Case Name: *Bramley Solar Farm Residents Group v Secretary of State for Levelling Up, Housing And Communities & Ors* [2023] EWHC 2842 (Admin) (15 November 2023)

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Commentary: This was an unsuccessful claim for statutory review (pursuant to s.288 of the Town and Country Planning Act 1990) by Bramley Solar Farm Residents Group ("the Claimant") against the decision by a planning inspector ("the Inspector") appointed by the Secretary of State for Levelling-Up, Housing and Communities to grant planning permission for a renewable led energy generating station ("the Development").

Background

In November 2020, Bramley Solar Limited ("BSL") applied for planning permission for a development which consisted of an energy generating station, ground mounted photovoltaic solar arrays together with a significant amount of associated infrastructure including transformer stations, cabling, and a battery storage facility ("the Original Scheme"). Basingstoke and Deane Borough Council ("the Council") refused planning permission in April 2022 for reasons relating to harm to the landscape character and visual amenity of the area and to the local historic environment.

In June 2022, BSL notified the Council of their intention to appeal against the refusal and their intention to make changes to the refused scheme for appeal. Three changes were made including: a) removal of a number of solar modules; b) removal of the "Forest School"; and c) enhancement of landscape screening between two fields ("the Revised Scheme"). BSL then proposed to provide information on the Revised Scheme to various parties (including neighbours living in the proximity of the appeal site and members of the public who responded to the application for the Original Scheme) and statutory and non-statutory consultees. All responses to this consultation were received by BSL and forwarded on to PINS for the Inspector's review along with the consultation responses received for the Original Scheme.

At the Case Management Conference prior to the Inquiry, the Claimant resisted the Revised Scheme being considered at the Inquiry but the Council had no objections to this. As a result, the Inspector concluded that he will consider both the Revised Scheme and the Original Scheme at the Inquiry to allow parties to fully cover the areas of dispute.

Following the Inquiry, the Inspector granted planning permission for the Development. The Claimant challenged the Inspector's decision on seven grounds.

Ground 1

The Claimant argued that the Inspector:

a) erred in law by considering the Revised Scheme, as he failed to address whether the Revised Scheme was substantially different from the Original Scheme; and/or
b) he acted irrationally in referring to the changes proposed as "minor"; and/or
c) he failed to give adequate reasons for his conclusions, namely why in his view the Revised Scheme was not substantially different from the Original Scheme.

Mrs Justice Lang held that the fact that the Inspector had concluded in his decision letter that the changes were "minor" demonstrates that he did address whether the Revised Scheme was substantially different from the Original Scheme and that the Inspector was entitled to reach this conclusion based on his planning judgement and the high bar of irrationality was not met. She further held that the reasons provided by the Inspector for this conclusion were adequate and that he was entitled to deal with issues shortly and does not need to rehearse every argument, namely there was no "duty to give reasons for reasons" (see [67-68]). Therefore, Ground 1 did not succeed.

Ground 2

The Claimant argued that the consultation conducted by BSL on the Revised Scheme was unlawful because it did not meet the requirements of the Town and Country Planning (Development Management Procedure) (Order) (England) 2015 ("the DMPO"), namely Articles 15(1A) and 15(7), which set out the statutory requirements for publicising a planning application accompanied by an Environmental Statement. The Claimant argued that the consultation failed to meet the DMPO requirements for several reasons including due to the consultation being conducted by the applicant (i.e. BSL) rather than the planning authority and due to a lack of information being available on the Council's website at the time.

Mrs Justice Lang highlighted that it is not sufficient to demonstrate that a consultation was not perfect or could have been improved for it to be deemed unlawful if it provided a fair opportunity to those at whom the consultation was directed at to address the issues. Further, she noted that in order for a claim for procedural unfairness to succeed, the Claimant must show that they were materially prejudiced thereby (see [71-72]).

Mrs Justice Lang held that the consultation was not unlawful for the following reasons:

a) There was no need for a consultation for an amended scheme at the appeal stage to comply with DMPO requirements for publicising a planning application – it was sufficient for the consultation to meet common law requirements and namely the "Sedley Criteria" derived from the case of R v Brent London Borough Council ex p Gunning (1985) 84 LGR 186 (see [86]);
b) There is no legal requirement or guidance that required such a consultation to be conducted by a local planning authority or a public body (see [90]);
c) Members of the public were given a fair opportunity to address the issues in this case (see [88]);
d) It was unlikely that members of the public were prejudiced even if they did not see BSL's consultation letters/notices because details were posted on the Council's website and

the Claimant themselves were actively communicating with local residents about the Revised Scheme and the Original Scheme (see (see [89]); and

e) There was no evidence to show that the existence of two deadlines for two separate consultations being conducted at the same time (i.e. a consultation in relation to the appeal and a consultation in relation to the Revised Scheme) caused confusion amongst members of the public (see [94]).

Therefore, Ground 2 did not succeed.

Ground 3

The Claimant argued that the Inspector should have determined, prior to the Inquiry, whether it was the Revised Scheme or the Original Scheme that was to be considered at the Inquiry. Further, they argued that considering both schemes at the Inquiry created confusion for the participants resulting in procedural unfairness.

Mrs Justice Lang dismissed this ground and held that:

a) It was within the Inspector's case management powers to decide to determine during the Inquiry the issue on whether the Revised Scheme or the Original Scheme should be considered at the Inquiry (see [103]);

b) There is no requirement in law, policy or guidance that only one scheme can be considered at the Inquiry (see [105]);

c) In the event that there was confusion or lack of clarity on the matters being discussed at the Inquiry, she would have expected the representative for the Claimant to raise such concerns during the Inquiry, which they did not; and

d) It was open to the Claimant to seek a costs order against BSL in respect of the additional preparation required to address the amendments application, therefore the Claimant was not prejudiced (see [106]).

