Neutral Citation Number: [2014] EWHC 332 (Admin)

Case Nos: CO/7744/2013 and CO/2386/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 24th February 2014

Before :

ELIZABETH COOKE
Sitting as a Deputy High Court Judge

- -

Between :

Peter Jackson	**Claimant**
- and -	
Norfolk County Council	**Defendant**
-and-	
Norwich City Council	**Interested Party**

(Transcript of the Handed Down Judgment of
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Ian Dove QC (instructed by **Richard Buxton**) for the **Claimant**
Harriet Townsend (instructed by **Norfolk County Council**) for the **Defendant and Interested Party**

Judgment
As Approved by the Court

Elizabeth Cooke:

Introduction

1. This is a reserved judgment given after an oral hearing of the Claimant's two renewed applications to seek judicial review, on 12 February 2014. The hearing lasted half a day, and I am very grateful to Mr Dove QC for the Claimant, and Mrs Townsend for the Defendant and the Interested Party, for their very clear and helpful argument.

2. The claimant is Peter Jackson, who lives in Norwich at 92-94 Upper St Giles Street in a building of architectural and historic interest.

3. The Defendant is Norfolk County Council, the highway authority for Norwich, and the interested party is Norwich City Council. Members of both councils sit on the Norwich Highway Agency Committee (NHAC) which took the two decisions sought to be reviewed in these proceedings, by the powers delegated to it by the highway authority. I refer for convenience therefore to decisions taken by the Defendant.

The decisions sought to be reviewed: the Grapes Hill scheme and the Chapel Field North Scheme

4. The two decisions sought to be reviewed relate to two schemes of traffic management and road works. The decisions were Traffic Regulation Orders made pursuant to the Road Traffic Regulation Act 1984, and the Defendant's power to make those orders, through the NHAC, is not called into question.

5. The two decision are:

    i) the approval of the Grapes Hill scheme on 29 November 2012; and

    ii) the approval of the Chapel Field North scheme on 21 March 2013.

6. There have accordingly been two applications for judicial review. I am not going to rehearse their procedural history, save to say that on 15 July 2013 it was ordered by Stuart-Smith J that the two cases be managed together by the Court. Accordingly the renewed applications were listed and heard together and this order is made in both proceedings.

The two decisions in context

7. Grapes Hill and Chapel Field (or Chapelfield) North are roads in Norwich. The Google map helpfully shows that the north-west end of Chapel Field North is separated only by a roundabout from the south-east end of Grapes Hill. The claimant's home, if I have understood the maps correctly, is adjacent or very close to Chapel Field North.

8. The schemes for the two roads are part of the Norwich Area Transport Strategy ("NATS"), a very wide-ranging programme of work which seeks – to put it very generally – to improve traffic flow within Norwich, both on the inner ring road (or Northern Distributor Road) and in the city centre. NATS has been the subject of a

Strategic Environmental Assessment in accordance with the requirements of the EU Directive 2001/42/EC. The city centre around the two roads contains buildings of great architectural and historic importance. Both roads are within an Air Quality Management Area.

9. The two schemes play different roles within NATS, although the two roads involved are close to each other and they are functionally related. Grapes Hill is part of the city's inner ring road. The Grapes Hill scheme involved the addition of a one-way bus lane to a two-way road, being part of the Bus Rapid Transit scheme focused on Dereham Road.

10. The Chapel Field North scheme was to close the road to traffic other than HGVs and buses, so as to improve the flow of traffic within the city centre.

11. The two schemes have a practical relationship. They are near to each other. Although one is part of the BRT scheme and the other is not, both are aimed at getting buses efficiently into the city centre. The Defendant was very alive to that relationship, as can be seen from, for example, the Report to the NHAC dated 26 July 2012 on the implementation of NATS. In the "background" section of that Report it is said:

> "The 2010 BRT corridor report stated that the scheme relied on implementation of proposals to make Chapel Field North into a two-way road for buses. However, the provision of the Chapel Field North improvement is dependent on future funding being available for this scheme. It would be possible to provide for the bus lane up Grapes Hill independently of any changes to Chapel Field North by terminating the bus lane just short of the Chapelfield Roundabout."

