

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

CO/1185/07

BETWEEN:

THE QUEEN
On the application of
KINGS CROSS RAILWAY LANDS GROUP

Claimant

-v-

LONDON BOROUGH OF CAMDEN

Defendant

-and-

(1) ARGENT (KINGS CROSS) LIMITED
(2) LONDON & CONTINENTAL RAILWAYS LIMITED
(3) EXEL PLC

Interested Parties

**SKELETON ARGUMENT ON BEHALF OF THE
INTERESTED PARTIES**

For Hearing: 24th May 2007

Time Estimate: 1 ½ days

Advance reading: ½ day

Essential reading : as recommended by Defendant and

*:Summary Grounds for Resisting the Claim submitted by the
Interested Parties [TB/1/494 – 512]*

Authorities

: those set out in Summary Grounds and

: R (Save) v. Westminster [2007] EWHC 807 (Admin)

: R(Chisnell) v. Richmond LBC [2005] EWHC 134 Admin

: Fordham page 899-900

: R (Saunders) v. Tendring [2003] EWHC 2977 (Admin).

Introduction

1. The Interested Parties ("IPs") have set out in detail their reasons why permission should not be granted and why the claim for judicial review should be dismissed in their Summary Grounds ("SG") [TB/1/494-514]. It is not proposed to repeat that detail here.

2. The IPs have seen in draft the Skeleton Argument (“SA”) proposed to be submitted on behalf of the Defendant (“the D”). The IPs agree with the arguments set out in that SA and, in the interests of avoiding unnecessary duplication, do not repeat them here.
3. Given the detail in those other documents, this SA does not set out the detail of the allegations made by the proposed Claimant (“C”) or the responses to them.
4. This document therefore seeks to respond to the main part of the case put by C in its SA.
5. However, first, it is appropriate to address shortly some omissions and errors from the C’s “Factual Background and Chronology” document (“the C’s Facts”).

Facts and chronology

6. As is explained in the first witness statement of Robert Evans (“RE1”) [TB/2/663-675] and as is well known, efforts to bring forward: (1) regeneration of Kings Cross railway lands; and (2) related planning and infrastructure projects have a very long planning history. That planning history provides an important background to the decision making exercise which is being impugned in this claim. This point is returned to under “Context” below.
7. In respect of the impact on conservation areas and listed buildings, the C’s Facts do not mention that English Heritage (“EH”) did not object to the proposals; or that C’s alternative proposals to avoid demolition had been comprehensively and repeatedly rejected by the D and EH. The matter was addressed in detail in March 2006 and nothing had changed by November. It is still not understood on what basis it is said the D’s Committee could have come to a different view on the merits of the demolition to enable the comprehensive regeneration of this area. The C has pushed its approach for a considerable period and that approach has found no favour with

those with statutory responsibility for protecting the historic environment (EH) and for determining planning applications (“the D). No explanation is provided as to what may have changed on this score between March and November 2006 – and no point was raised on these issues by any member in the November discussion.

8. The resolutions of the committee in November 2006 are set out in full at TB/1/246-7; and TB/1/183-5 and the decision notices at TB1/121. Para 1 of the C’s Facts: “approve nine applications” is an incomplete and inaccurate summary of those resolutions. They demonstrate the main purpose of the November committee meeting in the light of the resolutions passed in March. The court is referred to those resolutions and the reasons provided for them in full.
9. The vote was 9-6 as the webcast recorded : para 6.
10. The period taken in completing the section 106 agreement is not surprising or unusual for a scheme of this complexity: para 9.
11. The November report was 800 pages long only because it appended the March report. The “new” part of the report comprised 16 pages and the further appendices: para 13.
12. Whilst it is correct (para 17) that the November report did not separately address affordable housing, it is plain that the D’s committee was fully informed on it: see “Analysis Information” at [TB1/223-4]; and appx 10 and 11 which are referred to at para 7.2 of the report [TB/1/239]. The members were advised that they needed to consider whether they agreed with the conclusion of officers on policy compliance (see paras 3.5.38 – 39 [TB/1/233]) and the “Conclusion” at para 8.2 [TB/1/240]. It is plain that the scope of matters for their consideration included affordable housing and that councillors recognised as such (see e.g. para 19 of the C’s Facts).
13. The same is true of the C’s second issue - conservation areas and listed buildings (para 18).

