Neutral Citation Number: [2014] EWCA Civ 599

Case No: C1/2013/1835

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
MR JUSTICE KENNETH PARKER
CO/793/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2014

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE PATTEN
and
SIR STANLEY BURNTON

- -

Between :

Christopher James Holder	**Appellant**
- and -	
Gedling Borough Council	**1st Respondent**
Mr John Nigel & Mrs Catherine Mary Charles-Jones	**Interested Parties/2nd Respondent**

Richard Harwood QC (instructed by **Richard Buxton Environmental & Public Law**) for the **Appellant**
Richard Kimblin and Hashi Mohamed (instructed by **Solicitor to Gedling Borough Council**) for the **First Respondent**
Victoria Hutton (instructed by **Wilkin Chapman LLP)** for the **Second Respondents.**

Hearing dates : 9 April 2014

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Approved Judgment

Lord Justice Maurice Kay:

1. This appeal concerns planning permission for the erection within the Nottingham Green Belt of a wind turbine with a maximum ground to tip height of 66 metres. Gedling Borough Council (the Council) granted permission on 3 November 2011. The site is on farmland at Woodborough Park, Forwood Lane, Woodborough. Planning Policy Guidance Note (PPG2) provides:

> "3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such developments should not be approved, except in very special circumstances… "

In the present case, permission was granted in the face of substantial objection. The Planning Committee approved the application by ten votes to seven.

2. Mr Holder is a member of Woodborough and Calverton Against Turbines (WACAT). He made an application for judicial review of the planning permission but the application was dismissed by Kenneth Parker J (the Judge) on 12 June 2013: [2013] EWHC 1611 (Admin). Permission to appeal to this court was granted by Sullivan LJ at an oral renewal hearing on 4 December 2013: [2013] EWCA Civ 1719. He pertinently observed that the delays in this case had been lamentable; they had been procedural and systemic rather than a result of personal culpability on the part of the litigants. It is to be hoped that the new fast-track procedure for planning cases in the Administrative Court will make such delays a thing of the past. It is an additional feature of this case that, notwithstanding the spectre of litigation uncertainty, the land owners, Mr and Mrs Charles-Jones, have acquired and erected the contentious wind turbine since the judgment in the Administrative Court, notwithstanding the proceedings in this Court.

Factual background

3. I gratefully take the following account from the judgment below:

> "4. Woodborough Park is a farm near the village of Woodborough in Nottinghamshire. The land is open countryside and is within the Nottingham Green Belt.
>
> 5. Planning permission for the erection of two 11kW wind turbines was granted on 19 August 2010 (reference 2010/0244). These turbines were to have 18 metre high masts with 13 metre diameter rotors. On 6 June 2011 the Council granted planning permission for the erection of two ground mounted photovoltaic panel arrays (totalling 9.9kW) as appropriate development in the Green Belt.
>
> 6. On 22 July 2010 Segen applied for an Environmental Impact Assessment screening opinion in respect of the current proposal. The request enclosed 'Pre-application information' which identified the type of turbine and the proposed location.

Under 'possible environmental impacts' brief comments were made on bats, birds, shadow flicker, noise and the historic environment. It was said that substantial justification would be provided for the proposal in the Green Belt and early consultation would take place "to inform the Environmental Assessment which will accompany the forthcoming planning application".

