



Neutral Citation Number: [2019] EWHC 1771 (Admin)

Case No: CO/382/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2019

Before :

MR JUSTICE DOVE

Between :

Oxford City Council	<u>Claimant</u>
- and -	
Secretary of State for Housing Communities and Local Government	<u>Defendant</u>
-and-	
Leslie Wells	Interested Party

Douglas Edwards QC (instructed by Head of Law and Governance at Oxford City Council)
for the Claimant

Tim Buley QC (instructed by Government Legal Department) for the Defendant
No appearance and no representation for the Interested Party

Hearing dates: 21st May 2019

Approved Judgment

Mr Justice Dove :

1. The application before the court in the present case is for permission to apply for judicial review, permission having been refused on the papers by Andrews J on the 11th April 2019. The facts of the application are as follows.
2. On the 13th September 2017 the Interested Party made an application for planning permission to the Claimant for two residential dwellings and an associated sustainable urban drainage scheme at land adjacent to 75, Town Furze, Oxford. The application was refused by the Claimant on the 12th December 2017. The Interested Party appealed and the written representations procedure was used for the determination of the appeal. Following a site visit on the 21st December 2018 the Defendant's duly appointed Inspector dismissed the appeal. The Inspector identified that there were four main issues falling for his determination. In respect of the first two issues, namely the effect on the character and appearance of the area and the likely impact upon an adjacent Site of Special Scientific Interest the Inspector concluded that the issues had to be resolved in favour of the Claimant, and that these matters weighed against the grant of planning permission. The Inspector was satisfied in respect of the fourth issue that matters relating to surface water management and archaeology could be dealt with by way of suitably worded conditions, and therefore were not matters which could lead to the appeal being refused. It is the third issue before the Inspector, namely the issue of affordable housing, which is the issue of contention in the present case. The background to that dispute is as follows.
3. Before the Inspector there was no dispute on either party's case but that there was an acute need for affordable housing in Oxford. In February 2013 the Claimant adopted its Sites and Housing Plan in which there was a specific policy to deal with the provision of affordable housing on small housing sites. The policy provided as follows:

“Policy HP4

Affordable Homes From Small Housing Sites

Planning permission will only be granted for residential development on sites with capacity for 4-9 dwellings, if a financial contribution is secured towards delivering affordable housing elsewhere in Oxford. The contribution required will be 15% of the total sale value of the development, and will be calculated using the formula set out in Appendix 2.

Where both the City Council and the applicant agree that on-site affordable housing is appropriate, planning permission will be granted if generally a minimum 50% of dwellings on the site are provided as affordable homes. If it can be demonstrated to the City Council that the full contribution would make the development unviable, the City Council will accept a lower contribution, in accordance with Appendix 2 (paragraph 6).

Developers may not circumvent this policy by artificially subdividing sites. For mixed-use residential developments that include student accommodation and/or commercial floorspace,

the overall development floorspace will be used to determine the contribution required.”

4. Subsequent to the adoption of the Sites and Housing Plan on the 28th November 2014 the Defendant adopted a Written Ministerial Statement providing for a policy that no affordable housing would be required in relation to residential schemes involving 10 or less units. Subsequently this Written Ministerial Statement was incorporated within the July 2018 revised version of the National Planning Policy Framework (“the Framework”), which in paragraph 63 provided, in effect, that provision for affordable housing should not be sought in relation to residential developments of up to 9 units. The tension between policy HP4 and national planning policy was the subject of contention at appeals prior to the one with which this case is concerned. In a decision relating to an appeal at Hollybush Row, Oxford an Inspector concluded that policy HP4 should be afforded full weight given the exceptional level of the need for affordable housing in Oxford, and that Inspector’s conclusion that the financial burden on developers of making provision for affordable housing on small sites would not occur in Oxford to the same extent as it might do nationally. There was further evidence before that Inspector that the application of the continuing requirement to provide affordable housing on small sites (notwithstanding the provisions of national policy) had not compromised the ability for housing completions to come forward.
5. A similar conclusion in substance was reached at an appeal in respect of the Quarry Gate Public House in Oxford. The Inspector again concluded that the particular circumstances of Oxford were such that the provisions of the Written Ministerial Statement should not outweigh local policy and the failure to provide for affordable housing on that small housing site pursuant to policy HP4 was a factor supporting the refusal of planning permission.
6. In the officer’s report on the application they concluded that the failure to make a contribution towards affordable housing contrary to policy HP4 was a factor justifying refusal of the application. The officers made reference to the previous occasions upon which the requirements of policy HP4 had been upheld at appeal notwithstanding the provisions of national planning policy. These arguments were developed in the Claimant’s appeal statement in the following terms:

“1.13 The Council has explained in its delegated report why an off-site affordable housing contribution is required under the relevant policies and acknowledged the appellants arguments that were put forward at the time and which do not seem to have changed with the appeal. The Council’s delegated reports refers to para 3.36 of the Annual Monitoring Report 2016-2017 for background. For ease this is set out below:

