*119 R. v Broadland District Council and St Matthew Society Limited and Peddars Way Housing Association

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
26 January 1998

Report Citation
[1998] P.L.C.R. 119

Queen's Bench Division

Mr George Bartlett, Q.C. (sitting as a Deputy High Court Judge):

January 26, 1998

Judicial review—Planning permission—Material considerations—Fear of anti-social behaviour of future residents—application dismissed.

The first respondent council had granted planning permission for a hostel to the second and third respondents. The second respondent was a charity providing supported housing. The third respondent was a housing association providing accommodation for special and general needs. The applicants were residents living in the locality of the proposal. The council's planning officer's report stated that objectors' concerns, which focussed on the character and behaviour of the hostel's potential residents, were not land use planning issues. One concern was that the local residents' fears for their children would lead to increased car trips to the nearby school. The council had accepted that that matter was a material consideration. The applicants applied for judicial review to quash the decision to grant planning permission.

Held, dismissing the application, of:

(1) The potentially anti-social behaviour of the hostel's future residents was capable of amounting to a material planning considertion.
(2) The applicants had failed to show that the council wrongly took into account the planning officer's advice since the council members had also been advised that the matters complained of were ill-founded in any event.
(3) As there was no material before the council as to what the increase in car trips might be, no conclusions could be made that there was a real possibility that the council would have reached a different decision.

Cases referred to:

- Bolton Metropolitan Borough Council v. Secretary of State of the Environment (1990) 61 P. & C.R. 343 . *120
- *East Barnet UDC v. British Transport Commission [1962] 2 Q.B. 484* .
- *Gateshead Metropolitan Borough Council v. Secretary of State for the Environment (1994) 71 P. & C.R. 350* .
- Newport County Borough Council v. Secretary of State for Wales (June 18, 1997, transcript) .
- *Stringer v. Minister of Housing and Local Government [1971] 1 All E.R. 65* .
- *Tesco Stores Ltd v. Secretary of State for the Environment [1995] 1 W.L.R. 759* .
- West Midlands Probation Committee v. Secretary of State for the Environment (November 7, 1997, transcript) .
- Westminster City Council v. Great Portland Estates Plc [1985] 1 A.C. 661 .

Representation

Barry Payton and Philip Norman for the applicants.
Robin Barratt Q.C. for the first respondent.
Natalie Lieven for the second and third respondents.

MR GEORGE BARTLETT, Q.C.:

On February 12, 1997 the first respondent granted planning permission subject to conditions for the change of use of the East Norwich Inn, 47 Old Road, Acle, from a hotel to an eight bed hostel and eight bed group home with staff flats, and eight one-bedroom flats. The applicants for planning permission were the second and third respondents, St Matthew Society and Peddars Way Housing Association. The society is a registered charity whose main purpose is the provision of supported housing in East Anglia and the East Midlands for single lonely people, and the association manages a large amount of housing accommodation in Norfolk for both general and special needs. Their planning application attracted a substantial number of objections from local residents. There was, as it was put in the officers' report to the council sub-committee that resolved to grant planning permission:

> … a common thread running through the letters of objection which suggests that the occupants of the development will be unemployed, unemployable, anti-social and mentally unstable, thereby posing a security risk to persons and property in the locality.

On April 22 leave was given to the applicants, who are three of the objecting local residents, to apply for judicial review to quash the decision to grant planning permission. Three grounds of challenge were raised, but only two of these are now being pursued. They focus on two particular sentences in the officers' report which, the applicants claim, disclose errors of law. The sentences are these:

> People's concerns over safety of school children leading to ***121** increased journeys to and from the nearby primary school by parents are not material planning considerations. The main public concern appears to be related to the nature and character of the potential residents of the hostel, group home and flats, which is not a land use planning issue.

