Neutral Citation Number: [2023] EWCA Civ 25

Case No: CA-2022-000610

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mrs Justice Thornton
[2021] EWHC 3285 (Admin)
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2023

Before :

LORD JUSTICE HOLROYDE
(Vice-President of the Court of Appeal, Criminal Division)

LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ANDREWS

- -

Between :

R (on the application of EDWARD BLACKER)	**Claimant and Appellant**
- and -	
CHELMSFORD CITY COUNCIL	**Respondent**

- -
- -

Wayne Beglan and **Rowan Clapp** (instructed by **Holmes & Hills LLP**) for the **Appellant**
Josef Cannon and **Alex Williams** (instructed by **Chelmsford City Council**) for the **Respondent**

Hearing date: 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17th January 2023by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. On 13 January 2021 the Respondent Council, the relevant local planning authority, ("the Council") gave formal notice of its refusal of an application made by a Mr Sharp ("the applicant") for outline planning permission for a housing development on a site in Roxwell, Chelmsford.

2. The Appellant, Mr Blacker, is a local resident who supported the application. He sought judicial review of the Council's decision. The claim was dismissed by Thornton J ("the Judge"). Mr Blacker appealed to this Court on the following grounds:

   i) The Judge misdirected herself as to the correct interpretation of the resolution passed by the Respondent's planning committee at its first meeting to consider the application on 3 November 2020;

   ii) The Judge erred in law in concluding that the "consistency principle" was not engaged on the facts of this case; and

   iii) The Judge wrongly or unreasonably concluded that there was not a real risk that the minds of members of the planning committee were closed at the meeting on 12 January 2021 at which the decision under challenge was made.

3. I have concluded, for the reasons which follow, that there is no substance in any of these grounds, and that the Judge was plainly right to dismiss the claim for the reasons that she gave.

BACKGROUND

4. Part of the site was "brownfield" land, allocated for employment use in the Chelmsford Local Plan, which was adopted by the Council in May 2020. However, a substantial proportion of it – almost half the acreage – was classified as "greenfield" land.

5. An area of the brownfield part of the site was being used to carry out a waste disposal business in a manner which was in breach of planning controls, and a substantial mound of waste had accumulated there, aggrieving many local residents. At the time of the planning application, the Council was engaged in enforcement action. Other employment uses within the site were lawful.

6. One of the Council's senior planning officers, Kirsty Dougal, prepared a report for consideration of the application ("the Officer's Report"). Her recommendation was for refusal. Three main reasons were given, namely: the loss of an allocated rural employment site (contrary to a Local Plan which had been adopted only six months previously); the impact the proposed development would have on the countryside; and its unsustainable location. A further reason related to the necessary provision of an obligation under s.106 Town and Country Planning Act 1990, but the officer accepted that this should not stand on its own, because it was readily capable of being overcome.

7. Rule 4.2.25.3 of the Council's constitution provides that the Planning Committee's consideration of planning applications shall operate in accordance with the Planning Code in Part 5.2. The Planning Code makes specific provision for the procedure to be taken in circumstances where the Committee wants to make a decision contrary to the recommendation of its planning officer:

> "5.2.7 DECISIONS CONTRARY TO OFFICER RECOMMENDATION
>
> 5.2.7.1 If the Planning Committee wants to make a decision contrary to the officer's recommendation the material planning reasons for doing so shall be clearly stated, agreed and minuted. The application should be deferred to the next meeting of the Committee for consideration of appropriate conditions and reasons and the implications of such a decision clearly explained in the report back.
>
> 5.2.7.2 Only those Members of the Committee present at both meetings can vote on the reasons for the decision. Exceptionally, the Committee may decide that circumstances prevent it from deferring the decision but its reasons must be clearly stated and recorded in the minutes…"

8. As the Judge held in paras 38-40 of her judgment, on its natural and ordinary meaning, the constitution requires the decision-making on the application as a whole, and not just the conditions to be attached, to be deferred to a future meeting in circumstances where the Planning Committee is minded to go against an officer's recommendation. As she put it, the outcome is a pause or a "breathing space" in the decision making. There is no appeal against those findings. In any event, they are plainly correct.

9. The application was first considered at the meeting of the Planning Committee which took place on 3 November 2020. The meeting took place remotely over Zoom because of Covid-19 restrictions, but members of the public could and did participate. A transcript of the meeting was provided to the court below and to us. Ms Dougal first presented the Officer's Report. There followed a number of written and oral contributions by local residents, including an oral presentation by Mr Blacker supporting the application. Some councillors also spoke in favour of the application, whilst others opposed it. The transcript demonstrates that the fact that the meeting took place over Zoom created some practical difficulties. As the Judge recorded in para 36 of her judgment, at one point there was considerable confusion amongst participants as to what members were supposed to be voting on, but that confusion was ultimately resolved.

