Neutral Citation Number: [2017] EWHC 3317 (Admin)

Case No: CO/6141/2016 & CO/2411/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2017

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **on the application of**	**Claimant**
PAUL ROGERS **- and -** **WYCOMBE DISTRICT COUNCIL**	**Defendant**
JONATHAN SMARE	**Interested Party**

- -
- -

Andrew Parkinson (instructed by **Richard Buxton**) for the **Claimant**
Daniel Stedman Jones (instructed by **Wycombe District Council**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 14 November 2017

- -

Approved Judgment

Mrs Justice Lang :

1. In claim CO/6141/2016 ("JR1"), the Claimant applied for judicial review of the grant of planning permission by Wycombe District Council ("the Council"), on 24 October 2016, for a development at Sheron, Spurgrove Lane, Frieth, Buckinghamshire, RG9 6PB ("the Site") comprising "subdivision of the existing plot and erection of 1 x 4 bed detached dwelling with associated double garage, retaining wall and oil tank together with a new access & entry gates".

2. Permission to apply for judicial review was granted in respect of some grounds only by Timothy Straker QC, sitting as a Deputy Judge of the High Court, on 7 February 2017.

3. In claim CO/2411/2017 ("JR2"), the Claimant applied for judicial review of the Council's decision, on 31 March 2017, to grant a deed of release from an agreement entered into under section 52 of the Town and Country Planning Act 1971 ("TCPA 1971"), which restricted development on the Site ("the Agreement"). Permission was refused on the papers by Robin Purchas QC, sitting as a Deputy Judge of the High Court, on 14 July 2017. The renewed application for permission was heard at the same time as JR1, as a rolled-up hearing.

4. The Claimant objected to the application for planning permission. He lived in Spurgrove, close to the proposed development, and he was concerned that the development would adversely affect the outlook from his house and, more importantly, the rural character and openness of Spurgrove.

5. The Interested Party was the owner of the Site, and the applications for planning permission and for the discharge of the Agreement were made on his behalf.

Facts

6. The Site comprised a detached dwelling house, garage and outbuildings known as 'Sheron', situated within a large plot.

7. Spurgrove was an area of residential development in the village of Frieth, but separated from the main part of the village by fields. Sheron, and the other dwellings nearby, were detached houses in large plots, accessed from an unnamed road running off Spurgrove Lane. The Highways Management Officer from the highways authority described it as "located off a section of Spurgrove Lane which is not maintained by Buckinghamshire County Council" (consultation response, 18 October 2016). The plots were surrounded by fields and woodland, with views over the valley. Further up along the same road, there were houses situated in smaller plots and more tightly grouped.

8. The Site was within the Chilterns Area of Outstanding Natural Beauty ("AONB") in an area designated as "Open Countryside beyond the Green Belt" in the Adopted Wycombe District Local Plan to 2011, as saved and extended in 2007 and replaced by the Adopted Core Strategy July 2008, and Delivery and Site Allocations Plan July 2013. Policy C10 provided:

> "**POLICY C10**
>
> (1) Within that portion of the countryside beyond the green belt, and subject to other appropriate policies of this local plan, planning permission will only be given for:
>
> (a) development reasonably necessary for the purposes of agriculture and forestry;
>
> (b) development for outdoor sport and countryside recreation and for buildings which are essential to support those uses, as set out in Policy RT5;
>
> (c) limited affordable housing for local community needs in accordance with Policy H14;
>
> (d) local community facilities which cannot be provided elsewhere;
>
> (e) infilling within villages, hamlets and identifiable ribbons of development where there are no adverse effects on the character of the area. The closing of gaps or enclosure of open areas which contribute to the open character of the area will not be permitted;
>
> (f) development wholly appropriate to a rural area which cannot be located within a settlement; and
>
> (g) development consistent with the appropriate policies of this chapter.
>
> (2) All development must be of an appropriate design and scale for its location, and contribute to a sense of local identity by respecting or enhancing the existing character of the area, in accordance with the principles set out in Policy G3."

9. The Site and three neighbouring properties were subject to an Agreement made under section 52 TCPA 1971 with the Council on 25 April 1978. By that Agreement, the then owner of the Site and the owners of neighbouring properties covenanted "that no additional residential development shall be carried out on the development land or on the said property in the attached plan". The covenant was binding upon their successors in title.

