

Case No: C1/2007/1513
Neutral Citation Number: [2007] EWCA Civ 1026
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
ADMINISTRATIVE DIVISION
(HER HONOUR JUDGE HAMILTON QC)
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 27th July 2007

Before:

LORD JUSTICE PILL
and
LORD JUSTICE RIX

Between:

THE QUEEN ON THE APPLICATION OF LADY BERKELEY
Appellant
- and -

FIRST SECRETARY OF STATE & ORS
Respondent

(DAR Transcript of
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Mr R Drabble and Mr A Goodman (instructed by Messrs Richard Buxton) appeared on behalf
of the Appellant.

THE RESPONDENTS DID NOT APPEAR AND WERE NOT REPRESENTED.

Judgment

(As Approved by the Court)

Lord Justice Pill:

1. This is an application for permission to appeal against the judgment of HHJ Hamilton QC given on 9 March 2007. It is made by Lady Berkeley, and she seeks to quash a decision of the Secretary of State dated 30 January 2006 granting planning permission to Circadian Limited, the proposed respondents, along with local authorities, for a major development, primarily of housing, on a site overlooking the River Thames.
2. Two submissions are made. The first is that the Inspector, on whose report the Secretary of State's decision was based, erred in law and, accordingly, the Secretary of State did, in the test applied to the planning policies. It is further submitted that there is another compelling reason for the matter being considered by the Court of Appeal, namely that the court should express itself as to the approach which planning authorities should take to that part of the development plan known as the Blue Ribbon Network ("the BRN").
3. The judge's decision has not been mentioned in the course of the submissions made by Mr Drabble QC; no doubt no disrespect to the judge is intended by that. Whatever view it takes itself, this court is not approving the reasoning of the judge. It is not necessary to consider it because the error of law alleged is that of the decision maker, the Secretary of State, relying, as he did, in part at any rate, on the report of his Inspector. One important issue to which no reference need be made: the Secretary of State disagreed with his Inspector on one planning issue when granting planning permission.
4. The issues turn on the importance to be attached to the Thameside location of the site. Mr Drabble submits that the BRN policies, expressed as a part of the development plan, have a very considerable importance; the River Thames is a wholly underused resource. When riverside developments are proposed, an active appraisal is required of how the proposal can have full regard to the riverside location. Water-based policies should be followed and developments permitted under the plan, should require that importance be given to that aspect. Mr Drabble accepts that, on the facts of this case, the development was very much in contemplation before the relevant part of the London Plan was adopted in February 2004.
5. The relevant part of the Inspector's report is in Section 19. The report is a very long one, and it followed a long inquiry into the development proposals, as one would expect for a site of this importance and a development on the scale proposed. There was to be a demolition of parts of the former Lots Road Power Station, and the provision of a very substantial number of residential units.
6. The second submission is that the planning decisions in this case are likely to be treated as guidance in future development proposals, and they have insufficient regard, it is submitted, to the BRN.
7. Mr Drabble submits that the Secretary of State's approach appears to be that, unless an alternative water-based proposal is before the planning authority, there is nothing to give priority to, so that there has been no failure on anyone's part in coming to this decision to apply appropriate planning proposals. He submits that if a proposal is made for a site on or near the river, it must begin with a consideration of water-based possibilities for the development; that is crucially missing in the consideration in the case of this substantial site. There must either be a water-based use of the site or the developer must establish that such a use is not possible. He submits that, unless the test is put in that way, one will never have riverside developments appropriate to the plans for the river, because it will always be more profitable for the developer to ignore or have less regard to that aspect of the scheme. As with affordable housing, he

submits, the developer must be required to introduce water-based uses or to establish that it is not possible to do so.

8. Mr Drabble has referred to the appropriate policies. The Blue Ribbon Network is described in this way at page 4.74 of the February 2004 document:

"The Blue Ribbon Network has an essential role to play in delivering all the key elements of the Mayor's vision of an exemplary, sustainable world city. Water is a valuable and scarce asset within London and its use must be set within sustainable limits which prioritise those uses and activities that need a waterside location. The Mayor has a visionary approach to the Blue Ribbon Network, taking the water as the starting point for decision-making."

It is that last expression, to which particular importance is given on behalf of the applicant. A series of policies is then set out. 4C.1 provides that:

"The Mayor will, and boroughs should, recognise the strategic importance of the Blue Ribbon Network when making strategies and plans, when considering planning applications and when carrying out their other responsibilities. Other agencies involved in the management of the Blue Ribbon Network should recognise its strategic importance through their policies, decisions and activities.

"All agencies involved in the management of the Blue Ribbon Network should seek to work collaboratively to ensure a co-ordinated and cohesive approach to land use planning, other activities and the use of the Blue Ribbon Network. Decisions should be based upon the Blue Ribbon Network principles."