12. Thus the two schemes complement each other although they can be carried out independently. Indeed, the Report presented to the NHAC on 29 November 2012, when the Grapes Hill scheme was adopted, said at para 2 of the "Background" section "The bus lane proposal is a standalone scheme but would complement the separate proposal to divert buses from Chapel Field Road to Chapel Field North, in order to access the city centre".

13. As it turned out the Chapel Field North scheme was not resolved upon for some months after that date because the NHAC felt that the level of public debate meant that they needed to carry out further consultation and to commission a report on noise and vibrations. The report presented to the NHAC on 21 March 2013, for the meeting at which the decision to approve the Chapel Field North scheme was taken, had annexed to it the Chapelfield Action Group report, objecting to the scheme, and with the Defendant's officer's responses to the objections raised by the group.

The grounds for review

14. The Claimant seeks to review the two decisions on three grounds, which I set out here in the way that they were expressed in the Claimant's skeleton argument and in argument before me on 12 February:

    i) The Defendant failed to undertake a legally competent screening exercise in relation to the proposals for the Grapes Hill scheme and the Chapel Field North scheme.

    ii) The Defendant failed to have regard to an important material consideration, namely the impact of noise and vibration from the increase in heavy goods vehicles and bus traffic on the listed buildings around the schemes.

    iii) The traffic forecasts derived from traffic modelling were based on a traffic model which incorporated a northern distributor road which has yet to be progressed and has an uncertain future.

15. The first ground is an illegality challenge. Grounds 2 and 3 are *Wednesbury* challenges; it is said that the decisions were irrational because they failed to take into account relevant considerations.

16. In the course of the hearing I was taken through a great deal of documentation relating to the genesis of the two schemes, as well as a number of legal authorities. I refer to those documents and to the authorities as they become relevant in the course of my discussion of the three grounds for review.

Ground 1: illegality

17. Ground 1 is a challenge to both schemes on the basis of illegality. It is argued that the failure to conduct a screening exercise in relation to the Grapes Hill scheme and the alleged defects in the screening exercise done for the Chapel Field North scheme renders both decisions illegal.

18. That requires some explanation. A "screening exercise" is an assessment which may be required under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the "EIA Regulations"). The object of such an assessment is to determine whether an Environmental Impact Assessment (an "EIA") is required for a particular project. The EIA Regulations require a local planning authority (such as, for example, the Interested Party in these proceedings) to "adopt a screening opinion" either on request by a developer who is minded to carry out a development (Regulation 5) or where it appears to the local planning authority that a planning application falls within the terms of Schedule 1 or 2 to the EIA Regulations (Regulation 7).

19. The EIA Regulations implement the EU Directive 2011/92/EU ("the EIA Directive"), whose purpose is to fulfil part of the objectives of the Aarhus Convention by ensuring that projects "which are likely to have significant effects on the environment" (recital 7) are the subject of an EIA. "Significant effects" are

not limited to detrimental effects; something that improves the environment is not thereby exempt from the requirement for an EIA. The objective of an EIA is to provide information in an accessible form so that the public can understand the project and its effects, and participate in decision-making (recitals 16, 17 and 19). The Directive is thus, as Mr Dove QC put it, a procedural guarantee that someone in the Claimant's position will get the information he needs in a systematic form.

20. The scope of the EIA Directive is wide: it may for example encompass the refurbishment and improvement of an existing road *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* C-142/2007 (in particular paragraphs 18 and 36).

21. To that end the EIA Directive requires projects to be screened in order to determine whether an EIA is required (Article 4(2), and Annexe III requires that when that determination is made the cumulative effect of a project with other projects is to be considered. It is not legitimate to divide projects up artificially so as to avoid the need for an EIA. The importance of this is discussed in *R (Oldfield) v Secretary of State for Communities and Local Government* [2013] EWHC 4269 by Moses LJ at paragraphs 31 – 34 and in *Brown v Carlisle City Council* [2010] EWCA 523.

22. However, the EIA Directive does not have direct effect. It requires domestic legislation in order to transpose its requirements into our law. Mr Dove QC confirmed that that was his understanding of the Directive and that was the basis on which the Claimant's case was put at the hearing on 12 February. The Defendant's answer to this ground is therefore simply that no screening exercise was required for either scheme. The reason why there was no requirement in either case is that neither scheme was development, within the meaning of the Town and Country Planning Act 1990, therefore neither required planning permission, and therefore neither fell within the requirements for screening within the EIA Regulations.