10. In 1997, the owner of one of the plots (Medina) asked to be released from the Agreement. The Council refused the application, observing that further dwellings would damage further the special character of the area and undermine planning policies. The Agreement was, however, varied so as to enable development that did not amount to the erection of an additional dwelling.

11. On 1 August 2016, following some pre-application discussions with the Council's planning officer, the Interested Party applied for planning permission to sub-divide his

plot in two, and to erect a new four bedroomed detached house and garage, which would have its own access and entrance gate.

12. The Claimant and others objected to the application, on the grounds *inter alia* that the open, rural character of this area of the countryside would be harmed by introducing a large building into an undeveloped open space and it would create an unfortunate precedent. Their objections included reference to the fact that the application was contrary to the terms of the Agreement, and also inconsistent with previous appeal decisions in Spurgrove.

13. The Parish Council's comments on the application were as follows:

> "No objection if it is classed as a separation of property and infill build rather than a development in open countryside. However, we have been made aware of covenants put on this land by Wycombe District Council which state no new buildings, if this is still valid it would preclude any new development and we would object."

14. On 31 August 2016, Councillor Whitehead (who was Councillor for the Ward) stated that "the application is causing some concern locally so would ask for it to be discussed by the Planning Committee should the officers be minded to approve it".

15. The planning officer completed her report into the application on 18 October 2016 and recommended the grant of planning permission.

16. On 21 October 2016, Councillor Whitehead withdrew his request to have the application determined by the Planning Committee, saying "I have spoken to the Parish Council, and they are happy for this application to be decided by the officers – so no need to refer to the Committee."

17. The officer's recommendation was approved by Mr Martin, Development Management Team Leader, on 24 October 2016, and the decision notice granting planning permission was issued on that date.

18. Mr Robson, who lived in the neighbouring property to Sheron, made enquiries about the decision-making process. On 29 October 2016, Councillor Whitehead replied to Mr Robson saying:

> "On all planning applications I am guided by the Parish Council – especially in parts of my ward that I am not too familiar with. They are more familiar than I with the detail of the application, and without their support any objection that I might make in Committee would be hollow. In this instance, the Parish Council, having initially asked for this to be considered by the Planning Committee, subsequently changed their mind, and advised me that they were happy for the planning officers to decide the application. The reasons for permitting the application are given in the officer's report."

19. On 31 October 2016, the clerk to the Parish Council set out in an email to Mr Robson, her discussions with the Planning Officer regarding the Agreement, stating "With regards to [the Agreement], she knows very little about it and it does not show on her mapping, but that it is not a planning issue…".

20. On 3 November 2016, the clerk to the Parish Council sent another email to Mr Robson stating:

> "….. Councillor Whitehead approached the Parish Council after WDC documents on the preliminary decision were released, asking if the PC still wished the matter to be taken to Committee. Upon reading the documents, the PC decided not to proceed taking it to Committee. The main reasons for the original request to take it to the Committee were the Covenant on the land, and the "open countryside" development not being permitted. The documents showed that the Covenant is not a planning matter to be taken into consideration, but a private matter so that was not a valid argument for this purpose. After speaking with WDC Planning, being told that limited infill development is permitted in open countryside and that's what this application is, that voided that also. To take an application to the Committee the PC need to be sure that the reasons for opposing the application are valid for planning purposes or else it is not looked upon favourably. When these 2 complaints (as the consultee comment I submitted to WDC in September stated) were answered if you will be Planning, there was no further reason to take it to the Committee. At the time of the PC meeting you attended, it was the intention to take it to Committee, but after the objections were addressed by WDC there was no planning case to be answered….."

21. On 22 December 2016, the Interested Party applied to the Council to discharge the Agreement in its entirety, but if the Council was unwilling to do that, to modify the Agreement so as to exclude the Interested Party's land from its terms. Objections were sent from the Claimant and other parties to the Agreement, objecting to its general discharge, anticipating that it would result in harmful development. They also asked the Council not to discharge the Agreement in respect of their own properties.

22. The application was recommended for approval by the Council's officers in a report on the basis that the Agreement was "obsolete and no longer serves a useful planning purpose". The report referred to the grant of planning permission stating: "This does not necessarily require the Planning Authority to discharge or modify the covenant, but is something which must be taken into account". It went on to say:

> "3.8. Since the last Deed of Release in 2001 the National Planning Policy Framework (NPPF) has been published which introduced a presumption in favour of sustainable development (paragraph 14). Areas of Outstanding Beauty remain protected, but development is not prohibited within them (paragraph 115). The blanket prohibition of development set out in the S52 agreement is clearly not in compliance with the NPPF.