The policies are numerous amounting in total to 34. The two policies relied on by Mr Drabble are: first, 4C.12, which provides:

"Sustainable growth priorities for the Blue Ribbon Network

The uses of the Blue Ribbon Network and land alongside it should be prioritised in favour of those uses that specifically require a waterside location. These uses include water transport, leisure, recreation, wharves and flood defences.

For sites that are not suitable or not needed for these priority uses, developments should capitalise on the water as an asset and enhance the Blue Ribbon Network in order to improve the quality of life for Londoners as a whole, as well as for the users of the development."

9. Mr Drabble submits that the effect of that policy is to require the developer to consider first whether a water-borne development, with uses essentially linked to the presence of the river, is possible. Only if it does come within that category does the second part of the policy apply.

10. In the course of submissions on that point, the issue was raised as to whether, in pursuance of these policies or otherwise, there has been some overall assessment of the River in terms of what facilities ought to be provided; for example, by way of marinas, moorings, other facilities for boats and riverside restaurants. It appears that no such policy is in existence. I do find that surprising. One has reports and policies prepared for all kinds of leisure and leisure-related issues, showing the need for open space, and sports facilities of different kinds, and I am surprised, having been introduced to this subject in the course of the present case, that no one, neither public nor private authority, appears to have produced an assessment of that kind: setting out the total needs, by way, for example, of moorings and marinas, or making

recommendations or even suggestions as to places along the river where they might be positioned.

11. The point arises because of the word "needed" in policy 4C.12. It is difficult for anyone, in the absence of such a report, to assess whether a particular site is "needed" for the types of water-borne uses mentioned. There is no suggestion that it is needed for flood defences or for wharves, but it is very difficult, if not impossible, to assess whether it can be said to be needed, for example, for leisure or recreation. The submission is that it is not for an objector to proposals to suggest what alternative uses there may be, and one understands the difficulty of an individual, or group of objectors, in doing that, but that burden, and it is submitted to be a legal burden, is upon an individual developer to prove the negative: that the site is not needed for the water-borne purpose. I have to say that that is not a legal obligation which, it appears to me, the policies do impose.

12. Even if it does not go that far, Mr Drabble submits that there is a failure in this case which is likely to be repeated in what might be more prominent, more favourable cases, from an objector's point of view, to the question of water-borne development. Before expressing conclusions on 4C.12, I refer to the other policy relied, which is 4C.20, and headed:

"Design - starting from the water

The Mayor will, and boroughs should, seek a high quality of design for all waterside development. All development, including intensive or tall buildings, should reflect local character, meet general principles of good urban design and improve the quality of the built environment. In addition, development should integrate successfully with the water space in terms of use, appearance and physical impact and should in particular:

-- include a mix of uses appropriate to the water space, including public uses and open spaces to ensure an inclusive, accessible and active waterside and ground level frontage."

13. I do not propose at this time in the afternoon to read the whole of the policy. I would summarise it in this way: other features are set out, for example, providing landmarks and incorporating design and construction techniques as a precautionary approach to flood risk. These are essentially design questions using the word design in a more limited sense. The opening words would seem to support the Inspector to view: that what is in mind in this policy is the quality of design for waterside development, the reference to use, appearance and physical impact. The words on which Mr Drabble particularly relied are those I have read:

"Include a mix of uses appropriate to the water space."

14. He has referred the court to the meaning of design in general development policies. The concept of design includes a concept of mixed use, it is submitted, and, even though the heading of 4C 20 is 'design', it contemplates and requires a mix of uses under the heading of 'design'.

15. I would add that within the same sub-section of the policy, the examples given under the rubric of mix of uses include public uses of open spaces, accessible and active waterside and ground-level frontage. Provision is made for those aspects in the design which the Secretary of State has approved. It is not disputed that, viewed as a primarily residential development, the design proposals do have regard to the position of the development in a favourable site overlooking the river, do include open space and do include provision for use of a river footpath. That is not enough, submits Mr Drabble. What is missing is the consideration and presence of mixed uses. He does not specify mixed uses in detail, consistently with where he

says the burden of proof lies, but he says, by way of suggestion, that there should be moorings for boats, a marina. The possibility of riverside restaurants has also been mentioned.

16. Having referred to the policies, I turn to the facts of the case and I have mentioned the timing of the proposal; the Inspector undoubtedly had regard to it when he stated at paragraph 19.158 that the proposal has a long history:

"The site is identified for development in both the RBKC and LBHF UDPs, adopted in 2002 and 2003 respectively but obviously having undergone a long preparation period before that. In both, a residential-led scheme is anticipated."

Mr Drabble acknowledged as a weakness of this particular case, and without prejudice to the general submissions he makes, that this was a development which was formulated before the 2004 policies came into existence.

17. The Inspector then makes at paragraph 19.160 what Rix LJ said may be an overreaching point. He referred to the positive aspect of the development, namely the provision of substantial housing. The Inspector states:

"Here, the tension [that is the tension between development plan policies] created by a proposal for residential development would equally be created if the site were proposed for river-based uses - in particular, its loss for substantial residential development would be contrary to the housing strategy of the Plan.

