Case No: CO/11087/2010

Neutral Citation Number: [2012] EWHC 292 (Admin)

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

Birmingham Civil Justice Centre
33 Bull St, Birmingham, B4 6DS

Mr Justice Bean:

1.

alone which had been made in March 2008; but which, following adverse comments from statutory consultees and members of the public, was withdrawn on 19 December 2008.

8. The consent permits extraction and progressive restoration of the Quarry Site over a limited four year period.

9.

changed its position from opposing mineral extraction from the site at the time of the

(3) Flooding: Failure to comply with the publicity requirements of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 ("the EIA Regulations"); deferment to conditions of a flooding issue which should have been resolved prior to any decision to grant permission; and failure to give reasons for permission being granted notwithstanding that issue;

(4) Dust: Misleading the Committee by inaccurate statements in the Officer's Report; and irrationality, namely failure to take into account a material consideration.

It will be convenient to take grounds 3 and 4 in reverse order.

Ground 1: Policy A4 of the Gloucestershire Minerals Local Plan

21. Policy A4 of the GMLP states that:

> "Proposed aggregate mineral working outside the Preferred Areas defined in this Plan will only be permitted where they are in accordance with and will secure the effective implementation of the objectives and other policies of the Plan by providing for either
>
> A. The provision of aggregates not found in the Preferred Areas defined in this Plan where it can be demonstrated that the mineral is of a specification, or will meet a forecast shortfall, which is required to maintain the County's appropriate contribution to local, regional and national need, and where it is demonstrated that such provision would be significantly more acceptable overall than a site or sites in a Preferred Area.
>
> or,
> B. [not applicable]"

22. Paul Brown QC for the Claimant submits that what he describes as the exceptional nature of the circumstances in which policy A4 contemplates the grant of permission for a site outside the Preferred Areas is made clear by the supporting text in para 3.4.5 of the GMLP, as follows:

> "Proposals for aggregates mineral development outside of the Preferred Areas will not be permitted unless exceptional circumstances prevail…. It is possible that on the basis of new information becoming available about mineral resources outside areas identified in the Plan that an operator could bring forward an application site which might be significantly more acceptable overall than a site identified in the Plan. Although in practise these circumstances should be rare, any such applications should be determined in light of development control and other relevant policies of the Plan …. Following the appraisal undertaken by the MPA … it is unlikely that any such sites outside the Preferred Areas would be significantly more acceptable overall."

23.

This error was pointed out by CDC's Senior Environmental Health Officer, Mr Brassington, in a memo dated 7th May 2009. As well as being CDC's Senior EHO, Mr Brassington also advised GCC on matters such as dust and noise.

33. Until receipt of Mr Brassington's comments the authors of the ES were apparently unaware of the existence or location of Old Manor Barn. As a result, an updated noise assessment was produced. This predicted that noise levels at Old Manor Barn during working hours at the Quarry Site would be between 45dB(A) and 49dB(A), thus potentially being more than 10db(A) greater than at present.

34. On 3 June 2009 CDC, on Mr Brassington's advice, decided to object to the Application due to the noise impact on the residents of Shorncote. Mr Brassington concluded that the predicted noise level of 49 dB(A) was too high, given the low background noise levels in the vicinity. In his view, having regard to the Secretary of

> "the proximity of existing settlements requires that control be exercised over the type of use in order to protect nearby residents."

39. The SPG explains that uses in "Low Intensity Recreation Zones"

> "should not cause excessive noise, attract large numbers of people or generate high traffic volumes. Sites in low intensity zones may attract between 5 and 10 cars or 15 and 30 people per hectare at peak use."

40. The SPG is principally directed at identifying the leisure and recreation uses which will be appropriate in the Water Park. Mr Brown submits, however, that it is nonetheless relevant that CDC has determined that sites within Zone B are locations where "the proximity of existing settlements requires that control be exercised over the type of use in order to protect nearby residents". If Shorncote is sufficiently close to the Quarry Site to be sensitive to noise caused by recreational activities such as car-parking or watersports, it must also be close enough to be affected by equivalent or greater levels of noise caused by mineral extraction.

41. The GCC Officer's Report made no reference to the SPG in the context of the noise impact of the mineral extraction. GCC only considered the issue of compatibility with the SPG in the context of the proposed after-uses for the Quarry Site (car parking) and never in connection with the mineral extraction itself. However, the advice in the SPG that Shorncote needs and deserves protection from noise by

the Field. In the Design and Access Statement which accompanied the Claimant's application for this permission, the Claimant had explained that the proposed use of the stable and tractor shed was:-

> The EHO acts as the MPA's advisor on matters such as dust and noise and is consulted through the local authority (CDC) on environmental matters relating to planning applications. In this case the EHO has accepted that the DMP reflects good practice and that if there was to be a problem with dust CDC could take action as a statutory nuisance and that dust issues raised by the objectors can be dealt with through the implementation and operation of a DMP that have been approved by the MPA. If consent is granted for the proposal the DMP will be enforced via planning condition."

