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ECC CONSTRUCTION LIMITED v. SECRETARY OF STATE FOR THE ENVIRONMENT AND CARRICK DISTRICT COUNCIL

QUEEN'S BENCH DIVISION (Gerald Moriarty, Q.C. sitting as a deputy High Court judge): July 25, 1994

Town and Country Planning—Affordable housing—Permission granted for residential development—Permission lapsed although fresh application made—No site specific policy making provision for affordable housing—Whether need for affordable housing a material consideration capable of outweighing presumption in favour of development in accordance with statutory plan—Whether Inspector justified in refusing permission

The applicant had sought planning permission for a residential development on land at Truro. Outline permission for the development had been granted in 1989. Although that permission had subsequently lapsed, a fresh application had been made whilst the 1989 permission was still valid. The district council accepted the principle of residential development but now required the site to be used for "affordable housing". On appeal, the Inspector appointed by the Secretary of State considered that the main issue for determination was whether the proposal should make provision for affordable housing. Although the local plan policies which made provision for affordable housing were not site-specific to the appeal site, the Inspector concluded that the proposal did not contain adequate provision for affordable housing and, notwithstanding that in principle a housing development was an acceptable use of the appeal site, dismissed the appeal. The applicant sought to challenge the Inspector's decision in the High Court.

Held, dismissing the application, that, it was clearly the policy of the Secretary of State to encourage local planning authorities to have regard to the provision of affordable housing, notwithstanding that there was not specific provision in the structure plan. As such, the need to provide affordable housing was a material consideration which the Inspector had been justified in bearing in mind in reaching his decision. The Inspector had properly identified and interpreted the relevant policies, and had given a reason statement of his planning judgment that the proposal did not make adequate provision for affordable housing. The fact that a material consideration was to be found outside the statutory policies did not mean that it was not capable of being of great weight. It was a matter for the Inspector's planning judgment, even where the consideration weighed so heavily as to justify refusal of permission even though the proposal was otherwise acceptable. Otherwise, there would be an effective bar upon any decision-maker who wished to have regard to any consideration not based on the development plan. It was also not in accordance with the principle that each case was decided on its own merits.

Cases referred to:

(1) *Clyde & Co. v. Secretary of State for the Environment* [1977] 1 W.L.R. 927, [1977] J.P.L. 31.

(2) *Mitchell v. Secretary of State for the Environment and Another* (1994) 69 P. & C.R. 60.

(3) *Tesco Stores Ltd v. Secretary of State for the Environment* (1994) 68 P. & C.R. 219.

(4) *Westminster City Council v. British Waterways Board* [1985] 1 A.C. 676; (1986) 130 S.J. 409; (1986) 150 J.P. 449; [1986] 2 All E.R. 353; (1986) 83 Cr.App.R. 155; (1986) 84 L.G.R. 801; [1986] Crim.L.R. 693; (1986) 136 New L.J. 491; (1986) 83 L.S.Gaz. 2089, H.L.

(1995) 69 P&C.R. 51

Application under section 288 of the Town and Country Planning Act 1990 to quash the decision of an Inspector appointed by the Secretary of State for the Environment, given in a letter dated January 5, 1994. The Inspector thereby dismissed an appeal under section 78 of the Town and Country Planning Act 1990 against the decision of the local planning authority who had refused planning permission for a residential development of land at Truro. The grounds of the application and the facts are stated in the judgment of Gerald Moriarty, Q.C.

Christopher Katkowski for the applicant.
Richard Drabble for the first respondent.
The second respondent did not appear and was not represented.

GERALD MORIARTY, Q.C. In this application under section 288 of the Town and Country Planning Act 1990, the applicant company challenges the decision of the Secretary of State by his Inspector in the letter of January 5, 1994. The appeal was conducted by written representations. The Inspector refused planning permission for residential development of land at Tregolls Road in Truro. The site is described in paragraph 2 of the decision letter as follows:

> The appeal site comprises 5 unused fields totalling 8.4 ha on the eastern edge of the town, mostly flanked by other residential development and 2 schools. However, the north-western edge of the site is bordered by the line of the proposed Tregolls Road by-pass which passes through part of the northernmost field. The land generally slopes downwards from east to west and the fields are each bounded by dense hedgerows containing many semi-mature trees. A network of informal footpaths crosses the land and there is evidence of badger sets towards the middle of the site.