The applicants say that, on the contrary, these matters were material considerations which the council were bound to take into account under section 70(2) of the Town and Country Planning Act 1990 ; that the council must be taken to have based their decision upon the officers' advice as to their materiality; and accordingly that their decision was unlawful.

In a report which extended to some 17 pages, the officers summarised the comments of consultees and identified the various points made by those individuals who had objected to the proposal and those who supported it. Among the points of objection that were identified in paragraph 3.2 of the report were the following:

(1) Proposal will result in loss of property values.
(2) There are limited benefits, socially and economically, that Acle can offer the residents of the hostel and vice-versa.
(3) Residents of the hostel/flats would pose a security risk to local residents, children and property leading to increased level of crime …
(5) Proposal would lead to increased traffic congestion arising from parents transporting children to and from the nearby primary school …
(7) The proposed number of residents is too large for both property and village …
(14) The description of the proposal is misleading and should refer to the use as a residential institution rather than as a hostel.

The report went on to deal with the site and the nature of the proposed development, and then, in the main section entitled "Appraisal", it addressed the issues in the case. It discussed what it identified as the four principal issues—planning policy, "site performance", design, and the effect on adjoining occupiers in terms of overlooking. The report then said this at paragraph 8.28:

> Most of the letters of objection received have included common themes, summarised in 3.2 above. Some of the points do not constitute material planning issues. However they can be responded to as follows:
>
> (1) Loss of property values—This is not a planning issue …
> (2) Acle can offer very little in the way of social and economic benefits to the residents of the proposed use—There is a common ***122** thread running through the letters of objection which suggests that the occupants of the development will be unemployed, unemployable, anti-social and mentally unstable, thereby posing a security risk to persons and property in the locality. It should be emphasised that the nature, personal circumstances or character of individual people are not land use planning issues. The applicants have in any case explained that residents in existing homes have either paid employment, carry out voluntary work or community work, or are engaged in training courses. There is no reason why future residents of this proposed development should not do likewise.
> (3) Increased levels of crime—This issue is not a planning issue …
> (4) Closure of the hotel would lead to loss of recreation and employment provision.—The proposal will result in closure of the hotel and loss of jobs. This is a matter for the market to determine rather than the planning system …
> (5) The proposal would result in increased traffic congestion arising from increased car journeys to and from the primary school by parents—The proposal provides adequate parking provision to serve its needs. People's concerns over safety of school children leading to increased journeys to and from the nearby primary school by parents are not material planning considerations. The primary school has been consulted and has not objected. The applicants have agreed to provide a lighting scheme along the footpath at the rear of the property linking Cardington Court with De-Carle Smith Road, subject to the Parish Council accepting responsibility for maintenance.

The paragraph continued with a further seven numbered points. Paragraph 8.29 then stated:

> (1) The proposed development complies with government planning policy guidance and the provisions of the Broadland District Local Plan;
> (2) The proposal will provide adequate car parking and manoeuvring facilities and ample private amenity space;
> (3) The design of the new roof and construction materials are in keeping with the area;
> (4) The impact of the proposed development on adjoining occupiers would not be significant in terms of overlooking and any potential problems can be addressed through imposition of appropriate conditions;
> (5) The main public concern appears to be related to the nature ***123** and character of the potential residents of the hostel, group home and flats, which is not a land use planning issue;
> (6) A need exists locally for accommodation of this type;
> (7) The proposal involves re-use of an existing building within an established residential area. It is quite centrally located relative to the village centre and the village has relatively good transport links to Norwich and Great Yarmouth. The proposal should be regarded as a good example of sustainable development. As such it is concluded that planning permission can be granted.

Mr Barry Payton, who appears for the applicants, advances a simple argument. He refers to two pages of the *Encyclopaedia of Planning Law,* on which are set out two well-known statements of principle on the question of materiality. The first is that of Cooke J. in *Stringer v. Minister of Housing and Local Government [1971] 1 All E.R. 65* at 77:

> In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances.

