

IN A MATTER UNDER THE TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

Land at Grosvenor Rest Home, 13 Grosvenor Road, Southampton

ADDENDUM OPINION

Introduction

1. I am asked to further advise Highfields Residents Association (“**HRA**”) with regards to planning application reference 14/00999/FUL (“**the Application**”) that has been made to develop land at Grosvenor Rest Home, 13 Grosvenor Road, Southampton (“**the Land**”). My previous advice was dated 7th July 2014 and I understand that the HRA have recently had a meeting with Simon Rowberry, the Head of Planning at Southampton City Council (“**the Council**”).

2. I understand that Mr Rowberry had two primary concerns arising out of my previous Opinion;
 - i. That I have not made reference to the Court of Appeal’s judgement in **Tesco Stores Ltd v Secretary of State for the Environment** [1995] 1 W.L.R. 759 when criticising the findings of the Inspector in the previous appeal decision dated 15th August 2013 (“**the Appeal Decision**”)
 - ii. That I do not address the manner in which the Planning Committee should consider the previous appeal decision of Planning Inspector Sukie Tamplin dated 15th August 2013 (“**the Appeal Decision**”).

The Law

3. The Planning and Compulsory Purchase Act 2004 provides at s.38(6);

(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the

determination must be made in accordance with the plan unless material considerations indicate otherwise.

4. Further, the Court of Appeal in the case of **Tesco Stores Ltd v Secretary of State for the Environment** [1995] 1 W.L.R. 759 held that *it was entirely for the decision-maker to attribute to the relevant considerations such weight as he thought fit, and the court would not interfere unless the decision-maker had acted unreasonably in the Wednesbury sense.*

Further Opinion.

5. No reference is made in my original Opinion to the judgement in *Tesco Stores* as it is trite law and need not be referred to.
6. It is necessary to consider the criticisms that I made of the Inspector which I consider would have made her decision amenable to challenge.
7. I set out those criticisms at paragraphs 11 to 15 of my original opinion. For the avoidance of doubt I summarise them as follows;
 - i. The Inspector speculates with regards to what she considers to be material matters, particularly the nature of the future use of the proposed building in the context of over-intensification;
 - ii. She considers without any evidential basis that the use of the building by 15 people or more is unlikely;
 - iii. She fails to give adequate reasons as to why she considers it unlikely 15 people of more would or could occupy the building;
 - iv. Her conclusions with regards to “*...parental controls...*” and “*...good natural surveillance...*” are entirely illogical and potentially irrational.
8. My advice with regards to the soundness of the Appeal Decision was not based on the weight the Inspector gave to various matters or whether those matters were indeed material but rather that she speculates in a manner which is unlawful, she fails to give

adequate reasons for her findings as required by the Court of Appeal in *South Buckinghamshire CC v Porter (No.2)*[2004] 1 WLR 1953 and in speculating she takes into account matters which were not addressed in evidence and she therefore falls foul of the basis planning principles espoused in *Seddon Properties v Secretary of State for the Environment* [1978] J.P.L. 835; 248 E.G. 950. I have no hesitation in stating that the Appeal Decision is unsound for reasons relating to the Inspector's consideration of matters not based on evidence and for reasons relating to her failure to give adequate reasons. I do not consider that such criticism relates to materiality and weight.

9. The judgement of the Court of Appeal in *Tesco Stores* has little bearing on my criticism. I do not seek to attack the weight that the Inspector gave to the various issues set out above, but more specifically that those issues were inadequately reasoned or unlawfully included in her considerations. *Tesco Stores* is authority for the proposition that the Courts will not interfere with the weight a decision maker gives to RELEVANT material considerations unless the decision maker has acted unreasonably. It is not authority for the proposition that the decision maker can fail to adequately reason her findings, speculate, extrapolate evidence to an irrational degree or indeed seek evidence of their own. A RELEVANT consideration is one that is supported by the evidence advanced by the parties. Nor is *Tesco Stores* authority for the proposition that every matter that is raised or speculated upon by the Inspector is material. In fact it is quite the opposite.
10. In response to the criticism by Mr Rowberry I hope that the comments above make it absolutely clear that my previous Opinion did take account of the trite law set down by the Court of Appeal in *Tesco Stores*, to the extent that it is relevant.
11. On the second matter, the Planning Committee or indeed a future Planning Inspector is absolutely **NOT** bound by the findings of the first Inspector. To consider themselves so would be to fall into error and to act unlawfully. The application must be determined in the context of s.38(6) of the Planning and Compulsory Purchase Act 2004 which requires the Development Plan to be addressed first, the Appeal Decision amounting to a material consideration to which the decision maker can give whatever

weight they consider appropriate, such weight not being open to challenge provided it is not unreasonable (*Tesco Stores*).

12. Should a decision maker chose to disagree with a previous decision and thus give it little or lesser weight then it is always advisable to give reasons as to why they have chosen to take that approach. The criticisms of the Appeal Decision set out above are sufficient in themselves to allow the Planning Committee to consider the matter afresh.
13. Should advice be given to the Planning Committee to the effect that they must follow the Appeal Decision, that they are in some way bound by it I would advise that a very careful written record is kept of the same. Such advice would be unlawful and would mislead the Planning Committee to the extent that any subsequent decision based on such advice would be *ultra vires*. I am aware from experience that some committees are recorded, webcast or both. If this is the case such recordings may prove very useful. If not then a written record should be kept.

Costs

14. Further, I understand that the Council maybe concerned about their exposure to costs in the event that a refusal is appealed by the applicant.
15. The award of costs in planning appeals is entirely discretionary and governed by the Planning Practice Guidance at section 16 paragraphs 27 to 56. Paragraphs 30 and 31 state as follows;

30 - In what circumstances may costs be awarded?

Costs may be awarded where:

- *a party has behaved unreasonably; and*
- *the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.*

31 - What does “unreasonable” mean?

*The word “unreasonable” is used in its ordinary meaning, as established by the courts in **Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774.***

Unreasonable behaviour in the context of an application for an award of costs may be either:

- *procedural – relating to the process; or*
- *substantive – relating to the issues arising from the merits of the appeal.*

16. The Council will have to behaved in an unreasonable manner in order for there to be an award of costs against them. It would not be considered unreasonable to arrive at a different conclusion to the Inspector in the previous appeal provided that the Appeal Decision has been properly considered and any decision not to follow the same approach adequately reasoned. I have set out why I consider the approach of the Inspector to be fundamentally flawed and it would not be unreasonable for the Planning Committee to adopt this approach should they have the same concerns. In such circumstances I consider that the exposure of the Council to costs in any subsequent appeal would be minimal.
17. I hope this Addendum Advice clarifies my earlier advice. I hope it is of assistance and if there is anything further upon which I can advise or any questions arising from the above advice please do not hesitate to contact me.

Michael Rudd

29th September 2014

Kings Chambers

Manchester-Birmingham-Leeds