Open Spaces Society closing: Speaking Version

1. Introduction

1.1. This is my short closing statement on behalf of the Open Spaces Society. In my full statement of case I summarised three key points on which I believe the application must fail:

1.2. The proposed replacement land is already publicly accessible open land.

1.3. The proposed replacement land is in a different neighbourhood.

1.4. The distance and topography means that the proposed replacement land is of little, if any, utility to the public of the neighbourhood of The Sands.

1.5. Nobody challenged my witness statement in the inquiry. Having read the other submissions, and heard other evidence, I stand by my submissions, but I do acknowledge the different views regarding the current 'public accessibility' of the proposed replacement land. I have said in submissions what I found in the Applicant's submissions, and have reported what I saw on the ground. I leave that issue to the Inspector.

1.6. This leaves the two further heads of objection: 'different neighbourhood', and 'public interest'.

2. Different neighbourhood

2.1. 'Different neighbourhood' is a matter of fact and law. On the facts the two sites in this case sit in quite different and distinct neighbourhoods. It is a substantial journey between the sites, and to suggest that residents of the neighbourhood of The Sands would travel all that way for air, exercise, and recreation, is simply unrealistic. The River Wear and the East Coast Main Line sit alongside the physical distance as factors that put The Sands into what I call a 'Durham City

Neighbourhood', and the replacement land into what I call an 'Aykley Heads/Framwellgate Moor/ Newton Hall Neighbourhood'. It comes down to how far each plot of land is from the front doors of the community of each neighbourhood, and it comes down to 'cohesiveness'.[1] On a site visit — seeing the roofs of the houses nearby — it speaks for itself that there is no cohesiveness between the community using The Sands and that likely to use the proposed replacement land.

2.2. I rely also on the judicial description of a neighbourhood in *Sainsbury's Supermarkets*[2] — that considerations include natural boundaries or distinct boundaries formed by a large road such as a motorway; the presence or otherwise of facilities which might be expected to exist in a given neighbourhood, including shops, primary schools and a post office; differences in housing types and standards; and differences in socio-economic circumstances. On my site visits I went looking for these defining characteristics, and I found them. On the *Sainsbury's* criteria, the two sites are different neighbourhoods.

2.3. I addressed the view of the courts on the relationship between neighbourhoods and localities; and also whether exchange can take place between neighbourhoods. On that second limb, I come back again to the necessary singular construction to be applied to 'neighbourhood' in the statute and guidance. As set out in paragraph 40 of our statement of case, a plural construction opens the door to releasing land in Berwick and replacing it with land in Penzance — the merits of the exchange merely to be evaluated on balancing the benefit conferred on the residents of Penance against the loss suffered by those of Berwick. That would make a nonsense of the 'neighbourhood' criterion, and statutes should be construed (where possible) to avoid a nonsensical outcome.

2.4. In his attempted cross-examination of my legal submissions on behalf of the society, counsel for the applicant appeared to question the

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[1] *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) as cited in *R (oao Tadworth and Walton Residents' Association and Elcombe) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 972 (Admin), which is a section 16 case.

[2] *Sainsbury's Supermarkets Ltd v National Appeal Panel for Entry to the Pharmaceutical Lists* (2003) SLT 688.

relevance of the considerable body of case law on the meaning of neighbourhood in the context of s.15 of the 2006 Act, as applied to the context of s.16. But: ‘There is a presumption that where the same words are used more than once in an Act they have the same meaning.’[3] There is not the slightest cause to depart from that presumption in the present context.

2.5. Counsel also sought to cross-examine on the facts of the Walton Heath Golf Course case.[4] In that case, the release land was close to the village of Walton-on-the-Hill and Tadworth, and the replacement land isolated from the villages by the M25 (although there was a bridleway bridge linking the two). The claimant’s ground 3 was (para.81): ‘*that the Inspector acted irrationally by treating areas to the south of the M25, notably Buckland and parts of Reigate as falling within the neighbourhood for the purposes of section 16(6)(b).’* Note that the challenge was not on the basis that the inspector had erred in taking account of benefit to a different neighbourhood. Holgate J (para.86) states that: ‘*The criticism instead is that it was irrational for the inspector to include Buckland or parts of Reigate within the neighbourhood at all.*’ The challenge failed on that ground, being described as a challenge to rationality ‘on matters of judgment’.

2.6. The decision is not an endorsement of the findings of the inspector on the particular facts of the case. It is merely an illustration of the reluctance of the court to interfere with quintessential questions of judgment before the inspector.

2.7. Holgate J (para.92) finds that the benefit of the replacement land to adjoining areas, not part of the neighbourhood of the release land, would be considered under s.16(6)(c), and go ‘*into the overall balancing exercise performed by the inspector*’, and that he would ‘*find it impossible to see how the outcome of that final balancing exercise could have been any different.*’ However, with respect, we do not agree with the judge’s *obiter* comments. S.16(6)(b) provides for an

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[3] *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed., s.21.3. This paragraph has been judicially approved: *MC v Secretary of State for Work and Pensions* (UC) [2018] UKUT 44 at [24]; *Webb v Webb* [2020] UKPC 22 at [119] (Lord Wilson). Extract attached at annexe.

[4] *R (oao Tadworth and Walton Residents’ Association and Elcombe) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 972 (Admin).

express test for the interests of the neighbourhood, and if the outcome of that test is entirely negative, the society submits that it cannot easily be offset by showing some advantage to another part of the public under the test in s.16(6)(c).

Additionally: Holgate J expressly considered whether, if the replacement land were not in the neighbourhood of the release land, the benefits could be considered as part of the public interest under s.16(6)(c). He did not take the view that such benefits could accrue to an entirely different neighbourhood and be measured under s.16(6)(b).

3. Public interest

3.1. My third head of objection is the public interest. Again, the findings in my site visits are important. The distance between The Sands and Aykley Heads is considerable. It is so much more than 'popping out with the children and dog for 15 minutes'. And it is not distance alone. The topography is not welcoming, and the river, railway, and busy roads all combine to make the whole trip even less attractive than even the distance makes it.

3.2. Even if the Inspector finds that the proposed replacement land is not currently publicly accessible for commons-like access purposes, simply so designating the site would not outweigh, on the public interest scale, the journey that would be forced on residents of The Sands simply to get to Aykley Heads.

3.3. Taking the evidence as a whole, this proposed exchange of common land does not satisfy the essential tests, and we ask the Inspector to refuse the application