IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 802 (Admin)

No. CO/4420/2018

Royal Courts of Justice
Tuesday, 26 February 2019

Before:

MR JUSTICE WAKSMAN

B E T W E E N:

THE QUEEN
ON THE APPLICATION OF
PALM DEVELOPMENTS LIMITED — Claimant

- and -

MEDWAY COUNCIL — Defendant

- and -

ATTWOOD — Interested Parties

MR R. TURNEY (instructed by Temple Bright LLP) appeared on behalf of the Claimant.

MR J. NEIL (instructed by Medway Council) appeared on behalf of the Defendant.

MR P. BROWN QC (instructed by Whitehead Monckton LLP) appeared on behalf of the Interested Parties.

J U D G M E N T

MR JUSTICE WAKSMAN:

1 This is a renewed application for permission to bring judicial review proceedings, permission having been refused on paper by Holgate J on 25 January this year. It is an application which is made in respect of a decision of the defendant local planning authority, Medway Council, to grant planning permission to the interested party, who are members of the Attwood family. That was dated 26 September 2018. The Claimant in this application for judicial review is Palm Developments Limited, an adjoining landowner to the development site.

2 That decision followed a council resolution at a meeting in the usual way to grant the permission on 6 June and that had followed an officer's report. The planning application had been made on 15 February 2018. Permission was granted for the building of up to 450 residential units at Gibraltar Farm. The development would encroach to some extent - and I will deal with this in more detail later - on a small section of ancient woodland which would form part of the development site. In order to obtain access to the development to be built, the Attwoods would have to buy from the Council a parcel of land at Horwood which it owned and which it is not and has not been prepared to sell.

3 The original application for materially the same development had been made in 2015. The Council refused permission then on 27 January 2016. The Attwoods appealed and the Secretary of State called in the appeal. The inspector reported on 5 December recommending the appeal be allowed and the Secretary of State decided to follow that recommendation and allowed the appeal on 6 March 2017. One of the conditions was that the application for the approval of reserved matters be made by no later than 18 months from the date of the decision, i.e by 6 September 2018.

4 At the time of the second application for planning permission, February 2018, no proposals on reserved matters had been submitted in respect of the first permission, although at that stage there was still time. It is important to read from the officer's report and from the meeting of the planning committee. Consistent with the case-law, when I read and consider what they mean, I do so not on the basis that they are not a statute, but giving an ordinary common sense and objectively fair interpretation. There are a number of relevant paragraphs in the officer's report. First of all, under the heading "Principle" he said this:

> "Having regard to the Secretary of State's decision, notwithstanding the planning permissions that Medway Council had granted for housing development in the borough since the Secretary of State's decision just over a year ago, Medway Council is not able to demonstrate a five-year housing land supply. As such, no greater weight can be afforded to policies BNE25 and 34 of the Local Plan relevant to supply of housing land at the time of the public enquiry."

5 That, as it would appear, was a core point. The Council had in 2018, just as it had in previous years, an unfulfilled five-year need for housing supply. Then the presumption in favour of sustainable development at MPPF49 is referred to.

6 He then summarises the Secretary of State's decision, noting that the Secretary of State had decided that there was some environmental harm, but it was not critical and then referred to housing, jobs and so on. Then the next paragraph which is important:

> "That decision is still considered to be recent and relevant, based on the fact that the Council cannot demonstrate a five-year housing land supply and the application of paragraphs 49 and 7 of the NPPF. The permission is still capable of being implemented, subject to compliance with the conditions imposed by the Secretary of State and, therefore, great weight must be attached to that decision and the balance of the planning merits set out in the inspector's report and the Secretary of State's decision.

> Therefore, the Secretary of State's arguments with regard to the significant economic and social benefits of the proposal that outweigh the environmental harm and that the site is situated in a sustainable location are still relevant and, on this basis, the principle of the proposal for residential development is still considered to be acceptable."