14. Para 25 of the C's Facts makes the point that the wording of the D's SPG is not precisely the same as PPS3. That is correct but of no significance. There is no inconsistency between the two. The SPG does not use the phrase "below market prices or rents" in its definition but requires affordable housing to meet defined income affordability tests. This *necessarily* achieves a discount because those in housing need cannot afford prevailing market prices or rents as para 3.3.7 -12 makes clear [TB/1/324]. (See also the definition of affordable housing in the UDP at para 2.17: affordable housing "should be available at significantly less than the local market price or rent" [TB/1/534].)
15. As to para 35 of the C's Facts, the court is referred to the pragmatic consent order agreed by the C's and IPs to maintain the status quo pending this hearing. To rely on the IPs' sensible compromise on this as indicative of the alleged importance of the building itself is misconceived. The IPs do not accept the characterisation of the consent order in para 35 or in para 30 of the C's SA.

Ground 1

The C's complaint

16. At the heart of the claim is a complaint that the committee in November was: (1) given wrong legal advice; and/or (2) was "boxed in" by the written and oral advice such that it was effectively prevented from exercising its decision making role appropriately and prevented from coming to a different view on the planning merits if it had so wished. It is said that the "boxing in" can be illustrated by the affordable housing and listed building issues¹.

¹ The factual premise of this is not accepted. Whilst AH was raised in November by members, the impact on listed buildings was not. There was no indication that members wanted to reconsider afresh the matter of "listed buildings" and in the context (see para 7 above) that is hardly surprising.

17. It is in effect claimed that the report presented to the members in November operated to fetter their decision making discretion.
18. No specific substantive allegation is made as to how this committee on these facts could have legitimately reached a different conclusion. In respect of affordable housing the March committee had been unambiguously told that the offer was as far as the IPs were able to go and the position had not changed when the November committee met. On the listed building issue, too, nothing had changed in respect of the basic requirements for the layout of the development (as indicated in the brief) which necessitated the demolition of the listed buildings. The IPs were entitled to predictability and efficiency in the administrative procedures applied to the determination of their proposals (see references to PPS1 below).

The IPs' basic response

19. The IPs' basic argument is that the report and oral comments cannot be understood in this way; that there was no suggestion that the D had to act consistently. Rather, it is the IPs' basic case that the D's approach as displayed in the report and in oral comments was not a misconceived and unlawful attempt by officers to fetter the *powers* of the members but was a lawful and appropriate means of approaching the decision making exercise in the light of the March 2006 resolution.

The correct legal approach

20. Save as is explained in what follows, there is no dispute on the legal principles to be applied. It is clear that:
- (1) the relevant statutory requirement is that the planning application is to be determined in accordance with the development plan unless other material considerations indicate otherwise: s.38 Planning and Compulsory Purchase Act 2004 ("the 2004 Act");

- (2) a resolution to grant is not legally binding and can be revoked (the C's SA paras 21 and 22);
- (3) it is however a material consideration (the C's SA para 25) and one of significant weight, as its own terms make plain;
- (4) an intervening change of circumstances is not a prerequisite to such a revocation (the C's SA para 24);
- (5) a local planning authority is *empowered* to revoke or, to put it another way, not to ratify or confirm a previous decision on the basis of a change of view (the C's SA para 24, 25(b); (c); (f))²;
- (6) there is no imperative of consistency in planning decision making in the sense of obliging a local planning authority not to exercise its discretion afresh (the C's SA para 25(g); (h))³; and
- (7) thus, a new committee may make a different decision from its predecessor (the C's SA para 25(j)) or the same committee may do that.