23. The Defendant explains that neither scheme was "development" within the meaning of the Town and Country Planning Act 1990, because of the terms of section 55 (2) (b) of that Act, which excepts from the definition of development

> "the carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment".

24. So road works are not development unless they may have significant adverse effects on the environment. The Defendant argues, and I accept, that it took the view and was entitled to take the view that these two schemes – although not "exclusively for the maintenance of the road" – were ones of which it could not be said that they "may have significant adverse effects on the environment". The Grapes Hill scheme involved the moving of existing traffic over on to the existing central reservation and then adding a bus lane, so that no traffic was diverted elsewhere; the Chapel Field North scheme involved a reduction in overall traffic. Noise and vibration were anticipated to be reduced. These two schemes were not

therefore "development", they did not need planning permission (and the Claimant has not argued that they did), and the EIA Regulations do not bite upon the projects so as to require a screening exercise.

25. The Defendant observes that in effect the definition of "development" in section 55 of the Town and Country Planning Act 1990 Act and the requirements for screening, which depend upon planning applications, in the EIA Regulations, constitute a threshold below which a requirement for screening does not arise, and that the creation of a threshold is envisaged in Article 4 of the EIA Directive.

26. That being the case, it is not relevant that the two schemes may have fallen within the terms of Schedule 2 to the EIA Regs, being the construction of roads where the area of the work exceeds one hectare, as the Claimant says the two projects did when taken together. Nor is it relevant that an EIA is required even where the effect upon the environment is going to be to improve it; nor that it is not legitimate to "salami slice" a project so as to take it outside the screening requirements; nor that a screening exercise must look at the cumulative effects of the development concerned along with other developments (Schedule 3 to the EIA Regulations, paragraph 1(b). None of those points has any traction on the two schemes because they were not within any requirement in the EIA Regulations for a screening exercise. Therefore they were not unlawful and ground 1 is not arguable.

27. Mr Dove QC argued that nevertheless the EIA Regulations should be "read purposively" in order to require screening, so as to reflect accurately the intention of the EIA Directive. But that is simply not possible. There is no provision within the EIA Regulations that could be "read purposively" in this way. Towards the end of the hearing, when Mr Dove QC was responding to Mrs Townsend's arguments, I asked him whether, in view of that, his argument was that the EIA Regulations did not accurately transpose the EIA Directive into domestic law, and he said that it was. Because the point was introduced at such a late stage in the hearing it was not developed; but I do not think that it sows the seed of an arguable case. I see nothing in these two schemes of relatively minor traffic management that would lead me to suppose that they could be within the objective of the EIA Directive.

28. Accordingly I find that Ground 1 is not arguable,

29. I mention for the sake of completeness the issue of cumulative effect. The Defendant did in fact, on request, conduct a screening exercise for the Chapel Field North scheme, for the reassurance of people who were concerned about the scheme. The Claimant criticised the screening exercise undertaken on the basis that it did not consider the cumulative effect of that development with the Grapes Hill scheme. Mrs Townsend addressed the issue of cumulative effect in case I found against her on the issue of whether screening was required. She observed that the Claimant had not in fact produced anything to show that the effects of the two schemes would be cumulative. True, they are near to each other – "roads run into roads", as she put it. But it has not been shown that anything was in fact missing from the screening exercise carried out in relation to the Chapel Field North scheme on that basis. I accept that argument and, accordingly, if I had found that a screening exercise was required for the Chapel Field North Scheme, I

would not have regarded it as arguable that there was anything lacking in the screening exercise that was carried out.

30. I can now deal rather more succinctly with grounds 2 and 3.

Ground 2: failure to consider the impact of noise and vibration

31. The Claimant says that the Defendant failed to have regard to an important material consideration in making the two decisions, namely the impact of noise and vibration from the increase in heavy goods vehicles and bus traffic on the listed buildings around the roads concerned. Those buildings are fragile Regency grade II and II* buildings; the Claimant says that there was no information about noise and vibration in relation to Grapes Hill and only generic and unspecific material relating to Chapel Field North. Accordingly the decisions were unreasonable in the *Wednesbury* sense because they fail to take into account a relevant consideration.

