



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

Case No: CO/5120/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

Between :

The Queen on the application of Glenn Patrick Smith	<u>Claimant</u>
- and -	
Castle Point Borough Council	<u>Defendant</u>
- and -	
Benfleet Scrap Ltd	<u>Interested Party</u>

Mr W. Beglan (instructed by **Holmes & Hills LLP**) for the **Claimant**
Mr D. Stedman Jones (instructed by **the Borough Solicitor**) for the **Defendant**
No appearance or representation for the **Interested Party**

Hearing date: 15 May 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

C. M. G. Ockelton :

Judgment

1. The Interested Party, Benfleet Scrap Limited, operates a scrap metal yard on land adjacent to 16 Brunel Manor Road, Benfleet, SS7 4PS (“the site”). Planning permission was granted for that use, with conditions, on 8 March 2002. I am not concerned with the conditions that were imposed on that occasion save to observe that they did not include any condition limiting the storage of waste on the site by reference to height of deposit or anything else. The site occupies about 0.86 ha. It is on the edge of a trading estate, with other industrial properties to the west and south, and green belt land to the east and north. There is an Environment Agency licence for the scrapyards, which, among other provisions, limits the height of stored material to 5 m.
2. In September 2018 the Interested Party applied for planning permission for a wall 5m high along the south and east boundaries of the site, constructed of posts and concrete slabs, with a “buffer zone” outside the wall, which might be planted. As the application acknowledged, development had already begun without planning permission: the wall was already in place along the south boundary and part of the east boundary, the latter being about 113 metres long. The permission sought was therefore in part retrospective. The claimant owns some of the land adjacent to the site, including some green belt land. He hopes to develop it for residential and other purposes. He objected to the application, making detailed observations under a number of heads.
3. The decision on the application was delegated. The Officer’s Report, signed by Keith Zammit and dated 9 November 2018, recommended approval. Planning permission was granted, without conditions, by the Defendant on the same date. In these circumstances the Report stands as the reasons for the decision.
4. The Report summarised the claimant’s letter of objection as follows:

“Consultation responses

... A lengthy objection from a planning consultant has been received on behalf of the owner of adjoining land to the north and east. The general thrust of this objection is that Benfleet Scrap is not run in a very satisfactory manner, causes pollution of the environment and that the wall will have a great visual impact than existing boundary treatment, cutting out views from and to the green belt.”
5. By these proceedings the claimant challenges the decision. Permission was refused on the papers but, granted on limited grounds by Holgate J after a hearing. The grounds with which I am concerned assert error by the defendant in its approach to contamination, the planning history of the site, and the green belt.

Contamination

6. The application for planning permission used a form which at section 6 was completed as follows:

“Does the proposal involve any of the following? If Yes, you will need to submit an appropriate contamination assessment with your application.

Land which is known to be contaminated. No

Land where contamination is suspected for all or part of the site. No

A proposed use that would be particularly vulnerable to the presence of contamination. No.”
7. The claimant’s objection said that the land was contaminated. The evidence was that there was contamination on the claimant’s land, next to the site. The wall would be built on the site, which was contaminated land, and “hence as a matter of law, the application must be supported by targeted contamination reports (Phase 1 desk Top and Phase 2 Intrusive as a minimum) so that appropriate remediation can be considered within the context of the application. In the absence of such assessment, the planning application is fatally flawed and should not be determined.” This matter is referred to again at a number of points in the letter.
8. The only references to this issue in the Report are in the summary of the claimant’s letter, “Benfleet Scrap ... causes pollution of the environment”, and in the Comment on Consultation Responses, “If the business is causing environmental pollution, the adjoining landowner could report this to the Environment Agency”.
9. An enormous amount of material has been put forward by the claimant on this issue, including the detailed results of the tests made on his land (i.e. not on the site) and numerous policies relating to contaminated land and development on contaminated land. The ground of challenge is that by treating the allegation of contamination in this summary way the defendant failed to take a material consideration into account. The defendant was aware of the claimant’s position, that his land was contaminated, because he had previously asserted it. Furthermore, the defendant regarded the site as “potentially contaminated”, as is apparent from an entry in its records; but there was also an assessment that the “risk of oil run-off to affect ground water is considered as low”.
10. Mr Beglan refers to the requirements of the document “Land affected by Contamination: Technical Guidance for Applicants and Developers” (second edition, 2007) produced by the Essex Contaminated Land Consortium, and adopted by the defendant, which adopted guidance found in PPS 23 as in force in 2007, and Planning Practice Guidance in force at the date relevant to the present application, “Land affected by Contamination” published 12 June 2014, particularly at para 007. There is also a printout from the defendant’s website accessed on 14 May 2019, but still referring to PPS 23, and PPS 23 itself.
11. The arguments raised are partly intertwined with the assertion that the application was implicitly intended to facilitate intensification of the site’s use. I reject that assertion,