7. The Council adopted a screening opinion on 30 September 2010 in these terms:

> "The proposed development involves the installation of one turbine with a hub height of 50 metres and a maximum ground to tip height of 66 metres, in this case therefore the proposal is considered to be "Schedule 2 Development" of the 1999 Regulations. In these circumstances paragraph 33 of circular 02/99 (Environmental Impact Assessment) requires Local Planning Authorities to consider the impacts of the effects of the development in terms of the "selection criteria" set out in Schedule 3 of the Regulations. The selection criteria require consideration of the characteristics of the development, the location of the development and the characteristics of the potential impact.
>
> Paragraph A15 of circular 02/99 states that an EIA is more likely to be required for commercial developments of five or more turbines or more than 5mw of new generating capacity. I therefore consider that as the proposed development is for one turbine with a generating capacity of 330kw an EIA would not be required in this instance.
>
> Whilst, therefore, the Borough Council consider that an EIA would not be required to be submitted, should a formal planning application be submitted, consideration would need to be given to the appropriateness of the development in this location and whether or not there are special circumstances to justify the development. In addition to this consideration would need to be given to the potential impact of the development on the character of the area, the impact on the visual amenity of the area, the potential noise impact of the proposal on the area, impact on the area as a result of possible flicker from the turbine and the impact on wildlife.
>
> I can advise you, in respect to the above, that the site is located within the Green Belt and the landscape in this area is classified as Dumbles Rolling Farmland a sub type of Nottinghamshire farmlands and within the Nottingham Landscape Character Assessment as Woodborough Sloping Farmland. There are a number of residential properties surrounding the site, Woodborough Park Farm, Wood Farm

> and the residential properties on Georges Lane. I would also point out that a bridle path runs along the ridge line in this area linking Georges Lane with Foxwood Lane. The deciduous woodland, Fox Wood, to the east of the site is a site of important nature conservation and a Scheduled Ancient Monument."

8. The planning application was submitted on 11 May 2011. The proposal was intended to replace the planning permission for the two smaller turbines. It was accompanied by various documents including an 'Environmental Appraisal' which was not described as an Environmental Statement under the EIA Regulations.

9. Local residents formed "Woodborough and Calverton Against Turbines" to object to the application. They instructed a planning consultant and she sent a detailed letter of objection which referred to various matters including the ability to achieve economic benefits by the twin turbine and solar panel planning permissions. The letter proposed draft reasons for refusal on Green Belt, landscape and visual impact, heritage and amenity of recreational user grounds. It also identified other negative impacts including to noctule bats. WACAT also submitted reports from landscape consultants and from noise consultants which were critical of the proposals.

10. The planning application was reported to the Council's Planning Committee on 2 November 2011. Under "relevant planning history" the report referred to the planning permission for two turbines and the EIA screening decision.

11. The report summarised various consultation responses including:

> "Urban Design & Conservation Consultant - Objects to the proposed development due to the lack of planning policy on the siting of wind turbines and considers the proposal to be an intrusion into the rural setting around the Conservation Areas. Concerned that should this turbine proposal be approved, it would be difficult to refuse others in similar locations and result in a cumulative impact.
>
> Nottinghamshire County Council (Communities) – No planning objection subject to the applicant addressing the impact to bats and cumulative impact, as well as the Borough Council being satisfied that very special circumstances have been demonstrated.
>
> Rights of Way Officer – Objects to the proposal and refers to the British Horse Society advice of a 200m buffer zone between wind turbines and bridle paths."

12. 1125 objections had been received from the public and these were briefly summarised, some under the heading of "Material Planning Issues". The report then listed various representations under "Non-material Planning Issues" including:

> "Non-material Planning Issues
>
> - The granting of permission for this application would set a precedent for further turbine development nearby.
> - The proposed turbine would not generate a significant amount of energy and would be inefficient.
> - The proposal would only benefit the applicant financially.
> - The turbine should be sited elsewhere outside of the Green Belt on already degraded landscapes.
> - ...
> - There are other alternative methods of producing renewable energy instead of the proposed turbine."

13. The planning officers accepted that the proposal was inappropriate development in the Green Belt. It would not have an "unduly material impact on the openness of character of the site and wider locality" but would have a "major visual impact" on bridleway users. The County Council was reported as recommending that there be an ecological management plan to "partially mitigate against the impact of the introduction of an industrial feature into a rural landscape". On noise, the report said that the application site was in a rural "low noise environment" and that "with the imposition of a suitably worded condition, including absolute noise limits, the site and neighbouring properties would be safeguarded from any material noise impact".

14. In respect of visual and noise impacts on the footpath/bridleway the report said:

> **"Impact on Footpath/Bridle path.**
>
> As discussed previously, I consider the proposal would result in a visual impact on the recreational users of the Spindle Lane footpath due to the proximity of the proposed turbine to the footpath.

