

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

CO/5990/2008

BETWEEN:

(1) THE BARD CAMPAIGN
(2) DAVID BLISS

Claimants

and

**THE SECRETARY OF STATE FOR COMMUNITIES
AND LOCAL GOVERNMENT**

Defendant

and

WESTON FRONT

Interested Party

**SKELETON ARGUMENT ON BEHALF OF
THE DEFENDANT
(listed to be heard on 22
and 23 January 2009)**

References to the Core Bundles are given as follows [].

TIME ESTIMATE: 2 days

ESSENTIAL PRE-READING:

- the Claimants' Combined Statement of Facts and Grounds ("CCSFG", paragraphs in that document are referred to thus CCSFG/1) [];
- the 1st, 4th and 5th witness statements ("w/ss") of Henry Cleary [];
- the Secretary of State's Detailed Grounds of Resistance [];
- the impugned consultation document [];
- the Green Paper *Homes for the Future: more affordable, more sustainable* [];
- PPS3 Housing (2006) paras 1, 9, 10, 36 [];
- the 4th w/s of Simon Ricketts [];
- the Interested Party's legal grounds [];
- the 2nd w/s of John Henman [];
- The Claimants' Skeleton Argument ("CSA", paragraphs in the CSA are referred to thus CSA/1);
- *The Eco-towns – Living a greener future: progress report* [];
- The draft PPS [];
- The Sustainability Appraisal on the draft PPS [];

- The Sustainability Appraisal of the eco-Towns programme: Introduction; Conclusion and the location chapters for Middle Quinton and Weston Otmoor [].

ESSENTIAL PRE-READING TIME ESTIMATE: 1 day.

Introduction

1. These proceedings seek to challenge the publication of a consultation paper entitled “Eco Towns Living a Greener Future” on 3 April 2008 (“the impugned Consultation”).
2. More particularly section 3 of the N461 [] identifies the decision challenged as being the “[d]ecision of the Secretary of State for Communities and Local Government made on 3 April 2008 to short list potential Eco-town sites, as contained in the public consultation document entitled “Eco-towns: Living a Greener Future”, without having undertaken adequate consultation in respect of the “Eco-towns” concept.”
3. The impugned Consultation document is at [] and the Court is invited to read it in full including Annex A.

The Structure of this Skeleton Argument

4. This skeleton covers the following topics –
 - i. a brief summary of the Secretary of State’s case (paras. 5 - 10);
 - ii. the background to this claim (paras. 11 - 80);
 - iii. the relevant legal principles (paras. 81 - 103);
 - iv. the Secretary of State’s submissions in response to the Claimants’ grounds of challenge (paras. 104 - 150);
 - v. the Secretary of State’s submissions in response to the Interested Party’s additional grounds of challenge (paras. 151 - 164);

Summary of the Secretary of State’s Case

5. The Secretary of State’s principal contentions are as follows.

6. The principle of an eco-towns programme, as one of a range of national policy initiatives proposed to deliver sufficient new housing to meet growing demand, was the subject of fair and proper public consultation in the Green Paper *Homes for the future: more affordable, more sustainable* published on 23 July 2007. It is submitted that the public consultation that has taken place (in the form of the Green Paper and the Eco-Towns Prospectus and the impugned Consultation document) and is currently taking place (on the draft Planning Policy Statement on Eco-Towns and the Sustainability Appraisals) is “appropriate” for the purposes of Article 7 of the Aarhus Convention and provides a fair and proper basis for appropriate public consultation on both the principle and key elements of eco-towns.
7. The purpose of the impugned Consultation was to seek preliminary views on eco-town benefits and the 15 short-listed locations which the Defendant proposed to take to the next stage of assessment and public consultation under the emerging eco-towns programme. Those 15 short-listed locations had been identified by a “showstopper review” (as explained by Mr Cleary in his 1st w/s). Section 5 of the impugned Consultation set out an initial assessment of each of the 15 locations and invited public responses on 3 specific questions in relation to each of those locations. Consistent with the stated purpose of the impugned Consultation to seek *preliminary* views on each of the 15 locations, the purpose of these questions was self-evidently to enable the public to inform and assist the formation of the next, more detailed stage of the emerging eco-towns programme. So, for example, the public’s responses to these questions might inform the judgment whether a particular location should now go forward to that next, more detailed stage of assessment.
8. This was a fair and proper basis for public consultation at the initial stage of the overall public consultation process on the emerging eco-towns programme. The impugned Consultation was stated in the impugned Consultation document to be the first stage of a four stage process. At the second stage (now on-going) there is further, more detailed public consultation on the short-listed locations as well as full

compliance with the SEA Regulations and Directive including in respect of the consideration of alternatives.