On the 25th July 2016 a report was taken to a meeting of full Council, setting out the City Council’s response to the Court of Appeal decision. The report referenced the extreme nature of the local need for affordable housing and evidence showing that Oxford is the most unaffordable area of the country. The report also referenced Oxford’s reliance on smaller sites of fewer than 10 dwellings given the city’s highly constrained geographical area, with very few large housing sites available. Therefore

whilst the Written Ministerial Statement is a material consideration in the determination of planning applications, on balance there is substantial evidence that local circumstances justify continuing to apply the lower thresholds set out in the adopted Local Plan for seeking developer contributions. This approach has been supported by Inspectors at appeals.

In terms of the appeal cases where this has been upheld, these are:

- APP/G3110/W/16/3162804: Site of Former Quarry Gate Public House, Oxford, OX3 8AL (16/01737/FUL)
- APP/G3110/W/16/3165091: 8 Hollybush Row, Oxford, OX1 1JH (16/01541/FUL)
- APP/G3110/W/16/3155486: Land South of Manor Place, Oxford, OX1 3UN (15/01747/FUL)

Therefore the Council maintains that an off site affordable housing contribution is required. In the absence of a legal agreement or unilateral undertaking, the appeal cannot succeed as the necessary contribution cannot be secured in line with policy HP4 of the Sites and Housing Plan and the affordable housing SPD.”

7. The Interested Party contested these claims and sought to distinguish the conclusions which had been reached in the earlier appeal decisions. The conclusions which the Inspector reached in relation to the issues concerning affordable housing were set out in paragraphs 22-25 of the decision letter in relation to the appeal in the following terms:

“Affordable Housing

22. There is no dispute between the main parties that there is an acute need for affordable housing in Oxford. As set out within the development plan, much of Oxford’s supply of new housing comes from small sites and it is important that these sites contribute to achieving a balanced community. Under the SHP policy HP4, planning permission will only be granted for residential development on sites with capacity for 4 to 9 dwellings if a financial contribution is secured towards delivering affordable housing elsewhere in Oxford. The level of contribution will depend on development viability. The proposal does not include any such contribution and would be at odds with SHP policy HP4.

23. However, amongst other things, the Framework, which is an important material consideration and carries very considerable weight, states that provision of affordable housing should not be sought for residential developments that are not major developments, other than in designated rural areas.

24. The LPA has drawn my attention to local circumstances relating to the availability of large sites, the unaffordable nature of housing within the city, as well as several previous appeal decisions⁵. Whilst I do not under-estimate the difficulties of providing or obtaining access to affordable housing in Oxford, the threshold in the Framework is clear and outweighs conflict with policy HP4.

25. I conclude on the third main issue that the proposal should not include provision for an element of affordable housing.

...

⁵ Copies of these have not been provided by they all appear to pre-date to revised Framework.”

8. The overall conclusions that the Inspector reached as to whether or not the appeal should be allowed were set out as follows:

“Planning Balance/ Overall Conclusion

30. My findings in respect of the first and second main issue above are sufficient to justify withholding permission. This would not be outweighed by my findings in respect of the third and fourth main issues or the other matters that I have identified. The harm that I have found, including the conflict with the development plan, significantly and demonstrably outweighs the benefits of providing additional housing. The proposal would not amount to sustainable development and the appeal should not therefore succeed.”

9. The appeal having been dismissed, and the Claimant having been successful in its defence of the appeal, the procedure under section 288 of the Town and Country Planning Act 1990 for challenging the decision of the Defendant on an appeal under section 78 of the 1990 Act is not available to the Claimant. The Claimant therefore brings this application for judicial review in relation to the reasoning and conclusions of the Inspector in respect of the issue of affordable housing. The Claimant contends that the Inspector’s conclusions on this issue were flawed because he failed to have regard to material considerations bearing upon the issue, namely the earlier appeal decisions, or alternatively failed to provide any adequate reasons for the conclusions which were reached in respect of those material considerations.
10. On behalf of the Claimant, Mr Douglas Edwards QC contends that although the appeal decisions to which reference has been made above were not furnished with the Claimant’s appeal representations that was not necessary in circumstances where the appeal references had all been provided and the Inspector would have had easy access to them through the Planning Inspectorates website. The suggestion that they all pre-dated the revised Framework contained in the footnote to the appeal decision provided no adequate explanation at all as to why the conclusions of those earlier Inspectors ought not to have been followed in the present case. Thus, Mr Edwards submits that the Inspector failed to discharge the principles to be derived from North Wiltshire District

Council v Secretary of State [1993] P&CR 137 in that he failed to take proper account of earlier decisions on a similar issue or, alternatively, he failed to give adequate reasons for explaining why he was departing from the conclusions which had been reached in those earlier decisions.

