Neutral Citation Number: [2008] EWHC 3046 (Admin)

Case No: CO/3755/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10th December 2008

Before :

SIR GEORGE NEWMAN
(sitting as a Deputy High Court Judge)

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Between :

SB HERBA FOODS LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT and (2) SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL	**Defendants**

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Matthew Horton QC (instructed by Marrons) for the Claimant
Sarah-Jane Davies (instructed by The Treasury Solicitor) for the First Defendant

Hearing date: 4th November 2008

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Judgment

Sir George Newman :

1. This is an appeal by SB Herba Foods Limited ("the claimant") pursuant to section 288 of the Town and Country Planning Act 1990. The claimant seeks to quash, for error of law, a decision of the first defendant made on her behalf by an Inspector.

2. By a decision dated 28th March 2007 the Inspector dismissed an appeal by the claimant against a decision of the second defendant refusing planning permission for the extension of an existing factory operated by the claimant.

The Essential Facts

3. The factory is a former grain silo on the edge of the village of Fulbourn in Cambridgeshire. In 1988 the claimant commenced the re-use of it for the purpose of milling foodstuffs. The factory is outside but extends up to the very edge of the Cambridge Green Belt. The proposed extension would be in the Green Belt. But, being within the curtilage of the existing factory, the extension site, in planning terms,

is categorised as previously developed land (sometimes described colloquially as brownfield land).

Planning Policy

4. By section 38(6) of the Planning and Compensation Act 2004 any decision whether to grant planning permission must be taken in accordance with the development plan unless material considerations indicate otherwise. For the purpose of section 38(6), the development plan comprises adopted regional, county and local policy. The fundamental basis upon which it is submitted the Inspector made an error of law is in his interpretation of paragraphs 3.1 and 3.2 of PPG2. This is not the first time that these paragraphs have fallen for interpretation by the Court and they have been the subject of consideration in the Court of Appeal most recently in *Wychavon District Council v Secretary of State for the Communities and Local Government and Others* [2008] EWCA Civ 692. It will be necessary later to return to the judgment of Carnwath LJ. Apart from PPG2, the Inspector considered other relevant planning policy documents, namely the Regional Planning Guidance (RPG) for East Anglia, the Cambridgeshire and Peterborough Structure Plan (SP) and the Local Plan (LP). In paragraphs 4 to 8 of the Decision Letter ("DL"), the Inspector summarised the effect of the RPG, SP and LP documents.

5. It is common ground that the Inspector carefully analysed the relevant planning policy documents and that he correctly focused on the relevant parts of those documents, save in connection with LP policy GB2, where he summarised the policy as prohibiting "inappropriate development in the Green Belt …" unless very special circumstances exist and incorrectly went on to state, that they should also have "no adverse effect on the rural character and openness of the Green Belt". It is accepted that, according to the true meaning of the final part of the wording of the policy, that restriction relates to "appropriate" development and not "inappropriate" development. To that extent, he misread the policy but it is not submitted that this error has any real bearing on the issue before the court.

6. The important paragraphs of PPG2 are as follows, in their material part:-

> "3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances….
>
> 3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations…".

The Inspector's Findings

7. The Inspector identified three main issues in the appeal, namely:

> - "whether the proposal constitutes inappropriate development in the Cambridge Green Belt;
>
> - the effect of the proposal on openness and visual amenities of the Green Belt; and
>
> - if the proposal constitutes inappropriate development in the Green Belt, whether very special circumstances exist, which clearly outweigh the harm resulting from that inappropriateness and any other harm."

8. In a decision letter, which it is not disputed was carefully drawn up and well constructed, the Inspector took each of those issues in turn.

9. As to the first issue, he found that the proposed development would constitute "inappropriate development". Submission had been advanced to him by Mr Horton QC that the proposal to extend was to be regarded as the re-use of a building and, for that reason, it fell within the exception from the definition of inappropriate development. Although the issue of whether it amounted to re-use or not was canvassed in argument, it is not central to the matters which the Court has to decide. For myself, I am not in doubt that the Inspector reached the correct conclusion.