for reasons given in relation to the next ground, “planning history”. The application fell to be considered on its own terms: it was an application for permission to build a wall on the boundary of an existing and functioning scrapyard. The assertion in the letter of objection that the presence of contamination outside the site and/or the defendant’s knowledge of the site required reports “as a matter of law” must be a reference to the guidance documents. It is not easy to see that in the presence of so much detailed guidance there was also a free-standing duty to take contamination into account in circumstances where the guidance does not apply, and I did not understand Mr Beglan to rely on one. Mr Stedman Jones’ position was that the guidance cited by Mr Beglan does not have the impact on this application that he claimed. It is of course common ground, following Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 that the interpretation of the policy is a matter for the Court, and that the authority is obliged to apply policy according to its true interpretation.

12. In my judgment, the clear position is that the guidance did not require the reports and assessments in question in the present case. The submission that they were required can be made only by taking extracts from them out of context.

13. It is convenient to begin with the most local and the most detailed, the Technical Guidance. This contains the requirements for at least a desk study, site walkover, and preliminary risk assessment. But the whole guidance is somewhat restricted in its application, as its opening chapter makes clear. It begins as follows:

“1.1 As part of the Development Control process the Council aims to bring derelict land back into use. Some sites, particularly those that have been used for industrial processes, may be affected by contamination.

...

1.5 The purpose of this guide is to provide planning agents, developers and other applicants with details of the type and extent of investigations and decontamination schemes required by the Council for these sites. ...”

14. The site relevant to this application is not a derelict site being brought back into use. Indeed, it is simply not the purpose of the guide at any point to make provision for ‘investigations and decontamination schemes’ in relation to industrial land continuing in use. Mr Beglan submitted, in response to an argument raised by Mr Stedman Jones, that the document is not limited to proposals for residential development. Indeed, it is not, but that does not mean that it covers anything other than bringing derelict land back into use, whether for residential leisure, commercial or even resumed industrial use.

15. PPS 23, which no doubt forms in part the basis of the Technical Guide, is no more helpful to the claimant. At para 10 it says this:

“The planning and pollution control systems are separate but complementary. ... The planning system should focus on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than the control of

processes or emissions themselves. Planning authorities should work on the assumption that the relevant pollution control regime will be properly applied and enforced. They should act to complement but not seek to duplicate it.”

16. Mr Beglan relied particularly on para 24, which again sets out the necessary assessment, but the wording is that:

“LPAs should pay particular attention to development proposals for sites where there is a reason to suspect contamination, such as the existence of former industrial uses, or other indications of potential contamination.”

17. This passage is enclosed by paragraphs 23 and 25, the whole section having the heading “Development Control”:

“23. In considering individual planning applications, the potential for contamination to be present must be considered in relation to the existing use and circumstances of the land, the proposed new use, and the possibility of encountering contamination during development.

...

25. The remediation of land affected by contamination through the granting of planning permission (with the attachment of necessary conditions) should secure the removal of unacceptable risk and make the site suitable for its new use.

...”

18. In my judgment it is perfectly clear that here too the guidance is concerned with applications for change of use. There is no suggestion that the provisions are intended to apply to incidental developments on a site with an established use.

19. This view is confirmed by the wording of the 2014 Planning Practice Guidance. Paragraph 003 is headed “What is planning’s contribution?”. The answer given is as follows:

“The contaminated land regime under Part 2A of the Environmental Protection Act 1990 provides a risk based approach to the identification and remediation of land where contamination poses an unacceptable risk to human health or the environment. The regime does not take into account future uses which could need a specific grant of planning permission. To ensure a site is suitable for its new use and to prevent unacceptable risk from pollution, the implications of contamination for a new development would be considered by the local planning authority to the extent that it is not addressed by other regimes.”

