



Case No: C1/2009/2714 + A

Neutral Citation Number: [2010] EWCA Civ 613
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
(HIS HONOUR JUDGE MILWYN JARMAN QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 5th May 2010

Before:

LORD JUSTICE SULLIVAN

Between:

THE QUEEN on the application of STREET

Appellant

- and -

CARDIFF CITY COUNCIL

Respondent

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Mr James Burton (instructed by Messrs Richard Buxton) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented

Judgment

(As Approved by the Court)

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Lord Justice Sullivan:

1. This is a renewed application for permission to appeal against the order of HHJ Milwyn Jarman QC refusing the claimant's application for permission to apply for judicial review of a planning permission dated 12 March 2009 granted by the defendant to the interested party.
2. I have concluded that the grounds of appeal do have a real prospect of success and that it is appropriate to grant the application for permission to apply for judicial review and to order that the substantive judicial review application be retained in this court. It may assist the parties if I indicate very briefly the reasons why I have granted permission to apply for judicial review.
3. It is clear that leisure facilities such as the Hi Flier Balloon are acceptable in principle within the waterfront business area, but it is equally clear in policy terms that the loss of amenity open space is not acceptable in the absence of compensatory open space unless the Local Planning authority is satisfied that the loss will not cause or exacerbate a local or a citywide deficiency of open space and that the open space has no amenity or nature conservation importance: see policy 7 of the Local Plan.
4. I readily accept that the key question at the end of the day was whether the advantages of providing a new leisure facility outweighed the disbenefits of amongst other things the loss of part of the open space: see paragraph 8.8 of the officer's report. However, in carrying out that balancing exercise it was arguably important, given the provisions of section 38(6) of the 2004 Act for the Local Planning authority to be clear as to whether or not the loss of the open space was or was not contrary to policy 7 in the Local Plan. The fact that the parks development officer had no objection because the council did not maintain the land was entirely beside the point. Policy 7 on its face applies to amenity open space that is in private ownership.
5. The later statement in the officer's report that the amount of land to be enclosed "does not represent a significant loss of open space" at least arguably sidesteps rather than engages with policy 7. It was not suggested in the report that the open space had no amenity value and no consideration whatsoever appears to have been given as to whether or not there was either a local or citywide deficiency of open space. The proposition that the loss of open space was not significant appears to have been based in part on calculations in the report as to the percentage of open space that would be occupied by the proposed development. This leads on to the defendant's interpretation of the original outline planning permission in 1990, which was renewed in 1994 for the redevelopment of this part of the inner harbour. Of course a subsequent planning permission can override a condition in an earlier outline planning permission, but the report treated the question of compliance with the conditions in the outline planning permission as a relevant factor. It is arguable that the defendant's interpretation of conditions 5.4 and 5.7 in the outline planning permission (which require that no more than 25% of Roath Basin Park be built upon and that no building constructed as part of that

25% should have a foot print greater than 1,000 square feet) was flawed. The report does not address the questions: What was the extent of Roath Basin Park as defined in the outline planning permission in 1990? What percentage of it had been built upon? Would this application cause that percentage to exceed 25%? And is the application for a building greater than 1000 square feet, bearing in mind the definition of building in the Town and Country Planning Act?

6. The extent to which the proposed development would inhibit the use of this privately owned open space by members of the public was plainly a relevant consideration. Hence the reference in the report to the balloon mooring lines being in place only during periods of inactivity between 23.00 hours and 08.00 hours. Against that background, it is further arguable that the report's approach to local meteorological data, which indicated that because of wind speeds in the area the balloon would have to be locked down much of the time during periods of activity as well as periods of inactivity, was irrational. Why could weather patterns "from one period to another" not reasonably be employed to assess the implications of this application? See the planning officer's response to this representation in the late representations schedule. Such data is commonly employed to assess other planning applications, for example those which generate noise, smoke, dust or other emissions. There was no suggestion in the report that the data provided was either unreliable or inapplicable given the location of the recording apparatus.
7. If the officer's report had fairly acknowledged, for example, that the balloon would have to be moored on a significant number of days, thus significantly restricting the use of the open space, that the restrictions imposed in the earlier outline planning permission as to percentage and size of buildings that could be erected on a larger area of open space that was Roath Basin Park, would be overridden and that the loss of part of the open space would be contrary to policy 7, I acknowledge that the defendant might still have concluded that on balance those disadvantages were outweighed by the benefits of the proposal but at least those disadvantages would have been squarely confronted rather than arguably sidestepped in the decision-making process engaged in by the defendant in this case.
8. For these reasons I am satisfied that the grounds have a real prospect of success.
9. I turn to the application for a PCO. The judge refused to grant a PCO for essentially three reasons: see paragraphs 37 and 38 of his judgment. They were: 1) that at least part of the application for judicial review was in the claimant's own interests because a significant part of the reasons he brought the application was because of the nearness of his particular flat to the proposal and he was also concerned about the use of the amenity land by his grandchildren; 2) that the grounds, the judge thought, were not sufficiently arguable to warrant permission; and 3) that the claimant had brought the claim despite making full representations to the planning authority, attending a site view and attending the committee. I have already concluded that the grounds are sufficiently arguable to warrant granting permission to apply for judicial

review. As to the third point, that is not a reason for refusing a PCO. True it is the claimant had the opportunity to make representations to the local planning authority. The question is how those representations were grappled with in the decision making process.

10. That leaves the first objection, namely that at least in part the application for judicial review is being pursued because of the claimant's own private interests. It has been emphasised in this court that that fact, that is to say that a claim is being pursued at least in part because of an private interest, at least in an environmental case is not an overriding objection to the grant of a PCO. While I acknowledge that this claimant, for example, was concerned about the use of the amenity land by his own grandchildren, the fact remains that this was a proposal to carry out development on an open space that is available to members of the public even though it is privately owned and the report indicates that there were a large number of objections. A number of local residents objected and their objections included a petition of some 80 signatures, so there clearly was a degree of public concern as to the loss of this open space.
11. I acknowledge that this is a finely balanced case of a kind which perhaps the framers of the Aarhus Convention might not have had directly in mind, but I am satisfied that there are proper grounds which should be considered by this court and moreover there is a considerable amount of detail as to this claimant's means and it is plain that he would be prevented by his lack of means from pursuing those grounds if a PCO was not granted. I therefore grant a PCO limited to the sum of £500, which is the amount that the claimant explains in his witness statement that he could afford.
12. Other than ordering that the case ought to be heard by three Lord Justices, one of whom should have planning experience and expertise, I would have thought half a day will see this one out.

Order: Applications granted.