> 3.9. It is therefore considered that the agreement is outdated and that controls over any future development can be properly controlled by the planning system and the adopted Development Plan policies."

23. The application was approved for a deed of release for the Site, which was entered into on 31 March 2017. On my reading of the documentary evidence, it seems likely that the Council refrained from discharging the Agreement in its entirety in response to the requests from the other signatories not to do so.

Grounds for judicial review

24. In JRI, the Claimant's grounds for judicial review were that the Council:

    i) reached an irrational planning judgment that the development was "infill" of a "ribbon of development", within the meaning of Policy C10E of the Adopted Local Plan, relying upon a similar challenge in *R (Tate) v Northumberland CC* [2017] EWHC 664 (Admin);

    ii) treated the section 52 agreement as an immaterial planning consideration;

    iii) failed to take into account the conclusions of an Inspector in a previous appeal decision in 1997 in relation to a neighbouring site;

    iv) in respect of the matters at (i) to (iii), failed to give adequate reasons for its decision.

25. In response, the Defendant submitted that, on a fair reading of the officer's report, the Council:

    i) applied Policy C10E of the Adopted Local Plan and made a permissible planning judgment that the proposed development was infill of a ribbon development which would not have adverse effects on the character of the area and would not result in the closing of a gap or enclosure which contributed to the open character of the area;

    ii) treated the section 52 agreement as a material planning consideration, as confirmed by the witness statement of Mr Martin, the senior planning officer who took the decision;

    iii) was not required to consider the 1997 planning decision as it was distinguishable and therefore not material, but in any event, the officer did not depart from the Inspector's view of the character of the area;

    iv) gave adequate reasons.

26. The ground relied upon by the Claimant in JR2 only arose if he was successful in establishing, in JR1, that the grant of planning permission was unlawful. In those circumstances, the Claimant submitted that the planning permission was void from the date it was granted, and therefore the Council erred in taking it into account as a material consideration when deciding to discharge the Agreement.

27. In response, the Defendant submitted that the planning permission was lawful. In the alternative, the Council's decision to discharge the Agreement was not vitiated by any unlawfulness in the grant of planning permission, as the grounds for discharge, namely that it was obsolete and did not serve a useful planning purpose in the context of current planning policy, remained valid in any event.

28. After circulation of my draft judgment, the Claimant asked me to review my judgment on various grounds, including the judgment of the Supreme Court in *Dover District Council v CPRE Kent* [2017] UKSC 79 ("*CPRE Kent*") which had just been handed down. I received written submissions from both counsel, and revised my judgment accordingly.

Legal framework

(i) Judicial review of planning decisions

29. General principles of judicial review apply and so the Claimant must establish that the Council misdirected itself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

30. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. An application for judicial review is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, per Sullivan J. at [6].

(ii) Decision-making

31. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) of the Town and Country Planning Act 1990 ("TCPA 1990") provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application.

32. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

33. The duty under the equivalent Scottish provision was explained by Lord Clyde in *Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at 1459:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development

> plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

34. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, in which it rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. Development plans should be interpreted objectively, in accordance with the language used, read in its proper context. They should be followed unless there is good reason to depart from them.

35. Lord Reed re-affirmed well-established principles on the requirement for the planning authority to make an exercise of judgment, particularly where planning policies are in conflict, saying at [19]:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall

> within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)….."

(iii) Officer reports and the duty to give reasons

36. Officer reports are directed to an expert readership and those readers should be expected to be familiar with national and local policies, as well as their localities. In *R (Luton BC) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin), Holgate J. helpfully reviewed the authorities, as follows:

> "90. A great many of LBC's grounds involve criticisms of the officers' reports to CBC's committee. Accordingly, it is necessary to refer to the legal principles which govern challenges of this kind. I gratefully adopt the summary given by Mr Justice Hickinbottom in the case of *The Queen (Zurich Assurance Ltd trading as Threadneedle Property Investments) –v- North Lincolnshire Council* [2012] EWHC 3708 (Admin) at paragraphs 15-16:
>
> > "15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:
> >
> > (i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.
> >
> > (ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:
> >
> > > "[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (*Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby*

District Council (18 April 1997) 1997 WL 1106 106, per Judge LJ as he then was).

(iii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (*R v Mendip District Council ex parte Fabre* (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (*Oxton Farms*, per Pill LJ).

