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Case No: CO/3294/2011

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

Appeal reference is APP/K2420/A/10/2136522

Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham B4 6DS
23rd December 2011.

Before:

HIS HONOUR JUDGE PURLE, Q.C.
(Sitting as a Judge of the High Court)

Between:

PERSIMMON HOMES NORTH MIDLANDS LTD **Appellant**

- V -

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **Respondent**

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MR. IAN DOVE QC of counsel instructed by Harvey Ingram appeared for the Appellant.
MS. SARAH-JANE DAVIES of counsel instructed by Treasury Solicitor appeared for the Respondent.

HTML VERSION OF JUDGMENT

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HIS HONOUR JUDGE PURLE, QC

1. This is an appeal under Section 288 of the Town and Country Planning Act 1990. The appeal is from the decision of an inspector appointed by the Secretary of State for Communities and Local Government, dated 11th March 2001 refusing planning permission on appeal.

2. The planning application was for 200 units of residential accommodation in the administrative area of Hinckley and Bosworth Borough Council. There had been a public inquiry on 8th and 9th of February 2011. The land in question is to the east of Earl Shilton, a settlement which is part of or treated as being part of the main urban area of Hinckley.

3. By virtue of Section 70 of the Town and Country Planning Act 1990 an application for planning permission must be determined in accordance with the relevant development plan and other material considerations. Further, under section 38(6) of the Planning and Compulsory Purchase Act 2004, once regard is had to the development plan, the application for permission must be determined in accordance with it unless material considerations indicate otherwise.

4. In this case, as was noted by the inspector, the development plan included the Hinckley and Bosworth local plan adopted in 2001 and the council's local development framework core strategy adopted in 2009. The core strategy in turn referred to an intended action plan which was in the course of development and which I shall call the area action plan. The core strategy contained various provisions in Core Strategy Policy 2 (or CS Policy 2 as it is known for short), which stated that the sustainable urban extensions would be exemplars of sustainable design. Those extensions were two mixed-use sustainable urban extensions: one of 2,500 homes to the west of Barwell and one of 2,000 homes to the south of Earl Chilton. I am concerned with the latter. The particular planning application is relatively small, relating only to 200 homes.

5. It was stated in CS Policy 2 that the sustainable extensions would include the necessary community infrastructure to support the new residents, including neighbourhood shops, primary schools, GPs and green space provision and the like. It was later stated that all development must be in conformity with the area action plan (that is the one now being developed). No piecemeal developments would be permitted. There was no objection raised by other developers to the proposals for planning permission put forward by the Appellant and it seemed to be accepted, and is in any event reasonably plain, that the immediate impact of the proposed development of 200 houses could be met by accepting a planning obligation under Section 106 of the Town and Country Planning Act 1990, relating to the infrastructure requirements immediately occasioned by the development of 200 houses. However, the local authority had rejected the application upon the ground, amongst other reasons, that the development was piecemeal in the sense in which that expression is used in CS Policy 2. That decision was upheld by the inspector.

6. As the area action plan had not been developed in any detail, the inspector felt that he could not be confident that the proposals put forward by the developer Appellant by way of Section 106 obligation were either sufficient to satisfy the requirements of the area action plan or, to the contrary, might go too far.

7. The fundamental requirements of a planning obligation are now laid down in Regulation 122 of the Community Infrastructure Levy Regulations 2010, which provides as follows:

> "122. Limitation on use of planning obligations:
>
> (1) this regulation applies where a relevant determination is made which results in planning permission being granted for development;
>
> (2) a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is: (a) necessary to make the development acceptable in planning terms, (b) directly related to the development, and (c) fairly and reasonably related in scale and kind to the development."

8. I need not read the rest. This provisions reflect what previously had been (and still are) departmental policy and are plainly calculated to stop developers from offering wide-ranging inducements which may amount to the buying of planning permission. It is Mr. Dove QC's case for the Appellant that the effect of bringing into force Regulation 122 is that that which was previously policy now becomes law, and that unless the inspector could conclude that the obligations offered by the Appellant either needed to go further to make planning permission necessary in planning terms, or went too far, then no such consideration could lawfully be taken into account by the inspector. Likewise, he submitted that what the applicant for planning permission offered in this case by way of Section 106 obligations was directly related to the development. The wider aspects considered by both the local authority and the inspector on appeal were not directly related to the development but were related to the development of the sustainable urban extension as a whole. Under Regulation 122, therefore, the acceptance of a planning obligation covering the wider aspects could not be a reason for the grant of planning permission. The absence of such an obligation (the argument goes) was not therefore a material consideration justifying the refusal of planning permission.