50. It is clear from notes of the GCC members' site visit on 15 July 2010 that Mr Brassington was by then of the opinion that the proposed mitigation measures were sufficient. Mr Brown's pleaded argument that there was a material misrepresentation of Mr Brassington's views to the Committee cannot succeed.

Dust: failure to take material consideration into account

51. Mr Brown's alternative argument on dust is this: if and in so far as the GCC Officer's Report relied upon the fact that CDC had withdrawn its objection regarding dust, it was irrational and resulted in GCC's members failing to take into account the actual impact of the Application on the Claimant's use of the land for equestrian purposes. In particular, the Claimant's intention to use his land for equestrian purposes was explicitly spelt out in his application for permission to erect the stables, which CDC approved. CDC has at no stage suggested that there is anything improper or iiah-4.8(11.6(sata7fTw[(ual))-4.6(ond o Tw[(i))-4.8( )]TJal pa)7.the iman's use of the fi eld should c.8(e. were members asked to consider for themselves whether the impact on equestrian use would be acceptable. In the circumstances, GCC failed to take into account or to of the proposed developma7fent on the 5(d t)6.6(h)-5.5(e us)-9.9(e)7.5( )-5.3(of his fie)7.5(l)1.3(d)-5.5(s 7(. for equestr)-7.5(i)6.6(an pu)-5.5(rposesrp-)]TJ-3.0084 -2.1524 TI 3(the)-5.4(c)-4(l)0.4(ai)-10.3(mant)-5(fro)-6.4(m Bre)-4(tt,)-6.2(ra) ising concerns about the impact of dust

54. Groundwater in the Shorncote area generally drains from the north-west to the south-east, through the underlying sand and gravel, towards the River Thames and the River Churn. However, although the land in the vicinity of Shorncote generally falls away from north to south, Shorncote itself lies in a local topographical depression which, at it lowest point, is at 91.8m AOD. In contrast, the northern boundary of the Quarry Site is at approximately 93m AOD. Along the western boundary of the Shorncote quarry (and so to the east of Shorncote) the voids left after extraction have in part been infilled with impermeable inert materials which prevent groundwater from draining in that direction. Consequently, because Shorncote lies in the floodplain and the local terrain is otherwise generally flat, the area is prone to flooding.

55. Before making the March 2008 application, Cullimore had sought GCC's advice on the need for and scope of any ES for mineral extraction at the Quarry Site. On 1st July 2004 GCC issued a screening opinion stating that the proposal for mineral extraction was EIA development for which an ES was required. On 3rd August 2004 GCC issued a scoping opinion pursuant to reg. 10 of the EIA Regulations, identifying the information which would be required in any ES relating to an application for mineral extraction on the Quarry Site. Under the heading "Hydrology and Hydrogeology" the scoping opinion stated:

> "A full hydrological and hydrogeological assessment of the proposal will be required to determine baseline conditions at the site, and outline the potential impact of the operation and proposed restoration on water resources and water dependant features."

56. The March 2008 application was objected to by the EA on the ground that no flood risk assessment had been submitted. As already noted, it was withdrawn on 19 December 2008, at or about the same time as the present Application was made.

57. Part 2 of the ES which accompanied the present application contained a chapter (Chapter 9) headed "Water", which concluded (at para 9.8.4) that "direct groundwater flooding of the site will not occur", but made no reference to any increased risk of flooding to Shorncote.

58. By letter dated 11 May 2009, the EA wrote to GCC, objecting to the Application *inter alia* on the basis that the information supplied did not fully address concerns which had been expressed in relation to groundwater and flood risk.

59. In June 2009 GWP Consultants ("GWP"), acting on behalf of the Interested Parties, submitted an "Addendum to Hydrogeological Baseline Study and Impact Assessment and Flood Risk Assessment". In contrast to the ES, this Addendum concluded that the proposal would lead to a 20% reduction in the width of the aquifer through which groundwater would flow, and that groundwater levels would therefore rise by between 0.34m and 1.36m. The Addendum therefore recognised that there was a potential risk of groundwater flooding, and suggested that in order to mitigate the risk of groundwater flooding "ditches around the northern and western boundaries of the site could be dug, deepened and extended in order to control groundwater levels by draining water to the elevation of the base of the ditch".