16. The principles relevant to the proper approach to national and local planning policy are equally uncontroversial:

(i) The interpretation of policy is a matter of law, not of planning judgment (*Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13).

(ii) National planning policy, and any relevant local plan or strategy, are material considerations; but local authorities need not follow such guidance or plan, if other material considerations outweigh them.

(iii) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations is a question of planning judgment: the part any particular material consideration should play in the decision-making process, if any, is a matter entirely for the planning committee (*Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759* at page 780 per Lord Hoffman)."

91. I would also draw together some further citations:

"[The purpose of an officer's report] is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members, who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example in respect of local topography, development plan policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how

> much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail." (per Sullivan J in *R v Mendip DC ex p Fabre* (2000) 80 P&CR *500* at 509).

92. In *R (Siraj) v Kirkless MBC* [2010] EWCA Civ 1286 Sullivan LJ stated at para. 19:

> "It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a common sense manner, bearing in mind the fact that they are addressed to an informed readership, in this case the respondent's planning subcommittee"

93. In *R (Maxwell) -v- Wiltshire Council* [2011] EWHC 1840 (Admin) at paragraph 43 Sales J (as he then was) stated:

> "The Court should focus on the substance of a report of officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotations of material, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively.""

37. In *R (Lensbury Ltd) v Richmond-Upon-Thames Borough Council* [2016] EWCA Civ 814, Sales LJ said, at paragraph 8:

> "An officer's report containing a planning authority's reasons for granting planning permission is to be read fairly as a whole, focusing on the substance of the matter rather than the form. It is not incumbent on an officer compiling a report for the planning committee of a local planning authority to set out and discuss each policy in turn, like a sort of examination paper. If it appears as a matter of substance on a fair reading of the report that matters relevant to the proper application of policies in the development plan have been appropriately identified and assessed, that will be sufficient. Such reports are to be read against the background that they are written for an informed audience (the planning committee) who may be taken to have a reasonable understanding of, or the means of checking on, the local context and the legislative and policy framework in which the decision is to be taken: see e.g. *R v Mendip DC ex p Fabre* (2000) 80 P&CR 500 at 509; (*Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* (18 April 1997) 1997 WL 1106 106, per Pill LJ; *R*

> *(Trashorfield Ltd) v Bristol City Council* [2014] EWHC 757 (Admin) at [13] per Hickinbottom J."

38. I agree with the Defendant's submission that these principles also apply where an officer's report is directed, as in this case, to a senior planning officer within the local planning authority to whom is delegated the task of making the decision.

39. In this case, the senior planning officer who made the decision agreed with the recommendation in the officer's report, and did not set out any separate reasons of his own. Therefore the report stood as the reasons for the decision.

40. In 2013, the Secretary of State for Communities and Local Government decided to remove the duty to give "summary reasons" for the grant of planning permission: see Town and Country Planning (Development Management and Procedure)(England)(Amendment) Order 2013 (SI 2013/1238) ("the 2013 Order"). However, under regulation 7 of the Openness of Local Government Bodies Regulations 2014, an officer exercising delegated powers must produce a written record with reasons for the grant of a permission or licence. In *R (Shasha) v Westminster City Council* [2016] EWHC 3283 (Admin) Mr Howell QC, sitting as a Deputy Judge of the High Court, held that meant that reasons had to be given which complied with the general common law standard of "proper, adequate and intelligible" reasons which dealt with the substantial points that had been raised (see *Westminster City Council v Great Portland Estates Plc* [1985] AC 661, per Lord Scarman at 673).

41. In the *CPRE Kent* case, Lord Carnwath (giving a judgment with which other members of the Court agreed) confirmed that the 2013 Order did indeed impose a duty on officers to give reasons for the grant of planning permission (at [30]). As the *CPRE Kent* case was concerned with a decision by a Planning Committee, he did not explore the duty on officers further. However, in my view, the guidance given by Lord Carnwath on the standard of reasons, at [35] to [42], would in principle apply to officers too, as Lord Carnwath rejected the submissions that the content of the duty varied according to differences in the decision-making procedures (at [41]).