"The Mayor has firmly come out in favour of providing high-density housing on the site."

18. In the following paragraphs, the Inspector sets out in some detail the 4C policies, those which are central to the present case I have cited, and he reaches his conclusion. I put it first in a general way; that there is no significant clash between the proposal and many of the 4C policies.

19. At 19.164 he specifically refers to policy 4C.19. That is a moorings policy which provides:

"New mooring facilities should generally be in basins or docks but may be appropriate in areas of deficiency or as an aid to regeneration, where the impact on navigation, biodiversity and character is not harmful."

The Inspector makes the point that some of the uses suggested in the plan as alternatives which are water-based are not contemplated for a location such as this.

20. There was evidence before the Inspector, both from the Mayor and from Lady Berkeley and probably from other parties too, as to whether water-based developments were a sensible or possible use. I avoid the word 'feasible' in deference to Mr Drabble's point that it is a word which suggests profitability, and his submission is that developers must accept less profitability if they are loyal, and local authorities are loyal, to apply the water-based policies at 4C.

21. The Mayor's case on this aspect of the case is set out at 7.12; I will not read it in full. It concludes with the sentence:

"There is no evidence to suggest that Lady Berkeley's suggested alternative uses of boating and education centre with maritime support services, or indeed any similar proposals for such development, would be viable."

I accept that the word 'viable' is used and I note the reservations which Mr Drabble made about its use.

22. Lady Berkeley's submissions appear at paragraph 15.72 of the report, where a number of possible uses are suggested, I am sure without prejudice to the general legal submission now made by Mr Drabble.

23. It appears to me that in paragraph 19.163, the Inspector is making a finding of fact on those competing woes. Having referred to other policies:

"... there is no water-based use which could reasonably be expected to occupy the site, or part of it, if this scheme did not go ahead - and thus no use to which priority might reasonably be given in terms of policy 4C.12."

That appears to me to be tantamount to finding that, even if one applied a strict test as Mr Drabble advocates, even had a study on assessment of the type he proposes were to have been followed, it could have produced no scheme.

24. There is also an evidential difficulty. I have already mentioned it by saying that on Mr Drabble's submission a negative would have to be proved. It is extremely difficult for a developer, or an objector for that matter, to make an assessment of what other uses are possible on the available evidence. As I have said, I cannot accept it as a proposition of law that the policies require that, to be lawful, an exercise of that kind must have been done, and that a planning authority which grants a permission in the absence of such an assessment is wrong in law.

25. In my judgment, policy 4.20, the specific policy, is almost exclusively a design policy. In context, and set with the other policies, it is not intended to lay down that only mixed uses are acceptable. If it goes some way in that direction then the mixed uses specifically stated are in some respects uses which have been incorporated within these proposals. It does not require as a matter of law that there be something such as a marina or a series of riverside restaurants to make a policy lawful or that it can only be lawful if the impossibility of such other developments is proved.

26. That approach, in my judgment, applies to the more general point raised, and I have substantially covered it in the observations I have already made. I cannot, in this case, find the grant of permission arguably unlawful because of the absence of the type of initial study which Mr Drabble advocates. The point is reinforced in the present case because of the advanced stage which planning had reached before the 2004 policy came into existence. It is made more difficult too, because of the undoubted design approach which has had considerable regard to the riverside location.

27. While I am going to state the obvious, that the BRN policies are important ones, I do add that it does seem to me that, when planning decisions are now made, importance must be given by all concerned to the BRN policies, and to the need to put forward proposals which have full regard to them. What that requires in a particular case is, of course, way beyond the scope of the inquiry in this court, or indeed of an inquiry if the matter were to proceed to a full hearing.

28. In my judgment, there is no real prospect of this planning decision being found unlawful by this court. Mr Drabble goes on to submit that the court nevertheless should have the opportunity to declare itself on the policies. The court, particularly this court, is reluctant to embark on academic considerations. The issue is an important one and I have made certain

limited and guarded observations about it. It is not, in my judgment, appropriate to grant a permission so that the court can consider more fully the effect of the policies. Courts are reluctant in any event to lay down as a matter of law approaches which planning policies require; a degree of flexibility is essential. In my judgment it is not appropriate, in this case, to grant permission on the basis that a declaration or legal guidance should be given on the important issues which have been raised.

29. For those reasons I would refuse this application.

Lord Justice Rix:

30. I agree for the reasons given by my Lord, Lord Justice Pill. I can find no error of law arguably made by the Inspector which would give rise to an appeal. After a lengthy inquiry, in respect of this major development which has been long maturing, the Inspector was in the best of all positions to consider whether the Blue Ribbon Network policies had been breached, and I am satisfied that he was entitled to find that they had not. That is not to say, of course, that the BRN policies are not important policies which should be seriously considered by all those concerned in development along the network: by developers, local authorities and the Mayoralty of London.

Order: Application refused.