IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 2605 (Admin)

No. CO/1682/2021

Royal Courts of Justice

Thursday, 29 July 2021

Before:

MRS JUSTICE LANG

B E T W E E N :

THE QUEEN
on the application of
BEMBRIDGE HARBOUR TRUST — Claimant

- and -

ISLE OF WIGHT COUNCIL — Defendant

- and -

BEMBRIDGE INVESTMENTS LIMITED — Interested Party

MS N. PINDHAM (instructed by Keystone Law) appeared on behalf of the Claimant.

MR R. GREEN (instructed by Legal Services, Isle of Wight Council) appeared on behalf of the Defendant.

MS. J. LEAN (instructed by Graham Gover Solicitors) appeared on behalf of the Interested Party.

J U D G M E N T

(Transcript prepared from a CVP recording)

MRS JUSTICE LANG:

1 The claimant seeks permission to apply for judicial review of the decision dated 30 March 2021 by the defendant ('the Council') to grant outline planning permission for a development at three closely connected sites at Bembridge Harbour, namely Bembridge Marina, Duver Marina and Selwyn Boatyard.

2 The interested party ('IP'), Bembridge Investments Limited, owns the application sites and made the application for planning permission. Its directors and shareholders are Mr and Mrs Thorpe. Mr and Mrs Thorpe are also the directors and shareholders of the Bembridge Harbour Improvements Company Limited ('BHIC') which is the statutory harbour authority. It owns the freehold of the harbour.

3 The proposed development comprises thirteen houses and improved harbour facilities. The housing is a form of enabling development as the intention is that the sale of the houses will fund the improved harbour facilities.

4 The area features a number of sites of national and international conservation importance. Bembridge Harbour itself is designated as the Brading Marshes to St Helen's Ledgers SSSI and the Solent and Southampton Waters SPA and Ramsar site. The development's silt lagoon mitigation works are to be carried out within this designated land. The lagoon to the east of the access road to the site from the south-east corner of the harbour is designated as the Solent and Isle of Wight Lagoons SAC. All three sites are located within Flood Zone 3.

5 The application for the development was submitted to the Council in May 2014. The application was made in outline. Although matters concerning landscaping and layout were considered by the Council, access, appearance and scale were all reserved matters.

6 The Council carried out a screening opinion on 27 August 2014 which concluded that an environmental statement was not required. Natural England, after initially objecting, withdrew its objection on 11 November 2015, noting the development had been amended to remove the proposed works to Selwyn Boatyard and the proposed dwelling at the Old Boathouse. Despite Natural England removing its objection, the RSPB, the CPRE, the National Trust and Hampshire and Isle of Wight Wildlife Trust all maintained objections to the development. All, except for the CPRE, objected on the basis that an appropriate assessment pursuant to the Conservation of Habitats and Species Regulations 2010 (in force at the time) was required. The CPRE objection cited a failure to require an environmental statement.

7 The Council resolved to grant planning permission on 1 December 2015. This was then deferred in order for the Council to review viability and address outstanding environmental issues. Another screening opinion was carried out on 29 April 2016, which again concluded that no environmental statement was required. The application then came back before the Council's Planning Committee on 12 December 2017. It resolved to grant permission subject to a section 106 agreement being signed. Another appropriate assessment was carried out in December 2020. The section106 agreement was eventually agreed on 29 March 2021. The permission was issued on 30 March 2021.

Grounds of challenge

8 The claimant's submissions are continually evolving. I have taken into account the points pleaded in the statement of facts and grounds and the claimant's skeleton, but I have not dealt with new points raised by the claimant's counsel in the course of oral submissions, as these came too late for the Council and the IP to respond to, and well after the expiry of the time limit for a challenge.

Ground 1

9 On Ground 1 the claimant submits that by the date of the decision to grant planning permission in March 2021, material considerations had changed since the date when the Council resolved to grant planning permission. Applying the principles set out in *R (Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370, the changes were sufficiently material to require referral back to the planning committee for reconsideration. That did not take place. The claimant submits that the Council misunderstood one material consideration and two have changed.