9. The third requirement of Regulation 122, that the obligation must be fairly and reasonably related in scale and kind to the development, was said to be met by Mr. Dove QC on his client's proposals, which embodied a planning obligation in relation to access roads which his client was prepared to provide without contribution from anyone else. As, however, there was no offered obligation in relation to the wider aspects of the sustainable urban extension, it is understandable, he says, and strictly correct that the conditions did not go any further. The inspector appointed by the Respondent observed as follows: 9

> "(8) The appeal proposal goes some way towards meeting the identified infrastructure requirements, including the provision of an extended bus service, traffic calming on existing roads, foot and cycle paths and on-site recreational space, contributions are also made towards several public services. However, other requirements, including those relating to the wider highway network, educational facilities and improved utility services have not been included.
>
> > The council claim that it is not possible to calculate contributions for the overall infrastructure scheme in view of the preliminary nature of the proposals for the SUE [as the sustainable urban extension was referred to for short]. There is also a concern that a number of the contributions that have been offered would not meet the CIL Regulations test through lack of supporting evidence. The deficit would be likely to result in a greater burden on later development, conflicting with the integration concept of the urban extension and raising the prospect of a shortfall in the funding of necessary infrastructure or reduced commercial viability."

10. The inspector concluded that the council's concerns were valid.

11. It seems to me that the inspector was entitled to approach the matter in the way that he did and that it cannot be said that there was no evidence to support his conclusions. The proposed sustainable urban extension is part of the development plan referred to in the core strategy and the emerging area action plan, which is or was at the date of the hearing before me out for consultation. The results of the consultation should clarify matters. It is self-evident to my mind that there is a real risk, if not a likelihood, that the failure to require contributions from this particular developer in respect of wider aspects of the development of the sustainable urban extension may well inhibit further development and result in an increased burden upon other developers. It may also, of course, be that the Appellant's proposals would have the effect of increasing the burden upon the Appellant in respect of matters which would otherwise be the subject matter of pooled contributions. The Appellant does not mind that. Nonetheless to the extent that the contributions offered by the Appellant might be excessive for that purpose, they would be irrelevant and have to be rejected as a reason for the grant of planning permission under Regulation 122.

12. All of this presupposes that it is legitimate to take into account the wider requirements of the sustainable urban extension. In my judgment, it is legitimate to do so. I say that because the overriding requirement to give consideration to the development plan that I have mentioned brings in the requirements of the sustainable urban extension, which is clearly going to happen, and makes it inappropriate to look at this proposed development in isolation. It seems to me that Mr. Dove, QC, in arguing the contrary, is limiting the legitimate area of inquiry to the immediate impact of the particular development of 200 houses, with which his client is concerned, whilst overlooking the overall impact of those 200 houses upon the sustainable urban extension as a whole.

13. It seems to me that there was ample reason for the inspector to conclude that the impact on the sustainable urban extension overall requires other infrastructure matters to be addressed, such as the wider highway network, educational facilities and improved utility services (the ones that he mentions). It seems to me that those requirements could properly be said to be directly attributable, though not exclusively so, to amongst other factors the proposed development by this developer, and that some contribution to those requirements was therefore necessary to make the proposed development acceptable in planning terms. The proposed development could otherwise proceed without regard to its inevitable impact upon the remainder of the sustainable urban extension. The area action plan, once completed, will enable the local authority and developers to act in a co-ordinated way in relation to the sustainable urban extension as a whole.

14. I was referred to the decision of the House of Lords in *Tesco Stores Ltd v. Secretary of State for the Environment & Others,* [1995] 2 All England Reports, 636. That was a case which demonstrated the mischief with which Regulation 122 might be said to be intended to deal. Tesco had offered a significant inducement which in the events which happened did not lead to planning permission in Tesco's favour. This was said by Tesco to be a material consideration to which the Secretary of State had failed to have regard. The House of Lords considered amongst other things departmental circular 16/91, giving guidance on the proper use of planning obligations. It was emphasised in that circular - and it is still emphasised (indeed now enshrined) in the new Regulations - that purposes not directly related to the development should not be offered as the price of planning permission. For this reason, it seems to me that the case has some parallels to the present case. It was said in the then circular that:

> "The test of the reasonableness of seeking a planning obligation for an applicant for planning permission depends on whether what is required (1) is needed to enable the development to go ahead ... or (2) in the case of financial payment will contribute to meeting the cost of providing such facilities in the near future or (3) is otherwise so directly related to the proposed development and to the use of the land after its completion that the development ought not to be permitted without it."

15. A number of examples were then given and other points mentioned. The same circular also mentioned that the extent of what was required should be fairly and reasonably related in scale and time to the proposed development.

