[1993] 1 PLR 64

General Education Ltd v Secretary of State for the Environment and another

COURT OF APPEAL

Sir Thomas Bingham MR, Glidewell and Leggatt LJJ

October 8 1992

Material considerations — Planning history — Proposed change of use from language school to offices — Likely adverse impact on residential amenity — No special need shown for office use — Appeal dismissed — Finding that existing use likely to continue — Impact of office use similar to that of existing use — Whether inspector erred in having regard to circumstances in which permission granted for existing use

In 1981 planning permission was granted on appeal for the use of premises at 53 Woodbridge Road, Guildford, as a language school. The inspector who determined that appeal found that the use would not affect the appearance of the property, nor be detrimental to the amenity of the area and he held that on balance the need for the school was sufficient to outweigh the loss of the residential accommodation. He did not consider that such change of use would act as a precedent for the expansion of office uses in Woodbridge Road, as the language school was not an office use.

In 1990 the respondents, **General Education Ltd,** applied for planning permission to change the use of the premises to offices. The local planning authority, Guildford Borough Council, refused permission on the grounds of detriment to amenity and loss of the property for potential residential use. On appeal to the Secretary of State for the Environment, the inspector dismissed the appeal, finding that whereas it was very unlikely that the building would revert to residential use if the appeal failed, the proposed office use would be harmful to the character and appearance of the predominantly residential area. He accepted that the impact of the existing use was

similar and, in some respects, more pronounced, but stated that this use was only allowed on the basis that the need for the language school outweighed its disbenefits; there was no such special need as would justify the proposed office use. On May 20 1991, Sir Graham Eyre QC, sitting as a deputy judge of the Queen's Bench Division, quashed the inspector's decision, holding that where the impact of the proposed use would not be materially different from that of the existing use, which the inspector had found was likely to continue, the historic reason for the existence of the present use was irrelevant.

The Secretary of State appealed.

Held The appeal was allowed.

The inspector's reasoning was logical and clear. Once it was established that the language school had an adverse impact on the residential area, it was relevant to consider why permission for that use had been granted. What weight to give to that consideration was a matter for the inspector, not the court. He was entitled to conclude that

although the “demonstrable harm” that would be caused by offices was similar to that which was caused by the language school, the special need which prompted the exception in favour of the language school was not available in aid of offices: see pp 70F-71H and 73B-C. In 1981 the expectation was that the change of use could not be used as a precedent for offices because use as a language school is not an office use. Similarly, in 1991 the inspector recognised that to allow offices where none was needed would be liable to constitute a precedent for office use. These considerations supported his conclusion: see p 73C.

Decision of Sir Graham Eyre QC reversed.

No cases are referred to in the judgments

Appeal against decision of Sir Graham Eyre QC

This was an appeal by the Secretary of State for the Environment against the decision of Sir Graham Eyre QC (sitting as a deputy judge of the Queen's Bench Division) on May 20 1991 whereby he granted an application under section 288 of

the Town and Country Planning Act 1990 by **General Education Ltd** to quash a decision by an inspector appointed by the Secretary of State, given by letter dated January 22 1991, whereby the inspector dismissed an appeal by the company against the refusal by Guildford Borough Council of an application for planning permission to change the use of premises at 53 Woodbridge Road, Guildford, to use as offices.

John Howell (instructed by the Treasury Solicitor) appeared for the appellant, the Secretary of State for the Environment.
David Holgate (instructed by Atkins Wilson & Bell, of Guildford) appeared for the respondents, **General Education Ltd.**
The local planning authority, Guildford Borough Council, did not appear and were not represented.

The following judgments were delivered.

SIR THOMAS BINGHAM MR: I will ask Glidewell LJ to give the first judgment in this case.

GLIDEWELL LJ: The respondent company, **General Education Ltd,** own premises at 53 Woodbridge Road, Guildford, in which, since 1978, they have conducted a language school. They applied for planning permission to change that use to use as offices. Guildford Borough Council, the local planning authority, refused permission on two grounds:

01 The proposed use would seriously detract from the residential character of the surroundings, and from the character and appearance of the property itself.

02 The proposal is considered to be contrary to Policy IC3 of the Surrey Structure Plan 1989 in that it will effectively lead to the loss of this property for potential residential use.