42. Lord Carnwath set out the legal principles to be applied in respect of the standard of reasons at [35] to [37] and [42]:

> "35. A "broad summary" of the relevant authorities governing reasons challenges was given by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36:
>
> > "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a

> substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

36. In the course of his review of the authorities he had referred with approval to the "felicitous" observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, 271-272, identifying the central issue in the case as:

> "… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

37. There has been some debate about whether Lord Brown's words are applicable to a decision by a local planning authority, rather than the Secretary of State or an inspector. It is true that the case concerned a statutory challenge to the decision of the Secretary of State on a planning appeal. However, the authorities reviewed by Lord Brown were not confined to such cases. They included, for example, the decision of the House of Lords upholding the short reasons given by Westminster City Council explaining the office policies in its development plan (*Westminster City Council v Great Portland Estates plc* [1985] AC 661, 671-673). Lord Scarman adopted the guidance of earlier cases at first instance, not limited to planning cases (eg *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478), that the reasons must be "proper, adequate and intelligible" and can be "briefly stated" (p 673E-G). Similarly local planning authorities are able to give relatively short reasons for refusals

> of planning permission without any suggestion that they are inadequate."
>
> …..
>
> "42. There is of course the important difference that, as Sullivan J pointed out in *Siraj*, the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why.""

Conclusions

Ground 1: Policy C10

43. In my judgment, the officer's conclusion that this development fell within the scope of Policy C10 was a legitimate exercise of planning judgment which the Claimant could not challenge in a claim for judicial review, despite his strong disagreement with it. It was not irrational to treat the proposed new dwelling as limited infilling within an identifiable ribbon of development given that the Site was one of a number of properties in the residential area of Spurgrove, all accessed from the unnamed section of road running off Spurgrove Lane. I was able to see the existing development along this road from the helpful photographs provided at the hearing. There is no formal definition of ribbon development but it was common ground before me that the term is usually understood to mean development alongside a road. The officer found, at paragraph 5.9, that "the dwelling would be viewed against the background of other residential dwellings in a ribbon of development whereby it would not appear as an isolated discordant feature".

44. The Claimant criticised the officer's report for failing to have regard to the second sentence in Policy C10(e), which stated that the "closing of gaps or enclosure of open areas which contribute to the open character of the area will not be permitted". Applying the principles set out by Sales LJ in *Lensbury*, the officer was not required to set out every policy in full and it could not be fairly assumed that she had overlooked it because she did not refer to it in her summary of the policy at paragraph 5.4. On a fair reading of the report as a whole, the officer did consider whether the development would have such an adverse impact, when assessing conservation, layout, siting, scale, appearance and design, at paragraphs 5.5 to 5.12. For example:

i) the "siting of the dwelling would retain sufficient gaps to the boundaries and would respect the existing grain of development within the wider street scene" (paragraph 5.8);

ii) "the dwelling sits well within the site to ensure that the development appears in keeping within the landscape and not dominant in relation to the overall appearance of the site" (paragraph 5.10);

iii) "the proposal would not harm the rural character and appearance the Chiltern Area of Outstanding Natural Beauty, or the open countryside in which it is set" (paragraph 5.12).

45. In my judgment, the reasons for the Council's conclusion that Policy C10(e) applied were sufficiently adequate and intelligible from the officer's report, applying the standards set out in *CPRE Kent*. The report had fairly to be read as a whole. It had to be borne in mind that it was directed at those with some knowledge of the location of the Site and its surroundings. The key findings were:

i) The Site, which included the existing dwelling "Sheron", was located on a road in a large plot surrounded by residential properties of mixed style and design (Application address, paragraphs 2.3, 5.2).

ii) It was in a rural location, within the countryside beyond the Green Belt (paragraphs 1.2, 2.3, 5.1, 5.2, 5.12).

iii) The proposed development was "limited infilling" (paragraph 5.4).

iv) The proposed dwelling "would be viewed amongst the background of other residential dwellings in a ribbon of development whereby it would not appear as an isolated discordant feature" (paragraph 5.9).

v) "The siting of the dwelling would retain sufficient gaps to the boundaries and would respect the existing grain of development within the wider street scene" (paragraph 5.8).

vi) The proposed development "would not harm the rural character and appearance of the Chilterns Area of Outstanding Natural Beauty, or the open countryside in which it is set" (paragraph 5.12).

46. In my view, the report did not leave the reader in any genuine doubt as to the officer's conclusions on this issue: see *CPRE Kent* at [36].

