan. It is not a Local Green Space within policies 75 and 76 of the NPPF. It has no designation at all. The Inspector, if he had concluded, however, that designation was the same as valued landscape, would have fallen into error. The NPPF is clear: that designation is used when designation is meant and valued is used when valued is meant and the two words are not the same.

14. The next question is whether the Inspector did in fact make the error attributed to him. There is some scope for debate, particularly in the light of the last two sentences of paragraph 18. But in the end I am satisfied that the Inspector did not make that error. In particular, the key passage is in the third sentence of paragraph 18, in which he said that the site to be valued had to show some demonstrable physical attribute rather than just popularity. If he had regarded designation as the start and finish of the debate that sentence simply would not have appeared. What he means, as I read it, in the next sentence by the words "in the absence of any such designation" is in the absence of any such demonstrated physical attribute. I appreciate that the final sentence refers to "again" noting that the land is not "designated" (in a formal sense), but he refers to any "such designation" in the penultimate sentence, by which stage he has not referred to any formal designation at all. It is clear that there is a verbal infelicity in that paragraph but not one which shows to me that he has adopted an unlawful approach to the meaning of "valued".

15. There had been a certain amount of interplay at the Inquiry, and here, about the extent to which paragraph 109 of the NPPF had even featured as a significant point given that it was not cited as a reason for refusal, and there was some criticism of the paucity of the evidence about the value of the site produced by the Council. I can deal with those aspects briefly. A contention that the Inspector has dealt with valued as simply being "valued" by neighbouring residents, as if that was the sum total of the argument is, I think, going too far. Again, if he had meant to discount in that comment in the first sentence at paragraph 18 the points made

on behalf of the Council, he would have ignored certain factors which they prayed in aid. But on the other hand, the Inspector was entitled to conclude on the evidence he had before him that there had been no demonstrated physical attributes to make the land "valued". I have been taken to that which was referred to; there are certain limitations to that evidence which the Inspector was plainly recognising. He had before him evidence from consultants engaged by the Council which had not supported any particular physical attributes. More importantly, the Inspector had the evidence of Ms Kirby for the Council. Her evidence drew upon views from the footpaths in paragraph 41 and wider and more distant views from the site in paragraph 42, as well as, significantly, the views of the site from the AONB. She described the local landscape and amenity issues, again referring to the three public footpaths and the sense of open country starting before one even entered the site.

16. It is not difficult to see that the sort of demonstrable physical attributes which would take this site beyond mere countryside, if I can put it that way, but into something below that which was designated had not been made out in the Inspector's mind. The closing submissions of Miss Wigley referred to a number of features and it is helpful just to pick those up here. The views of the site from the AONB were carefully considered by the Inspector. There can be no doubt but that those aspects were dealt with and he did not regard those as making the land a valued piece of landscape. That is a conclusion to which he was entitled to come.

17. The first point raised by Miss Wigley was the visibility of the site in the wider landscape from the AONB. It is in the setting of the AONB, she submitted. But that issue, as I have said, was properly dealt with. It is difficult to see why that should be a demonstrable physical attribute when the site has not fallen within the policy designation designed to protect land beyond the AONB which is said to be important for them.

18. It is then said that the land represents a wedge of countryside extending right into the hearts of the settlement. But that issue itself was considered in relation to coalescence. It is a feature of the land but it is impossible to see that the Inspector would not have had that aspect in mind if he thought it was something that demonstrated its attributes. It was crisscrossed by well-used public footpaths and from those public footpaths it is evident that you can see the escarpment of the Cotswolds AONB and that the housing development on the site was going to impose considerable limitations. But the Inspector was entitled to regard that sort of factor as falling below the level required for demonstrable physical attributes in order for countryside to be "valued" but not designated countryside. The Inspector did not specifically refer to those factors in this context but I have no doubt that in paragraph 18, in his

description of demonstrable physical attributes needing to be shown rather than just popularity, he was not remotely persuaded that the points made by Ms Kirby demonstrated that it had attributes that took it out of the ordinary, but did not warrant formal policy designation.

19. I do not quash the decision on ground 1.

20. Ground 2 concerns the policy significance of the treatment of views out of the site towards the AONB. Paragraph 12 represents the Inspector's consideration of this issue. It is clear that paragraph 115 of the NPPF was raised as the policy basis upon which submissions about the effect of views onto the site from the AONB and from the site of the AONB were to be judged and given weight. The competing position of the parties at the inquiry was that Mr Goatley for the interested party here and for the appellant at the Inquiry contended that the word "in" in paragraph 115 meant "in" and views from the AONB to land outside it and vice versa were not subject to 115. Miss Wigley contended that views from the AONB to land outside and from land outside onto the AONB were covered by policy 115. Policy 115 says this:

> "Great weight should be given to conserving landscape and scenic beauty in … Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty."

Conservation considerations in those areas should be given great weight in National Parks and the Broads.

