Bernard Wheatcroft Ltd. v. Secretary of State for the Environment and Another

QUEEN'S BENCH DIVISION

FORBES J.

October 21 and 24, 1980

Town and country planning—Planning permission—Whether power in local planning authority or Secretary of State to grant planning permission for smaller development than that for which permission applied for—Whether proper test whether development proposed in application for planning permission severable or whether to allow development subject to condition that size of development should be reduced would be to allow development in substance not that for which planning permission applied for—Planning judgment—Matters to be taken into account—Whether those who should have been consulted on changed development deprived of opportunity of consultation

The applicants applied to the local planning authority for planning permission for a housing development comprising approximately 420 dwellings on 35 acres. The local planning authority refused permission, and the applicants appealed to the Secretary of State. Prior to the opening of the inquiry, the applicants indicated to the local planning authority that they were proposing to put forward at the inquiry an alternative proposal for 250 dwellings on 25 acres, that alternative proposal to be considered only if the issue of scale of development was deemed to be critical to the determination of the appeal. That alternative proposal was duly put forward at the inquiry. The local planning authority contended that the Secretary of State could not legitimately reduce the area of the appeal site by 10 acres and only had power to deal with the application as submitted. The inspector in his report concluded that if the appeal was restricted to consideration of 420 dwellings on 35 acres it should, on the planning merits, be dismissed but that if it was permissible to reduce the area to 25 acres and for the number of dwellings to be reduced such development would not be objectionable and planning permission should be granted accordingly. The Secretary of State in his decision letter said:

> Having regard to the inspector's conclusions concerning a smaller site than that proposed in the application under appeal, whilst it is accepted that there are circumstances where a split decision would be appropriate, the opinion is held that where an appeal results from an application for permission to erect a specified number of dwellings without any indication at all of their sizes or of the individual plots, the proposed development is not severable and it would be improper to purport to grant permission in respect of part of the site or for a lesser number of houses.

He accordingly dismissed the appeal. The applicants applied under section 245 of the Town and Country Planning Act 1971 for his decision to be quashed.

Held, allowing the application, that there was no principle of law that prevented the imposition on a planning permission of conditions that would have the effect of reducing the permitted development below that for which permission had been applied for except where the application was severable; that the true test was not whether the development proposed in the application was severable but whether the effect of the conditional planning permission would be to allow development that was in substance not that for which

permission had been applied for; and that, accordingly, the Secretary of State having misdirected himself in law, his decision must be quashed.

Kent County Council v. *Secretary of State for the Environment* (1976) 33 P. & C.R. 70 considered.

Per curiam. The main, but not the only, criterion on which the judgment of the local planning authority or the Secretary of State should be exercised on the question whether the effect of such a conditional planning permission would be to allow development that is in substance not that for which permission has been applied for is whether the development is so changed thereby that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, those words being used to cover all the matters of the kind with which Part III of the Act of 1971 deals. Where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, it is difficult to believe that it should be necessary to go again through the process of consultation about a smaller development.

MOTION.

The facts are stated by Forbes J.

Joseph Harper for the applicants, Bernard Wheatcroft Ltd.

The first respondent, the Secretary of State, was not represented.

Jeremy Sullivan for the second respondents, the Harborough District Council.

Cur. adv. vult.

October 24. **Forbes J.** In this case Mr. Harper moves to quash an order of the Secretary of State for the Environment whereby he dismissed an appeal against refusal of planning permission by the second respondents, the Harborough District Council. Despite the fact that it is concerned solely with the extent of his powers, the Secretary of State is not represented.

The facts may be set out briefly as follows. The applicants own a large area of agricultural land at Bitterswell Road, Lutterworth, in the district of Harborough. The site with which we are concerned is a 35-acre portion of that land lying to the north of Lutterworth and immediately adjacent to a developed area of that town, a large portion of which in fact is a previously developed estate of the applicants. The applicants also own a still further area of seven acres of land that was not included in the application. In 1972, despite objection by the local planning authority, the Secretary of State decided that 25 acres of the 35 for which planning permission was now applied for were suitable for development if two problems could be overcome. The first was surface water disposal, and the second was access to Bitterswell Road. The Secretary of State said, as I understand it, that the access problem alone would not have been sufficient to prevent planning permission being granted. After that appeal, and encouraged by the Secretary of State's decision, the applicants purchased some further land that enabled, in their view, the access problem to be overcome, and that land was included in the current application. The 35 acres included, however, further land, beyond