47. For these reasons, ground 1 does not succeed.

Ground 2: the Agreement

48. It was common ground that the Agreement, made under section 52 TCPA 1971, was capable of being a material planning consideration. In *R (Stimpson) v First Secretary of State* [2003] EWHC 1591 (Admin) Sullivan J. said, at [16] to [17]:

> "16. …..Here there is a section 52 agreement entered into in 1990. In that agreement the Council, as local planning authority, agreed with the landowner and the prospective developer that the appeal site should not be developed residentially but should be reserved for community uses.
>
> 17. I can see no reason why that exercise of the Council's powers as local planning authority should be any less capable of being a material consideration than, for example, an agreed development brief between the local planning authority and an intending developer. Unlike the Secretary of State in the British Railways Board case, the Inspector in the present case did not rely upon the difficulty of implementing a residential planning permission for so long as the section 52 agreement remained in force. There is no reference to any such difficulty in the decision letter. He gave weight to the section 52 agreement because it was an agreement reached between the local planning authority, the owner of the land, and a prospective developer as to what would be the appropriate use for this site. Whether a local planning authority's agreement as to the future appropriate use of a site is contained in a deed under section 52 or a non-legally binding document, such as a development brief, it is still capable of being a material planning consideration. If it is such a consideration, then it is for the Inspector to decide whether, in the circumstances of the particular case, he should give it much, some, or little weight."

49. The Claimant contended that the Council considered the Agreement was not capable of being a material consideration, and therefore did not treat it as such.

50. In her report, the officer said, at paragraph 5.26:

> "Other matters
>
> It is noted that there is a covenant which restricts development at the site. However such circumstances do not override the Local Planning Authority granting planning permission. Any permission required under the covenant would need to be pursued separately and therefore does not form part of planning considerations."

51. On my reading of the officer report, it was clear that the officer did treat the Agreement as material since she devoted a paragraph to consideration of it. The main heading for section 5 was "Issues and Policy Considerations". The officer went through the issues in turn. The heading "other matters" preceding paragraph 5.26 meant another matter for consideration, which did not fall under the earlier headings in section 5. If she had thought it was not a material consideration, at most it would only have been noted under her summary of objections.

52. The officer correctly observed that "any permission required under the covenant would need to be pursued separately and therefore does not form part of planning

considerations". The Claimant erroneously treated the second half of this sentence as relating to the materiality of the Agreement, whereas it clearly related to the "permission required".

53. The Claimant adduced evidence about the views of the Parish Council and Councillor Whitehead at the time, which I set out above. The evidence seemed to me to indicate that the Parish Council did not really understand the relevant planning and legal issues and so misconstrued the Council's position. In my view, the officer report was a more reliable source of information about the Council's approach than the hearsay evidence from the Clerk to the Parish Council about a telephone call she had with the officer. As for Councillor Whitehead, he relied upon the Parish Council to tell him whether or not to object, or to seek consideration by the Planning Committee. He did not make an independent assessment.

54. However, the officer did not explain in paragraph 5.26 how the decision was reached to recommend the grant of planning permission, despite the restrictions in the Agreement, and why the Agreement was overridden.

55. Applying the authorities on officer reports which I have set out above, I consider that despite its brevity, paragraph 5.26 adequately informed Mr Martin, the decision-maker, of the material consideration to be taken into account when considering whether planning permission ought to be granted in accordance with the development plan. The officer was addressing a knowledgeable reader, with expertise. Mr Martin had the benefit of the detailed information about the Agreement which the objectors, Dr McCullough and Mr Robson, provided to the Council. If he needed more information about the Agreement, he could consult the Council's own records. As a senior planning officer with expert knowledge, Mr Martin could be assumed (1) to know the statutory test which he had to apply; (2) to understand the nature and effect of an Agreement such as this one; (3) to be able to assess whether and to what extent it was in conflict with national and/or local planning policies; and (4) to be able to assess what weight should be accorded to it in the decision-making process. I am satisfied that the report did not "significantly mislead" Mr Martin (per Judge LJ in *Oxton Farms*) when he was making his decision.

56. On the authorities, there is a distinction between the latitude which the courts accord to the officers when giving advice to the decision-maker, and the more exacting standards required of decision-makers who are under a statutory duty to give reasons to the public for their decisions. Although paragraph 5.26 met the required standard for advice in an officer report, it did not meet the more exacting standard required for the provision of "proper, adequate and intelligible reasons" on the substantial points raised, as it did not explain why permission had been granted pursuant to Policy C10(e), despite the restriction on development in the Agreement.

57. Mr Martin filed a witness statement in these proceedings providing the missing reasons. However, I accepted the Claimant's submission that I should disregard this evidence as it was not contemporaneous; it was evidence prepared after the event, to assist in litigation by "plugging a gap": see *Timmins v Gedling* [2014] EWHC 654 (Admin), per Green J. at [109].