20. It is true that the phrase “a new development” is general, but the context is again that of a “new use”. Paragraph 7 again contains requirements for assessment and report, but in that context. It is in fact rather less prescriptive than its predecessor.

21. There is a further aspect to this issue. PPS 23 observes at para 8 that:
- “Any consideration of the quality of land, air or water and potential impacts arising from development, possibly leading to an impact on health, is capable of being a material planning consideration, in so far as it arises or may arise from land use.”
22. At the end of the 2014 Guidance there is a flow chart. The first question is: “Is site potentially affected by contamination and could development result in unacceptable risks?”. If the answer is “No”, the next step is “Proceed to decision”. It is only if the answer is “Yes” that the risk assessment regime applies.
23. Both of these point to the fact that the requirements of assessment and reports and so on are intended to be imposed only if the proposed development (“arising from the development”; “could development result in”) itself poses the risk. Obviously that would be the case if contaminated land were to be developed by certain changes of use. Equally obviously, the possibility of the construction of a wall around a scrapyard does not itself give rise to the risks in question.
24. For these reasons, the issues of development on contaminated, possibly contaminated or potentially contaminated land raised by the claimant do not have the effect he claims. This was not a case where the defendant had to undertake the assessments and make the reports required where there is a proposed change of use, or a proposed development creating a risk of contamination. On the contrary: the defendant correctly followed the guidance, which had the effect that it should assume the pollution control regime (to which the report specifically referred) would be operated and enforced, treating as planning matters only such things as were not addressed by other regimes; and, having appreciated that the proposal to build a wall was not said itself to be going to result in unacceptable risks (and realistically was incapable of doing so), the defendant proceeded to decision.
25. I reject the ground based on contamination.

Planning History

26. The Planning Statement accompanying the application described the proposal as for a 5 m high wall “being the same height as the open storage on the site”. Under “Site Description” at section 2, there is a statement that open storage is permitted “up to a height of 5 metres”. Under “Planning History” at section 3, there is a comment that “Previous permissions pre-date the website records and it is understood that they have included some restrictions on the use and height of open storage”.
27. The claimant’s letter of objection said at page 2 that there was in the application no indication of how the yard is used or is intended to be used; and “the increase in height will implicitly allow a material intensification of the use which is not factored into the application”. Then, with reference to what the Planning Statement said about height, is the comment “This is far from conclusive on what height of storage is allowed (under planning or EA licensing) and how this justifies the proposal to increase the boundary enclosure [from the existing 2-4m] by some 3 m [sic] in height? The application should clarify exactly what the permitted height is, or if not, then what the intended height of storage is, and how this is enabled by a 3 m height

increase in the wall. The planning statement does not anywhere acknowledge the proposed increase in height of the boundary. The increase is not then justified in relation to how the use is operated (or intended to be)”.

28. Later, the letter sets out a series of allegations about the operation of the site, with photographs. Specifically, it says that there is sometimes unstable storage on the site rising to 6 or 8 m, and “on behalf of my clients I submit that the proposed wall is nothing more than a stalking horse to allow Benfleet scrap to store and process more metal than they do at the moment”. There are then further assertions about the way the business is run, and then this:

“There has been no assessment of how the 3m increase in wall height will alter the scrap processing potential in terms of volumes, tonnage, vehicle movements, staffing levels, onsite parking, etc. . . . I appreciate that some of the limiting factors are related to licensing, but it is for the applicant to make his case and demonstrate why this proposal is acceptable in all respects, and where there are licensing restrictions, oddities or potential anomalies, these should be explained.”

29. The relevant passages of the Officer’s Report (in addition to the summary of the objection, noted above) are as follows:

“The running of the scrap business is not a matter for consideration in the context of this application. The application before the local planning authority is for boundary treatment . . .

.

“It is noted that the adjoining landowner fears that the provision of this wall may simply enable the scrapyard operator to store scrap to even greater heights, worsening the existing problems of scrap and pollutants escaping the site onto his land. However, there is no condition on the planning permission for use of the site . . . that limits the height to which scrap may be stored. While it may have been prudent to impose such a condition with the benefit of hindsight, the simple fact is that there is no planning mechanism to prevent the operator of the site storing scrap to the height he wishes, regardless of whether this application is approved.

...

On the matter of whether any permission granted should be subject to conditions, it is not considered that any are necessary.”