7 That really summarises the whole host of arguments on the merits which had been put before the Secretary of State, which he considered in full. There is a question, said to be an arguable question, as to whether that paragraph was really making an important point about the fact that, regardless of the planning merits, this earlier planning permission was one which could still be implemented or not. I accept the fact that there is a reference to capability of implementation, but I do not consider at all that this is the main or even the real point of this paragraph.

8 The real point of this paragraph, which was critical in my judgment for the Council, was that as the second application was a rerun of the first and as the first had been upheld decisively on the planning merits on an appeal, that was it so far as the merits were concerned; so if the Council wished to refuse planning permission, it was going to run headlong into an assessment on a comprehensive basis of the first planning permission which came to an opposite effect.

9 I then turn to the minutes of the meeting on 6 June. There are two aspects of this which require some reference. First of all, under the heading "Discussion":

> "The head of planning outlined the planning application in detail and reminded the committee that an application for 450 dwellings at this site had been considered by the planning committee and, at that time, the committee determined it to be refused, but the applicant had appealed following a public enquiry and that had been overturned. The head of planning informed the committee that upon receipt of the appeal decision, officers had met with counsel to assess that potential of judicial reviewing the appeal decision that had been decided with no grounds on

> which it could be challenged. Second counsel supported this view. Committee was advised that current application related to means of access with details of appearance, landscape, layout and scale all be reserved for future consideration.
>
> Head of planning therefore advised the committee that in the light of the above, that is the determination on the planning merits which is referred to above, which is obviously taken from the officer's report, there were no planning grounds on which the committee could refuse this planning application. To refuse the current planning application would likely result in a further appeal and a public enquiry and, should the Council lose again, it will be required to pay significant costs."

10 That judgment and that expression of opinion by the head of planning, in my judgment, is wholly related to the substantive merits of the application. It is quite right that the paragraph goes on to say, in the meantime, the applicant could progress or reserve the matters of planning application based on the planning permission held under the earlier permission, but that, in my judgment, is an add on and it is not going to the core of the matters which were discussed above for the consideration of the planning committee.

11 While look at the planning committee minutes, the next part that is relevant is where the committee allowed two counsellors, who had submitted a letter of objection, to speak about the planning application and one of the matters that they spoke to was said at the top of p.B113 "The applicant does not have access to the land." It then says:

> "The committee discussed the planning application in detail, noting the concerns expressed by ward counsellors."

12 It is impossible on a fair reading of those minutes not to come to the conclusion that, the committee considered all of the bullet points, including the fact that the applicant does not have access to land, which of course the Council well knew, because it was not at that stage selling the land to the applicant. It then went on to say:

> "The committee was mindful of its previous decision to refuse, but the decision had been overturned at appeal by the planning inspector and the Secretary of State. While it was unsupported, it had no alternative but to approve the application, based on the fact that the principle had already been established."

13 For the sake of completeness, I should then record what happened at a cabinet meeting after the resolution to grant, but before the actual grant. This was on 7 August. It notes:

> "The cabinet confirmed the position will continue to use its best endeavours to protect the valley from any form of development. It will not facilitate or sell any land in the Capstone Valley or the head of the Capstone Valley south of Hempstead for development."

14 They said this reflected local community concerns, despite the fact that a head of planning inspection intervention of the planning committee had refused planning permission on the previous occasion.

15 The challenges are principally, although not exclusively, made on the basis that there have been material changes since the Council's resolution, but before the permission was granted which could have led to reconsideration and a different outcome. In that context, on the basis of the principles laid down by Jonathan Parker LJ in the well-known case of *Kides v South Cambridgeshire District Council*. I have read the extracts there, but all I need to do for present purposes is to look at the summary of those principles given by Lindblom J (as he then was) in *Wakil v Hammersmith* [2014] ENVLR 14 where he said at 94:

> "When a grant of planning permission is challenged on the ground that the local planning authority, having resolved to approve the development proposed, ought to reconsider that decision, the court will have to consider whether the new factor relied upon in the challenge would have been capable of affecting the outcome. What is required therefore is not merely some obvious change in circumstances but a change that might have had a material effect on the authority's deliberations had it occurred

> before the decision was made. The crucial question for the court to consider is whether the new factor might have led the authority to reach a different decision."