9. Having regard to the stated purpose of the impugned Consultation and with further more detailed consultation still to follow, the information contained in the impugned Consultation document itself was sufficient to allow for there to be proper and lawful public consultation by way of seeking the public's preliminary views on the 15 short-listed locations. It was fair and reasonable for that purpose to provide high level summary information and refer the public to the contact points for individual bidders. The impugned Consultation was intended to be a preliminary consultation – it was not intended to provide a detailed account of the individual proposals.
10. For the purpose of undertaking a fair and proper public consultation, the Secretary of State was not required to offer the public the opportunity to comment upon those locations or bids which were not selected for inclusion in the impugned Consultation document.

The background

(i) Eco-towns - introduction

11. What follows is an account of the key matters of background to “the Eco-towns programme”¹. A fuller account is given in the 1st w/s of Henry Cleary, the Head of Housing and Growth Programmes Division at the Department for Communities and Local Government (“DCLG”). The Court is invited to read that w/s in full. The purported account given by the Claimants of the background (see paras. 8 – 55 of the CSA) is not accepted as being complete, correct or accurate.

¹ The use of the phrase “Eco-towns programme” in these Detailed Grounds and in other DCLG documentation does not carry with it an admission that it is a “programme” subject to the requirement of Strategic Environmental Assessment (CCSFG/17(iii) is thus incorrect).

12. The Eco-towns programme is intended to be a “combined response to three challenges: climate change, the need for more sustainable living and the need to increase housing supply”².
13. There are two main elements in the policy background to Eco-towns. First, the need for a major increase in housing supply to meet rapidly rising housing need and improve affordability and second, the challenge of redesigning the way people live so as to respond more effectively to climate change and greater sustainability challenges. There is a very full account of these elements of the policy background in the 1st w/s of Henry Cleary. The first element involves consideration of the *Sustainable Communities Plan* (February 2003)³; the *Barker Review of Housing Supply* (December 2005); the Government’s response to that review including the New Growth Points NGP Programme (“the NGP Programme”) (December 2005)⁴; Planning Policy Statement 3 Housing (November 2006 - PPS3); the Green Paper (July 2007) and the establishment of the National Housing and Planning Advice Unit. The second element involves consideration of the consultation *Building a Greener Future: Towards Zero Carbon Development* (December 2006); the Code for Sustainable Homes (December 2006); PPS: Planning and Climate Change (December 2007 – supplementing PPS1 Delivering Sustainable Development) and the Climate Change Act 2008 [].
14. The experience gained from the Growth Areas⁵ and NGP Programme demonstrated that local authorities and developers would need to be more innovative in the types of development to be brought forward if the scale of housebuilding envisaged in the

² See the impugned Consultation document at []. Accordingly the Claimants are wrong to suggest that Eco-towns have been created “most specifically ... as a means of accommodating housing growth in England”. That is merely one of three matters which the programme seeks to respond to. The programme applies to all parts of England and not just rural areas. Para. 1 of the CCSFG is thus incorrect.

³ The plan set out to deliver a ‘step change’ in the supply of new housing in London and the South East and focused development in four Growth Areas: Ashford; London-Stansted-Cambridge-Peterborough; Milton Keynes and South Midlands; and the Thames Gateway.

⁴ The programme is designed to provide support to local communities, outside the four Growth Areas, who want to pursue large scale and sustainable growth, including new housing, through a partnership with Government.

⁵ See above.

Barker Review and later the Green Paper was to be realised. As PPS3 – the national planning policy on housing dated November 2006 - itself indicated this would need to include consideration of new settlements⁶ []].

(ii) the Parties

15. The Secretary of State for Communities and Local Government (“the Secretary of State”) is responsible for the DCLG and has ultimate responsibility for the Eco-towns programme.
16. The Claimants oppose the selection of one of fifteen sites short-listed for a proposed Eco-town namely the Long Marston site also referred to as “Middle Quinton”. The Long Marston site is 6 miles to the south west of Stratford-upon-Avon⁷. Long Marston is a former MoD Engineers Depot with extensive warehousing, a rail system and a rail freight connection to the main Worcester-Oxford-London line. The site does lie adjacent to the Cotswold Area of Outstanding Natural Beauty.
17. The Interested Party opposes the selection of another of the fifteen sites short-listed for a proposed Eco-town namely the Western Otmoor site. Weston Otmoor adjoins the M40 and is about 3 miles south west of Bicester and 7 miles from Oxford. The southern edge of the site is in the Oxford Green Belt.
18. Eight of the fifteen short-listed locations involve sites parts of which either were or are currently in military use⁸. The Claimants’ are correct that “[a]lthough the site at Long Marston has been sold to private developers, the Government retains a significant financial interest in the event the site is developed: the Government will recover 50% of the uplift in the land value resulting from the development of the site” (CCSFG/9 and CSA/7). However, there are a number of important points that must be made:

⁶ See PPS3 paras 36/37

⁷ The Secretary of State does not accept the Claimants’ description of the site as being “remote and isolated”: CCSFG/4.