58. Following the decisions in *Shasha* and *CPRE Kent*, it would be prudent for officers exercising delegated powers to set out their own reasons for the decision, and not merely rely upon the contents of the officer report.

59. Therefore ground 2 succeeds, on the limited basis that the Council failed to give adequate reasons.

Ground 3: previous decision

60. The Claimant submitted that the officer erred in not taking into account the findings of an Inspector in a previous decision in 1997, dismissing an appeal against a refusal of an application for planning permission for an extension and a garage at a neighbouring site ('Lynwood'). The planning inspector said:

> "dwellings served by the unmade road to the north-east of The Moorings and Glastonbury generally stand in much larger, open plots with substantial spaces between buildings. I consider this part, which includes the appeal site, derives its character from the space about individual dwellings, its topography and affinity with the openness of its countryside surroundings."

Alternatively, the Claimant submitted that the officer departed from this decision without having regard to the importance of consistency, and without giving any reasons.

61. A previous planning decision may be a material consideration in a planning decision in certain circumstances which were set out in *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P & CR 137 by Mann LJ at 145:

> "To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

62. If a previous planning decision is sufficiently closely related (or sufficiently analogous) then it will be a material consideration. See *R v Secretary of State for the Environment, ex p. Baber* [1996] JPL 1034 per Glidewell LJ at 1040; and *Pertemps*

Investments Ltd v Secretary of State for Communities and Local Government [2015] EWHC 2308 (Admin) per Lindblom J. at [62].

63. In my judgment, the officer was not required to take this earlier decision into account when drafting her report because it was not sufficiently closely related or analogous. It related to development at a different property. The proposed development was different. It was an application for permission to build "extensions, elevational re-model and a replacement garage", not to construct a new dwelling.

64. But in any event, the officer in this case also found that the Site was in an area of open countryside with a rural character and appearance, protected as an AONB in both local and national planning policy. Therefore there was nothing to indicate that the officer disagreed with the Inspector's finding on this point.

65. For these reasons, ground 3 does not succeed.

Relief

66. The only error of law which I have identified is the failure to give adequate reasons in respect of the Agreement, at the time when the decision to grant planning permission was made. The Council has since provided full reasons. In the course of the litigation, the Council supplied reasons to the Claimant, in the witness statement of Mr Martin, made on 31 March 2017. It is permissible to have regard to his evidence for the purpose of considering relief. He explained at paragraph 6 that the Agreement "was taken into account as a material consideration but afforded little weight due to its age and the fact that the restrictions it imposes have been superseded by more up to date planning policy". When the Agreement was made in 1978, its purpose was to safeguard the Chilterns AONB, but this aim was now achieved by means of national and local policies which were not in existence in 1978. The terms of the Agreement were inconsistent with the NPPF.

67. Mr Martin's evidence was supported and amplified by the officer's report in March 2017 recommending that the Agreement should be discharged because it was obsolete and no longer served a useful planning purpose (see paragraph 22 of my judgment above).

68. Thus, the Claimant and other objectors were given adequate reasons about 5 months after the decision, which enabled them to assess whether or not to continue with their challenge to the lawfulness of the Council's decision to grant planning permission, despite the restrictions in the Agreement. I have found that the decision reached, for the reasons given, was lawful, and the claim had no merit. If the decision was quashed, and re-taken, it is clear on the evidence that the outcome would be the same. Obviously, if the application had to be re-considered, there would be further delay and cost for the Council and the Interested Party who seeks planning permission.

69. In my judgment, this is the type of procedural error in an otherwise unmeritorious claim which section 31(2A) Senior Courts Act 1981 was enacted to address. The relevant provisions are as follows:

> "31.

> …..
>
> (2A) The High Court—
>
> > (a) must refuse to grant relief on an application for judicial review, and
> >
> > (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

70. Applying the terms of that section, I consider it is highly likely that the outcome (the grant of planning permission) would not have been substantially different even if the conduct complained of (the failure to give adequate reasons for the decision) had not occurred, and therefore I must refuse relief. There are no reasons of exceptional public interest to the contrary. I base these conclusions upon Mr Martin's evidence, which was supported by the views of the Council expressed in the officer report recommending discharge. It was not open to the Claimant to argue that, if adequate reasons for the decision had been supplied, the Parish Council would have asked to have the application decided by the Planning Committee, since by then the decision would already have been made under delegated authority. In any event, Mr Martin, in his evidence, considered that, even if the application had been decided by the Planning Committee, it was highly likely the outcome would have been the same, for the reasons he gave.