The second extract is from the speech of Lord Scarman in Westminster City Council v. Great Portland Estates Plc [1985] 1 A.C. 661 at 670 dealing with the relevance of personal circumstances. It includes the following:

> Personal circumstances of an occupier, personal hardship, the difficulties of business which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use.

So, Mr Payton says, the character of the people likely to be resident in the proposed development is a material consideration, as is the concern of parents about the safety of their children. The weight to be accorded to them would be a matter for the council (and on this Mr Payton refers to *Tesco Stores Ltd v. Secretary of State for the Environment [1995] 1 W.L.R. 759*), but in ignoring them altogether the council has erred in law. For the respondent council Mr Robin Barratt Q.C. says, firstly, that the report was quite right to say that the nature, personal circumstances or character of individual people are not land use planning issues. The use for which consent was sought was essentially residential and institutional, and it was that to which the council had to pay regard in deciding the acceptability of what was proposed, and not the possibility that some particular occupiers ***124** might give rise to problems. In approaching the matter in this way, the officers' report was in accordance with *East Barnet UDC v. British Transport Commission [1962] 2 Q.B. 484* , where Lord Parker C.J. said, at 491:

> It seems clear to me that under both Acts (the Town and Country Planning Acts 1932 and 1947) what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier.

Mr Barratt refers also to the recent Court of Appeal case of West Midlands Probation Committee v. Secretary of State for the Environment (November 7, 1997, transcript), which concerned an application for the extension of a bail and probation hostel, the inmates of which had caused distrubance to local residents. After referring to the passage I had just quoted from the East Barnet case, Pill L.J., with whom Hirst and Swinton Thomas L.J.J. agreed, said:

> A significant feature in the present case is the pattern of conduct and behaviour found by the inspector to have existed over a substantial period of time. I include as part of that pattern the necessary responses of the police to events at the hostel. That behaviour is intimately concerned with the use of the land as a bail and probation hostel. As analysed by the inspector, it was a feature of the

> use of the land which inevitably had impact upon the use of other land in the area. On the evidence, the inspector was entitled not to dismiss it as isolated and idiosyncratic behaviour of particular residents. The established pattern of behaviour found by the inspector to exist, and to exist by reason of the use of the land as a bail and probation hostel, related to the character of use of the land, use as a bail and probation hostel. Given such an established pattern, I would not distinguish for present purposes the impact of the conduct upon the use of adjoining land from the impact of, for example, polluting discharges by way of smoke or fumes or the uses in Finlay and *Blum (Finlay v. Secretary of State for the Environment [1983] J.P.L. 802* ; *Blum v. Secretary of State for the Environment [1987] J.P.L. 278*). There can be no assumption that the use of the land as a bail and probation hostel will not interfere with the reasonable use of adjoining land when the evidence is that it does.

Mr Barratt contrasts the facts in the West Midlands case with those here. There is here no background of disturbing behaviour, and, given the nature of the proposed development there is, he says, nothing to suggest that there is any justification for the concerns of local residents. ***125**

Mr Barratt's second submission follows on from this. He says that the officers' report was stating a conclusion that the concerns of local residents were unjustified, so that the council, who would have been well aware of the fears and concerns of local residents, can be taken to have based themselves on this conclusion.

Thirdly, Mr Barratt argues that, if the council were in error as claimed by the applicants, relief should as a matter of discretion be denied because there is nothing to suggest that the apprehensions of local residents would have been sufficient to persuade them to refuse permission, and thus there would be no real possibility that they would reach a different conclusion if the matter were remitted to them. He relies on *Bolton Metropolitan Borough Council v. Secretary of State for the Environment (1990) 61 P. & C.R. 343* and in particular on the statement of principles (to which I will refer later) by Glidewell L.J. at 353.