> ...
>
> Whilst accepting that the proposed turbine would be highly visible to the recreational users of the footpath, I consider that with the attachment of conditions relating to an ecology and landscape plan which would facilitate the introduction of further hedgerow planting to partly mitigate against the visual impact as well as conditions stipulating maximum noise limits, I am of the opinion that the proposal would not result in such a great impact as to impede or deter recreational users of the footpath."

15. In respect of very special circumstances in the Green Belt the report referred to general guidance in Planning Policy Statement 22 on the materiality of the wider environmental and economic benefits of renewable energy proposals and the advice in paragraph 13 of the PPS that "very special circumstances may include the wider environmental benefits associated with increased production of energy from renewable sources".

16. The officer's advice continued:

> "In accordance with the above guidance, therefore, the case for justifying that very special circumstances do exist to overcome other policy objections does not have to cover the issues of whether the proposal is needed or the likely amount of energy to be generated, but should be based around the wider economic and environmental benefits that renewable energy generation brings.
>
> In this context, the erection of the proposal would allow the end-user of the energy created, either on the site itself or through it being exported to the National Grid, to use less fossil fuel generated energy, which would result in lower carbon dioxide emissions as well as energy being generated at lower cost. Equally, not granting permission could perpetuate long term reliance on fossil fuels for energy generation at significant financial, in terms of needing to import fossil fuel and exploit increasingly expensive sources, and environmental, in terms of carbon emissions, costs.
>
> In relation to environmental benefits, therefore, it is considered that the production of renewable energy and the associated reduction in carbon emissions and improvement to air quality constitutes the very special circumstances necessary to justify inappropriate development within the Green Belt. This approach has been applied by Planning Inspectors in appeal decisions. It is also considered that as the proposal would assist the farm to diversify and be

> strengthened financially, which in turn would ensure the farm is viable to continue to manage the area, this element of the proposal also demonstrates a wider economic benefit and is considered a very special circumstance. The social benefits put forward by the applicant in regard to the increased educational opportunities are not considered to be a very special circumstance in this instance, however the wording of PPS22 (paragraph 1iv) gives greater weight to environmental and economic benefits and not social benefits."

17. The report concluded:

> "... I am satisfied that very special circumstances, both economic and environmental, apply to this proposal and recommend that Members grant planning permission."

…..

21. The Committee resolved to approve the application by 10 votes to 7.

Some issues about conditions and other matters also arose but they are not relevant to the present appeal.

The Policy Framework

4. I again take this from the judgment below:

> "**Relevant Planning Policy**
>
> 27. Planning Policy Guidance Note 2 ("PPG2") sets out Green Belt Policy:
>
> > "3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances. …
> >
> > 3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development."

28. Paragraph 3.15 of PPG2 dealt with visual amenity:

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

29. The proposed wind turbine was inappropriate development and the paragraph 3.2 test had to be satisfied. The approach to paragraph 3.2 was set out by Sullivan J, as he then was, in *Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions* [2002] J.P.L. 1509 at para 70:

> "Given that inappropriate development is by definition harmful, the proper approach was whether the harm by reason of inappropriateness and the *further* harm, albeit limited, caused to the openness and purpose of the Green Belt was *clearly* outweighed by the benefit to the appellant's family and particularly to the children so as to amount to *very* special circumstances justifying an exception to Green Belt policy." (original emphases)

30. As to renewable energy, paragraph 20 of the Supplement to Planning Policy Statement 1 (Planning and Climate Change) states that, in particular, planning authorities should:

> "not require applicants for energy development to demonstrate either the overall need for renewable energy and its distribution, nor question the energy justification for why a proposal for such development must be sited in a particular location." (Referring to paragraph 5.3.67 of Meeting the Energy Challenge (2007) cm 7124)

Paragraph 13 of Planning Policy Statement 22 states that renewable energy development is capable of being accommodated within the urban and rural areas. PPS22 – Key Principles states that applications should not be refused solely on the ground that the level of output is small. Applicants do not need to satisfy a "sequential" test and to show that the application site was superior to alternatives (see paragraph 16 of PPS22).”