the original 25 and not included in the access land, that extended into open meadow with no particular natural boundaries. The application was made on the appropriate form on April 3, 1978. After giving the address of the site and identifying the 35 acres on a plan, the applicants went on to answer an invitation on the form to state the number of dwelling units proposed by filling in " approximately 420 dwellings." It is pointed out that that is the mathematical result of taking a density of 12 houses to the acre over the whole of the 35 acre site. That application was refused by the local planning authority on July 12, 1978, for a variety of reasons, including amenity, population, access, traffic and surface water disposal. The applicants appealed to the Secretary of State on December 22, 1978, and a public inquiry was held on January 22 to 24, 1980. On January 4, that is, less than three weeks before the inquiry was due to be held, the applicants wrote to the local planning authority indicating that they were proposing to put forward another proposal and submitted what they described as a schematic layout showing about 250 dwellings on a reduced area of 25 acres. The letter emphasised that the applicants " would wish the schematic lay-out to be considered as a viable alternative proposal to the application as originally submitted only if the issue of scale of development is deemed to be critical to the determination of the appeal and without prejudice to the proposals contained in the original application."

On January 11, 1980, the local planning authority wrote back: " My council is of the opinion that this is a new application and should be considered in the normal way, that is, determined by the council after consultation with interested parties," etc. At the inquiry, the applicants called a planning consultant who said that he could not support the development of 420 units on the 35-acre site, and he produced three alternative plans. Two of them provided for 250 dwellings on 25 acres and differed only in their proposals for access and internal roads. The third included another six acres, making 31 in all, and provided for 330 to 350 dwellings. The local planning authority's case was almost wholly concerned to argue that any development on this site would have undesirable consequences, although it is clear that the impact of the development reduced to 250 houses had been examined by the traffic experts of the county council, who appear to have given evidence that even this reduced number was unacceptable on traffic grounds. The local planning authority maintained at the inquiry that the Secretary of State could not legally reduce the area of the appeal site by 10 acres and that he only had power to deal with the application as submitted. It was accepted that the surface water objection could be adequately resolved by using a balancing reservoir scheme, and that reason for refusal was abandoned.

Various other parties appeared at the inquiry. A fair reading of their evidence and arguments recorded in the inspector's report is that they objected to any development on the site. One of them

clearly stated that even 250 houses would be objectionable. The inspector reported on March 6, 1980. It is unnecessary to refer to his report other than to summarise his conclusions and recommendations. His conclusions were, first, that it was a legal matter for the Secretary of State to determine whether it was possible to restrict any planning permission granted on that appeal to an area smaller than 35 acres and to fewer than 420 dwellings, secondly, that if the appeal was restricted to consideration of 420 dwellings on 35 acres he felt that it should be dismissed, thirdly, that, if it was permissible to restrict the area to 25 acres and for the number of dwellings to be reduced, then such development would not be objectionable. He recommended that, on the assumption that there was no legal bar to such action, permission should be granted for the erection of dwellings on 25 acres at a density of 10 to the acre.

The Secretary of State gave his decision by a letter dated April 24, 1980. After setting out the inspector's conclusions and recommendations, he went on in paragraphs 4 and 5:

> 4. Having regard to the inspector's conclusions concerning a smaller site than that proposed in the application under appeal, whilst it is accepted that there are circumstances where a split decision would be appropriate, the opinion is held that where an appeal results from an application for permission to erect a specified number of dwellings without any indication at all of their sizes or of the individual plots, the proposed development is not severable and it would be improper to purport to grant permission in respect of part of the site or for a lesser number of houses. In this particular case it must be noted that although plans D, E and F illustrate a possible lay-out and a reduced approximately 25-acre area of the appeal site for about 250 dwellings which your clients agree would be an acceptable alternative development, it was clearly indicated at the inquiry that these plans, which were submitted after the appeal had been made, were not provided as replacements for the original appeal proposals. Consequently the view is held that it would not be appropriate for the appeal proposal to be severed or reduced, and the Secretary of State has therefore considered the appeal on the basis of the original application before him. 5. The Secretary of State agrees with the inspector's conclusions regarding the proposal on this appeal and concurs with his opinion that the appeal should be dismissed. Any proposal for a smaller development would have to be the subject of a further application which would lead to consideration by the local planning authority in the first instance. In the circumstances the Secretary of State does not propose to comment on any of the inspector's conclusions regarding a reduced development. For the reasons given he does not accept the inspector's recommendations and thereby dismisses the appeal.