60. The Brett report commissioned by the Claimant and fellow Shorncote residents identified a heightened flood and settlement risk which had not been addressed by the applicants for planning permission. A copy was sent to the EA on 1 July 2009.

61. Having considered the Addendum and the Brett report, the EA's Groundwater and Contaminated Land Team provided its formal response to the application by letter dated 9 October 2009. In that letter, the EA advised that its previous objections on groundwater protection and flood risk had been addressed sufficiently, and that it withdrew its objection, subject to the imposition of conditions relating to drainage and monitoring. The proposed condition relating to drainage required *inter alia* the provision of:

> "details of storage available within local ditches and lakes proposed to receive drained groundwater and any changes needed to accommodate additional water."

62. Local residents continued to be concerned about the adequacy of the information which had been provided. On 4 January 2010 the Claimant sent GCC and the EA a copy of a report which had been prepared by Mr Steeves-Booker (a Shorncote resident) alleging errors in the Addendum. Mr Steeves-Booker's report took issue with GWP's suggestion that the proposed mitigation of any groundwater flooding could drain into the County ditch. He argued that this should not be allowed because the County ditch was already overloaded.

63. The EA met local residents in Shorncote on 6 May 2010. Following that meeting, and further correspondence from local residents, on 18 June 2010 consultants acting for Cullimore wrote to the EA enclosing a further document from GWP ("the Advisory Note") which provided an outline design for a "drainage feature" to the north of the proposed excavation to control groundwater levels to the north of the Quarry Site.

64. The EA's "further consultation response" of 24 June 2010, which has been the subject of a (so far) unsuccessful application for judicial review, is a long and carefully reasoned document which I shall not reproduce in detail in this judgment. The EA did not dispute that the presence of landfill would cause groundwater levels to rise to some extent, and considered that detailed drainage conditions designed to mitigate the worst affected areas would be appropriate to manage any groundwater rise and avoid impacts on local receptors. In their view there were no "in principle" reasons why groundwater levels, rise and flood risk could not be controlled through the planning conditions of which they had supplied a draft (para. 2.4.7); and the proposal to dig ditches along the northern and western boundaries to drain rising groundwater levels back to natural levels was an appropriate means of mitigating any rise in groundwater levels (para. 2.8.3).

65. In their overall conclusions, at para 6.3, the EA stated:

> "We recognise that there are flooding problems in the locality and that residents are understandably concerned about this. The MPA may wish to seek a view on this from the Local Authority or County Council as the lead on land drainage matters. However we do not consider the proposed development will exacerbate these flooding issues, from either

> a ground or surface water perspective. Again, the conditions we have recommended allow for control of this matter."

66. The Officer's Report to GCC's Planning Committee set out at some length the various representations that had been made on the issue of flooding. The report referred to

71.

> “any other substantive information relating to the environmental statement and provided by the applicant or the appellant as the case may be.”

73. In

The documents referred to, in particular the Advisory Note submitted on 19 June 2010, were additional information provided by the Interested Parties. They related to the mitigation measures proposed to deal with the problems of flooding identified in the Addendum report. They were accordingly within the definition of "any other information" for the purposes of reg. 19(3). Contrary to reg 19(3), the additional information was not advertised in the manner required, nor made available to the public for a period of at least 21 days as required.

76. Mr Cairnes did not submit that there is evidence, either in Mr Betty's witness statement or elsewhere, that the Advisory Note was advertised and made available for inspection for a minimum period of 21 days in accordance with reg. 19(3). Rather he submitted that the County Ditch issue is not "any other information" within the meaning of the regulation because, in the light of the view taken by the EA, the development was not likely to have "significant adverse effects"; and that therefore

mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given. As Harrison J put it in [*R v Cornwall County Council ex p Hardy* [2001] Env LR 26]:-

> "Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions, it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list

> granted, or by virtue of a condition where full planning consent is being given as in the instant case."