71. I do not accept the Claimant's submission that I am required to quash the planning permission on the basis of the judgment in *CPRE Kent* as I consider the two cases are distinguishable on the facts, and *CPRE Kent* is not authority for the proposition that a quashing order must follow wherever reasons are found to be inadequate. Moreover, *CPRE Kent* did not address section 31(2A) Senior Courts Act 1981.

72. In *CPRE Kent*, the Supreme Court quashed the grant of planning permission because of the Planning Committee's failure at any stage over the previous three years to attempt to make good an admitted breach of the duty to give reasons under the Environmental Impact Assessment ("EIA") Regulations, by explaining how they reconciled their conclusions with the contrary advice given by their officers. The points in issue were fundamental, and raised a substantial doubt whether the Committee had understood the key issues or reached a rational conclusion on relevant grounds. In my view, these factors did not exist in this case.

73. Lord Carnwath rejected the submission that relief should be limited to a mandatory order for the giving of reasons, disagreeing with the reasoning of the Court of Appeal in *R (Richardson) v North Yorkshire County Council* [2004] 1 WLR 1920, because "the provision of reasons is an intrinsic part of the procedure" under the EIA Regulations (at [48]). However, he did not disagree with the decision not to quash the planning permission on the particular facts of *Richardson* which were clearly distinguishable from *CPRE Kent*, since in *Richardson*, the committee had granted permission in accordance with the recommendation in the officer's report and could be taken to have adopted its reasoning. The facts of this case are closer to *Richardson* than *CPRE Kent*.

74. Moreover, Lord Carnwath cited an earlier judgment of the Supreme Court confirming that the Court retained a discretion to refuse relief, saying, at [49]:

> "….the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by the European legislation, and there has been no substantial prejudice" per Lord Carnwath in *R (Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 WLR 3710, para 54, following *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 139, 155."

75. Finally, the Supreme Court did not address section 31(2A) Senior Courts Act 1981 as presumably it was not relied upon on the particular facts of that case. This statutory requirement operates independently of the court's general discretion to refuse relief in judicial review claims. It also makes it mandatory to refuse relief where the statutory conditions are met.

76. The Claimant also relied upon *R (Ermakov) v Westminister CC* [1995] EWCA Civ 42, in which the Court of Appeal held that (1) the court should only allow the stated reasons to be supplemented by evidence which elucidates them, not which alters or contradicts them; and (2) where reasons were deficient, a claimant was prima facie entitled to have the decision quashed as unlawful, and the discretion to refuse relief should only be exercised in exceptional cases. The Claimant submitted that, since I had applied the first principle in *Ermakov* to exclude Mr Martin's evidence in deciding liability, I ought also to apply the second principle so as to quash the decision, absent exceptional circumstances. Assuming in the Claimant's favour (without any submissions from the Defendant) that the second principle in *Ermakov* continues to reflect the law, I consider that the circumstances of this case (as set out in Mr Martin's witness statement, the officer's report on the discharge of the Agreement and paragraphs 66-68 and 71 above) are exceptional. But in any event, the statutory bar on the grant of relief in 31(2A) Senior Courts Act 1981 post-dates and overrides the second principle established in *Ermakov*.

JR2

77. The claim in JR2 was dependant upon the quashing of the planning permission, and therefore permission to apply for judicial review in JR2 is refused.

78. The Claimant objected to the Defendant's application for the costs of JR2, in the sum of £4,414.71, comprising £1,425.67 in respect of the Acknowledgment of Service, and £2,989.04 in respect of the costs incurred in preparation for the hearing. In my view, the Defendant was entitled to its costs. The general rule that an unsuccessful claimant at a renewed permission application is not liable to pay the defendant's costs of attending the hearing is subject to a number of exceptions. One such exception is where a claimant is unsuccessful at a rolled-up hearing. The court will usually order the claimant to pay the defendant's costs because the defendant had no choice but to attend, and to incur the costs of preparing for a substantive hearing: see the notes in the White Book at CPR 54.12.5. Here the Claimant requested a rolled-up hearing, and the Defendant had to prepare for the substantive hearing. The amount of the costs (which were capped) was reasonable, and there was no unfair duplication between the two claims.