The real question in this case is whether the Secretary of State was right in considering that he had no power to grant planning permission for development on a smaller site and with houses at a lower

density than were indicated on the application form originally submitted to the local planning authority.

Mr. Sullivan, however, had an argument that, on a true reading of the decision, the Secretary of State was in fact exercising his planning discretion. It will be convenient to deal with this argument first. The inspector in his conclusions and recommendations clearly poses a legal question. I have no doubt that in paragraph 4 the Secretary of State was attempting to answer it. When he uses the term " improper " in the first sentence of this paragraph, he refers, it seems to me, to an improper—that is, an illegal—use of powers. This first sentence sets out in general terms the legal proposition to which the Secretary of State commits himself. One can expand it in the context of the appeal in this way. If the application indicates a number of sites for development, each with a single house, then it can be severed by, as it were, lopping off individual sites. In such a way, permission can be granted for a reduced area or for a lesser number of houses. If, however, all that one has is an area covered by the application and a number of houses proposed to be built on it, such severance is impossible and therefore reduction in the area or the number of houses is improper, because no power is given to achieve a reduction by this means. Put simply, the Secretary of State is saying: " The only way in which I can properly exercise my powers and achieve a reduction in the area or the number of houses is if the application can be regarded as severable. If it cannot be so regarded, I have no power to achieve this end." The second sentence in paragraph 4 does no more than set out those circumstances in the current appeal that led the Secretary of State to say that, despite the other proposals put forward, what he was dealing with was a non-severable application. The last sentence is the conclusion to the other two. The three sentences of this paragraph, properly read, amount to my mind to a logically unimpeachable syllogism: only severable applications can result in planning permission for a reduced area; this is not a severable application; therefore it cannot result in planning permission for a reduced area. As with all syllogisms, the conclusion is only valid if the premises are sound. It remains to be seen whether the major premise here is a valid statement of the law.

The powers of the Secretary of State are derived from section 36 (3) of the Town and Country Planning Act 1971. They are well-known, but I should refer to them:

> Where an appeal is brought under this section from a decision of a local planning authority, the Secretary of State, subject to the following provisions of this section, may allow or dismiss the appeal, or may reverse or vary any part of the decision of the local planning authority, whether the appeal relates to that part thereof or not, and may deal with the application as if it had been made to him in the first instance.

What can be done when the application is made in the first instance is to be found in section 29 (1):

> Subject to the provisions of sections 26 and 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—
> (*a*) [subject to certain sections of the Act] may grant planning permission, either unconditionally or subject to such conditions as they think fit; . . .

At this point, I can, I think, go straight to the judgment of Lord Widgery C.J. in *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment*[1]:

> . . . one has got to look at the learning on the question of what conditions can properly be attached to planning permissions. The attachment of conditions to planning permissions is as old as the planning legislation itself, and is now to be found in section 30 (1) of the Town and Country Planning Act 1971: " Without prejudice to the generality of section 29 (1) of this Act, conditions may be imposed on the grant of planning permission thereunder —(*a*) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission; . . ." Those are wide words; they clearly on their face entitle the local planning authority to impose conditions which affect land not the subject of the application itself, and which go to the restriction of the past user or the removal of existing works. Although they are wide it has been recognised for a very long time that they are subject to certain restrictions. The two principal restrictions which the courts have placed on those words are first that a condition is invalid as being contrary to law unless it is reasonably related to the development in the planning permission which has been granted. It must not be used for an ulterior purpose, and must, in the well-known words of Lord Denning M.R. in *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government,*[2] " fairly and reasonably relate to the permitted development." The second restriction on those words which the courts have adopted in recent years is that a condition which is so clearly unreasonable that no reasonable planning authority could have imposed it may be regarded as *ultra vires* and contrary to law and treated as such in proceedings in this court. But as far as I know those are the only two general limitations on the wide powers in section 30 of the Town and Country Planning Act 1971, . . .