10. The operative resolution came after the Committee was reminded by its Head of Democratic Management of the constitutional requirement to defer the application to a subsequent meeting if it proposed to reject the Planning Officer's recommendation. Following that reminder, Councillor Roper proposed a motion in these terms:

> "I move that, as the committee is minded to grant this application, further consideration be now deferred so that Officers may consider

> appropriate conditions to be imposed on a grant of planning application and report back to a future meeting of this committee".

That motion was carried by 8 votes to 6, with one abstention.

11. The Minutes of the meeting record that:

> "After votes on motions either to refuse the application or to defer its consideration to enable conditions to be presented on any grant of planning permission, it was
>
> RESOLVED that the Committee, being minded to approve application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, defer it to enable officers to report to a future meeting on conditions that could be attached to any grant of planning permission for the development."

12. Those Minutes were approved as a correct record at the next meeting of the Planning Committee.

13. Following the meeting on 3 November 2020, Ms Dougal liaised with the applicant's planning agent in relation to draft Heads of Terms for a s.106 agreement and, on achieving agreement on these in principle, discussed the more detailed requirements of such an agreement with his solicitor. Meanwhile, another local resident, a Mr Philpot, made comments on the planning application through the Council's online Public Access system. Mr Philpot strongly objected to the application.

14. On 15 December 2021 Ms Dougal drafted a further Officer's Report which summarised Mr Philpot's objections and offered a response to them. Her superior, Mr Keith Holmes, the Council's Planning Development Service Manager, finalised and signed off that report, which was then published on the Council's website.

15. Mr Philpot subsequently sent an email to the Council on 6 January 2021 which comprised a letter to the Chair of the Planning Committee setting out his objections, and attaching two maps. One of the points that he specifically brought to the attention of the Committee was the extent of the proposed encroachment of the development on greenfield land.

16. The matter came back before the Planning Committee for consideration at a meeting on the evening of 12 January 2021. The Planning Officers provided the Committee with a "Green Sheet" updating them with information which had become available since the publication of the Officer's Report. The Enforcement Notice in respect of the unlawful activity had been upheld by a Planning Inspector, and a further three months had been given for compliance with it. Mr Philpot's email of 6 January 2021 was quoted in full in the Green Sheet. The Committee was also provided with a letter from the applicant's solicitor which gave an update on the position regarding conditions and the s.106 agreement.

17. At the start of the meeting on 12 January 2021 the Chair reminded the members of the Committee that at the meeting on 3 November 2020 the Committee had indicated that

it was minded to approve the application, and asked for Officers to come back with proposed conditions. She then said this:

> "We now have the Officer's report with those proposed conditions. Before I open it, firstly, as the report makes clear, no formal decision was made, but that is the normal process and it was minded to approve, all options remain open to the committee. Secondly, only those members who were present when this application was considered at the November committee and are allowed to vote on the application itself, can participate in the vote."

18. It is clear from the transcript (and is recorded in the Minutes of that meeting) that some of the councillors who had previously been in favour of the application had changed their minds; each of them explained why. The councillor who had abstained on the November vote was now opposed to the application. Their reasons varied but, as the Minutes record, they included the precedent that would be set by going against, for inadequate reasons, a policy in the recently adopted Local Plan, and that the development would encroach on greenfield land. It appears that the extent of that encroachment was not fully appreciated until Mr Philpot brought it to the Committee's attention and illustrated it on the maps he provided.

19. After the matter was fully debated and all councillors had had an opportunity to express their views, a motion to refuse the application was carried by 10 votes to 1, with 2 abstentions (Councillor Roper, who had previously been in favour of the application, and another member who abstained because she had arrived very late). Even if they had both voted in favour, the majority would have been overwhelming.

GROUNDS 1 AND 2

20. These grounds are inextricably interlinked. Mr Beglan, on behalf of Mr Blacker, submitted that a deferral of the application for the purpose of obtaining proposed conditions on the grant of permission necessarily involved a rejection of the recommendation in the Officer's Report. It was only after an "in principle" decision was made to grant the application that any question of conditions would arise. He sought to characterise the decision taken in November 2020 as "a decision to approve the application so far as we can".