⁸ This is now accepted by the Claimants: contrast CSA/6 and CCSFG/8.

- i. The Government is keen that Eco-towns should make use of surplus public sector land where these present good opportunities for so doing. This was part of the Government's response to the *Barker Review* (see the w/s of Henry Cleary). It is a long-standing and perfectly sensible and lawful policy for the purpose of delivering new homes through the planning process: see, for example, paragraph 36 of PPS3.
- ii. However, no final decisions have been taken as to which locations will eventually be taken forward. Moreover, locations have not been short-listed on the basis of any financial interest in sites which other Government departments may have⁹. The factors considered in the short-listing process are clear from the documentation i.e. environment and transport;
- iii. Any financial interests in sites which other Government departments may have does not disqualify the Secretary of State from planning policy or decision-making in respect of the same: see *Alconbury v SSETR* [2003] 2 A.C. 295¹⁰.

(iii) Eco-towns - origins

19. On 7 March 2007 Yvette Cooper, Minister for Housing, announced by written statement that the Government would be prepared to support proposals for "Eco-towns" of between 5000 and 10,000 new homes as part of the NGP Programme. A

⁹ The CSA at para. 84 says "The contention in para 10(ii) of the Detailed Grounds of Resistance that "locations have not been short-listed on the basis of any financial interest in sites which other government departments may have" is inconsistent with the Government's pronouncements in respect of Eco-towns. For instance on 7 March 2007 Baroness Andrews stated in Parliament that the new towns "should also make use of brownfield and surplus public sector land". Furthermore in the "Eco-towns Prospectus" at para 19 the Defendant stated "Where practicable we want to encourage the development of Eco-towns on surplus public sector land." This is not correct. It has long been Government policy to seek to make use of brownfield land including surplus public sector land. This avoids using greenfield sites to meet development needs. Encouraging the re-use of surplus public sector land is thus a well established aim and not one that can reasonably be said to be improperly motivated by financial considerations.

¹⁰ The facts in *Alconbury* were that the developer had agreed with the MoD, the owner of a disused airfield at Alconbury, that if planning permission was given the developer would redevelop the site into a national distribution centre in return for financial payments to the Ministry: see para. 4 of the speech of Lord Slynn. One of the 57 bids in this case in fact related to Alconbury airfield. Lord Slynn said at para. 55 "I do not consider that the financial interests of the Ministry of Defence ... precludes a decision on planning grounds by the Secretary of State". Lord Hoffmann at para. 130 said "Nor do I think it makes any difference that in the Alconbury case the Ministry of Defence, another emanation of the Crown, has a financial interest in the proposed development".

parallel announcement, referred to in CCSFG/11¹¹, was made in the House of Lords by Baroness Andrews. The Claimants say that that these announcements were made “without any prior consultation with any regional or local planning authorities or any members of the public” (CCSFG/12)¹². This is strictly correct but of no legal moment as regards the issues raised by the present Claim. There was no requirement in law to consult before making these announcements. The notion that before Government even contemplates the possibility of pursuing a policy it must consult is both impracticable and nonsensical. It is well recognised (see below) that consultation can properly take place in relation to specific proposals formulated by a decision-maker and that this still constitutes consultation at the formative stage.

20. On 13 May 2007 the Rt. Hon Gordon Brown MP, who was at that time the Chancellor of the Exchequer, indicated that he wanted to see five new Eco-towns containing up to 20,000 homes: [].
21. On 11 July 2007 Rt. Hon Gordon Brown, by this time the Prime Minister, said in the House of Commons in respect of the draft legislative programme that he wanted “in environmentally friendly ways, using principally brownfield land and building Eco-towns and villages, to meet housing need by building over 250,000 more homes than previously planned”.

(iv) the Green Paper

22. On 23 July 2007 the DCLG published the Green Paper *Homes for the future: more affordable, more sustainable* (“the Green Paper”). The Green Paper made extensive reference to the concept of Eco-towns: see e.g. [133– 136¹³; 148; 151 – 155 and 158]. There were further references to Eco-town at [internal page numbers 42 – 43; 48; 52 – 53; 61 and 63] of the Green Paper. This is an important document in the

¹¹ [].

¹² The allegation is not repeated in the CSA: see CSA/8 – 11.

¹³ [] says “We are launching today an invitation for local authorities and developers to propose 5 new Eco-town schemes, with the entire community designed to be able to reach zero carbon standards. Each scheme could provide between 5,000 and 20,000 new homes giving a total of some 25-100,000 homes. Final decisions will depend on the strength, cost and sustainability of the bids received.”

context of the issues raised in this challenge. The Green Paper will be relied on for its full terms and effect.