<u>The issues arising on this appeal</u>

5. Not all the grounds of challenge rehearsed in the Administrative Court remain live issues in this Court. The central substantive issues concern the ambit of “material considerations” and focus upon the advice given by a planning officer, Mr Elliott, to the Planning Committee in this regard. However, if the appeal is substantively

meritorious, there remain consequential issues relating to discretion, including the question whether positive relief is appropriate now that the wind turbine has been erected and is operational. I shall return to the factual position relating to this aspect of the case later.

6. The substantive issues were succinctly encapsulated by Sullivan LJ in his permission judgment (at paragraph 24):

> "…there is a respectable argument that precedent, the fact that the turbine would not generate a significant amount of energy and would be inefficient, and that it should be sited elsewhere outside the Green Belt, were all factors which were capable of being material planning considerations and material to this application. It is arguable that the officer's approach that these matters were not material, and that effectively there would be no precedent because each case in the Green Belt would be site specific, was based on a serious misapplication of Green Belt policy in respect of proposals to site wind turbines within the Green Belt."

7. There is a great deal of common ground as to the law relating to material considerations. By section 70 (2) of the Town and Country Planning Act 1990 a local planning authority is obliged "to have regard to the provisions of the development plan, so far as material for the application, and to any other material considerations". The disputed matters on this appeal are not rendered material considerations because the statute has expressly declared them to be so. Their materiality, if established, is based on their potential to have a legitimate bearing on the ultimate decision.

(1) Precedent

8. It is not disputed that, in principle, a grant of planning permission may set a precedent for further developments of the same character: Collis Radio Ltd v Secretary of State for the Environment (1975) 29 P & CR 390. In particular, where development is proposed in the Green Belt, the grant of planning permission based on very special circumstances may create a precedent for future applications in the same area: Doncaster Metropolitan Borough Council v Secretary of State for the Environment [2002] JPL 1509. Risk of creating precedent is therefore a potentially material consideration.

9. As I have related, in the present case the report to the Planning Committee includes under the heading "Non-material Planning Issues",

> "The granting of permission for this application would set a precedent for further turbine development nearby."

The case for the appellant is that this was legally erroneous advice because it conveyed the message that precedent was not a material consideration.

10. The Judge rejected this interpretation. He said (at paragraph 38):

> "…there is nothing in the case law…that precludes an officer from giving guidance and advice to the Council as to what in substance are the considerations material to the planning application in relation to the specific proposal before the Council. On the contrary, there are considerable advantages if the officer does give such guidance and advice because, if it is soundly based, the decision maker is more likely to focus and to concentrate on what is really important and determinative, rather than be distracted by matters which could, hypothetically, be relevant but which, in the particular case, have no real bearing on the final decision. The process is then likely to be more efficient and the final decision to be more justifiable"

In a witness statement, the planning officer (Mr Elliott) had emphasised the site–specific nature of planning applications, opining that "a grant of permission in one place creates no precedent in respect of another". He went on to suggest that cumulative impact might become relevant in relation to subsequent applications in the area but it was not yet "a real issue" because this was the first such application.

11. The Judge concluded (at paragraph 41):

> "In these circumstances, it appears to me that, in contrast to Copeland, the advice or guidance given in relation to the specific application under consideration in respect of "precedent" was soundly based – indeed plainly correct…"

The reference to Copeland is [2011] JPL 40; R (Copeland) The London Borough of Tower Hamlets [2010] EWHC 1485 (Admin), in which planning officers had wrongly advised that the proximity of a proposed fast-food takeaway to a school that was trying to promote healthy eating was "not a material planning considering that can have weight in determining this application against Council policy".

12. In seeking to uphold the Judge's analysis, Mr Richard Kimblin points to the fact that the wording of the report is expressly site-specific in that what it states to be non-material is the assertion that:

> "… permission for this application would set a precedent for further turbine development nearby." (emphasis added).