21. Principles (3) to (7) tell one what a local planning authority *could* do. They do not assist in the consideration, on the facts of a particular case, of what an authority *should* do.

22. As to the grounds of challenge based on alleged errors in reports to committee, the principle stated by the Court of Appeal in *Oxton Farms v. Selby District Council* (unrep 18th April 1997) is important. It was recently cited with approval by Collins J in *R(Save) v. Westminster City Council* [2007] EWHC 807 (Admin) at para 30:

“From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer’s report. This reflects no more than the court’s conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer’s report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the

² although whether it should on the facts of a case in fact do so is of course, another, matter

³ although see below as to the role of consistency in decision making

meeting of the planning committee before the relevant decision is taken”: per Judge LJ.

Was the correct approach infringed on the facts?

Introduction

23. The regeneration of King’s Cross has a long planning history stretching back over decades. The planning and other heritage applications before the D had their own long history going back over several years and involving extensive consultation with all relevant parties including with the D (as plan maker and decision maker) and EH (with its statutory role in respect of listed buildings etc.).
24. It is submitted that: (1) the claim ignores the context in which the D’s decision was made; and (2) when that context is properly understood the way in which the C reads the report and understands the oral comments is plainly wrong.
25. The logically first question is “what is the significance of the March 2006 resolution?”
26. It is accepted that it is clearly not the same as - and does not have the legal effect of - a grant of permission. However, its legal status (see para 25(a) of the C’s SA) does not deprive it of substantial contextual significance.

Evolution of policy affecting the site

27. Given the significance of the development, the general chronology is as follows: (1) the determination of the UDP (and London Plan) policies applicable to the area (including the processes through Parliament for the approval of the Channel Tunnel Rail Link); (2) then the evolution of a development brief which set out in more detail what was required to be delivered; and (3) then the submission of a planning

application which was framed by reference to those site specific policies in the development plan framework.

28. At each stage of the evolution of the planning framework against which the proposals came to be assessed, there was extensive statutory consultation and opportunity for objections to be made. No complaint has been, or could be, about the care and thoroughness of this process.

29. It is important for the court to note that the change of political administration of D did not lead to the D deciding to take forward: (1) proposals to amend the relevant parts of the UDP affecting the site; and/or (2) proposals to amend the development brief for the site. There is no evidence that, after the local elections, the D had any agenda for regeneration of the King's Cross area inconsistent with the UDP policies and the brief adopted by its predecessors. The change of political control was, thus, in itself of no significance.

The planning application and the March resolution

30. The proposals were framed by reference to the policy framework in the UDP and development brief precisely so that the IPs could be confident that, in accordance with the approach required by section 38(6) of the 2004 Act, it would be likely to gain the requisite approvals. That is why the application was not submitted until the policy framework had been settled. The guidance in paras 7 and 8 of PPS1 is relevant, the essential objective being:

"...transparent, flexible, predictable, efficient and effective planning"

and

"the certainty and predictability"

of the plan led system.

31. The planning application was assessed in a thorough report in March⁴; and debated at length by the members with opponents being given a full opportunity to make their representations. The C made its representations forcefully at this time covering, amongst other things, affordable housing (“AH”) and listed building (“LB”) issues.
32. This led to the resolution to grant the planning application and associated resolutions in respect of the listed building applications [TB1/184-5]. Given the need to refer to the Mayor (and EH), the D was not at that stage able to issue planning permission (and the other approvals), but effectively resolved that it would do so when that course became open to it.
33. Further it endorsed the heads of terms and authorised officers to finalise the terms of the section 106 agreement subject only to the section 106 agreement being required to be referred back to the sub-committee for “final consideration” [TB/1/186].
34. The proposals were found to be in accordance with the development plan. There was no reference to GOL on the basis of a departure from the development plan (the only reference was under the shopping direction).