23. In the Green Paper the Government indicated an intention to deliver 2 million new homes by 2016 including as one possible source via "Eco-towns":[.]. The context in which the Government proposed eco-towns for that purpose is shown by the Executive Summary of the Green Paper which identified eco-towns as one of a range of proposals for delivering more homes to meet growing demand.

24. The Green Paper said []:

"Eco-towns

12. Eco-towns will build on the UK's rich historic experience of creating planned new settlements. The garden cities are rightly highly regarded across the world. Ebenezer Howard's vision of garden cities was of places to combine 'the health of the country with the comforts of the town'. Green Belts have kept places separate and distinct and many of the new towns of the second half of the twentieth century have been highly successful. Modern schemes need to be more flexible in design and make more use of different models of financing but many of the lessons of the new towns still apply.

13. Eco-towns will be entirely new towns which are exemplar "green developments" of between 5,000 to 20,000 homes. They will be designed to meet the highest standards of sustainability, including low and zero carbon technologies and good public transport. They should incorporate renewable energy systems such that, overall, the whole development in Eco-towns is capable of achieving zero-carbon. The entire community will be designed to have zero or low carbon use, including new schools, community and health facilities. Environmental infrastructure will be a key component of ecotowns including effective flood management, sustainable urban drainage systems, waste water management together with greenspace and enhanced biodiversity.

14. Eco-towns will complement town and city centre renewal, urban extensions and the redevelopment of major sites in existing urban areas. Two prototype schemes, Northstowe in Cambridgeshire and Cranbrook outside Exeter in Devon, are already at an advanced stage of planning and will provide a test bed for informing plans for Eco-towns. Construction will start next year.

15. We are looking for at least five new schemes to start within two years, each with 5,000-20,000 homes. As new developments, they provide an excellent opportunity to show how homes can be built to higher environmental standards with potential for lower cost. This will include zero-carbon development and integrated services and transport. Final decisions will depend on the strength, costs and sustainability of the bids received.

16. In line with support provided to Growth Areas and New Growth Points, Government will invest in Eco-towns to provide support for delivery capacity, early site infrastructure projects, essential studies and master-planning. Eco-towns will be eligible for support from the Community Infrastructure Fund. £2m has already been made available for preparatory work. A large proportion of future investment in Eco-towns will be made by the private sector.

Selecting Eco-town developments

17. Alongside this Green Paper we are publishing a prospectus setting out the vision and outline criteria for Eco-towns. We are inviting proposals from local authorities and other interested groups as to how Eco-towns could contribute to additional growth. Ecotowns will be judged against the following criteria:

- zero carbon and environmental standards;

- sustainable travel;
- design quality, including through design competitions;
- community involvement; and
- use of land.

18. We are committed to preserving green spaces. So, where possible we will use brownfield and public sector land to deliver these new developments.

19. On identifying promising Eco-town proposals, we will:

- review them with other Departments and Agencies;
- commit resources where appropriate to enable Eco-towns proposals to be dealt with quickly through the planning system using mini RSS reviews and use of the new town powers where necessary to secure implementation;
- provide guidance for developers, prepared by David Lock and the Town and Country Planning Association (TCPA);
- establish a wider reference group to provide input and expert advice into their development; and
- sponsor an architectural competition to stimulate new thinking on design for new settlements.”

25. The Green Paper was a consultation document and it allowed until 15 October 2007 for responses. As the Claimants are forced to acknowledge the Green Paper specifically invited views on “the range of ideas and proposals contained in the Green Paper” (see CSA/76). The range of ideas and proposals clearly (see above) included Eco-towns.

26. In February 2008 DCLG published a summary of the consultation responses to the Green Paper []. This recorded at para. 16 [] that:

“Well over 100 submissions from across the range of respondent types commented on the Government’s proposals for new Eco-towns, of which over four fifths were supportive of the Government’s plans. A small number of responses (16) from local authorities, NGOs and RSLs/housing associations stressed that Eco-towns needed to be sustainable in terms of transport links to existing economies.”

27. In his 1st w/s Henry Cleary indicates the range of responses received on the concept of Eco-towns following the Green Paper. Copies of the consultation responses were exhibited to his 1st w/s and extracts are included at []. Thus, for example, as well as responses from a range of local authorities and regional bodies there were responses on the concept from CPRE; the Environment Agency, the Town and Country Planning Association, the English National Parks Association, the Planning Officers Society, the Local Government Association, the Academy for Sustainable Communities, the RICS, Natural England and the National Housing Federation []. In the light of this evidence the Claimants are constrained to accept that “some views