Mr. Sullivan initially argued that the Secretary of State was right

[1] [1973] 1 W.L.R. 1549, 1552–1553; [1974] 1 All E.R. 193; 26 P. & C.R. 480, 483–484; 72 L.G.R. 206, D.C.
[2] [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625; 9 P. & C.R. 204, 217; 56 L.G.R. 171, C.A.

and that severability was the only test. In his subsequent submissions, however, he seemed to have abandoned that stance, because they proceeded on the basis that the proper test was whether the development permitted was in substance different from that applied for. The extent to which this latter formulation is incompatible with the former I shall deal with in a moment. Although, therefore, Mr. Harper and Mr. Sullivan put forward a number of propositions, in the end I do not think that they differ markedly from each other on the essential principles governing the question of when conditions can be regarded as *intra vires*. Both, I think, accept as a starting point the passage in Lord Widgery C.J.'s judgment that I have just quoted. In the context of that passage, the question here is whether it is permissible to grant a planning permission subject to a condition that only what I may call a " reduced development " is carried out. Both counsel, I think, accept that it is permissible to grant planning permission subject to such a condition; both, I think, would seek to limit such conditions to those that do not alter the substance of the application; and both agree that in considering whether it is right to grant planning permission subject to such a condition the planning authority should, among other things, have regard to one of the underlying purposes of Part III of the Act of 1971, which is to ensure that before planning permission is granted there should be adequate consultation with the appropriate authorities and a proper opportunity for public comment and participation. The broad proposition, therefore, as I see it, to which both counsel would give assent is that a condition the effect of which is to allow the development but which amounts to a reduction on that proposed in the application can legitimately be imposed so long as it does not alter the substance of the development for which permission was applied for. If it does alter the substance, the argument goes on, it cannot legitimately be imposed, because there has been no opportunity for consultation and so on about what would be a substantially different proposal. Parliament cannot have intended conditional planning permission to be used to circumvent the provisions for consultation and public participation contained in this Part of the Act.

Now, the test of substantial difference is not at all the same thing as the test of severability. It is possible to imagine an application for two related developments on the same piece of land, say a major and a minor development, that is clearly severable into these two portions. To give planning permission subject to a condition that the minor development was not carried out might well not alter the substance of the application. On the other hand, if the condition prevented the major development being carried out, that might well amount to a permission substantially different from the application. Thus, the application of the severability test alone could result in planning permission being given for development that was substantially different from that applied for. The proposition that conditions can only be used to reduce the development below that proposed in the

application where the application is severable is derived from a decision of Sir Douglas Frank, Q.C., sitting as a deputy High Court judge, in *Kent County Council* v. *Secretary of State for the Environment.*[3] That decision itself clearly arose from the argument put forward by counsel for the Secretary of State, which was in these terms, as recorded in Sir Douglas Frank's judgment[4]:

> . . . (1) where an application contained a number of separate and divisible elements it was lawful for them to be separately dealt with, (2), alternatively, that if the elements were not divisible there was power to modify the application providing that (a) the scope of the development was not enlarged; (b) the essential nature of the development was not altered; and (c) any persons affected were given a chance to make representations.

It can be seen that the second alternative formulation looks remarkably like the proposition to which I have just referred and to which both counsel would assent. In giving judgment, Sir Douglas Frank acceded to the first part of this argument and presumably thought it in consequence unnecessary to deal with the second. The Secretary of State, in the case with which I am dealing, has clearly directed himself that it is only if the application is severable that he can by condition reduce the ambit of the planning permission granted. He has had no regard to the question whether the planning permission, if granted subject to a condition, would be substantially different from that applied for.