30. The claimant’s grounds of challenge under this head are first, that the Report shows that there was insufficient investigation into the existing limitations on the use; secondly that the Report’s treatment of the planning history is insufficiently reasoned, and thirdly that the defendant ought to have considered imposing, in the present grant, a condition directed to the operation of the site.

31. The first part of that challenge is based on a wholly unsustainable speculation. It seems to be said that the defendant should have discovered conditions imposed on the original grant of planning permission and taken them into account in making a decision on the present application. There were no relevant conditions in the previous grant. That is specifically stated in the Report, and there is not the slightest reason for thinking that the Officer had not checked (particularly given his expressed view that it might have been better if there were conditions). Further, there is no basis now for saying that there were such conditions. The Planning Statement's author's "understanding" was simply mistaken. There is nothing more to be said.
32. The claim that this part of the Report is insufficiently reasoned is apparently a new point in the skeleton argument for the hearing. There is nothing in it. It is far from easy to see any gap in the reasoning even if a forensic analysis of the Report is undertaken, but that is not the test. A report written for a planning committee of a local authority is written for a knowledgeable readership, with some knowledge of the tests to be applied, and will not be subject to judicial challenge unless read as a whole it is misleading. The authorities and their effect are conveniently summarised in the judgment of Hickinbottom J (as he then was) in R (Midcounties Co-operative Ltd) v Forest of Dean DC [2015] JPL 288 at [5]. The difficulty of mounting a challenge of this nature must be even greater when, as here, the readership is not a planning committee but a professional officer operating under delegated powers. The author of the Report noted what the claimant's objection had said. He considered whether it would be appropriate to impose any conditions on the grant of planning permission for the wall. No doubt he had in mind (there was no need for him to set it out) the relevant test, that any condition would have to be necessary, relevant to planning and to the development to be permitted. There is a wholly intelligible chain of reasoning on the issue of planning history, and the Report does not mislead.
33. Finally on this ground, it is argued that the defendant should have considered, and by implication perhaps imposed, a condition relating to the operation of the site. Mr Beglan submits that "it was open to the defendant to consider imposing a condition relating to the height of open storage consistent with the planning statement ... the Report simply does not address this point".
34. The power to impose a condition on an existing use, when there is a grant of permission relating to the site in question, is well established: see Penwith DC v Secretary of State for the Environment (1977) 34 P & CR 268. The power is not at large, however: the condition imposed must be related to the development being permitted (ibid, and see also NPPF para 55). So the first question posed by Mr Beglan's submission is this: in what way could a condition restricting the height of open storage be related to the construction of the wall? The answer provided by Mr Beglan is, he says, to be found in the claimant's letter of objection: the wall was intended to enable intensification, and a suitable condition might prevent intensification occurring. But the assertion that the purpose of the wall was to enable intensification is merely a feature of the claimant's rhetoric: there is no evidence at all to support it. Indeed, to an extent it is undermined by the claimant's own evidence that even without the wall there has been storage over 5 m high. Nothing anywhere else in the material before the defendant is capable of raising this issue. This is wholly different from Penwith, where the avowed purpose of the development sought

was to intensify use of the site and enable the existing development to be used more efficiently and for longer hours.

35. Next, a condition could only be imposed if it were necessary (amongst the other factors set out in NPPF para 55). No suggestion of necessity is raised by Mr Beglan. Any general prohibition on intensification would not be necessary, because intensification amounting to a material change of use would require planning permission anyway. And a specific prohibition against storage over 5 m high would not be necessary in the present case because the prohibition is already in force as part of the licence.
36. One adds to this the factor that the letter of objection did not suggest the imposition of such a condition, and the result is that the defendant is being criticised for failing to consider whether to impose a condition that it would not in general have had power to impose, that would apparently not have been necessary, and which nobody had suggested. In my judgment the defendant had no obligation to consider this matter.
37. The ground relating to the planning history therefore fails on each of the points raised.