10. As to the effect of the proposed development on the openness and visual amenities of the Green Belt, he drew attention to the fact that the original mill building is very large and prominent and that the extension would be small in comparison to the existing building. He concluded that, by virtue of the proposal for the erection of a building on land which is at present not built upon, it would "as a matter of fact … reduce the openness of the Green Belt", although "the extent to which that reduction in openness is material depends on what would actually be visible". He concluded that the extension "would not have a material impact on the wider landscape and would not be prominent in longer views". When viewed from close advantage points to the north and south, "the appeal site appears as part of the attractive, open, rural character of the Green Belt setting of Fulbourn, rather than part of the village's built environment". There was in evidence before him the proposal that there should be a planting programme which would be carried out by the claimant and he concluded: "… in the medium to long term, the harm caused by the proposal to the openness and visual amenities to the Green Belt would be limited". The proposed planting would also, in association with the extension, "improve the screening of the earlier extension". He concluded that "the visual impact of the proposal would not be sufficient in itself to justify dismissal of the appeal". He accepted that the "unusual characteristics of the original … building make it ideally suited to the appellant's milling process". He accepted that "the appellant currently needs more storage space and … that need is likely to continue". Further he concluded "The current pressure on space is hindering efficiency and making it more difficult, though not impossible, to ensure compliance with Health and Safety requirements…". Further, that "the only options available to the appellant are to extend the existing buildings or secure storage space off-site" and he concluded that since off-site storage space was available, if the

appeal failed, storage space off-site would be used. He drew attention to the disadvantages of off-site storage in terms of economic and efficient operation of [the business] and concluded that "… it would be better to extend the building than to use off-site storage…".

11. The use of off-site storage would inevitably give rise to more heavy goods vehicle movements, a consequent increase in CO_2 emissions and an increase in the amount of packaging waste. He recognised that minimising the effects of these matters was the subject of national, regional and local planning policy in relation to the first two, and an important environmental aim in the case of the third.

12. I have deliberately set out his conclusions in relation to all these considerations without referring to the reasoning process which he applied to each consideration. It is his reasoning which is specifically under challenge, it being said that he erred in the test he applied in the process of determining the character and weight which could be given to these various considerations.

The Cases

13. The Inspector directed himself when considering the effect of paragraphs 3.1 and 3.2 of PPG2 according to his understanding of the decision of Sullivan J. in *R (Chelmsford Borough Council) v First Secretary of State and Draper* [2003] EWHC Admin 2978. As I have indicated above, the Court of Appeal has recently considered the proper approach to paragraphs 3.1 and 3.2 in the *Wychavon* case. I take Carnwath LJ to have stated at paragraphs 21 to 26:

    (1) that the words "very special" in paragraph 3.2 are not to be treated as the converse of "commonplace". Rarity may contribute to the special quality of a particular factor, but what is required is a qualitative judgment as to the weight to be afforded to a particular factor for planning purposes (see paragraph 21);

    (2) that contrary to the approach of Sullivan J. in *Chelmsford*, the two elements of paragraph 3.2 – the existence of very special circumstances and the need clearly to outweigh the harm to the Green Belt – should not be rigidly divided. The factors which make a case very special may be the same as, or at least overlap with, those which justify holding the Green Belt considerations are clearly outweighed. The Court of Appeal preferred the formulation taken from an earlier decision of Sullivan J. in *Doncaster MBC v SSETR* [2002] JPL 1509 para 70 where the judge had stated:

> "Given that inappropriate development is by definition harmful, the proper approach was whether the harm by reason of inappropriateness and the *further* harm, albeit limited, caused to the openness and purpose of the Green Belt was *clearly* outweighed by the benefit to the appellant's family and particularly to the children so as to amount to *very* special circumstances justifying an exception to Green Belt policy".

Carnwath LJ approved of this formulation because it treated "… the two questions as linked" but started ".. from the premise that inappropriate development is by definition harmful" to the purposes of the Green Belt.

The Inspector's Approach

14. It can be seen from paragraph 3 of the DL (third bullet point) that the Inspector formulated the issue to which paragraphs 3.1 and 3.2 of PPG2 gave rise as, "whether very special circumstances exist". It is true this was the ultimate issue, because development could only be "approved … in very special circumstances". But the critical question on the path to the correct determination of the ultimate question was whether "other considerations" clearly outweighed the harm by reason of "inappropriateness and any other harm". The correct approach outlined by Sullivan J in *Doncaster MBC v SSETR* [2002] JPL 1509, approved by Carnwath LJ in *Wychavon,* should have been adopted (see paragraph 13 above). It must be noted that the judgment in *Wychavon* was delivered after this DL.

15. It was submitted, with justification, that the Inspector's initial formulation in paragraph 3 of the DL was not developed by him in the subsequent detail of the DL so as to demonstrate that he had the critical question sufficiently in mind. In paragraph 20 of the DL he stated that he understood the *Chelmsford Borough Council* to indicate that he:

> "must consider whether a particular circumstance or combination of circumstances is very special. Ultimately then, I have to view all of the circumstances of this case in the round, but I will first consider the individual matters advanced by the appellant as constituting or contributing to very special circumstances".