The council accept that in one respect the advice given in the officers' report was wrong in law. This was the suggestion that increased car trips resulting from parents' concerns about the safety of their children was not a material planning consideration. Following the decision of the sub-committee to grant planning permission, the applicants' solicitors wrote to the council raising the points that are now argued in these proceedings. As a result the council's director of development reported to the subcommittee at its meeting March 12, 1997 that his advice should have been that the question of increased journeys by parents was capable of being a material consideration but that he considered that no weight should be attached to it. The sub-committee was invited to consider whether, if this advice had been given at its meeting February 12, its decision to grant permission would have been different, so that consideration might be given to the possibility of revoking the permission. It resolved that its decision would not have been different. Mr Barratt invites me to have regard to this resolution for the purpose of deciding whether as a matter of discretion relief should be granted. Again he relies on Bolton Metropolitan Borough Council v. Secretary of State for the Environment .

Miss Natalie Lieven, who appears for the second and third respondents, argues that a distinction must be drawn between, on the one hand, the concerns or fears of local residents and, on the other, the nature and characteristics of the proposed residents and their anti-social behaviour. Concerns and fears, she says, would not be sufficient to amount to a material planning consideration, and unless, therefore, there was something to suggest that such concerns were justified the council would not have erred in leaving them out of account. She places reliance on the West Midlands case, and in particular on a passage to which Mr Barratt had referred in which Pill L.J. set out the following propositions which, he said, emerged from the authorities: ***126**

(1) The impact of a proposed development upon the use of and activities upon neighbouring land may be a material planning consideration.
(2) In considering the impact, regard may be had to the use to which the neighbouring land is put.
(3) Justified public concern in the locality about emanations from land as a result of its proposed development may be a material consideration.

On the question of discretion Miss Lieven refers to an affidavit sworn by Mr J.P. Miller, the chief executive of St Matthew Society, in which he gives details about the society and describes the operation of its homes. Miss Lieven says that the evidence overwhelmingly suggests that there were no grounds for the objectors' fears and therefore that the committee would have come

to the same conclusion even if differently advised as to the materiality of the objection. Relief, she says, should therefore be refused.

It is in my judgment clear from the passages I have quoted from the officers' report that the sub-committee was being advised to leave out of account in determining whether to grant permission the concerns of objectors that occupants of the development would pose a security risk to local residents, children and property. Paragraph 8.28 begins by referring to the letters of objection and then says:

> Some of the points raised do not constitute material planning issues. However they can be responded to as follows—

and all of the first five points, including the ones now in issue, are dismissed on the basis that they are not material planning considerations. Moreover it seems to me erroneous to say that the matters about which local residents are concerned—anti-social behaviour by the residents of the proposed hostel—are not matters which are capable of constituting material planning considerations. Such behaviour, were it to occur as objectors fear, would be attributable to the nature of the use of the land proposed in the planning application—as a hostel and group home capable of accommodating special types of person—and it could affect local residents in the enjoyment of their own land and in their use of the highway. Those are land use considerations, and they are material to planning, just as the patterns of behaviour on the part of the inmates in the West Midlands case were material planning considerations.

In this respect, therefore, the advice given to the council was erroneous. But the key question is whether that misdirection has resulted in an invalid decision on the part of the council. Although the officers' report was advising the council that the concerns of local residents about the nature and character of potential occupants of the development were not land use planning issues, it was also saying, as I read it, that, if such concerns *were* to ***127*** be taken into account, they would not count against the proposal. The report had concluded in paragraph 8.5 that the proposal accorded with planning policy relating to residential institutions and similar proposals. It had noted in paragraph 6.2 the nature of the St Matthew Society elements of the development, as follows:

> (1) eight bedroom hostel with communal sitting room, dining room, kitchen and bathrooms. Two ground floor flats are proposed for a permanently resident house manager and his/her relief. It is the applicant's objective to create a small, family atmosphere where residents, who are drawn from a variety of special needs backgrounds, can co-exist and develop friendships and self-confidence in an informal but supervised environment. All residents are encouraged to share an evening meal prepared by the house manager.
> (2) eight bedroom Group Home with communal sitting room, dining room, kitchen and bathrooms. The house manager's flat is directly linked to the group home as well. This element represents the next stage in re-establishing residents to full independence. It is self-catering yet still supervised and help is available for training and teaching, *e.g.* finding work, completing job applications, crafts and the like.