10 When the Council resolved to grant planning permission it considered that the conflict with the development plan was outweighed by the material consideration that the grant of permission would provide enabling development to fund improvements to the harbour. The officer's report ('OR') said at 2.3 that, because the housing was proposed as enabling development, it was important that the amount of housing would be commensurate to the cost of the improvement works.

11 Viability information was obtained from the applicant and from objectors, who considered that the amount of housing proposed was excessive. The District Valuer produced an independent review on 6 April 2017. He assessed the appropriate developer's profit at 20 per cent.

12 The claimant's first point, pleaded in the statement of facts and grounds, was that in fact there would be a developer's profit of at least 35 per cent. In my view, this submission has been effectively dismissed by the IP who has explained the error that the claimant has made in relation to the figures. But, in any event, the Council and the IP point out that the legal agreement provides that if the development does generate a profit in excess of 20 per cent the IP would have to pay over the excess and it would be used for harbour improvements. Therefore, this point is not arguable.

13 The claimant did not pursue the excess profit point in the skeleton argument but instead argued that the profit of £1.2 million, based on a 20 per cent calculation, could not be used to pay off BHIC's debt as proposed by Mr Thorpe because £946,500 of it constitutes retained investment as recorded in the District Valuer's report. The IP has explained that the claimant has misunderstood the reference to the retained investment figure of £946,000 in the report. It represents the value of the parts of the development which are to be retained by the IP to generate an estimated development value which was then compared against the estimated development costs (including the 20 per cent developer's profit) to assess viability. In any event, the OR concluded that how the developer utilised its profit from the scheme was not relevant to the planning application. For these reasons, I consider that this point is not arguable.

14 The claimant's second point, following the sequence in the skeleton argument, was that Mr Thorpe confirmed in 2018, during section 106 negotiations, that BHIC could be in funds to purchase the new harbour facilities outright upon completion. By reference to some draft heads of terms showing BHIC as purchaser, this contrasted with the position before the committee and called into question the reliance on the enabling development aspect to justify the departure from the development plan.

15 The Council and the IP submit in response that the draft heads of terms were merely suggestions for the section 106 agreement which was never acted upon or implemented. The IP states that BHIC is not, and never has been, in a position to purchase the facilities outright. For these reasons, I consider that this point is unarguable.

16 The claimant's third point, following the sequence in the skeleton argument, was that under the section 106 agreement BHIC would be charged at a market rent, assessed at £45,000 p.a., for the new offices, which was a significant increase from the previous £18,000 figure. The claimant submits the offices will be partly built on BHIC's own land and it does not make sense for BHIC to pay the IP rent for land it already owns.

17 The Council submits that it made its decision on the basis that the IP was owner of the land on which the development was to take place and that is also set out in the section 106 agreement. The Council considered the rentals and the management charges in some detail and were satisfied that they were appropriate.

18 My conclusion is that the evidence before me, in particular the Land Registry plans, is not sufficient to establish any arguable case that the basis upon which the Council made its decision has changed. Therefore, I do not consider that this point is arguable.

19 The claimant has not pursued the point pleaded in para.37 of the statement of facts and grounds, namely the grant of two houseboat plots which would generate some alternative funding.

20 For all these reasons, Ground 1 is not arguable and permission is refused.

Ground 2

21 Ground 2 relates to flood risk as the proposed development is in Flood Zone 3. The claimant submits that the policy tests under the NPPF, paras.155 and 158-161, were unlawfully interpreted and applied. The first part of this ground is parasitic upon success on Ground 1 so that now falls away. The second part of this ground is a submission that the Council muddled the sequential and exception tests in the NPPF. The claimant refers to para.2.46 of the OR. The claimant submits that both tests were wrongly considered together in that the OR took the enabling aspect of the development into account at the sequential test stage. This was an error and an impermissible mixing of considerations relevant to separate tests on the national planning policy.