81. In *R (Hereford Waste Watchers) v Herefordshire County Council* [2005] EWHC 191 Admin Elias J (as he then was) said:-

> "24. *Smith* was concerned with outline planning consent, but the same principles clearly apply to the grant of planning permission itself.
>
> 25. The authorities make it clear, therefore, that if the planning authority consider that a process or activity will have significant environmental effects then the ES needs to include the detailed information identified in schedule 4 to the regulations. It cannot leave the matter to be covered by conditions at a later stage. Even if that might otherwise be a satisfactory way of dealing with the problem, it frustrates the democratic purpose of the consultation process.
>
> 26. However, as the observations of Harrison J in the *Hardy* case make clear, it is a matter for the authority itself whether or not the development will have significant effects, and its decision on the point can only be challenged on traditional public law grounds. There is a screening system whereby the authority may give a decision whether an ES is required or not, and the regulations set out the material information which the developer has to provide if it seeks such an opinion (see regs 4, 5 and 7). In this case no screening opinion was required since the developer voluntarily provided the ES. But if the information is defective because it fails to deal with all significant environmental effects, even if it deals with some of them, then the ES will be inadequate and the consultation process will not reach to its full extent. "

82. Elias J cited a passage from the judgment of Pill LJ *in R (Gillespie) v First Secretary of State* [2003] EWCA Civ 400:-

> "The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature

> to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration".

83. Elias J summarised the material principles to be derived from *Smith* and *Gillespie* as follows:-

> "1. The decision whether a process or activity has significant environmental effects is a matter for the judgment of the planning authority. In making that judgment it must have sufficient details of the nature of the development, of its impact on the environment and of any mitigating measures.
>
> 2. Equally, it is for the planning authority to decide whether it has sufficient information to enable it to make the relevant judgment. It need not have all available material provided it is satisfied that it has sufficient to enable a clear decision to be reached.
>
> 3. In making that determination, the planning authority can have regard to the mitigating measures provided that they are sufficiently specific, they are available and there is no real doubt about their effectiveness. However, the more sophisticated the mitigating measures and the more controversy there is about their efficacy, the more difficult it will be for the authority to reach a decision that the effects are not likely to be significant.
>
> 4. If the authority is left uncertain as to the effects, so that it is not sure whether they may be significant or not, it should either seek further information from the developer before reaching a conclusion, or if an ES has already been provided it should require a supplement to the ES which provides the necessary data and information. It cannot seek to regulate any future potential difficulties merely by the imposition of conditions.
>
> 5. The authority cannot dispense with the need for further information on the basis that it is not sure whether or not there are significant environmental effects, but that even if there are, other enforcement agencies will ensure that steps are taken to prevent improper pollution. However, it should assume that other agencies will act competently and it should not therefore anticipate problems or difficulties on the basis that those agencies may not do so."

84. Mr Brown points out that GCC moved from the position set out in its scoping opinion, where the Interested Parties were required to produce a full hydrological and hydrogeological assessment of the proposal to determine baseline conditions at the site (including the detailed list of information set out in the EA's letter of 11 May

2009) as part of the ES, to a position where it was willing to leave provision of the majority of that information over to be dealt with under Condition 30. In particular,

The effect of those conditions is that an acceptable groundwater drainage scheme would have to be approved by GCC prior to the commencement of extraction from the site, and a detailed monitoring scheme also approved.

88. Mr Cairnes submits:

(1) GCC was required to consult with the EA as to the likely significant effects of the proposal in the context of flood risks.
(2) The EA properly considered the enviro

(iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development…"

91. In *R(Telford Trustees) v Telford and Wrekin Council* [2011] EWCA Civ 896 the Court of Appeal approved the following passage in the judgment of Sir Michael Harrison in *R(Ling (Bridlington) Ltd) v East Riding of Yorkshire County Council* [2006] EWHC 1604 Admin:

> "In considering the adequacy of reasons for the grant of permission there are a number of factors which seem to me to be relevant. The first is the difference in the language of the statutory requirement relating to reasons for the grant of planning permission compared to that relating to the reasons for refusal of planning permission. In the case of a refusal, the notice has to state clearly and precisely the full reasons for the refusal, whereas in the case of a grant the notice only has to include a summary of the reasons for the grant. The difference is stark and significant. It is for that reason that I reject the claimants' contention that the standard of reasons for a grant of permission should be the same as the standard of reasons for the refusal of permission.
>
> Secondly, the statutory language requires a summary of the reasons for the grant of permission. It does not require a summary of the reasons for rejecting objections to the grant of permission.
>
> Thirdly, a summary of reasons does not require a summary of reasons for reasons. In other words, it can be shortly stated in appropriate cases.
>
> Fourthly, the adequacy of reasons for the grant of permission will depend on the circumstances of each case. The officer's report to committee will be a relevant consideration. If the officer's report recommended refusal and the members decided to grant permission, a fuller summary of reasons would be appropriate than would be the case where members had simply followed the officer's recommendation. In the latter case, a short summary may well be appropriate."

92. In the present case the Committee accepted the recommendation contained in the Officer's Report to grant permission. The Officer's Report contains very detailed reasons for the recommendation. It was en