Therefore, Ground 3 did not succeed.

Ground 4

The Claimant argued that the Inspector erred in law in failing to have regard to objections associated with the Bramley Road Access ("the BRA") and/or failed to provide adequate reasons for considering that the BRA was acceptable.

The BRA was neither objected by Hampshire County Council not the Council's Transport Officer, subject to the appropriate conditions being imposed. However, objections were raised by a member of the public at the planning application stage for the Original Scheme as to the safety of the BRA. A private law issue relating to the ownership of the land on which entrance to the BRA was planned to be provided was also raised. The Inspector agreed with the conclusions reached by Hampshire County Council and the Council. The Claimant argued that the Inspector was in breach of the "Tameside" duty (arising from the case of Secretary of State for Education and Science v Tameside MBC [1977] AC 1014) to take reasonable steps to acquaint himself with

the relevant material, which included a need to investigate the extent and adequacy of the assessment by Hampshire County Council.

Mrs Justice Lang held that the reasons given by the Inspector were adequate since he explained that he had no reason to disagree with the conclusions reached by independent professionals at both Hampshire County Council and the Council. These reasons were sufficient, and no further detail was required since the BRA was not one of the main issues in the appeal as identified during the Case Management Conference. Also, Mrs Justice Lang held that the possibility of issues arising in relation to private rights of access was a private matter (see [123-124]).

Mrs Justice Lang identified that the "Tameside" duty was an aspect of the doctrine of irrationality and, as such, the steps taken or not taken by the Inspector in acquainting himself with the relevant material can only be unlawful if they were such that "no reasonable decision-maker could suppose that that it possessed the information necessary for its decision" (see [125]).

Therefore, Ground 4 did not succeed.

Grounds 5 and 6(1)

The Claimant argued that the Inspector misunderstood paragraph 174(b) of the NPPF (Ground 5). They also argued that the Inspector failed to have regard to the Claimant's case on the appeal site being a valued landscape and/or he failed to give adequate reasons for his conclusions (Ground 6(1)).

Mrs Justice Lang held that the Inspector had correctly summarised the distinction between the protective levels afforded to "valued landscape" and "other countryside" such that the level of protection for the former is higher (see [140]). In concluding that the appeal site has "medium landscape value" and then proceeding to assess the harm by the development to that landscape and weighing this in the planning balance, the Inspector "both recognised and safeguarded the intrinsic character and beauty of the countryside" [141]. Therefore, Mrs Justice Lang concluded that it was not evident that the Inspector had misunderstood paragraph 174(b) of the NPPF.

In relation to Ground 6(1), Mrs Justice Lang noted that the Inspector had received and heard a considerable body of evidence from landscape witnesses for the Claimant, BSL and the Council. A Landscape and Visual Impact Assessment was also submitted and a site visit was conducted by the Inspector. All of these matters were discussed in the decision letter by the Inspector, therefore, Mrs Justic Lang held that, realistically, the Inspector must have had regard to all this evidence in determining whether the landscape was a "valued landscape" and if not, what its value was (see [142]).

Therefore, Grounds 5 and 6(1) did not succeed.

Ground 6(2)

The Claimant argued that the Inspector failed to have regard to the Claimant's case on battery storage and/or failed to give adequate reasons for his conclusions.

At the planning application stage, there was a dispute as to the whether battery storage could be considered as a public benefit. To address this point, BSL at the time had sought and submitted evidence from an engineering consultant to address issues raised against the battery storage. At the inquiry, battery storage was not a main issue and the Claimant's experts did not address battery storage as an issue in their evidence. Mrs Justice Lang held that the Inspector was entitled to accept the evidence given by BSL's engineering consultant and did not have to provide reasons for not accepting opposing evidence produced at the planning application stage, especially when evidence on this point was not submitted at the Inquiry stage. The fact that this was not a main issue in the appeal was also used by Mrs Justice Lang to support her conclusion that the reasons provided were sufficient (see [158-159]). It was also noted that it any event, the Inspector accepted the Claimant's submission, which was part of their closing submissions, that the battery storage should not be treated as a public benefit, therefore the Claimant was not prejudiced by the Inspector's approach (see [160]).

Therefore, Ground 6(2) did not succeed.

Ground 7

The Claimant argued that the Inspector failed to take into account a material consideration, namely a lack of identified alternative sites being considered. The Claimant agued that the search for alternatives conducted by BSL was inadequate and that the Inspector's reasoning was legally flawed since the Planning Practice Guidance ("the PPG") states that an applicant must show that the proposed use of any agricultural land is "necessary" and the only way to do this is through a sequential approach. A sequential approach would require the applicant to demonstrate that there are no other sequentially preferable sites that do not involve the use of agricultural land. The Claimant argued that local policy further supported this reading of the PPG and the Inspector erred in law in concluding that permission should not be withheld on the basis of a lack of identified alternative sites being considered.

Mrs Justice Lang noted that the PPG is merely practice guidance which supports policies in the NPPF – the PPG is not a binding code (see [177]). Mrs Justice Lang held that the PPG does not mandate a consideration of alternatives, let alone a sequential test for the consideration of alternatives. There is no such sequential test for testing alternatives in the NPPF either and it was noted that where a sequential test is required then the NPPF states so clearly (e.g. sequential test for assessing flooding) (see [179]). Therefore, Mrs Justice Lang concluded that the Inspector's assessment and reasoning on the issue of consideration of alternatives was sufficiently adequate.

Therefore, Ground 7 did not succeed.

For the reasons stated above, the claim was dismissed.

Case summary prepared by Chatura Saravanan