The structure of the decision letter is clear. The issue is defined in paragraph 3:

> I note that the Council resolved on 9 December 1992 to authorise the determination of the application subject to the completion of agreements under section 278 of the Highways Act 1980 relating to highway matters and under section 106 of the Act relating to the allocation of land for local needs affordable housing, in accordance with the Council's relevant planning policy. I understand that the highways agreement was completed on 16 December 1992. As the Council appear to have accepted the principle of residential development at the site I therefore consider that the main issue in this case is whether the proposal should make any provision for affordable housing.

In paragraph 4 the Inspector referred to an outline permission for residential development of the site granted in January 1989 which he held had lapsed. Because the application had been made before the permission lapsed he applied Circular 1/85 and directed himself that he should refuse only if a material change in the planning circumstances required it. He then identified the changes in these words:

> 4. . . . In this case, the relevant changes appear to me to comprise the

introduction of section 54A of the Act, the approval of the First Alteration of the County Structure Plan, the emergence of the draft Truro Local Plan, the publication of the revised version of Planning Policy Guidance Note (PPG) 3 and the approval by the Council of its Planning Policy for Local Needs Housing.

In paragraphs 5 to 11 he approaches those changes and considers them. He does so following the sequence in which he had identified them. I should read paragraphs 8, 9, 10 and 11 because those are particularly important to the applicant's case:

> 8. It seems to me that the proposal would comply with the relevant policies of the development plan. I have therefore given consideration to the other material considerations in this case, as listed in paragraph 4 above.
> 9. In the case of the emerging local plan, housing policy 6A makes a general presumption in favour of renewing previous housing consents, provided there has been no change of circumstances and there is no conflict with other local plan policies. Although there is a statement in this policy that 25 per cent of the plan's housing allocation will be allocated for low cost/"affordable" housing, this appears to me to relate to certain specified allocations which do not include the appeal site. No other housing policy in the local plan precludes development of the site and I note that policy 6J about housing for local needs relates to Structure Plan Policy H14a and rural sites. Similarly, Appendix E applies to rural housing policy and specifically does not apply to Truro. Nor is there any evidence of underlying conflict with infrastructure, traffic management or countryside policies, subject to the creation of an acceptable layout and the safeguarding of nature conservation interests. The plan has reached only an early stage in the procedural process and is now to be incorporated into a District-wide local plan. Although it can be afforded only limited weight, I cannot see any conflict in principle between the proposal and that plan.
> 10. However, the current version of PPG3 indicates that a community's need for affordable housing is a material consideration which may properly be taken into account in formulating development plan policies. Although such a need has not yet been formally incorporated into the development plan for the Truro area, the Note advises that it may be desirable that new housing development on a substantial scale in urban areas should incorporate a reasonable mix and balance of house types and sizes. Where there is a demonstrable lack of affordable housing throughout a plan area, authorities may indicate a target, including targets for specific sites, based on evidence of need and site suitability.
>
> The inclusion of the element of affordable housing will be reasonable, both on allocated sites and on other sites. Policies must be flexible, and must indicate what arrangements are expected to ensure that such housing is reserved for those who need it.
> 11. In furtherance of this advice, in 1992 the Council (through their Housing and Planning Committees) adopted a Planning Policy for Local Needs Housing as a revision of an earlier policy dating from 1990. This was developed in association with a Housing Strategy Statement which is produced annually and I note that the latest Statement dated

> July 1993 was produced after consultation with the public and relevant agencies. In view of PPG3, I consider the Policy and Statement to be material planning consideration in this case to which significant weight should be attached because of the wider consultation and the Council's corporate approach. I note that the policy is intended to be incorporated into the District-wide local plan.

In paragraphs 12 and 13 the Inspector went on to consider how many affordable housing units were appropriate on the site.

In my view, his statement in paragraph 13, that the applicants were prepared to provide 30 units of affordable housing, is justified in the context of the submissions that had been made by the applicants. They are important submissions, notwithstanding that the applicants made it quite clear that they were putting forward their proposals for affordable housing subject to a reservation of the position on the principle of whether or not there should be such housing.