32. The Claimant points to the report obtained by the Defendant from the Norfolk Partnership Laboratory, in November 2012, on the impact of noise and vibration from the Chapel Field North scheme. He says that it made no assessment of existing noise levels and carried out only a generic analysis. It concluded that traffic would be reduced along Chapel Field North by about 25%. But the Claimant is concerned that it took account only of the quantity of traffic and not of the quality of vibration or noise, since the traffic would be solely buses and HGVs.

33. The Defendant in reply points out that there was no noise and vibration report commissioned for Grapes Hill because there was no anticipated increase in traffic levels (this was explained in the Defendant's letter to the Claimant dated 14 December 2012).

34. As to Chapel Field North, the Defendant relies upon the report it commissioned, and discussed at its meeting on 24 January 2013; the report of the city's Director of environment, transport and development, prepared for that meeting carefully considers noise, vibration and air quality concerns. It is unarguable that these issues were not carefully considered.

35. In reality, the Claimant is making an argument in this ground about the merits of the two schemes and about the sufficiency of the report that was obtained. The Claimant is questioning the Defendant's judgement about noise and vibration, and the competence of the report that it commissioned. This is well outside the scope of judicial review. The Claimant cannot show that the Defendant failed to have regard to the impact of noise and vibration, and does not have any arguable basis for doing so. The Claimant disagrees with the Defendant's conclusions, but he has had his objections thoroughly aired and considered in the course of the consultation process and of the Defendant's deliberations. The Claimant's views on noise and vibration do not provide grounds for judicial review of either of these two decisions.

Ground 3

36. The Claimant says that the traffic forecasts derived from traffic modelling were based on a traffic model which incorporated a northern distributor road (the "NDR") which has yet to be progressed and has an uncertain future. Accordingly, says the Claimant, the Defendant should have assessed the effects of the two schemes in issue here with and without the NDR. There should have been traffic modelling available that would have provided an assessment of their effects on the assumption that that work did not take place.

37. This seems to me to be unrealistic. It is accepted that these two schemes are part of NATS, which itself involved a multitude of different projects. As Mrs Townsend pointed out, all of them were going to progress at different speeds and none could be said to be certain since they all involve elements of consultation and potential adjustment. Inevitably dates are not known, and it is not even known for certain whether particular schemes and sub-schemes will happen at all. In theory there could be traffic modelling for an infinite number of potential outcomes.

38. The Defendant points to the NATS Implementation Plan dated September 2009, which contains what is called "strategic modelling" of the proposed strategy. The impact of the NDR is discussed on page 13 of that Plan, and it is clear from that discussion that the Defendant had brought to its attention the relationship of the introduction of the NDR to the NATS and the possibility of the NDR not taking place.

39. The Strategic Environmental Assessment carried out for NATS in February 2010 made clear the complementary nature of the Bus Rapid Transit "corridors" and the NDR. It was noted that the full benefits of the measures taken for buses would only be achieved after the opening of the NDR. Nevertheless it noted that some works could be implemented in advance of the NDR.

40. Likewise in the Defendant's cabinet paper of 6 April 2010, being an update on the NATS Implementation Plan and on the NDR, it is clear that the importance of the NDR and its close relationship with the NATS projects is taken into account. It is said at paragraph 1.4 that some transport measures within NATS are only made possible by the NDR; but there is no suggestion that either the Grapes Hill scheme or the Chapel Field North scheme dependant on the NDR to the extent that it could not go ahead without it. Indeed, the Defendant says that traffic modelling undertaken for the NATS Implementation Plan was not relied upon when assessing the benefit of either of these two schemes.

41. I take the view that it is unrealistic for the Claimant to take issue with the absence of a particular traffic model, or to suggest that the Defendant did not have the uncertainties associated with the NDR in mind. Clearly it did. I find this ground unarguable.

42. I note that this Ground was put forward by the Claimant in tentative form in its original grounds, and that its full basis was not really clear before the skeleton argument was settled. The Defendant suggested in its summary Grounds for

Defence that this ground was something of a fishing expedition, and I think that there is some truth in that.

Conclusion

43. In conclusion I refuse this application for permission to seek judicial review of the Defendants approval of the Grapes Hill scheme and the Chapel Field North scheme. None of the three grounds now put forward by the Claimant disclose an arguable case.