For my part, I cannot accept that the proper test is whether the development proposed in the application was severable or not. Unless coupled with a requirement that the result must not be substantially different from the development applied for, it would be possible, as I have just indicated, for local planning authorities to grant planning permission for developments that were in fact substantially different and thus defeat the consultative objects of Part III of the Act of 1971. The severability test, therefore, could only be a proper one if combined with a test of substantial difference. I can, however, see no justification for the severability test at all. It should be remembered that we are dealing here with applications for outline planning permission. Many of these applications are, no doubt, for multiple purposes, some of them severable, some of them perhaps not. Many applications, however, as here, are for single purposes, for instance, residential development. Why should it be impossible for the local planning authority to say, on an application for outline planning permission: " we think 35 acres is too much but 25 will be all right," and similarly with a reduction in density? So long as the reduction passes the test of not altering the substance of the application, what vice is there in that? It is clearly a condition fairly and reasonably related to the permitted development (see *Pyx Granite Co. Ltd.* v. *Minister of*

[3] (1976) 33 P. & C.R. 70.
[4] *Ibid.* at p. 75.

Housing and Local Goverment[5]), and it is not unreasonable under the *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[6] doctrine. To give permission for a substantially different development would, on the other hand, be unreasonable as that word is understood in these cases (see, for instance, a passage from the judgment of Diplock L.J. in *Mixnam's Properties* v. *Chertsey Urban District Council*[7]), because it would not be what Parliament intended a consultation process to comprehend. The test of substantial difference is thus firmly based on the broad principles of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[8]. The severability test, on the other hand, seems to me to have no particular validity. To grant a planning permission for part only of an application that is not severable does not appear, merely by that fact, to run counter to either of the two general limitations referred to by Lord Widgery C.J. in *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment.*[9] Perhaps the argument on severability put forward by the Secretary of State in *Kent County Council* v. *Secretary of State for the Environment*[10] and accepted by Sir Douglas Frank had its origin in the fact that the application in that case clearly was severable. That does not, however, seem to me to justify its elevation into a matter of general principle.

I conclude, for my part, that there is no principle of law that prevents the Secretary of State from imposing conditions that have the effect of reducing the permitted development below the development applied for except where the application is severable. The Secretary of State clearly directed himself that there was such a principle and thus fell into error, and his decision must be quashed.

I should add a rider. The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, and I use these words to cover all the matters of this kind with which Part III of the Act of 1971 deals.

There may, of course, be, in addition, purely planning reasons for concluding that a change makes a substantial difference, but I find it

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[5] [1958] 1 Q.B. 554; 9 P. & C.R. 204.
[6] [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.
[7] [1965] A.C. 735; [1964] 2 W.L.R. 1210; [1964] 2 All E.R. 627; 15 P. & C.R. 331; 62 L.G.R. 528, H.L.
[8] [1948] 1 K.B. 223.
[9] [1973] 1 W.L.R. 1549, 1553; 26 P. & C.R. 480, 483–484.
[10] (1976) 33 P. & C.R. 70, 75.

difficult to believe that, where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, whether larger or smaller, it should be necessary in all cases to go again through the process of consultation about the smaller development. It is clear that, in this case, the processes of consultation had resulted in such root-and-branch opposition that further consultation could not have resulted in more opposition but only, if there was any change in public attitudes, in less. In those circumstances, Mr. Harper invites me to say that only an unreasonable Secretary of State could have concluded that the course recommended by the inspector would result in a development substantially different from that contained in the application. In consequence, he says, I should make an order the effect of which would be to substitute for the dismissal of his client's appeal planning permission as recommended by the inspector. As I understand it, however, all that I have power to do under section 245 of the Act of 1971 is to quash the order, and that is all, in fact, that Mr. Harper's notice of motion asks me to do. The court cannot grant planning permission. I must decline his invitation and merely order that the Secretary of State's decision should be quashed.

I might add that I have come to my general conclusion with a certain feeling of satisfaction, as it seems to me to permit a welcome degree of flexibility in the conduct of planning applications and appeals while at the same time maintaining adequate safeguards for the interests of those in whose favour the provisions for consultation were enacted.

Application allowed. Decision of Secretary of State quashed.

Secretary of State to pay such costs of applicants as would have been incurred by them if Secretary of State had submitted to judgment. Additional costs to be borne by second respondents.

Solicitors—R. G. Frisby & Small, Leicester; Solicitor, Harborough District Council.

[*Reported by Michael Gardner, Barrister.*]