This, it is submitted, connotes that every application has to be treated on its own merit and that what is permissible as a first application in the area may, if replicated, become objectionable on a cumulative basis, all other things being equal. That was, essentially, the Judge's analysis.

13. In my judgment, it is necessary to construe the planning officer's advice having regard to how a reasonable planning decision maker would understand it. There is no suggestion in the wording to the effect that, whereas precedent is a potentially material consideration, it merits little or no weight in this case. The Planning Committee was being advised – correctly – that in a Green Belt case the proposed wind turbine was inappropriate development unless it could be justified by very

special circumstances. Nevertheless, in that exacting context, it was being provided with a list headed "Non-material Planning Issues". It seems to me that the wording which followed would only be understood by the Planning Committee as meaning that precedent was, as a matter of law or policy, of no materiality whatsoever – not that the circumstances of this particular proposed development were such that they reduced to zero the materiality which it might otherwise have had. I do not consider that the inclusion of the words "permission for this application" would be understood as meaning that, as a matter of judgment, what would be potentially material in another Green Belt case is, for some undisclosed reason, of no materiality here. Nor is the resort to "cumulative impact" persuasive. Although referred to in the planning officer's witness statement, it was not apparent at the time of or on the face of the advice.

14. I observe that, in his permission judgment, Sullivan LJ, without even the qualification "arguably", described the wording as "straightforward advice that these were simply not material planning issues" (paragraph 14). I respectfully agree. The advice ought not to have been expressed as it was. Precedent was a live issue. Indeed, the Council's own Urban Design and Consultant's response to the prior consultation had expressed concern that "should this turbine proposal be approved, it would be difficult to refuse others in similar locations and result in a cumulative impact".

15. Whilst, of course, no two planning applications are exactly the same, a grant of planning permission in the present case would undoubtedly be advanced as a precedent in relation to a similar application in the same area and, unless other matters such as greater visual impact rendered it distinguishable, it would have real precedent value. It is significant that the features said to constitute "very special circumstances" are essentially generic features which could be claimed in relation to comparable sites. In my judgment, in a case where the bar is set as high as "very special circumstances", the advice that precedent was incapable of achieving material consideration status was simply wrong. This, in itself, vitiated the ultimate decision.

(2) Alternatives

16. The planning officers list of "Non-material Planning Issues" also included:

> "The turbine should be sited elsewhere outside of the Green Belt on already degraded landscapes".

And:

> "There are other alternative methods of producing reasonable energy instead of the proposed turbine."

The judge accepted that in some circumstances alternative sites "may well be a material consideration in an application for development in the Green Belt". (Paragraph 43). He referred to Trusthouse Forte Ltd v Secretary of State for the Environment [1986] 53 P & CR 293; Siraj [2011] JPL 571 and R (Siraj) the Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286 in support of this proposition. However, he again concluded that in this case the advice given by the planning officers was "soundly based, indeed correct" (paragraph 47). He took the view that it was consistent with policy which was intended to encourage renewable energy projects, namely Planning

Policy Statement: Planning and Climate Change (supplement to Planning Policy Statement 1) which provides that there is no requirement to demonstrate need and PPS 22, paragraph 16, which states that, as most renewable energy sources can only be developed where the resource exists and where economically feasible, local planning authorities should not use a sequential approach in the consideration of renewable energy products. The Judge added (at paragraph 45):

> "In short "alternative sides" or "alternative means of generating energy" were simply irrelevant as far as the present application was concerned."

17. The question of alternatives raises two different considerations: alternative sites, away from the Green Belt, and alternatives on the same site. I do not propose to dwell on alternative sites away from the Green Belt. Plainly, Mr and Mrs Charles-Jones were interested only in the erection of wind turbines on their own farm. However, alternatives on that farm were a potential issue. Strikingly, there was the extant planning permission for the two smaller turbines. During the consultation process, Nottinghamshire County Council had drawn attention to this factor. In a letter dated 14 June 2011 its officer wrote:

> "…I wish to raise concerns as to whether [there] is sufficient justification particularly in light of the extant planning permission for the two turbines which would enable the farm's needs to be met….I would therefore request that your Council seeks further justification and demonstration of very special circumstances from the applicant as to why the proposed size and scale of turbine should be sited within this Green Belt location."