Then, having stated that "the nature, personal circumstances or character of individual people are not land use planning considerations", the report went on:

> The applicants have, in any case, explained that residents in existing homes either have paid employment, carry out voluntary work, or are engaged in training courses. There is no reason why future residents of this proposed development should not do likewise.

Thus it appears that the advice being tendered to the council was that, even if the concerns of the local residents about the potential occupants were taken into account, there was nothing in this consideration to count against the proposal. If the council followed this advice I do not think it can be said that they committed the error that is alleged against them—that they left those concerns out of account. The case for the applicants depends, it seems to me, on the proposition that the council must be taken to have accepted the advice of the officers that those concerns were immaterial and thereupon to have dismissed them from further consideration, without going further, as the officers themselves had done, and considered what the decision would be if the concerns were to be taken into account. If they did take that further step, their decision would clearly be free of the ***128** criticism that is levelled against it. It is for the applicants to show that the council made the error that is alleged against them, and, while it is reasonable to infer that the council accepted the advice about materiality, I see no reason to conclude that they stopped short at that point and did not go on, as the officers had done, to consider the concerns for local residents and whether that would affect the decision. The councillors had before them a fair summary of those concerns and advice that addressed itself to them. The applicants have not in my judgment shown that they left those matters out of account.

It is in the circumstances unnecessary for me to consider the distinction which Miss Lieven seeks to draw between the matters about which local residents are concerned and the concerns themselves. Whether unjustified concerns can amount to a material planning consideration is a question on which there is apparent conflict between two Court of Appeal decisions— *Gateshead Metropolitan Borough Council v. Secretary of State for the Environment (1994) 71 P. & C.R. 350* and Newport County Borough Council v. Secretary of State for Wales (June 18, 1977, transcript) . The conflict was not resolved by the Court's decision in the West Midlands case, upon which reliance was placed, and the propositions stated by Pill L.J. which I have quoted, do not purport to do so. In the present case, since, as I conclude, the applicants have failed to establish that the council left out of account either the concerns of local residents or the question whether such concerns were justified, there is no need for me to decide which of the conflicting decisions I ought to follow, and I do not do so.

This brings me to the error which it is conceded on the part of the council that they did commit—in treating as immaterial the question of increased car trips resulting from parents concerns about the safety of their children. Such a matter is clearly capable of being a material consideration for the purposes of section 70(2) . Whether the error on the part of the council renders their decision invalid, however, is in my judgment properly to be considered in the light of the principles set out by Glidewell L.J. in the Bolton case. (It should be noted, in view of the basis upon which the Bolton case was cited in argument, that the first 6 of the 7 principles are concerned with validity, and it is only the last that is concerned with discretion.) They are these:

(1) The expressions used in the authorities that the decision maker has failed to take into account a matter which is relevant, which is the formulation for instance in Forbes J.'s judgment in *Seddon Properties,* or that he has failed to take into consideration matters which he ought to take into account, which was the way that Lord Greene put it in *Wednesbury* and Lord Denning in *Ashbridge Investments,* have the same meaning. ***129**

(2) The decision-maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision-making process. By the verb "might", I mean where there is a real possibility that he would reach a different conclusion if he did take that considertion into account.

(3) If a matter is trivial or of small importance in relation to the particular decision, then it follows that if it were taken into account there would be a real possibility that it would make no difference to the decision and thus it is not a matter which the decision-maker ought to take into account.

