Planning Law - Reading the Documents

For a planning lawyer, there is a tension as to the speed at which one is required to read documents. There are two essential skills.

Two essential skills

First, in most planning cases (involving planning applications and appeals) one is presented with mounds of documents – The Planning Statement, The Landscape Assessment, Traffic Reports, Ecology – the list is endless, even before consideration of the Environmental Statement. Speed reading is essential, otherwise one would be perpetually immersed in those documents. But equally essential is the skill, the instinct, of spotting the points that matter. The only way, in my view, of achieving this is through experience. Often, the clue is to go at the outset to the end of the "story" first. For example, in a planning case, the grounds of refusal need to be studied, which will assist in spotting the key passages in the many thousand pages of material.

Second, and this is the main point of this paper, at the other end of the spectrum is the range of cases where the question at issue is the meaning (the "construction") and effect of planning documents, predominantly planning permissions, lawful development certificates, enforcement notices and so forth. Here, I suggest a number of skills are required (not necessarily set out in the order of importance).

Skill 1: have no pre-conceptions as to the legal effect of what you are presented with

A simple – and indeed graphic – real life example concerns a huge site (now fully developed) on the A303 approach to Amesbury. The client had secured – or could readily secure – control over hundreds of acres of open

agricultural land. His (not entirely reliable) planning advisers had got hold of the adopted local plan. This showed approximately one tenth of the area, adjacent to the built up area, notated EMP in purple. The policy was to the effect that the land shown on map XX is allocated for employment development in the plan period. So far so good. I was asked to visit the site, and advise on the planning prospects.

But they had not read the context for the allocation. For example they had not read the calculations of the amount of employment land required in the district within and beyond the plan period; they had not spotted that the larger site was stated to be the key element of employment land supply for the next period; they had not spotted that the proposals map showed a very thin black line around the whole site. They therefore had not spotted that they had, in effect, a massive employment allocation for all the land they controlled. A good lunch was subsequently supplied in the client's magnificent Manor House. The site has been and is one of the major business parks in Wiltshire.

Skill 2: read the words very carefully

As for Skill 1, have no preconceptions. While the draftsman's intentions are relevant, it is the words ultimately and actually used which determine the construction of the document.

Take the following (real life) example. Housebuilders in north Norfolk applied for planning permission in 2011 for 85 dwellings on a greenfield site. In compliance with the affordable housing policy of North Norfolk District Council, and in advance of the grant of planning permission, they executed a s.106 obligation to provide 45% affordable dwellings (together with more minor obligations). Planning permission was granted in 2012. In 2013 they applied for and were granted, a s.73 permission to "vary" conditions relating to matters such as access. The permission had a note to the effect of a reminder of the affordable housing obligation. In 2015, they applied for and were granted a further s.73 permission relating to other conditions extraneous to affordable housing. There was a similar note. There had been

no further s.106 obligation beyond that of 2011. The 2015 permission was implemented.

The general assumption, certainly advanced by the Council, was that the development was subject to the affordable housing obligation. I was asked to advise whether it was.

It was not. The s.106 obligation was, on detailed analysis, linked exclusively to the 2011 permission, and no other permission. The 2011 permission had not been implemented. We took High Court proceedings to establish the point. They were resisted by the Council on the bases that (1) on the proper construction of the s.106 it applied to the later s.73 permissions, alternatively (2) that there was an implied term to the same effect. The Court rejected both points, and the site was developed with 100% market housing: Norfolk Homes Ltd v North Norfolk DC [2020] EWHC 2265

Skill 3: read the whole document

Whether one is construing the terms of the planning permission itself (the development being permitted) or a condition, there are likely to be (and often are) indications as to the meaning of the key words in the rest of the document. Where the terms of the application have (by reference) been incorporated within the planning permission, those terms may be relevant. Indeed, in the Norfolk Homes case, although the meaning of the relevant words was clear (as above) and reference to other parts of the documents was not necessary, there were indications which showed that the preferred meaning was further justified.

The above short comments are justified by authoritative statements as to the law of construction of planning documents. These often relate to the meaning of planning conditions, but are applicable to planning documents more generally. The most recent decision on the point by the Supreme Court is Lambeth Borough Council v Secretary of State[1] in which the following references are made:

“15. We have received extensive submissions and citations from recent judgments of this court on the correct approach to interpretation. Most relevant in that context is Trump International Golf Club Scotland Ltd v. Scottish Ministers [2016] 1 WLR 85. An issue in that case related to the interpretation of a condition in a statutory authorisation for an offshore wind farm, requiring the developer to submit a detailed design statement for approval by Ministers. One question was whether the condition should be read as subject to an implied term that the development would be constructed in accordance with the design so approved.

16. In the leading judgment Lord Hodge JSC, at paras 33-37 spoke of the modern tendency in the law to break down divisions in the interpretation of different kinds of document, private or public, and to look for more general rules. He summarised the correct approach to the interpretation of such a condition, at paragraph 34:

“When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense”.

These are the main principles governing the meaning of planning documents. They will stay, but one can be sure that disputes over meaning will go on and on.

Disclaimer