This was also of concern to those in the Planning Policy department of the Council. Mr Tom Dillarstone of that department wrote an internal memorandum to Mr Elliott on 30 June 2011 stating:

> "The applicant should explain why other, less intrusive forms of renewal energy provision are not proposed. Alternatives should be comparable in terms of the energy produced and cost…the applicants should explain why they have decided not to proceed with the turbines granted under [the extant permission] so that the benefits and impacts of the two schemes can be compared …"

Its seems to me that in a case concerning inappropriate development within the Green Belt which can only be justified by "very special circumstances" these were and remained material considerations. The fact that very special circumstances had been found in relation to the two significantly smaller turbines located in a different position within the farm did not mean that very special circumstances would also attach to the single significantly larger wind turbine in a different position within the farm. As I have related, it was common ground that the two smaller turbines could generate sufficient power to meet the needs of Mr and Mrs Charles-Jones (albeit following feeding into the grid). In my judgment, it was a legal error to proceed on the basis that it was immaterial

that other alternative methods of producing reasonable energy existed. It was a factor for the Planning Committee to weigh in the balance.

(3) Efficiency

18. The proffered list of "Non-material Planning Issues" also included:

> "The proposed turbine would not generate a significant amount of energy and would be inefficient."

The Judge considered this to be "highly prudent" advice in the light of the Key Principles set out in PPS 22 paragraph 1, including:

> "(iv) the wider environmental and economic benefits of all proposals for renewable energy projects, whatever their scale are material considerations that should be given significant weight in determining whether proposals should be granted planning permission.
>
> …
>
> (vi) small scale projects can provide a limited but valuable contribution to overall outputs of renewable energy and to meeting energy needs both locally and nationally. Planning authorities should not therefore reject planning applications simply because the level of output is small. (All emphases added by the Judge)"

The Judge concluded (at paragraph 51):

> "Given the relevant planning policies in this context, the officer was entitled, and could have been reasonably expected, to advise the Council that it should not take into account, in deciding this specific application for planning permission, the likely levels of output of energy from this turbine, and, in particular, should not consider whether a higher level of output might be achieved at some other (unspecified) location"

19. In one sense this had the effect of removing from the list of material considerations the question of whether this turbine, with its design, specification, location and output, would constitute "very special circumstances" in the context of Green Belt policy. On the Judge's analysis, there would be no material difference between this proposal in the Green Belt and another proposal, in all other respect identical, but outside the Green Belt. That, it seems to me, is counter-intuitive. However, before I address the Judge's analysis, I should refer to the more fundamental way in which Mr Kimblin seeks to approach this issue.

20. Mr Kimblin's submission is that the Planning Committee was correctly advised to disregard the amount of energy to be produced and the question of efficiency. He contends that when one looks at the full range of applicable policies it becomes clear that the policy designed to encourage renewable energy projects rendered questions of volume and efficiency irrelevant. His ultimate submission is that the market is the

means whereby inefficient installations will be discouraged and avoided. He suggests that the only circumstance in which a Planning Committee has to involve itself in addressing the volume and efficiency of an alternative energy installation is if there is a factual dispute about it. Here, he submits, there was not such a dispute.

21. For my part, I cannot understand his concession about factual disputes. If the matter is truly one for the market, there is no need to resolve active disputes about volume and efficiency. In the present case it may be said that there was not a crystallised dispute in any event. The figures advanced on behalf of Mr and Mrs Charles-Jones were extrapolated from national averages and were not site or turbine specific. No one else advanced alternative figures. I propose to disregard the question of factual dispute.