(4) As Hodgson L.J. said, there is clearly a distinction between matters which a decision-maker is obliged by statute to take into account and those where the obligation to take into account is to be implied from the nature of the decision and of the matter in question. I refer back to the Creed NZ case.

(5) If the validity of the decision is challenged on the ground that the decision-maker failed to take into account a matter in the second category, it is for the judge to decide whether it was a matter which the decision-maker should have taken into account.

(6) If the judge concludes that the matter was "fundamental to the decision", or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid.

(7) (Though it does not arise in the circumstances of this case.) Even if the judge has concluded that he could hold that the decision is invalid, in exceptional circumstances he is entitled nevertheless, in the exercise of his discretion, not to grant any relief.

In the present case I find myself wholly unable to conclude (in the terms of principle 6) that there is a real possibility that if the question of increased car trips had been considered by the council it would have made a difference to their decision. Unsurprisingly there appears to have been no material before them as to the number of possible additional trips that might be occasioned or as to the effect that any such additional trips might have on congestion or safety. No arguments on the point were addressed to me by the applicants, whose challenge focussed on other matters. In the ***130** light of these considerations, therefore, I do not think that the admitted error on the council's part rendered their decision invalid.

The applicants have accordingly failed to make out their case on invalidity. It is thus unnecessary for me to consider the question of discretion, and I do not do so on a contingent basis. The considerations affecting the exercise of discretion would, I believe, be different depending on whether the council's duty was to take into account the concerns of local residents even though they might be unjustified (see the Newport case) or whether they were obliged to consider those concerns only to the extent that they were justified (see the Gateshead case), and it has not been necessary for me to come to a conclusion on that particular point.

The application is refused.

Solicitors —Hansell Stevenson, Norwich Steele and Co., Norwich; Greenland Houche, Norwich.

Reporter —Matthew Reed.

Commentary

The Court of Appeal in *Midlands Probation Committee v. Secretary of State for the Environment [1988] J.P.L. 30* held that the justified fear that the extension of a bail and probation hostel accommodation would cause disturbance and unpleasantness to neighbouring properties, was a material consideration. The present decision is however distinguishable in that the kind of hostel being proposed would not inevitably cause that kind of behaviour and there was no previous history or pattern of disturbance. Yet George Bartlett Q.C. the Deputy Judge in the present case did accept that anti-social behaivour could amount to a material consideration, if it were to be attributable to the nature of the use of land. In that respect the Deputy Judge accepted that, although it was not a bail and probation hostel which was being proposed, the proposed hostel and group home was capable of accommodating special types of person and so *could* affect local residents' enjoyment of their land and use of the highway. This shows the difficulty of distinguishing between material and non-material considerations. Presumably fears (that a proposal to build a new dwelling next to an existing dwelling, could lead to the new dwelling being inhabited by the "neighbour from hell") would not be a material consideration. Neighbours may turn out to be good, bad or indifferent and so the anti-social behaviour you may have to suffer from bad neighbours is not attributable to the nature of the proposed development.

What is rather unclear from the judgment is the extent to which fears of anti-social behaviour have to be justifiable to be a material consideration. The tenor of the judgment would seem to be that the fears of the residents were ***131** material considerations and so the advice to the committee was erroneous. Yet the Deputy Judge went on to hold that the misdirection had not resulted in an invalid decision because the council considered the concerns to be immaterial and the mistake had not affected the outcome. Of course in the end in the present case, the distinction did not really matter from a practical point of view. The concerns were either not a material consideration as they were not justified or they were a material consideration but the council gave them little or no weight because they were not justified. From the caselaw the position would seem to be that even unjustified fears can be material considerations. The disagreement between the approach of Glidewell L.J. in the Gateshead case and the Court of Appeal in the Newport would seem to be over whether such fears could be the only reason for refusing permission. Such a situation is unlikely to occur in practice but unjustified fears could determine the outcome of a planning application, where the planning arguments are otherwise balanced.

Commentary by —Michael Purdue ***132**