21. It was common ground that a decision on a planning application does not take effect until it has been notified to the applicant, and not on a resolution to grant or refuse: see *R (Burkett) v Hammersmith & Fulham LBC (No 1)* [2002] UKHL 23, [2002] 1 WLR 1593. This means that it was open to the Planning Committee to change its mind at any time prior to the notification of its decision to the applicant's representatives on 13 January 2021, even in the absence of a material change of circumstances. However, Mr Beglan sought to rely on the "principle of consistency" articulated in authorities including *North Wiltshire DC v Secretary of State for the Environment and Clover* (1993) P&CR 137, and *St Albans City & District Council v Secretary of State for Communities & Local Government* [2015] EWHC 655 (Admin).

22. A previous decision to grant or refuse planning permission in respect of the same site is capable of being a material consideration on a later application, because of the importance of consistency for decision-making in "like cases". Therefore, if the

decision-maker is going to depart from a previous decision on the substance of the same (or materially similar) planning application they must "grasp the intellectual nettle" by engaging with the reasons for the previous decision, and providing an explanation for any departure from it. Mr Beglan submitted that this principle was not adhered to in the present case.

23. The fundamental problem with Mr Beglan's submissions is that this was not a case of the Planning Committee revisiting or seeking to revisit a previous decision on the merits of the application. The situation here was completely different from cases such as *St Albans*, where the previous decision was an appeal decision made after a lengthy public inquiry, or *King's Cross Railway Lands Group v London Borough of Camden* [2007] EWHC 1515 (Admin) where a previous decision had been made to grant planning permission subject to the completion of a s.106 agreement. On the contrary, and consistently with the provisions of the Council's constitution, the decision that was taken on 3 November 2020 and reflected in the language of the resolution was to defer consideration of an application which the Committee was "minded to" grant but had not, at that stage, decided. As the Planning Officer's second report expressly recognised and as the Chair informed the Committee at the start of the 12 January meeting, all options were still open.

24. The purpose of the provision for deferral in the constitution is plainly to give the decision-maker an opportunity to stand back and think twice about the implications of going behind the recommendations of the Planning Officer before committing itself to doing so. The opportunity for reflection is particularly important in a case such as this, where the proposed development would be contrary to the local development plan, to which primacy would normally be afforded.

25. As Mr Cannon, on behalf of the Council, submitted, at the time the resolution was passed on 3 November, the members of the Planning Committee knew that the constitution prohibited them from deciding to grant the application. Indeed they were expressly reminded of this before the motion was formulated. The circumstances that arose required them to defer making any decision, and that is what they did. The requirement did not limit their powers, but simply paused the process they were undergoing. The Judge was right, in para 34 of her judgment, to describe the decision-making as "more inchoate" than an "in principle" decision. She was also right to find that the principle of consistency was not engaged in circumstances where there was no substantive earlier decision.

26. At one point in his oral submissions Mr Beglan sought to contend that there was a material distinction between the resolution that was voted on and recorded in the transcript, and the public record of that resolution in the approved Minutes. He claimed that insofar as the Judge based her analysis on the language used in the formal record she fell into error, because that record was materially inaccurate.

27. This argument was not raised before the Judge, and in my view it took the appellant's case nowhere. The first difference between the wording of the resolution in the transcript and in the Minutes is that the former refers to the Committee being "minded to grant" the application whereas the latter refers to it being "minded to approve" it. They mean the same. Secondly, the transcript records the resolution as being that "further consideration [of the application] be deferred" and the Minutes record that

the Committee, being minded to approve the application, resolved to "defer it". Again, that is a distinction without a difference.

28. The third difference is that the Planning Officers were to consider conditions "*to* be imposed on *a* grant of planning application" and the Minutes record that they were to consider conditions "that *could* be attached to *any* grant of planning permission". Again, there is no material distinction between the two formulations. Since the Committee could not and did not purport to grant planning permission at the November meeting, either formulation makes it plain that the Committee was seeking to follow what the constitution required of it in that context. The phrase "conditions to be imposed on a grant" does not connote that a decision to grant permission has been taken in principle.

29. Had it been necessary to do so, I would have decided that even if the principle of consistency had been engaged, it was substantively complied with; those councillors who changed their minds gave cogent reasons for doing so at the time, and the summary of those reasons in the Minutes of the January meeting is both accurate and sufficient. Mr Beglan contended that the Minutes did not expressly reveal a freestanding recognition of the value of consistency, but they did not need to. A sufficient explanation was given for the fact that, having been initially "minded to" grant the application, the Committee ultimately decided to refuse it.