22. On the other hand, I believe Mr Kimblin to be simply wrong in his submission that, having regard to the full range of applicable policy, matters such as volume and efficiency are irrelevant and can be left to the working of the market. I do not accept that the Green Belt has been sold out to the market in this way. The position remains that the proposed development is, by definition, inappropriate development which can be justified only in very special circumstances. Any consideration of such circumstances must necessarily embrace assessment of the benefit which is likely to ensue. It cannot be the case that a very large but unproductive and inefficient installation ranks equally with a small but extremely efficient one when it comes to evaluating "very special circumstances". Size, efficiency and ability to meet need are all considerations relevant to the issue of "very special circumstances". It was legally erroneous for the Planning Committee to have been advised to the contrary and its subsequent decision is vitiated by that error.

Discretion

23. On behalf of Mr & Mrs Charles-Jones, Ms Victoria Hutton submits that, even if we find the grant of planning permission to have been legally flawed, we ought to stop short of quashing it. She puts the submission in three different ways. First, it is said that if the Planning Committee had treated as material considerations those matters which it was wrongly advised not to treat as material considerations, it would have still come to the same conclusion and granted the same permission. Secondly, if it were now reconsidering the application and taking those matters into account, it would again reach the same conclusion and grant the same permission. Thirdly, even if there is a real possibility that the planning decision would be different, nevertheless the existing permission should not be quashed because Mr and Mrs Charles-Jones have considered themselves obliged to proceed on the basis of the flawed permission, purchasing and erecting the turbine, and it would be contrary to the interests of justice to require them to dismantle it at this stage.

(1) Would the additional material considerations have made any difference to the granting of the existing permission?

24. The legal position was synthesised by Glidewell LJ in Bolton Metropolitan Council v Secretary of State for the Home Department (1991) 61 P & CR 343, 352-353. He propounded six principles of which, for present purposes, the sixth is the most pertinent:

> "If the judge concludes that the matter was 'fundamental to the decision' or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid"

In Simplex GE (Holdings) Ltd v Secretary of State for the Government [1988] 3 PLR 25 it was held that, where a material consideration was not taken into account by the decision-maker, it should grant relief unless it is satisfied that it would have reached the same decision. These formulations are really two sides of the same coin, depending on whether one is determining materiality or relief.

25. In my judgment, it is not possible for this Court to conclude that there would have been no real possibility of a different outcome or that the decision would have been the same. These matters – and I concentrate on precedent and efficiency – are not self-evidently trivial considerations. Nor do I accept Ms Hutton's conclusion that the fact of the previous two (smaller) turbines permission amounts to a fall-back position (in the sense in which that term was used in R v Secretary of State for the Government, ex parte Aherne [1998] PLR 189, 196, per Mr Christopher Lockhart-Mummery QC) such that it militates against a refusal of permission in relation to the current application. It is important to keep in mind that this is prima facie inappropriate development requiring the establishment of very special circumstances. It is also relevant that the flawed decision was by a narrow majority of ten to seven. The application relates to a significantly bigger construction in a different position. It is for the Planning Committee rather than this Court to assess whether there are very special circumstances in a case in which the answer is not self-evident and there is a real possibility (which need not amount to a probability) of a different outcome.

(2) If the application were to be considered by the Planning Committee now, would it grant retrospective permission?

26. Ms Hutton refers to two sets of considerations which would be relevant to reconsideration by the Planning Committee. The first set derives from the fact that the new turbine is up-and-running, with all the cost that this has entailed. The second is that the policy framework has changed and the reconsideration would have to be by reference to the current policy.

27. The fact that Mr and Mrs Charles-Jones have chosen to purchase and erect the turbine during the currency of the present appeal is more a matter for the "interests of justice" aspect of discretion to which I shall shortly return. The fact that the policy framework has changed has prompted some debate as to whether it has become more stringent. In his witness statement, Mr Elliott suggested that "there is no major shift in central government's position on renewable technology within Green Belt locations or in material planning issues central to these proposals" as a result of the new National Planning Policy Framework. On the other hand, the recently published Planning Practice Guidance for Renewable and Low Carbon Energy states that the efficiency and energy contribution of a turbine may be relevant "particularly when a decision is

finely balanced". It is not for this Court to second-guess the implications of these changes in policy. They may, as Mr Richard Harwood QC submits, be more radical than Ms Hutton suggests. One way or another, I do not feel able to say that this narrowly divided Planning Committee would now, having had regard to all current material considerations grant retrospective permission.