General Education appealed against that decision to the Secretary of State for the Environment. The appeal was heard by an inspector appointed by the Secretary of State. His decision letter was dated January 22 1991. On the second ground of refusal he held in favour of General Education. Nothing now turns on this save that

reference has been made to the fact several times during the course of argument. On the first ground, however, he concluded that the borough council were correct to withhold permission and dismissed the appeal to him.

General Education applied to the High Court under section 288 of the Town and Country Planning Act 1990 to quash that decision. On May 20 1991 Sir Graham Eyre QC, sitting as a deputy High Court judge, concluded that the inspector had erred in his approach and quashed his decision. The Secretary of State now appeals to this court.

I must say something about the facts and the planning history of this matter before coming to the decision itself. The relevant facts are conveniently referred to, as one would expect, in the inspector's decision letter. He said in para 5 of that letter:

> … I saw that Woodbridge Road is a busy arterial route leading from the nearby Guildford town centre. On the eastern side of the highway commercial and retail properties extend northwards from the edge of the town centre towards No 53. However, this predominance of business uses ceases at the junction with Drummond Road and your clients' premises lie within an essentially residential area which stretches to the north and east of this junction. Whilst the houses fronting Woodbridge Road are subject to noise and activity on the main road, they appear to be satisfactorily used for residential purposes.

No 53 is separated by one other property from Drummond Road. It thus lies within, but only a short distance within, what the inspector has characterised as “an essentially residential area”.

The history is that no 53 ceased to be occupied as a dwellinghouse in, I believe, 1977. The use as a language school started in 1978. An application was made in 1980 for that use which had commenced to be allowed to continue. Guildford Borough Council refused permission for the use to continue. There was an appeal against that decision and another inspector, appointed to hear that appeal, gave his decision on September 17 1981. He said:

> I consider that the main issue is whether the need for this school is sufficient to outweigh the loss of residential accommodation.

He then referred to the merits of the school and the useful service it provided, and he said in para 5:

The proposed use would not affect the appearance of the property and would not be detrimental to the amenity of the area. I do not consider that such a change of use would act as a precedent for the expansion of office uses in Woodbridge Road as it is not an office use.

In para 7 he concluded:

The arguments in this case are in my view very finely balanced but I consider that the need for this school is sufficient to outweigh the loss of the residential use of this particular house. I regard the description of educational use in the application as being too wide in scope and [I] am including a condition to limit the use to a language school.

Subject to that condition, he allowed the appeal and granted permission.

In the decision of the inspector of January 22 1991, he considered first the loss of the building for residential use and, as I have said, concluded that in favour of the present respondent, General Education, on the ground that if the appeal failed, nevertheless it was very unlikely that the building would revert to residential use. He then went on to consider the first ground of refusal, that is to say, the impact of the proposed office use on the amenity of the residential area. In para 6 he said:

The proposed offices would produce more comings and goings of persons and vehicles to the premises than one would normally find in a residential area.

He then dealt in the remainder of that paragraph with matters relating to traffic, car parking, noise of vehicles and so on. In para 7 he said that the company were willing to accept a condition limiting advertisements or any sign that clearly would distinguish the premises from nearby residential premises, and in the last sentence of that paragraph he said:

In the light of the activity likely to be associated with the proposed use and the attendant changes to the setting and appearance of the property I consider that the proposed offices would be harmful to the character and appearance of the predominantly residential area.

Of course, if he had thought it proper to stop there, that would have been a conclusion which led to him dismissing the appeal. But quite properly he did not stop there. In para 8 he continued:

8. I accept that the existing use of No 53 has a similar impact on the surrounding area and in some respects, such as the comings and goings of students, it has a more pronounced effect. However, this use was only allowed on the basis that the need for the language school outweighed its disbenefits. In my judgment, there is no such special need in respect of the current proposal. The register of commercial property indicates there is no shortage of offices in or near the town centre and there was no firm evidence that your clients' desire to centralise the administrative function could not be met by using some of this accommodation. Consequently, the improved educational service could be achieved by using other premises.

9. Whilst I can appreciate your clients' preference to use the company's only freehold property I am not convinced that this constitutes a special need which overrides the proposal's impact on the residential neighbourhood. In the light of this impact the proposed offices conflict with the overall provisions of the relevant employment policies of the Surrey County Structure Plan and the Guildford Borough Local Plan and do not accord with the advice in Planning Policy Guidance Note No 4. In reaching my conclusions I have also been mindful that allowing this

proposal in the absence of special need may result in further applications for similar developments in the residential area which the Council would find more difficult to resist. Nevertheless, I have considered this proposal on its particular merits. In my judgment the harmful impact on the character and appearance of the area overrides my findings on the first issue and the Council was correct in withholding permission.