16. In my judgment, the *Chelmsford Borough Council* case led him into error. He was entitled to look at the circumstances individually and cumulatively and ultimately to consider whether they amounted to "very special circumstances", but before coming to a conclusion he was obliged to give adequate consideration, either individually or cumulatively, and to determine whether or not they "clearly outweigh" the green belt harm. He had to exercise a judgment and assess the quality of the factors according to planning principles and considerations. In paragraph 21 of *Wychavon* Carnwath LJ, having identified the error in treating "very special " as the converse of "commonplace", went on to state:

> "The word "special" in the guidance connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes. Thus, for example, respect for the home is in one sense a "commonplace", in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently "special" for it to be given protection as a fundamental right under the European Convention."

17. The Inspector carefully went through the factors constituting other considerations (see paragraphs 20-37). He concluded that the appellant ".. currently needs more storage space and unless customers' requirements change again, that need is likely to

continue" (paragraph 22). He concluded that ".. in terms of the economic and efficient operation of his business, it would be better to extend the building than to use off-site storage and that this would make compliance with health and safety requirements easier" (paragraph 23).

18. He did then weigh those conclusions against the harm and at paragraph 26 stated:

> "Whilst I am satisfied that the proposed extension makes perfectly good business sense, I am not persuaded that the business need is so compelling that it would outweigh the overall harm identified. Furthermore, I am not convinced that the need for additional storage space represents a particularly unusual, let alone very special circumstance. For the appellant, Mr Phillips ventured to suggest that, at any given time, some 5 to 10% of businesses are seeking more space. I am not aware that there is a sound statistical basis for that estimate, but I accept that Mr Phillips can draw on considerable experience as a planning consultant. Nevertheless, I take the view that, to fall within that proportion of businesses, would not be very special. I also note the Council's submission that it would be more relevant to consider the proportion of businesses in need of more space at some time in their existence. On that basis, it seems to me that such a need is likely to be quite common. I acknowledge that many other businesses will have much greater flexibility to relocate their entire operations than the appellant has. However, the appellant does not have to relocate. The evidence indicates that in business terms, the use of off-site storage is a perfectly feasible, albeit second best option".

19. It is clear that the Inspector gave less weight to the need for storage because he regarded it as a commonplace consideration. He was wrong to do so. I shall return to what should flow from this error later.

Off-site storage

20. The Inspector concluded that there was "harm" which would arise from increased HGV movements using off-site storage. He weighed this harm against the green belt harm, but held that it did not outweigh the green belt harm. He then added:

> "Furthermore, whilst these environmental considerations are important, they are likely to arise in many cases where businesses in the Green Belt require additional storage space. In my view, these circumstances cannot be described as unusual, let alone very special." (paragraph 29).

The Brownfield Factor

21. The Inspector stated:

> "I note that the proposal would make use of previously developed land and it would assist in further securing the use of an existing building with significant embodied energy and resources, thus making best use of those resources. However, these factors would surely apply in all cases where an extension is proposed to a building, within its existing curtilage. Such circumstances can hardly be very special." (paragraph 30)

Screening

22. It can be noted that in paragraph 31 of the DL the Inspector carried out a weighing exercise without reference to the test of it being "commonplace" or "unusual" and addressed the arguments by reference to the "limited additional harm in terms of loss to openness" by weighing it against the harm for inappropriateness (see paragraphs 35 and 36).

23. The Inspector concluded, in two short paragraphs, as follows:

> "On examining each of the circumstances relied upon by the appellant, I have found that none of them is very special and none of them clearly outweighs the harm identified. I also consider that the combination of factors referred to would not be particularly unusual and could apply to many businesses that wished to extend their existing premises to meet a need for additional storage space." (paragraph 36)

And (paragraph 37)

> "I fully understand the appellant's desire to pursue this scheme; it is consistent with sound business planning. Nevertheless, on the last main issue, I conclude that the circumstances of the case and the benefits of the proposal, either individually or collectively, are not very special and do not clearly outweigh the harm by reason of inappropriateness and the limited harm to the openness and visual amenity of the Cambridge Green Belt…".

Conclusion

24. This was a careful and well constructed DL. As such, it is possible to see that, in some respects, the necessary exercise was discharged. But, as I see it, the question whether the misdirection both in the formulation of the critical issue as well as the subsequent weighing process which was to a large part, by reference to whether the factors were "commonplace" or "unusual", so seriously flaws the decision as to require it to be quashed and remitted to another Inspector. I have concluded that it is impossible to disentangle the Inspector's conclusions on the weight to be attached to the "other considerations" from his predominant focus on looking for the character of each being a "very special circumstance". More so I find it impossible to disentangle the extent to which his conclusions on weight were influenced by his erroneous test of looking for the "unusual" or the uncommonplace factor.

25. Further, Carnwath LJ stated the exercise involved a "qualitative judgment as to the weight to be given to the particular factor for planning purposes". That seems to me, in a case such as this, to be for an Inspector, not for the court.

26. The DL must be quashed and, unless counsel wish to submit otherwise, my present view is that the matter should be remitted to another Inspector.