(3) The interests of justice

28. In the Bolton case, Glidewell LJ referred (at page 353) to the situation where a Court may hold a planning decision to have been legally flawed but "in exceptional circumstances" may, as an exercise of discretion, refuse relief. Ms Hutton submits that this is such a case because of the passage of time, the (as she would have it) forced purchase and erection of the turbine and the financial and other consequences to Mr and Mrs Charles-Jones of a quashing remedy.

29. I say at once that it is regrettable that it has taken this long for the case to reach this Court. The grant of planning permission was issued on 3 November 2011. Although WACAT and Mr Holder have not been guilty of procedural delay at any stage, they have had to surmount many hurdles. Permission to apply for judicial review was refused in the Administrative Court both on paper and on oral renewal. It was granted in this Court by Lewison LJ who remitted the application to the Administrative Court for hearing. When the Judge had heard the substantive application and had given judgment, he refused permission to appeal, as did Beatson LJ on consideration of the papers. It was only on 4 December 2013 that Sullivan LJ granted permission following an oral hearing. We heard the substantive appeal on 9 April 2014. It is to be hoped that now that the fast-track procedure has been introduced for planning cases in the Administrative Court, such delays will not occur. However, they have occurred in this case without culpability of the parties. Attempts to obtain expedition appear to have failed.

30. What is particularly striking in this case is that Mr and Mrs Charles-Jones contracted to purchase the turbine and proceeded to erect it at times when they knew that WACAT and Mr Holder were seeking permission to appeal the order of Kenneth Parker J. Indeed, it seems that the turbine has only been erected since Sullivan LJ granted permission to appeal. Ms Hutton seeks to explain and justify this chronology by submitting that (1) the permission was specific as to the manufacture and design of the turbine; (2) it was ascertained in August 2013 (after the issue of the Appellant's Notice on 3 July 2013) that the manufacturer was about to cease production of this model; (3) Mr and Mrs Charles-Jones contracted for the purchase of the turbine in August 2013; (4) they endeavoured to obtain permission for a variation of the permission but were refused. It is said that all this has cost them a lot of money and it would cost yet more to dismantle and remove the turbine. The history has been stressful and is now threatening the financial viability of the farm.

31. Whilst I accept that the consequences of quashing the permission would be detrimental and damaging to Mr and Mrs Charles-Jones, I find these submissions to be wholly unpersuasive. They were not compelled to proceed as they did. They chose to and must be assumed to have appreciated the risks. Planning permission is not simply a private matter. It is a decision of a public authority in discharge of statutory obligations the purpose of which is to serve the public interest: see R (Tata Steel UK Ltd) v Newport City Council [2010] EWCA Civ 1626, at paragraphs 13-15, per

Carnwath LJ. The present case is a world away from the sort of legitimate expectation which resulted in a discretionary refusal of relief in R (Majed) v London Borough of Camden [2009] EWCA Civ 1029. Moreover, the submissions on behalf of Mr and Mrs Charles-Jones are not wholly transparent. They are in part based on mere assertion and to some extent hide behind a curtain of "commercial confidentiality". For example, we have not been shown the contract for the supply of the turbine and we know little of what real alternatives may have existed. I can see no good reason why this successful appeal establishing the legal invalidity of the planning permission should leave the appellant without the normal fruits of such success. I would not expect the Council to take enforcement proceedings in advance of reconsideration by the Planning Committee, but if that reconsideration were to be adverse to Mr and Mrs Charles-Jones, they would only have themselves to blame for their precipitate action.

Conclusion

32. It follows from what I have said that I would allow this appeal and quash the challenged planning permission. Any reconsideration of the merit of the planning application is a matter for the Council.

Lord Justice Patten

33. I agree.

Sir Stanley Burnton

34. I also agree.