The significance of the March resolution

35. The March resolution was plainly a material consideration for the members when they had the proposals before them again in November [the C’s SA para 25(a)].
36. The weight to be attached to it was entirely a matter for the D’s committee: [the C’s SA para 25(d)].
37. However it was plainly a material consideration and one which the officers were entitled to advise the members to approach in the way they did (for the reasons given

⁴ The thoroughness of which was commended by GOL when the matter was referred to it.

above), so that they should depart from it only if there were good reasons to do so. The following points – which distil the argument set out above - bear on this submission:

- (1) As a matter of fact, the D had reached the position in March in which a scheme that had been evolving for many years and was of great importance for the borough was found to be acceptable after consideration of a thorough and clearly expressed report to committee and a long debate with full detail of what was proposed and a painstaking appraisal of its planning merits presented to the members. The position of the major consultees, including EH, was clear. The objections of the C on, among other things, affordable housing and the demolition of “important buildings” were considered and rejected.
- (2) Had permission been issued at that point, there would have been no grounds for challenge. This seems to have been accepted by the C, in that none of the numerous legal and procedural grounds it raised originally in respect of the first resolution have been pursued in this challenge.
- (3) Whilst it is *legally* correct that the March resolution was not binding on the November committee, that resolution provides an important part of the context for the November committee. After full consideration of the planning merits, the D had decided that permission should be granted. The November committee therefore did not come to the question with a “blank sheet of paper.”

38. The March resolution thus set the context within which the November committee was exercising its discretion. That context is one in which:

- (1) the D had already assessed the proposals against the same development plan considerations as applied in November and had no relevant proposals to change the applicable development plan policies;
- (2) the D had made a resolution to grant the necessary approvals; and
- (3) the D had already satisfied itself that the proposals were in accordance with the development plan and ought to be approved.

39. That context necessarily and inevitably shaped the advice on the exercise of the discretion and the members' approach to the exercise of their discretion at the November meeting. There is nothing unlawful or surprising in that.
40. Given that context, it is submitted that the D's committee in November would have had to have good planning reasons if it were to come to a different decision on the planning merits. That is what the report to committee, fairly read, and the oral comments, fairly understood, told the members.
41. It is further submitted that any such good reasons would have had to be weighed in the balance with provisions of the UDP and the brief, neither of which had changed since March. It is telling in this case that there is a striking absence of any identified change - let alone any material change - in planning circumstances or policies.

The resolution of 16th November 2006

42. A committee speaks by its resolution (as was submitted in the SG [TB/1/504-507]).
43. The D's committee resolved to grant permission for the reasons it gave at [TB1/121]. The committee found that the development was in accordance with the development plan. It also expressly endorsed and adopted the reasoning of the report to committee in March 2006.
44. The newly composed authority thus reached a fresh decision of its own that the application complied with the development plan for the reasons given in the March report. Members were specifically asked to address their minds to whether they agreed with the officer's conclusions on these matters. No caveats were expressed in the reasons for the resolution and there is no indication that the councillors believed they had been given no choice in the decision they made. They appreciated that they

had a choice – indeed some members voted against approval being given – and by a majority chose to reach the same decision as did the committee in March.

45. In the light of the reason given by the November committee for its decision, and in the absence of any other identified material considerations indicating a different outcome, s.38(6) dictated approval.

46. The conclusion is not in the least surprising, either

- (1) on the issues relating to the listed buildings and conservation areas (see para 7 above), or
- (2) on affordable housing (see the detailed consideration in the March report); and the analysis of policy and quantum in November.

The reasons for the resolution

47. In attacking the decision, C therefore seeks - in the circumstances, necessarily - to go behind the resolution and challenge the legality of the advice given which led to that resolution. In so doing, the C:

- (1) misreads the relevant parts of the report to committee – where the distinction between what the D could and should do is clear;
- (2) fails to consider the report to committee as a whole (see e.g. para 3.5.38 – 39 and para 8.2);
- (3) takes certain oral comments out of context and attributes to them a meaning they do not bear;
- (4) assumes that those oral comments and “wrong” advice underpin the resolution and reflect the true reasons of the members for resolving to grant permission *rather than* the reasons given in the resolution, which is akin to seeking to find the reasons of individual members for their decision – an approach deprecated in the case law (as is explained in the IPs’ SG);

- (5) impermissibly, and without evidence, asserts that the members were clothed in some sort of straitjacket which they themselves do not testify to; and
- (6) relies on a letter written after the event to the press, which is exactly the sort of exercise deprecated in the case law referred to in the IPs' SG.