16 I take Mr Turney's point that, as this is an application for permission to bring judicial review, he says that he has a relatively modest hurdle to overcome, which is, is it "arguable" that the new factor might have led the authority to reach a different decision and I proceed on that basis.

17 A preliminary point that was made by Mr Turney is that it is not suggested that in relation to the changes which I am about to refer to there actually was any further consideration prior to the time of the grant of planning permission. *Kides* and *Wakil* do not say that there have to be. The question is in terms of what the different outcome might have been.

18 There are three areas of challenge here. The first is that between the resolution to grant and the decision the first planning permission had expired in September, because no reserve matters for approval were put forward. The claimant says that is a material change, because it could have had an effect on the planning committee and made it change its mind. Because the planning committee did not consider it then the decision is defective. That relies to a very large extent on an interpretation of the officer's report and the planning committee minutes, which I do not consider even arguably is correct, because it relies upon the notion that a true significant factor in the deliberations was the fact that, as at June, the first planning permission was capable of implementation. I have already, in referring to those documents, explained why I take the view that that is not the correct interpretation.

19 Rather, the core point concerned the underlying planning merits. From all the extracts which I have read, that is the thread which runs through the officer's reported and the Council's deliberations. For that short reason, in my judgment, ground one is simply unarguable.

20 I then turn to ground two. This has been concerned with the consideration of the points arising in respect of the incursion into ancient woodland. I do need to say just a little more about the background facts here. As we have seen in the course of argument, there is a very small section of the relevant woodland which would have to be crossed by an access road into the new development. It has been referred to in argument as "the axe head" and that section where the existing road runs out but where it would have to run across the woodland can clearly be seen in B14 and where the existing road runs out just before the axe head can be seen at B153. It is a very small part indeed of the woodland.

21 The Secretary of State recorded a submission made on the appeal that there would be significant environmental benefits for Horwood, which is the overall area, because it is not well managed and, as a result, suffers damage from unregulated access and fly-tipping. The proposed woodland management plan would address these issues, benefiting the ancient woodland itself and its value for recreation and biodiversity.

22 The NPPF 2012 version which governed the position as at June 2018 said this:

> "Planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including ancient woodland ... Unless the need for, and benefits of, the development in that location clearly outweigh the loss."

23 This was replaced in July in the 2018 version of NPPF with the following at 175(c):

> "Development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland ...) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists."

24 The simple point made here is that there is a shift, not in the beginning of the presumption, which is that planning permission should be refused where there is a loss of irreplaceable habitat, but the strength of the counterbalancing factors which are required and that "wholly exceptional reasons" mean that it is going to be harder to displace the starting point

presumption. It is not suggested that the nature and extent of the counterbalance has not changed against the granted of planning permission as between the original and the reformulated policy.

25 However, the argument for the defence and the interested party is that that balancing exercise was never in truth engaged in the first place, effectively, because the Secretary of State inspector really found that there was no material incursion at all or, to put it another way, when one considers what would happen with the woodland, not the other countervailing benefits of the development at large, for example the increase in the housing supply, there was not in fact any loss at all. Paragraph 30 of the inspector's report said this and this was a statement of common ground:

> "It is accepted that the small area of woodland that would be required for access contains no significant tree specimens. The proposal includes under three hectares of new woodland and additional open space that would be safeguarded. It is accepted by both parties that the loss of ancient woodland is minor and offset by mitigation in the form of new woodland and open space in line with para.118 of the framework. The parties have agreed planning permission conditions which seek to ensure the proposed housing would not encroach within a distance of 15 metres from the ancient woodland. That is the broader point. This is reflected in the illustrative master plan."