For those reasons he dismissed the appeal.

The learned deputy judge's reasons for his decision to quash the inspector's decision are contained in two passages in his judgment, the first starting at p 5D. The judge quoted a sentence from para 8 which I have already quoted:

I accept that the existing use of No 53 has a similar impact on the surrounding area and in some respects, such as the comings and goings of students, it has a more pronounced effect.

Sir Graham Eyre then said:

On the face of it, his finding as to harm to the character and appearance of the predominantly residential area appears to proceed on a basis which ignored the existence of the present use.

If I may say so, that sentence clearly relates back, not to the sentence he has just quoted from para 8, but the preceding conclusions in para 7.

The judge continued:

However, when the existing use was brought into account, he found that the impact on the residential area would be similar and, indeed, may be more pronounced in certain respects, on the basis of an earlier finding that the current use was, in any event, likely to continue in the future. Accordingly, in the *de facto* circumstances of the present and future situations, there would be no material change.

Having regard to these findings, it is difficult to discern how any harm to the character and appearance of a residential area could be a factor in the decision. However, on examining the genesis of the current use, which he extracted from the inspector's previous decision in 1981, he took the view that it was in place only because in the previous case, nearly ten years before, the need for the educational facility outweighed policy disbenefit.

In the context of what change the residents would suffer from the proposed use, that is to say the *de facto* situation, past reasons for its current existence would appear to be nothing to the point. The fact that the question of need for offices would not override alleged environmental disbenefits in this case appears not to be germane having regard to the view he had formed that this appeared that it was unlikely to occur. Accordingly, in comparison with the existing use, environmental disbenefits would not flow from the proposed use.

Later, having summarised the argument of Mr Howell, the deputy judge said at p 8E:

In a case such as the present, the onus of persuasion, as it has been termed, was clearly upon the planning authority to demonstrate why a planning permission should not be granted and the inspector's task was

to identify a chain of reasoning of integrity which resulted in the identification of such demonstrable harm. The planning authority failed on the main policy issue in relation to the protection of residential accommodation. It was sought to demonstrate, in the absence of a proper comparison between the existing use which would continue, and the proposed use, that harm would be caused to the character of

the residential area, whereas it was found that when the *de facto* situation between the proposed use and the existing use was introduced into the equation, no harm, and perhaps some benefit, would result.

I cannot, for my part, see how, when the historical reasons for the existence of the present use are brought into account, demonstrable equilibrium, or benefit, in environmental terms becomes demonstrable harm to any interest of acknowledged importance. The inspector was not approaching the issues on the correct basis and had regard to a factor that left the *de facto* comparison unaffected. But for the historical reason, which did not affect the nature, quality and characteristics of the present use, the issue could only have been resolved in favour of the applicants.

Mr Howell for the Secretary of State started his most useful skeleton argument, an adjective which I apply equally to that of Mr Holgate, with this paragraph:

The issue raised by this appeal is whether, in a case where

(1) a proposed use will have unacceptable environmental effects and

(2) a planning authority is comparing the existing with the proposed use in order to determine whether the existing use provides a reason why planning permission should none the less be granted for the use proposed,

the planning authority as a matter of law may only consider in making such a comparison the relative environmental consequences of the existing and proposed use and may not regard as material the circumstances in which planning permission was granted for the existing use.

Mr Holgate was inclined, at least at first, to submit to us that that was not the issue raised by this appeal, indeed that the issue raised by this appeal was nothing like so wide. But, in my view, for the reasons I shall seek to explain, that is a proper way of formulating the issue.

Mr Holgate submits — putting it shortly and of course nothing like as extensively as he did — that the inspector was required to compare the impact of the proposed use on the adjoining residential area with that of the existing use as a language school: what Sir Graham Eyre called “the *de facto* use”. The inspector concluded, in the first sentence at para 8 of his letter, that the impact of the two uses was similar, if indeed the language school in one respect did not have a more pronounced effect. Accordingly, submits Mr Holgate, no demonstrable harm has been shown. It is

established that, at any rate at the time when this decision was being made, when section 54A had not been introduced by amendment into the Town and Country Planning Act 1990, it was necessary for the planning authority to be able to show, and there was a burden upon them to show to the satisfaction of the inspector, that some demonstrable harm would be done. The demonstrable harm that was relevant in the circumstances of this case was harm to the amenities of the adjoining residential area.