In paragraphs 15 to 18 the Inspector then considered the adequacy of the undertaking to provide affordable housing embodied in a draft submitted to him by the applicants. At the end of his decision letter, in paragraph 22 he said:

> In summary, I consider that although the site is suitable for residential development in principle and that matters of density, layout and nature conservation could be satisfactorily dealt with, the proposal does not make secure provision for 30 units of affordable housing which would be appropriate for the site.

Mr Katkowski for the applicants based his submissions on a number of presumptions; first, the presumptions to be found in P.P.G. 1 in paragraph 25 and paragraph 5; secondly, on the presumption to be found in Circular 1/85; thirdly, on section 54A itself and, fourthly, on policy 6A referred to in the Inspector's decision letter.

The affordable housing policy is to be found in the relevant plans, that is the structure plan, the local plan, and also in the more recent policy material adopted by the council. That policy does not apply to this site because the site is to be treated as already a commitment to housing development. The policies look rather more to the future and to allocations.

Mr Katkowski attacked the decision on three main grounds.

First, he contended that the Inspector had misunderstood P.P.G. 3 and the draft explanatory note produced in December 1992. Secondly, he contended that the Inspector had failed to follow the policy in the relevant plans, and in P.P.G. 1, and failed to observe the other presumptions to which I have referred. Thirdly, he contended that the Inspector had given inadequate reasons for his decision. The main thrust of Mr Katkowski's submissions was that the failure to provide a benefit, which was not required by policies to be found in the plan, could not be considered to be demonstrable harm, and in those circumstances permission should have been granted for residential development on this site without making provision for affordable housing.

Mr Drabble, for the Secretary of State, contended that there was a recognised need for affordable housing in reliance on P.P.G. 3 and the draft note; secondly, that that need was capable of being a material consideration, and, thirdly, that the failure to meet a need by providing benefits not required by the plan policies was nevertheless capable of being

demonstrable harm. He relied on the decision of the Court of Appeal in *Mitchell v. Secretary of State for the Environment and Another*.[1] Before considering that decision, I note that in the covering letter to the draft explanatory note of planning and affordable housing the Department write:

> The enclosed draft guidelines do not represent a change in policy; rather, they elaborate current policies. They explain more clearly what is or is not permissible, in order to enable local planning authorities to:
> (i) set out plan policies that are more likely to survive legal challenge; and
> (ii) take account of affordable housing in planning decisions in a way that Inspectors are more likely to support at appeal.

I have taken that extract because it seems to me that what is said in the second paragraph indicates clearly that it is the policy of the Secretary of State to encourage local planning authorities to have regard to the provision of affordable housing, notwithstanding that there is no specific provision in a statutory local plan. It is right, as Mr Katkowski emphasised, that much of the draft note is directed to the formulation of plans. The same is true of course of P.P.G. 3. Mr Katkowski relied in particular on paragraphs 3, 4, 8, 13, 16, 17, 25, 35 and 36. Paragraph 25 reads:

> Such limitations on occupancy may be considered unreasonable if they are not set out in an approved local plan policy. What is more, these limitations should be expressed in a way that meets the test of certainty and enforceability, or they will fail in the courts. While local planning authorities will generally want to control the initial occupant, there will be circumstances where control of successive occupants is also justified. Authorities should therefore consider in advance how they will enforce any proposals for control over occupation in the longer term.

That shows that the advice is concentrated on plans yet to be formulated. There is really no doubt about that.

The decision of the Court of Appeal in the *Mitchell* case is important. In the leading judgment Saville L.J. said[2]:

> It is clear that the reason for this decision of the Secretary of State was that he accepted the view of the local authority that there was a need in the area for all types of housing, including, in particular, multiple occupation housing for those who require cheap rented accommodation; and that the conversion into more expensive self-contained accommodation and the consequent loss of housing of this kind, which met or was capable of meeting Housing Act standards for multiple occupation, should accordingly be resisted.
>
> The Secretary of State was satisfied on the balance of probabilities that if planning permission were refused the house in question would continue to be used for multiple occupation.