22 In my judgment, this ground is unarguable when the relevant section of the OR, from paras.2.33-2.50, is read fairly as a whole. It set out the correct policy tests. It then applied them to the specific circumstances of this development. The OR stated at paras.2.45-2.47:

> "2.45 When considered simply in terms of a general availability for residential development, it is apparent there are two sites at Bembridge and three at St Helens that are sequentially preferable to the application site. These are all large sites that would be much larger than the area required for the proposed housing at Bembridge Harbour, but there would be the potential for sub-division.
>
> 2.46 However, as stated above, paragraph 101 of the NPPF states that 'the aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. Moreover, the Government's PPG states when applying the Sequential Test a pragmatic approach on the

availability of alternatives should be taken. For example, in considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere. In this context, Officers consider that the applicant's argument for the need of the housing must be considered, in order to determine whether in pragmatic terms the sites are in fact suitable and reasonably available for the development proposed.

2.47 Officers recognise that the delivery of the improvements to the harbour facilities is reliant upon the viability of the whole development and in essence, the ability of the residential development to fund the proposed works. Therefore, rigidly applying a requirement for the housing to be delivered on land currently outside of the ownership of the harbour authority and at a lower risk of flooding would, taking into account the applicant's viability assessment, lead to the development being unviable and undeliverable due to the likely costs associated with purchasing sites outside of the applicant' control. Officers consider that this is a valid consideration, given the pragmatic approach for Sequential Tests that is advocated by the Government's policy guidance. The applicant has included land values within the submitted viability assessment for the sites proposed for development, based on asset values. Officers have undertaken searches of land values for potential housing plots and these have shown that purchasing sites outside of the applicant's control would be a significant cost that would render the proposed development unviable."

23 Then at 2.50 there was consideration of the exception test. It reads as follows:

"2.50 Therefore, given the viability issues relating to the application, it is considered there would be no reasonably available alternative sites at a lower risk of flooding to deliver the proposed housing development. Therefore on an exceptional basis, as a form of enabling development, on balance Officers consider that the proposal satisfies the Sequential Test. However, even if it was concluded that the general availability of lower risk sites meant that the Sequential Test was not satisfied in terms, Officers consider that the need for the residential element of the proposal to function as effective enabling development for the improvements to harbour facilities (and the viability implications of the lower risk sites making them unable to fulfil this role), provide strong reasons to justify departing from the Sequential Test on the facts of this case. As noted in the original report, the proposal is able to satisfy the Exception Test and will deliver sustainability benefits and the occupiers of the development can be kept safe by the flood warning and resilience measures proposed."

24 In my view, the approach adopted in the OR was a lawful application of the policy requirements in the NPPF in the specific circumstances of this application. For these reasons, I conclude Ground 2 is not arguable and permission is refused.

Ground 3

25 Ground 3 alleges that the Council failed to carry out an appropriate assessment under the Habitats Regulations. The claimant submitted in the statement of facts and grounds that:

(1) Condition 16 does not reflect the requirements of the appropriate assessment.

(2) The appropriate assessment does not assess the effects of the silt lagoon mitigation scheme.

(3) The delivery of mitigation in the Yar catchment is impermissibly uncertain.

(4) There was no consultation on the 2020 appropriate assessment.

Point 1 – Condition 16

26 The appropriate assessment carried out in December 2020 identified that during the construction period there was a risk of flooding in the car park which could result in petrol and oil residues entering the SPA. It recommended re-wording Condition 16 to provide for a scheme to address this risk. That did not happen. However, the imposed condition is sufficient to ensure that there will be no adverse effect on the integrity of the designated sites consistent with regulation 70 of the Habitats Regulations. The Council will be required to approve a scheme for the drainage and disposal of surface and foul water from the development prior to any development taking place. In doing so, it will have to give effect to the conclusions of the 2020 appropriate assessment and the mitigation recommended. Therefore, in my view, this point is not arguable.