Harking back for a moment to the Cherkley Campaign case, paragraph 116 reads:

> "Planning permission should be refused for major developments in these designated areas expect in exceptional circumstances … "

21. It is evident, reading the decision as the whole, that the Inspector adopted neither party's point of view. He does not explain why he rejected both Mr Goatley's submissions and Miss Wigley's. It is clear from paragraph 17, the final sentence and his consideration of the views from the AONB, and paragraph 19 that he took the view that the AONB within 115 included the views from the AONB into the surrounding landscape, effectively taking the view that the beauty in the AONB would be harmed if looking out of it one saw ugliness. Mr Goatley sought to pursue the submissions he made to the Inspector by way of defending the decision against Miss Wigley's contention that 115 could not cover views from outside into the AONB.

22. In my judgment, the Inspector would have been unrealistic in adopting so narrow a view as to ignore for the purposes of paragraph 115 views out of the AONB and the effect of development upon them. I do not find it easy to accept that those have the same policy significance as views into the AONB from outside. It seems to me that there is a very considerable distinction to be drawn between the two. Before I reach the final conclusion on that point, however, I should refer to other policy matters in relation to that point.

23. Miss Wigley says that views into the AONB are important because the planning policy guidance on landscape of March 2014 refers to the duty in section 85 of the Countryside and Rights of Way Act as being relevant in considering development proposals outside an AONB but which might have "an impact on the setting of and implementation of the statutory purposes of those protected areas". The setting, she submits, includes the views in and the views out of the AONB. She also points to the need for planning bodies to have regard to the Management Plan. The Management Plan of the Cotswold Conservation Board refers to the special qualities of the Cotswolds as including the Cotswolds escarpment "including views to and from it".

24. I pause there to say it is entirely unclear whether that is referring to views inside the AONB of the escarpment or not, because much of the land within the AONB includes land that is beyond the foothills of the escarpment. The management plan also includes a statement that the surroundings are important to the landscape and that views into and out of the AONB can be very significant. The position statement, not a policy statement, of the Conservation Board says that interference with views of the AONB from public viewpoints is an adverse impact on the setting of the AONB. Miss Wigley says that either individually or all together there is a policy basis for the consideration of views into the AONB as being a factor of

significance.

25. The only point, however, that it seems to me from a consideration of those policy documents which arises is whether it is a matter to which great weight is required to be given under paragraph 115. The Inspector clearly has treated those impacts (though not set out at any great length, that is to say the impacts on views from outside looking in) as material consideration, as paragraph 12 of the decision later shows. That is the significance of his reference to the development meaning that there would be much more restricted views from the footpaths crossing the site which would be of harm to the character and appearance of the immediate vicinity.

26. So the question is whether on the proper interpretation of paragraph 115 views of the AONB from outside the AONB fall within its scope. It is my judgment that that is not what policy 115 is intended to cover. It certainly covers the impact on the scenic beauty of the land actually within the AONB. It seems to me that it would be unduly restrictive to say that it could not cover the impact of land viewed in conjunction with the AONB from the AONB. But to go so far as to say that it must also cover land from which the AONB can be seen and great weight must be given to the conservation of beauty in the AONB by reference to that impact reads too much into paragraph 115. The effect of Miss Wigley's approach would be to give very widespread protection to land outside the AONB and not significant in views from the AONB. The Inspector noted that almost everywhere in Stroud District would fall into that category. That could not be, in my judgment, the correct interpretation of paragraph 115, and the word "in" If there was an error by the Inspector, it was an error against Mr Goatley rather than an error against Miss Wigley.

27. Accordingly, I reject ground 2.

28. Ground 3 contends that the references to limited harm to the AONB in paragraphs 28 and 40 and some harm in paragraph 26 show that the Inspector has ignored, when he came to the balance, the significant harm that he has found there would be on views from a section of the Cotswold Way just below Stanley Wood in the initial years while the roofs mellowed and landscaping softened the effect of the development.

29. I am not persuaded that the Inspector had overlooked the earlier conclusions to which he had come, when he came to deal with the overall round-up conclusions in paragraph 28 and 40. Although I understand why the argument is put forward, it seems to me most unlikely that the Inspector has simply ignored that harm which he has identified, and the references to "limited harm" and "some" harm are references to the insignificant harm in the future from the views from below Stanley Wood coupled with the fact that the significant harm that he describes would be limited in time.

30. I reject ground 3.

31. Ground 4, which is the one upon which the Secretary of State threw in his hand, concerns an aspect of Policy NE8. I observe that Policy NE8 is not put forward as the policy basis either for the valued landscape argument nor for the debate about whether views into the AONB are a breach of policy. The sole point that is put forward in relation to NE8 concerns the way the Inspector dealt with the 150 houses as a major development.

32. The first observation I make is that the question of whether the development was a major development at all did not make it to Miss Wigley's closing submissions, as a major point. Indeed, it appears to have received no elaboration at all in the evidence of the Council. There was nothing to explain why this development would be a major development. A major development under that policy would require to be justified by the national interest to the extent that it was harmful. That gives an indication of the scale envisaged.