11. On behalf of the Defendant Mr Tim Buley QC submits that there is a preliminary issue in relation to justiciability which the court has to consider. He submits that this claim is an academic claim because, as set out above, the Claimant was successful in resisting the appeal and the aspect of the decision about which they complain will not affect the outcome of the decision. Whilst Mr Buley accepts that there is a jurisdiction for the court to consider academic judicial reviews in exceptional circumstances, he contends on behalf of the Defendant that those exceptional circumstances do not exist in the present case. He further submits that there is an alternative remedy in the present case in the form of the Claimant's ability to re-examine this Inspector's conclusions in any subsequent appeal. The essence of the North Wiltshire principle is that appeal decisions are not precedents and it is always open to a subsequent decision taker to form a different conclusion to one which has been reached in earlier appeal decisions in respect of a similar issue for a good reason. Given that the application before the court is one for permission to apply for judicial review Mr Buley drew attention to the provisions of section 31(3C) of the Senior Courts Act 1981 which provides as follows:

“31.

...

(3C) When considering whether to grant leave to make an application for judicial review, the High Court-

(a) may of his own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may have disregarded the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.”

12. Mr Buley submits that in the light of this statutory provision, and the Defendant's submission that the outcome would not have been substantially different, the court must refuse to grant leave.
13. These submissions were resisted by Mr Edwards, firstly on the basis that it was important and necessary to the court to grapple with the significance of the issue concerned so far as the Claimant's interests were affected when considering whether or not to exercise its discretion to adjudicate in the case. In the present case the issue was of particular significance to the Claimant, since it had a clear bearing upon the weight to be attached to an important policy and a potential impact upon the ability of the Claimant to secure provision for affordable housing. Mr Edwards further submitted in relation to section 31(3C) that the outcome for the Claimant was not simply the result of the appeal but also included the reasoning and interim conclusions in respect of each of the issues in the case. Thus the Inspector's conclusions in respect of affordable housing were an outcome so far as the Claimant was concerned, and that outcome would have been substantially different had the Inspector taken account of the material considerations represented by the earlier decisions or alternatively provided adequate reasoning in relation to his consideration of them.
14. It is sensible and appropriate to deal with the question of justiciability first. It is beyond argument that, firstly, the Claimant is not able to avail itself of the bespoke statutory provisions for relief in relation to a planning appeal decision provided by section 288 of the 1990 Act. Furthermore, it is in my view beyond argument that the judicial review in this case is academic, in the sense that it bears upon reasoning in a case in which the Claimant has in fact succeeded. A claim was brought in very similar circumstances in the recent case of Tewkesbury Borough Council v Secretary of State for Communities Housing and Local Government and Other [2019] EWHC 1775 (Admin). For all of the reasons which are expressed in paragraphs 32 to 39 of that judgment, which are of application to the present case, I am entirely satisfied that in the present case it would not be appropriate for the court to exercise jurisdiction in this claim. Whilst such a jurisdiction may exist in respect of hypothetical cases I do not consider, for the reasons given in the Tewkesbury case, that this case is one of the exceptional cases in which jurisdiction should be deployed.
15. In particular, in the present case the court is not concerned with a question of policy interpretation but rather the weight to be attached to a local policy in particular evidential circumstances. The weight to be attached to policy HP4 is quintessentially a question of planning judgment to be reached bearing in mind not simply the terms of the policy but also the surrounding evidential matrix pertaining to a particular case. Furthermore, as explained in the Tewkesbury case, there is every opportunity for the Claimant to seek to persuade a subsequent Inspector that the Inspector in the present case was in error in reaching the conclusion he did about policy HP4 for the reasons which Mr Edwards effectively articulates as breaches of the North Wiltshire principles in the present case. Mr Edwards complains that the only forum in which those points can be articulated and adjudicated upon as an error of law are in reality this court. That may, in substance, be true, but is not in my judgment a basis for regarding this case as exceptional or one in which the intervention of the court is required. As is explained in the Tewkesbury case it is a feature of the statutory framework for decision-taking in relation to appeals under section 78 of the 1990 Act that issues of this type can be re-investigated in subsequent appeals without the need for any intervention by the court in

that process. Whilst the Tewkesbury case made reference to section 31(2A) of the 1981 Act it is clear that the provisions of section 31(3C) and following are to similar effect and, again, for the reasons set out in the Tewkesbury case are a further reason why the court ought not to entertain engaging with the Claimant's case.

16. It follows that for all of these reasons in my view the Claimant's case is unarguable as there is a clear bar to its consideration on that basis that it is academic and there are no exceptional circumstances pertaining to it which would justify the court giving it consideration. I therefore propose on that basis alone to refuse permission, and given the nature of that refusal it is inappropriate for the court to go on to consider and form any view as to the substance of the claim.