Case Name: *Kenyon v The Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302 (05 March 2020)

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Commentary:
The Court of Appeal has roundly rejected an objector's legal challenge to a negative screening direction by the Secretary of State for Housing Communities and Local Government ('SSHCLG') in relation to a residential proposal to build 150 homes on the outskirts of Hemsworth, West Yorkshire. In giving its judgment, the Court of Appeal criticised what was described as an "unduly forensic and nit-picking reading" by the objector to the SSHCLGs screening direction and bemoaned the "all- too- prevalent attitude" that in judicial review applications it is always possible to "have another go".

The 4.6-hectare development site was a quarry until 1970, after which there was some infilling with waste. It later became a recreation ground and stadium but that use ceased in 2007. The site was then fenced off. Planning permission to build 150 homes on the site was originally granted by Wakefield Council in 2010 but quashed following a legal challenge. A further permission, granted in 2013, was also quashed by consent in 2016. The EIA legal challenge arose after local campaigner, Mr James Kenyon, requested a positive EIA screening opinion from the SSHCLG after the LPA had issued a negative screening opinion. In his negative screening direction, the SSHCLG concluded the proposed development was not likely to have significant environmental effects in respect of noise, odour, air quality and other environmental impacts.

Mr Kenyon's legal challenge was rejected by the High Court in December 2018. In dismissing Mr Kenyon's appeal brought on 5 separate grounds, the Court of Appeal noted that the proposal was "on any view, a routine development of residential houses. There was nothing unusual about the proposed development." Helpfully, as part of its judgment, the Court of Appeal summarised important case law principles on reviewing screening opinions/directions reiterating, among other things: (1) the limited nature and scope of screening opinions which concern a preliminary environmental assessment and do not involve or require a full/detailed assessment of the environmental effects of the proposal and (2) the practical limits of screening opinions/directions not requiring excessive conjecture about future development on other sites that might, in combination with the proposal, cause indirect, secondary or cumulative effects;

Having reviewed the case law principles and the contents of the negative screening directions, the Court of Appeal concluded that the SSHCLG had properly taken into account the cumulative environmental impacts of the proposed development, in combination with 5 other existing or reasonably foreseeable proposed residential developments in the local area.

In response to the air quality grounds, the Court of Appeal considered that the SSHCLG was well aware that there was a designated Air Quality Management Area nearby and the weight to be given to this in the screening direction was a matter for the SSHCLGs planning

judgment, subject to legal challenge only on rationality grounds.

As to the reasons ground, the Court of Appeal found that the reasoning in the negative screening direction, in respect of what was a "comparatively modest residential development" were sufficient, intelligible and adequate with this ground being, in the Court of Appeal's view, evidence of the objector's "unduly forensic and nit-picking" approach.

As to the ground that the "precautionary principle" should have been applied to the screening direction to screen the proposal in given the alleged uncertainty around air quality impacts arising from the development in combination with other nearby residential proposals , the Court of Appeal pointed out the precautionary principle only applies if there is a reasonable doubt in the mind of the decision maker whereas in the present case there was no doubt in the mind of the SSHCLG, after carrying out the screening exercise, as to the absence of likely significant environmental effects.

As to the alleged mischaracterisation of the site as an existing development site rather than a greenfield site, the Court of Appeal held that , given its past use, it was "contrary to common sense to suggest that the site should somehow be designated or treated in the same way as a greenfield site".

Case summary prepared by Paul Arnett