Green belt

38. The boundary of the site is the boundary of the green belt. The claimant's letter of objection raised a number of issues relating to the visual impact of the proposed development. The first is that the "buffer zone" was not properly delineated; it appeared to be inaccessible and so could not be maintained; the interested party had a history of allowing scrap to escape outside the existing boundaries and might well continue to do so. Secondly, The Planning Statement contained no assessment of the impact on the green belt, but asserted, wrongly in the claimant's view, that the wall "would not have any discernible impact on the openness of the green belt".
39. The letter of objection had said that the visual impact of the wall will be greater than at present with the lower boundary fence. "It could be argued that the proposed wall will screen the scrap, but ..." and this objection shades off again into complaints about the management of the site. What there is not at any point in the letter of objection is any hint of the difference between what is allowed by the licence, that is to say scrap metal 5 m high, and what will be there if the application is successful, that is to say a wall 5 m high occupying the same part of the view. Instead, there is a further assertion that the wall will harm the openness of the green belt, and "does offend national and Local Planning Policy" and permission should be refused pending some sort of investigation into the interested party's "business needs, remedies, business practices and development remedies", which should be "properly justified in a better mannered application".
40. The visual impact of the proposed wall was taken by the Officer as a main issue in the application. The Report sets out a short and relevant history of policy on development visible from green belt land, quoting the current Local Plan Policy EC2, requiring the appearance and treatment of spaces around buildings to be enhanced with appropriate hard and soft landscaping, noting the concordance of that with para 127(b) of NPPF, considering that a wall is 'hard landscaping', and that the proposed development does not conflict with the purposes of the green belt set out in NPPF para 134.

41. Noting that the wall would ‘of course’ be visible from the green belt land, and summarising the claimant’s objections, the Report observes that if the boundary of the site is prominent in views at present, that is because the claimant has cleared trees and vegetation from his land. The Report continues as follows:

“[P]art of the proposed wall has already been constructed, which is light grey in colour, being formed of concrete panels. The earlier boundary treatment, which remains along the northern sections of the eastern boundary, is darker coloured. Although the proposed wall would be higher than the former boundary treatments by between 1 and 3 metres, and would be light-coloured, it is not considered that the visual impact of this would be significantly greater than the old boundary treatments. The old boundaries are quite dilapidated in appearance and providing a new concrete panelled wall might be said to be a visual improvement, even though it would be taller than the boundary treatments it replaces. The provision of higher boundary treatment may also serve to better screen the scrap, which the adjoining landowner finds visually offensive. ... Taking all relevant factors and representations received into account, it is not considered that there may be an objection to the proposal on the basis of its visual impact.”

42. The Report then goes on to consider the other “main” factor, the impact on residents. It is noted that the screening of the site by the proposed wall is to be welcomed because of the impact it may have on noise. The final relevant factor is in relation to conditions. The Report shares the claimant’s view that planting in the “buffer zone” is unlikely to flourish.
43. The claimant’s first complaint is that the clearing of vegetation near the boundary by the claimant is wholly irrelevant to the planning judgment to be made. I agree. There is, however, no reason to suppose that it impacted on the planning judgment. On the contrary, the point that the wall will be visible is treated as the starting-point, and it is evident too that the judgment in relation to visual impact is made on the basis that the wall will be highly visible and that it will not be ameliorated by planting in the “buffer zone”.
44. The next complaint is that the Report is equivocal when it should have made clear findings on the prominence, the question of visual improvement, and screening. I do not accept this submission, which amounts to precisely the sort of level of criticism of an officer’s report that is not to be undertaken in the courts. The Report reads as the thinking of a person who is taking all relevant factors into consideration and, in particular, not reaching a final view until all relevant factors have been identified. There is nothing wrong with that: indeed it is to be encouraged. Specifically so far as regards screening, there was no reason for the defendant to make a decision on the assumption that the site would be (and would not be restrained from being) in the future operated unlawfully.
45. Nor in my judgment is it properly arguable that the defendant erred in considering that the alternative to allowing the proposed development was that the boundaries would

remain as they were. There was no alternative under consideration, and no alternative had ever been suggested by the interested party so far as I can see: certainly none is mentioned by Mr Beglan.

46. The remaining argument under this head, that the defendant's finding was perverse as an exercise of planning judgment, because the interested party had indicated that it too thought the present boundary was inadequate, is simply hopeless. It depends on reading into the Interested Party's acts and words some alternative proposal that the defendant ought to have considered. But there was no alternative. The Report considered the material available against the relevant policies and reached a view after taking into account the relevant considerations. As an exercise of planning judgment on visual impact it is unassailable.
47. I reject ground 4. As I have found that there was no error of law in the decision under challenge, I do not need to consider s 31 of the Senior Courts Act 1981. The claimant's application for Judicial Review will be dismissed.