Consistency in decision making

- 48. The case law is clear that if a different decision is to be made on the same subject matter: (1) the decision maker must have regard to the importance of consistency in decision making; and (2) give his reasons for departure from the previous decision. These general propositions are well established in *Spackman v. SSE* [1977] 1 All ER 257; and *North Wiltshire District Council v. SSE* [1993] 3 PLR 113 at 122F-H as applied in *R(Chisnell) v. Richmond LBC* [2005] EWHC 134 Admin paras 19 – 20.
- 49. This is no more than an application of the general public law principles set out at Fordham page 899-900: see e.g. Sullivan J in *R (Saunders) v. Tendring* [2003] EWHC 2977 (Admin).
- 50. It is submitted that, however one characterises the legal principle, the basic point is clear. Good administration, fairness and transparency dictate that if a decision maker is to change its mind it must have a good reason for doing so and explain why, especially in circumstances like this where substantial effort and expense was incurred in the light of and in reliance on the March resolution. That is no more than the November report to committee and the oral comments make clear.
- 51. The members were not prevented from considering the planning merits afresh by the approach adopted in the report to committee and the oral advice they received.

Ground 2:

52. The factual premise of this ground is wrong. PPS3 draft contained the definition now said to be a “new” consideration. The principle recognised in *Kides* is not engaged. The C’s SA at paragraph 57 is factually wrong.
53. Further whilst the wording of the PPS is different from the SPG and/or the UDP, the basic requirement is not. The rationale of *Kides* is that where new considerations arise the matter should be taken back – but that is no more than saying that the decision maker should take into account all material considerations. If the decision maker is the committee then it cannot comply with this requirement if it has not been appraised of a material consideration⁵.
54. The C also asserts that the committee might have reached a different decision had it known that there was a potential shortfall of 70 units. That may be so *if* there was a potential shortfall of 70 units, but there was not. This claim is based on a misunderstanding of the section 106 agreement. This misunderstanding is incomprehensible for the reasons set out in the IPs’ SG, to which there is no response in the C’s SA.
55. Paragraph 49 of C’s SA suggests that the section 106 agreement does not secure below market cost housing. This allegation is based on a misunderstanding of what shared ownership and shared equity housing is. Shared ownership housing involves a purchaser only buying a share of the equity. On the remainder, he pays a rent which is far below the open market rent which would otherwise be payable: see the section 106 agreement section NN para 19.4(c) [TB/1/567]. The RSL can afford this because of the sale to it of the units at cost price excluding land. The units are allocated to those eligible and in housing need under the RSL’s local lettings plan (section 106

⁵ *Carlton-Conway* applies this principle in a different context. It is not directly applicable and in any event the question as to the requirements of policy was in this case expressly considered in March.

section NN para 15). Those people by definition will not be able to afford market rents on the remaining equity.

56. On shared equity, the purchaser only purchases a share of the equity and pays no rent on the remaining equity. That is by definition below the price the market would charge. There are also non-market restrictions on use of staircasing receipts which ensures recycling of subsidy.

57. These points appear to have been overlooked by the C.

58. For these reasons the claim for judicial should be refused.

Keith Lindblom Q.C.

David Forsdick

18th May 2007

Jay Fullilove

From: David Forsdick
Sent: 18 May 2007 11:28
To: Jay Fullilove
Subject: Hours on Kings X

If I have to still account to you for hours on Kings X I have spent a further 3 ½ hours today on top of the time yesterday.

Dave