26 Then part of his conclusions states:

> "Aside from the main development area, I appreciate the small area of woodland within the site boundary would remain largely intact and be proactively managed were the appeal to be successful. The section to be removed would be limited to that essential for the access and does not contain high importance trees. Thus, in respect of the existing woodland and the proposals overall would be able to secure benefit."

27 That in some ways is the key point because, building on what was common ground, the inspector had to make a conclusion on the matter. I accept the submissions made by the defendant and the interested party that on a proper and fair analysis the inspector was not engaging in an overall balancing exercise as contemplated by paragraph 118(or now 175) by looking at other countervailing factors at all. What the inspector was doing was saying effectively there was no material loss at all and, therefore, one did not get into the question of paragraph 118 (or now 175). That was not the way that his decision ran and it would be absurd if it was not open to a planning authority or an inspector to say that, yes, there was a loss, but it is so small that it cannot be regarded as material or a loss which in fact is not a true loss, because of woodland that could replace it, rather than having to go through the whole of the balancing exercise. That is my clear view as to how one has to read the reports.

28 On that basis, the fact that the policy emphasis changed between the date of the resolution and the date of grant of planning permission is not material. It could not even arguably have led the committee to a different decision and, accordingly, that ground is not arguable either.

29 Finally, I turn to ground three, of which there are three parts. The first part was an allegation that the officer's report was misleading, because it proceeded on the basis that the overall development was deliverable when in fact it was not true, because there was not in fact, at that stage or subsequently, any right of access to the new area. That is because the Council owned the all-important plot of land and it was not prepared to sell. It is correct that the officer's report does not mention this matter. However, I do not consider that that is something which is misleading, not least because, in the extract which I have read; the Council had that point well in mind, because they referred to the point and they said that they expressly discussed it.

30 I do not accept the submission that that is not good enough and the Council might have not known what to do with such a point, absent clear advice in planning terms from the planning officer. That is wholly unrealistic, in my view, especially in the context where the planning committee would have known full well what the position was in relation to the access for the land. Since, in my judgment, the point was before the Council and they expressly referred to it, the fact that it is not specifically mentioned in the officer's report goes nowhere. Therefore, this element of ground 3 must fail as an arguable challenge.

31 Secondly, we come back to another *Kides* point. This is that there was another change in the NPPF, because there was a new para.76 in relation to dealing with housing supply matters which said this:

> "To help ensure the proposals for housing development are implemented in a timely manner, local planning authorities should consider proposing a planning condition, provided that development must begin within a timescale shorter than the relevant default period. For major development involving the provision of housing, local planning authorities should also assess why any earlier grant of planning permission for a similar development on the same site did not start."

32 Mr Turney's point, so far as that is concerned, is that that meant that there was, therefore, a requirement to go back and consider why the earlier grant of planning permission had not started and that could have caused the committee to change its mind. I do not think there is anything in that point. It seems to me that this is all about assisting the Council when considering what the position is in relation to housing development going forwards and doing it in a timeous fashion and on the basis that, if something had not happened before, then when they are going forward they could learn the lessons, as it were, from that. It is either helpful to the grant of planning permission or, and this is sufficient for present purposes, it is, at best, neutral. I do not consider that the introduction of this paragraph could have had any conceivable effect on the planning committee's deliberations.

33 Then, finally, we come to the cabinet decision, which was that they were, in my judgment, looking at this fairly, continuing their policy or their strategy of trying to prevent this development and they would not sell the land. The suggestion is that this is a material change. There is absolutely nothing in that point.

34 The Council knew perfectly well that it was not selling the land for access. That is why the reference was made back at the planning meeting to the fact that the applicant does not have access. It is ludicrous to suggest that the Council did not know that the reason why the applicant did not have access is because the Council itself had not provided the access by means of sale of the relevant land. Therefore, the fact that the council was maintaining its position, or perhaps emphasising that, in the cabinet at 7 August could not conceivably have made any difference to the outcome, even if the planning committee had looked at the cabinet minutes and saw what they said.

35 For all of those reasons and despite the attractive submissions of Mr Turney, I am quite clear that permission must be refused.

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