16. Lord Justice Steyn in the Court of Appeal ruled that Tesco's offer had been so generous that it was not a proper offer of a planning condition at all, in which case it should be ignored. That mirrors Mr. Dove's submission here. In the House of Lords, by contrast, Lord Keith (with whom the remainder of the House of Lords agreed) treated Tesco's offer as a material consideration for planning purposes, but one which, in the light of the departmental policy, the Council were entitled to attach little or no weight to. Matters of weight were for the decision maker, not the Court. Moreover, necessity and directness of effect are not the tests for planning permission, the House approving in this connection the earlier decision of the Court of Appeal in *R v. Plymouth City Council ex parte Plymouth & South Devon Co-operative Society Ltd* [1993] 67 P & CR, 78.

17. Lord Hoffman in the same case, adding some observations of his own, noted at page 655 E-F that, as it was agreed in the *Plymouth* case that there could be a superstore in the area, it was probably true to say that the benefits offered by the developer were not necessary to make the development acceptable if it had been the only application. He went on to conclude that the only test ultimately for planning permission was that it must fairly relate to the proposed development and must not be unreasonable. There was no additional test, he said, of necessity.

18. Mr. Dove QC, founding himself upon the new Regulations, says necessity is now one of the tests which must be passed before, irrespective of weight, a planning condition can be taken into account at all. That may well be so, but the approach begs the question of what is necessary. What Regulation 122 refers to is that which is necessary to make the development acceptable in planning terms. To determine whether a particular application is acceptable in planning terms one must have regard to the development plan which in turn brings in the core strategy and emerging area action plan. The *Tesco* decision does not help at all in answering the question of whether the contributions offered by the Appellant in this case were either sufficient, or greater than needed in some respects, or whether some further planning obligation was necessary to make the development acceptable in planning terms.

19. The inspector in his report continued after paragraph 8 as follows:

> "(9) Whilst it is recognised that some of the contributions being offered with this scheme

> represent a significant proportion of the total costs of the facilities being provided, in the absence of an infrastructure plan, it is not possible to conclude that these would represent a fair proportion of the overall costs nor may significant weight be given to the possibility that the council would benefit from the contribution from the new home development scheme; there being no indication that this is intended as a substitute for necessary infrastructure provision."

20. No point is taken before me on the new homes bonus scheme. What is complained about is that the inspector acted without evidence in making his other observations in and following paragraph 9. I do not consider that there was a lack of evidence or that the inspector's conclusions were in any sense perverse.

21. Once one rejects the narrow approach founded upon Regulation 122 which Mr. Dove QC urges upon me, and gives a wider construction to what can be regarded as necessary or directly related to the development, it seems to me that the inspector's statement that it was not possible to conclude that the contributions on offer, absent the infrastructure plan, represented a fair proportion of the overall costs, was clearly correct and justified the refusal of permission. At all events, the inspector was in reaching that conclusion exercising planning judgment and I can only interfere if there was an error of law, such as the inspector taking into account material which he should not have taken into account or failing to take into account material which he should have taken into account, or acting perversely. It seems to me that none of that can be said of this inspector who considered both sides' arguments very carefully, having correctly approached the matter on the basis that there were infrastructure requirements, presently subject to public consultation, as to which there was presently insufficient detail to allow a realistic assessment and apportionment of costs.

22. I should say that it has for some time been a departmental policy requirement to pool costs in appropriate cases (including cases such as this). The pooling requirement has been limited to works that are necessary for and directly related to the particular development. The quantum under the departmental policy must be fairly and reasonably related in scale and kind to the development. The 2010 Regulations seem to do no more than replicate that policy. Prior to the 2010 Regulations, the concept of pooling contributions in relation to different developments within an enlarged area was expressly contemplated. I find it impossible to believe that the effect of enshrining the previous policy into law by the Regulations has been to make the application of that policy any less vigorous or effective than it was before.

23. The council acknowledged (as was recorded in paragraph 11 of the inspector's decision letter) that a scheme might be allowed once the area action plan had been subject to public consultation and then finalised. The inspector correctly recognised that there was a clearly established housing need, and properly went on to consider whether there were nevertheless reasons for withholding permission. He found that there were sufficient reasons because of the need to prevent, as he saw it, piecemeal development, in the sense that the proposed development was not strictly in accordance with the area action plan, because there was no realistic assessment of apportionment of the overall costs referable to that plan.

24. In those circumstances, it seems to me that the main grounds of appeal, namely, the so-called failure of the inspector to understand the law properly and his alleged refusal to proceed on the basis of evidence or policy, are not made out. I also consider that, looking at the decision from the standpoint of a reasonably informed person knowing the background, his reasoning is readily apparent and cannot be regarded as inadequate. In those circumstances, the challenge to the inspector's decision fails.

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