Then he said[3]:

> There was nothing in the council's then current development plan which specifically spelt out the policy of the council to resist the change

[1] See this issue (1994) 69 P. & C.R. 60.
[2] *ibid.* at 61.
[3] *ibid.*

> of use under consideration, or the reasons for such a policy. It is clear, however, that the Secretary of State correctly identified the current view and policy of the council, and the reasons for it, which were to be found in a draft unitary development plan prepared by the council and, indeed, in the written submissions made by the council on the matter of the application.

In that case the draft unitary development plan was a statutory plan and, although it was at an early stage, it was nevertheless subject to the statutory processes. In this case the plans on which the council relied, and on which the Inspector seems to me to have based his decision, had not yet reached that stage. The judgment of Saville L.J. continues:

> The question which arises is whether the policy of the council was a material consideration within the meaning of section 70(2) of the Act. Mr Vandermeer, Q.C., sitting as a deputy High Court judge, concluded that this was not the case and quashed the decision of the Secretary of State on the ground that that decision was based on a consideration which should not have been taken into account. The Secretary of State now appeals to this court.

Then Saville L.J. said[4]:

> Counsel's submission however, which the deputy judge seems to have accepted, is that the decision of the Secretary of State was based upon the factor of price (that is to say the difference in rent payable for the two respective types of residential accommodation) and tenure, namely the differences between the letting or licensing arrangements for those two types, and that since these factors have nothing to do with the character or use of the land, they do not amount to legitimate planning purposes.
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> In addition it is suggested, and indeed the learned judge appears to have accepted, that what in truth the Secretary of State has sought to do by withholding planning permission is to cast some of the local authority's public housing obligations upon Mr Mitchell, which, again, is not a legitimate planning purpose.
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> It is undoubtedly the law that material considerations are not confined to strict questions of amenity or environmental impact, and that the need for housing in a particular area is a material consideration within the meaning of what is now section 70(2) of the 1990 Act. . . .

There are then references to the case of *Clyde & Co. v. Secretary of State for the Environment*[5] and *Westminster City Council v. British Waterways Board*.[6] Saville L.J. continued:

> On the law as it presently stands, therefore, the need for housing in a particular area is a planning purpose which relates to the character or the use of land. Given that this is so, the proposition advanced on behalf of Mr Mitchell is that the need for a particular type of housing in an area is not a planning purpose which relates to the character of the use

[4] *ibid.* at 62.
[5] [1977] 1 W.L.R. 927.
[6] [1985] 1 A.C. 676.

> of land if that need is itself dictated or generated by considerations of costs or type of tenure.
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> I cannot accept this argument. To my mind there is no sensible distinction to be drawn between a need for housing generally, and a need for particular types of housing, whether or not the latter can be defined in terms of cost, tenure or otherwise. In each case the question is whether, as a matter of planning for the area under consideration, there is a need for housing which the grant or refusal of the application would affect.

In the light of that decision, to which Mr Katkowski had himself referred me, Mr Drabble submitted that the decision letter was clear and exceptionable.

In reply, Mr Katkowski emphasised again that the decision in principle should have been, and was, for residential development of this site, and that it was wrong for the Inspector to have demanded a strict guarantee that affordable housing should be provided. He submitted that the proper way of dealing with that aspect of the matter, in the light of the Inspector's view of affordable housing, was to impose conditions as to density and mix of housing on the site. Secondly, he reiterated that the failure to provide a benefit should not have been given the weight that it was. He accepted that it might be a material consideration but contended emphatically that, if that consideration was to be found outside the statutory plan or plans, it could not justify a refusal of permission. He was wrong to treat the failure to provide the benefit as demonstrable harm. He relied in particular on Circular 16/91, the passage at paragraph B8 in the Annex, and on paragraph 32 of P.P.G. 1. Thirdly, he pointed out that Mr Drabble had submitted that the failure to provide a benefit could form a ground for refusal of permission was only implicit in P.P.G. 3. That is of course accurate. P.P.G. 3 does not state expressly that which Mr Drabble submitted should be drawn or inferred from it. Mr Katkowski therefore said, again emphatically, that it would be most unjust to leave the decision to a matter which was only implicit in such an important policy document. He rightly stressed the general public interest in having regard to and giving the greatest weight to material that was to be found in a plan that had been through the complete run of plan processes. Of course, that is a matter of degree, depending on at what stage one is looking at the plan in the course of formulation.