Point 2 – The silt lagoon

27 The ecology reports relating to the salt lagoon project are appended to the section 106 agreement. It is a mitigation scheme directly connected with the management of the SPA/Ramsar site within regulation 63(1)(b) of the Habitats Regulations. It was approved by Natural England, who raised no concern about its impacts. The lagoon works are addressed in conditions 3, 10, 11, 12 and 19 of the planning permission.

28 The more extensive works to the silt pond were reintroduced as part of the mitigation for the wider scheme, specifically to mitigate the loss of a slipway. This was considered by the Council, the IP and Natural England in meetings and discussions in 2020. The evidence before me is incomplete but there are emails which evidence these discussions in the documents which are adequate, in my view, to confirm that matters were considered.

29 The information which was considered when carrying out the appropriate assessment in December 2020 included the indicative plan published in March 2020, the March 2015 ARC report, the June 2015 ARC report and the October 2015 ARC report. There was no suggestion that a construction of the lagoon, or the more extensive lagoon works, would cause disturbance or harm to protected species and habitats.

30 The potential for disturbance during construction and pollution incidences were also considered in the appropriate assessment.

31 In carrying out the December 2020 appropriate assessment, officers were clearly aware of, and had regard to, the fact that more extensive works were being proposed for the silt lagoon than in 2015 and 2017, which were limited to mowing, coppicing and monitoring. Officers were aware that those works were on land within the SPA, Ramsar site and SSSI. The relevant paragraphs in the appropriate assessment are 3.3, 4.1, 4.17-19, 4.28, 4.29 and 5.1.

32 In my view, it was acceptable for the detailed design of the further works to be undertaken at a later date as this was an outline permission. However, full consideration was given to both the original scheme and the further works in principle which was sufficient to comply with the 2017 Habitat Regulations. Therefore, in my view, this point is not arguable.

Point 3 – Mitigation in the Yar catchment

33 There was no obligation that the delivery of mitigation in the Yar catchment be specifically secured. Planning permission was not granted dependent on the acquisition of land in the Yar catchment by the Wildlife Trust. Permission was granted subject to Condition 16 which requires approval of a mitigation package and implementation strategy. The Council can prevent the development from beginning until it is satisfied that suitable mitigation has been secured. As the appropriate assessment recognised at para.4.33, that could entail the mitigation which the Wildlife Trust was delivering but could also, if necessary, involve other schemes. That approach was agreed with Natural England.

34 Currently there is no uncertainty about the Wildlife Trust scheme coming forward and they have confirmed they expect the new site to come "on stream in July 2021". Therefore, in my view, this point is not arguable.

Point 4 – Consultation

35 There was no obligation on the Council to consult publicly on an appropriate assessment. The only obligation was to consult with Natural England, which it did. The consultation responses from the RSPB and the Wildlife Trust were taken into consideration and were referred to in the 2015 committee report. Therefore, in my view, this point is not arguable.

36 For all the reasons I have given, Ground 3 is not arguable and permission is refused.

Ground 4

37 On Ground 4 the claimant refined the original pleaded ground, which was directed at the 2014 screening opinion which has been superseded. The Council carried out screening opinions in 2014 and 2016. The claimant submitted that the 2016 screening opinion was flawed as it failed to consider the works within the SPA, in particular the lagoon works. However, the 2016 screening opinion expressly referred to the proposed silt lagoon mitigation works and, as already mentioned under Ground 3, there is insufficient evidence to support the proposition that the more extensive lagoon works identified later give rise to a risk of likely significant effects and so ought to have been screened.

38 For these reasons, I conclude that Ground 4 is not arguable and permission is refused.

39 Therefore, permission is refused on all grounds. That concludes my judgment.

CERTIFICATE

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This transcript has been approved by the Judge.