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Mr Holgate submits that, the balance having been struck and no demonstrable harm thus having been shown as a result of the inspector's conclusion, permission should have been granted. He goes on to submit that the planning history, that is to say, the fact that planning permission was granted in 1981 because of the need for the building to be used as a language school, did not and could not alter the impact which the office use would have, nor the comparison between that impact and the impact which the language school had on the residential area. Thus, Mr Holgate submits, that factor is irrelevant, the history is irrelevant and the reason why the planning permission was granted is irrelevant.

We have to decide, and Sir Graham Eyre had to decide, whether the inspector made an error of law. Under section 288 of the Act the court is empowered to quash the decision of the inspector if it be satisfied that the decision was “not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it”. If an inspector has made an error of law, and in particular if he has relied upon some consideration which as a matter of law it is not open to him to take into account, that is not acting within the powers of the Act. The argument with regard to not complying with the relevant requirements is a reference to Mr Holgate's submission that the inspector has not given adequate reasons for his decision. It is commonplace that a decision-maker in the position of the inspector must give such adequate and understandable reasons, and if he does not and if, as will often follow as a result, the applicant is prejudiced, that also may be a reason for quashing.

Coming back to the error of law, in my view Mr Howell is right in suggesting that the error of law can only be, as in effect Sir Graham Eyre at p 9 of the transcript of his

judgment found that it was, that the inspector had regard to an irrelevant consideration, that is to say, the planning history, the reasoning for the 1981 decision. The inspector was in exactly the same position as was the planning authority when they were making their decision. By the provisions of the Act he was required to have regard to the provisions of the development plan and to other material considerations, and it follows, of course, not to immaterial considerations.

Mr Howell's submission is that, far from the consideration being an irrelevant one, it was one which was indeed relevant and which was not an error of law but which, as a matter of planning judgment, the inspector was entitled to take into account. He analyses the inspector's decision letter in this way. First of all, the inspector considered whether office use as such would create a demonstrable harm. At the end of para 7 of the letter he concluded that it would. “I consider,” he said, “that the proposed offices would be harmful to the character and appearance of the predominantly residential area.” Then he went on to consider whether, weighing that harm against such harm as there was resulting from the existing language school use, it could be said that the offices would create no greater harm, in which case that of course would be an argument in favour of allowing the appeal. He said in the first sentence of para 8 that he accepted that the existing use had a similar impact, if

indeed not more pronounced. But in the next sentence he came to the point which turns out to be crucial in this appeal: “However, this use was only allowed on the basis that the need for the language school outweighed its disbenefits”.

In effect, Mr Howell is submitting that the inspector is quite properly doing a weighing process between the arguments for and the arguments against allowing this appeal. First of all he has put in the scale against, the finding that the office use would be harmful to the character and appearance of the area. Then he considers whether to put in the scale on the opposite side, a weight relating to the effect of the existing use. He says that on the face of it the existing use has roughly the same impact and therefore the weight will presumably be equal. But, he goes on to say, that weight results from a decision which came about because of the established need for the language school. Then he says, is there any such need for the offices? That is the remainder of para 8 and the beginning of para 9. He answers that, no;

there is not. So the weight of the piece that he puts in the scale in favour is substantially reduced, if indeed there is any of it remaining at all. He then considers policies and the “thin end of the wedge argument”, as it can be characterised, in the remainder of para 9. I will come back to that.

If that is a proper analysis of the inspector's reasoning, as I believe it to be, then it is clear and it is logical. As a matter of law I, for my part, cannot see how it can be said that the inspector was not entitled to take the reasoning for the 1981 permission into account. I say that, however, subject only to a last argument of Mr Holgate's on this part of the issue, which is this. As I have already made clear, the inspector in 1981 concluded that there was likely to be no amenity effect from the use as a language school and the only disbenefit he was considering was the loss of housing. He considered there was such a disbenefit, but he thought the need overrode it. Mr Holgate's argument, as I understand it, is that since the need was brought in to override the disbenefit from a loss of housing, it has nothing to do with possible disbenefit from impact on the amenity of the residential area nearby and therefore, for that reason, is irrelevant.