Finally, he contended that in this case there was no evidence to establish a sufficiently close relationship between the general need for affordable housing in the local planning authority's area, which, as I understand it, was never contested, and this particular site. He relied upon what he conveniently referred to as the *Tesco Witney* case[7] in the Court of Appeal. I do not propose to cite any part of the judgments in that case.

Having regard to those arguments, my view is that the general approach to be followed in the examination of this decision letter is well established, and the general approach of an Inspector to the decision of this type of appeal is equally well established. In my judgment, the decision letter is clear and followed the well established approach.

I can summarise the matter in this way. The plan is to be followed unless there are other material considerations of sufficient weight to be preferred. Material considerations may be and often are found outside the plan

[7] (1994) 68 P. & C.R. 219.

policies. P.P.G. 3 and the draft note of 1992 are capable of being material considerations and were held to be so by the Inspector. In my view, that was a matter for his planning judgment. His decision on that point was one that was open to him.

It is clear also from Circular 16/91, in particular paragraphs B7 and B8 as a whole, that the relationship between a particular factor, a material consideration, and the proposed development of a particular site, allows the Inspector to have regard to the need to provide affordable housing on this site.

Turning then to the way in which the Inspector dealt with the matter, he first defined the issue on the basis of his general acceptance that development for residential purposes was appropriate for this site. He accurately recorded the outline planning permission of 1989 and defined the relevant changes, as he was required to do. It is not suggested that those changes were not relevant. He then identified the relevant local and national policies. Broadly, that is not in dispute. In my view, he interpreted those policies properly and he indicated clearly the planning judgment that he made having regard to the weight that he attached to the policies. I note in particular that in paragraph 14, as I have indicated, he held that affordable housing was a material consideration. He also accurately stated the applicant's reluctant offer in paragraph 13. At first reading and in isolation, Mr Katkowski is correct in saying that in paragraph 13 the Inspector did not reflect closely the terms of the applicant's reservation as to affordable housing in the documents to which I have already referred. But I am satisfied that, read in context, what the Inspector had to say was accurately and reasonably based upon the submissions made to him by the applicants. The Inspector then gave a reasoned statement of his planning judgment that 30 units of affordable housing were appropriate on this site. He explained his judgment on the relationship between the general need for affordable housing in the area and the proposed development of the site, and he explained why he was rejecting the applicants' proffered undertaking. In my view, he fairly and clearly summarised these reasons in paragraph 22 of the decision letter.

At this point I return to Mr Katkowski's principal contention, which is to be found in paragraph 20(4) of his skeleton argument in these words:

> The Secretary of State for the Environment does not advice, even where there are affordable housing policies in the development plan, that planning permission can be refused for a development proposal which is acceptable in every other respect simply and solely on the basis that the scheme does not make provision for units of affordable housing, a fortiori where (as in the instant case) the affordable housing policy is non-statutory.

In relation to that contention, I can find no authority for the proposition that a material consideration, which is to be found outside the wording of the statutory policies which are relevant to the decision, or which arises only by implication, is not capable of being treated by an Inspector as a matter of considerable weight. That must be a matter for the Inspector's planning judgment. Nor can I see any authority for the further proposition that such a material consideration, one that is derived from matters arising outside the language of the development plan, cannot justify refusal on the grounds that to allow the permission would give rise to demonstrable harm.

In my view, following the process of decision making in the way that I have set out, a material consideration clearly can be given such weight as to entitle an Inspector not to follow even the clearest policies in the statutory plan, and can be treated by him as of sufficient weight to justify refusal. It seems to me that Mr Katkowski's concept is wholly contrary to principle, because it would in effect mean that the language of the statutory plan policies could be used to impose a ban on reliance on any consideration not based on the plan. That is not in accordance with the principle that the system has to be operated in a way that is not only consistent but is sufficiently flexible to allow a decision to be taken on all material considerations in each case. The proper approach is to require a decision to be taken in each case on the particular facts and merits as they appear to the Inspector or to the Secretary of State. It follows, in my judgment, that this application must be dismissed.

Application dismissed with costs.

Solicitors—Denton Hall, London; Treasury Solicitor.

Reporter—Christopher Wagstaffe.