33. The second observation I make, but which reinforces the conclusions I have come to in the first and second grounds, is that the phraseology "development within or affecting the setting of the AONB will only be permitted if all the following criteria are met" and referring there to the setting of the AONB, is not what was relied on in the earlier grounds concerning views into the AONB from outside. The language of the major development tailpiece is not itself clear as to whether it applies to development within or merely development affecting the setting of the AONB, which is the highest that it could be said is the position of this development. The text accompanying that policy states that it is proposals for major development within the AONB which will only be permitted where it is in the national interest and there is a lack of alternative sites, as with paragraph 116 of the NPPF.

34. Mr Goatley makes the point that that means that the major development tailpiece did not fall for consideration here at all. He may very well be right in his interpretation of the plan but he attributes error to the Inspector in that respect in order to defend him because the Inspector clearly took the view that major development could be development outside the AONB, which might affect the setting of the AONB, viewed from inside.

35. The Inspector, in my judgment, considered this policy by reference to the first part of paragraph 19 and concluded that the criteria were met: it would not cause significant harm to views out of the AONB and thus would not affect its setting. The next aspect in his judgment in paragraph 19 is that the major development issue did not arise because this was not major development. By the sentence "even if it were deemed to amount to major development" in the context of paragraph 19, he is saying that he does not think it is. I can see no other proper interpretation of paragraph 19. Unless he had rejected the notion that this was major development he would have gone straight to deal with major development. In my judgment, the Inspector was entitled, absent any other guidance, to conclude that this development did not amount to major development and was entitled to resolve the matter in paragraph 19 in the way he did, up to his consideration of major development. If it were major development within the policy however then the Inspector has erred because he does not consider the national interest. But if that arises as an error only on the basis that the policy applies to development outside an AONB but affecting views from within it, it is an error that has no impact on the decision because the Inspector has reached a perfectly lawful conclusion that the development could not cause significant harm to views out of the AONB and would comply thereby with the criteria in Policy NE8. As I have said, NE8 was not said to be the policy which applied to protect views of the AONB from outside it.

36. The Secretary of State's letter gives no real clue as to why he threw in his hand. It is not, I would respectfully suggest, sufficient simply to say that it is not evident on the face of the letter that all elements of Local Plan Policy NE8 have not been considered. By itself that does not amount to a decision of error of law at all.

37. Finally in reply Miss Wigley developed a little further the argument, which the effect of the NPPF has sometimes given rise to, that the Inspector has not considered compliance with Development Plan Policy. This often arises where, as is said here, Policy NE8 is not wholly consistent with policy paragraphs 115 and 116 of the NPPF. Be that as it may, and accepting that the Inspector has not cast his decision in terms of whether the development accorded with the Development Plan or not, he has concluded that the development complied with the policies about which issue has been taken in these proceedings. So far as there is an error in

formulation, it does not go to the substance of the decision.

38. Accordingly, I reject this application.

39. MR GOATLEY: My Lord, thank you for that. I do not believe that any schedules have been agreed on costs but I would ask for my costs on this matter.

40. MR JUSTICE OUSELEY: Do you resist an order for costs?

41. MISS WIGLEY: My Lord, I cannot resist an order for costs in this appeal.

42. MR JUSTICE OUSELEY: There will be an order for costs in favour of the interested party to be subject to detailed assessment if not agreed.

43. MR GOATLEY: My Lord, thank you.

44. MISS WIGLEY: My Lord, I do have an application for permission to appeal. In relation to the first ground, my Lord, in my submission, with respect to your Lordship's judgment, it is arguable for the reasons I have given today that the Inspector did restrict his consideration to designated—

45. MR JUSTICE OUSELEY: Miss Wigley, I have got another matter to attend to, so I will take it shortly. I am going to refuse you permission to appeal because although your grounds were attractively presented, I think at the end of it all when one looks at the reality of the decision as opposed to the forensic play that may be made with words, the decision is perfectly reasonable and you would not, in fact, even if you were right on 115, it is difficult to see that that would in reality get you anywhere in the light of the evidence you provided and the conclusion he has come to. So I refuse you permission. If you want to renew it, without

meaning to be offensive, you know where to go.

46. MISS WIGLEY: My Lord, could I have an extension of time from when the transcript comes out?

47. MR JUSTICE OUSELEY: Your current time is, what, 14 days?

48. MISS WIGLEY: I think it is 21.

49. MR JUSTICE OUSELEY: I extend time for 21 days for you to lodge the notice of appeal, if I have power to do so. You must make sure that that order is correct. There have been one or two difficulties about such formulations recently. So I am not going to draft it for you, you must make sure it is correct. But I will give you a period of 21 days from when the transcript comes out in which to lodge any application for permission to appeal.

50. MISS WIGLEY: I am grateful.

51. MR GOATLEY: My Lord, I am not sure, do we need to ask for expedition of the transcript?

52. MR JUSTICE OUSELEY: Well, you can ask but I do not know when it will get there, you must ask the shorthand writer what she is doing.

53. MR GOATLEY: If I do not ask, I do not get, so therefore I ask for it.

54. MR JUSTICE OUSELEY: I have no objection to expedition.

55. MR GOATLEY: Thank you, my Lord.