Mr Howell roundly characterised that submission as illogical. I would not go quite so far as that. I would, however, say that I do not follow the process of reasoning. If, in 1981, the inspector had then concluded, as the inspector his colleague in 1991 did, that there was a disadvantage arising from the impact of the language school on the amenity of the residential area, then he would put that in the scales in addition to the loss of housing when considering whether to allow the appeal in 1981. Who knows what conclusion he would have come to, but he would have weighed those disbenefits against the need. Assuming that he concluded still in favour, it would have been clear that the environmental impact was something against which the need was weighed, and when it is established that the language school does have an impact upon the residential area it is, in my judgment, relevant to consider why the planning permission was granted in the first place. It is not for us to decide what weight to give to that consideration, but that the inspector was entitled to take it into account is, in my view, clear.

There were two other matters to which I say reference was made in the last main paragraph of the inspector's decision letter. The last was the passage in which he said that “the absence of special need may result in further applications for similar developments … Nevertheless, I have considered this proposal on its particular merits” and it is clear that he did not take that into account in his decision. Indeed, Mr Holgate does not object to that.

Finally, by a respondents' notice Mr Holgate has sought to uphold Sir Graham Eyre's decision on that ground that, though the inspector at the 1991 inquiry was referred to a number of provisions in the relevant development plans, which he submits positively supported this development, he made no reference to them. The relevant plans were, at the time, the county structure plan, the existing local plan for Guildford and a draft plan which, nevertheless, was a material consideration to be taken into account. It is quite clear that in the detailed submissions made to the inspector, reference was made to the area policies, but Mr Howell has pointed out to us that all the policies which might have been held to contain provisions in support of a development such as the change of use to offices were all characterised by some such phraseology as “the planning authority will take into account the impact upon the residential amenities of the area” or words to that effect. In other words, they were none of them policies that positively pointed to the grant of permission in circumstances such as this, and indeed I would be surprised if they had been. Therefore, submits Mr Howell, it was sufficient for the inspector, having reached the conclusion he did on the central issue of the impact of the office use on the residential area, to deal with the policies quite shortly. He did deal with them in the sentence in which he said:

> In the light of this impact the proposed offices conflict with the overall provisions of the relevant employment policies of the Surrey County Structure Plan and the Guildford Borough Local Plan and do not accord with the advice in Planning Policy Guidance Note No 4.

That, submits Mr Howell, is sufficient. It is not extensive, but he did not need to set out a list of the policies. I agree with that submission.

For those reasons I take the view that, unusually, Sir Graham Eyre has fallen into error in taking the view that all the inspector was permitted to do was to make a

comparison between the impact of the office use and the impact of the language school use and to make no reference to, or to place no reliance upon, the reason for the 1981 permission. I find no error of law in the inspector's approach, nor do I find that his reasoning was defective.

Accordingly I would allow this appeal and set aside the order made by the deputy judge.

LEGGATT LJ: In 1981 planning permission for a language school in a predominantly residential neighbourhood was granted as a special case to meet a special need. In 1990 the borough council refused permission for a change of use to offices on the ground that it would seriously

detract from the residential character of the surroundings. The inspector upheld the refusal on the ground that the harmful impact on the character and appearance of the area overrode his findings that the proposal did not cause an unacceptable reduction in the housing stock or a harmful loss of educational facilities. The deputy judge compared the existing use with the proposed use without regard to the fact, which to the inspector had been determinative, that the existing use was explained by special need. He therefore had no difficulty in concluding that because use as offices would probably be no more environmentally harmful than use as a language school, the change should be permitted.

In my judgment, the inspector was entitled to conclude that although the “demonstrable harm” that would be caused by offices was similar to that which was caused by the language school, the special need which prompted an exception in favour of the language school was not available in aid of offices. In 1981 the expectation was that the change of use could not be used as a precedent for offices because use as a language school is not an office use. Similarly, in 1991 the inspector recognised that to allow offices where none was needed would be liable to constitute a precedent for office development. These considerations all support the inspector's conclusion that in this residential area, whereas a need for a language school justified the grant of planning permission for use as a language school, there is no such need for offices as could justify a grant for use as offices.

I consider that the inspector's approach accorded with the development plan and took account of such other considerations as were material, including the relevant planning history, and he was entitled to conclude that the proposed office development would conflict with both structure and local plan policies. The deputy judge erred in deciding that the inspector should have ignored the reason why planning permission was granted for use as a language school. The inspector's decision was unimpeachable and should be restored.

I agree that the appeal should therefore be allowed.

SIR THOMAS BINGHAM MR: I agree with both judgments which have been delivered.

Appeal allowed with costs of appeal and below; application for leave to appeal to the House of Lords refused.