30. I would therefore dismiss this appeal on grounds 1 and 2.

GROUND 3: A REAL RISK OF CLOSED MINDS

31. The Judge accurately summarised the law in paras 56 and 57 of her judgment. The key question for the court is whether the circumstances gave rise to a real risk of closed minds such that the impugned decision ought not to be upheld. Given the role of Councillors, "clear pointers" are required if their state of mind is to be held to have become a closed or apparently closed mind at the time of the decision: see *R(Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, especially at [62] and [63]. The evidence in this case fell a long way short of providing such pointers.

32. As the Judge identified, many of the points in the list of 12 adumbrated by the Appellant in support of this ground (and reflected in para 58 of her judgment) fell away because of her conclusions on the nature of the decision making and the Council's constitution, which I have already endorsed. I would add that some of the 12 points came nowhere near being evidence of closed minds – for example, a complaint about "entertaining" Mr Philpot's further representations. It was accepted by the applicant's own agent that it was proper to report those representations, and the Planning Officers both addressed and sought to answer Mr Philpot's objections in their further report.

33. I also respectfully agree with the Judge that the fact that several members of the Committee changed their minds since the first meeting might be said to be evidence of open, rather than closed minds. On a fair reading of the transcript of the January meeting, all options were on the table, as the Committee was told they were. There was no indication of the matter being "railroaded to a refusal" as the Appellant alleged. The fact that two members of the Committee who had previously supported the application were absent when the decision was taken at the January meeting is of

no relevance; the Committee was entitled to proceed in their absence (the reasons for which were not identified).

34. Mr Beglan focused his oral submissions on this ground upon the way in which the second Officer's Report was prepared. It went through six different iterations. He contended that the report should have included draft reasons for the approval of the application, since the Committee had indicated it was minded to approve it, but none were provided for review, even after the Chair of the Committee had indicated in correspondence that she was expecting to see them. He also complained that the author of the Officer's Report had requested feedback from the Committee as to "what they wanted the report to look like" and that the Chair of the Committee had provided a response which included comments from the leader of the Liberal Democrat Group (the party in control of the Council) and from "another Councillor who had previously been a principal objector to the scheme". Although he did not suggest that there had been any impropriety, he submitted that a neutral observer would not regard these communications as an attempt by the officers to seek neutral guidance. The impression fostered in the mind of the neutral observer would be one of an attempt to skew the contents of the Officer's Report when it was "purportedly independent planning advice that would be presented to all the Committee's members as such".

35. Lord Justice Stuart-Smith asked Mr Beglan, even if one made an assumption for the purposes of argument that the correspondence demonstrated that the Chair had a closed mind, how one got from there to the whole Committee having a predisposition to reject the application? He responded that the Court should draw that inference from the fact that the decision was made by a 10-1 majority. The fact that Mr Beglan was unable to provide a satisfactory answer to the question demonstrated the absence of merit in this ground of appeal.

36. Mr Cannon pointed out that there was no legal requirement to give reasons for a decision to grant planning permission, as opposed to a decision to refuse it. He painstakingly went through the correspondence complained of and satisfied me that it was wholly innocuous. Certainly it fell a long way short of what would be necessary to suggest to an independent and impartial observer that the Committee members who did so were predisposed to reject the planning application.

37. Ms Dougal asked her superior officer, Mr Holmes, what *he* wanted the further report to look like, and to make any changes he wanted or to let her know what needed to be done. She was not involved in any correspondence with any member of the Planning Committee concerning the contents of the report. Mr Holmes made some changes to Ms Dougal's draft to clarify the officers' professional views on the proposals, and the options available to the Committee in determining the application. He then forwarded his draft to the Head of Planning for his approval, copying in the Chair of the Committee (who voted against the application on both occasions) and the Cabinet Member (who attended neither meeting).

38. The only amendments suggested or made by those individuals in subsequent correspondence were confined to the procedural aspects, and were designed to ensure that it was made clear to the members that all options remained open to the Committee. Since that was indeed the position, there was nothing objectionable about ensuring that the members of the Committee understood that their hands were not

tied. That is a long way from suggesting to them how they should vote. I cannot see how this could possibly have been regarded by the neutral observer as an attempt to skew the substantive decision in a particular way, let alone providing a clear pointer towards the members of the Committee having already made up their minds. On a fair reading of the correspondence, the relevant exchanges were no more than evidence of conscientious officers seeking to get the procedure right.

39. There is no need to go through all the other points relied on in the list, which were comprehensively answered in the Council's skeleton argument. The Judge was right to reject this ground of challenge, for the reasons that she gave. Ground 3 fails.

CONCLUSION

40. For those reasons, I would dismiss this appeal.

Lord Justice Stuart-Smith:

41. I agree.

Lord Justice Holroyde:

42. I also agree.