

Case Name: *Zins, R (On the Application Of) v East Suffolk Council* [2020] EWHC 2969 (Admin) (06 November 2020)

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Commentary: The Claimant, Barry Zins, challenged the grant of planning permission by the Defendant, East Suffolk Council, for redevelopment of the former council office complex into a residential development. The Claimant's arguments, which focused on the Council's deferral of determination of the details around affordable housing provision, were dismissed.

Following a tender process, Suffolk Coastal District Council (later amalgamated with Waveney District Council to form the Defendant) entered into a conditional contract for sale with Active Urban (Woodbridge) Limited (the Interested Party). The Interested Party applied for permission for a scheme for 100 residential units in July 2017, with a proposed condition requiring 32 affordable housing units. Following an officers' report, committee members agreed to a condition deferring further details of affordable housing provision (including unit size, location, tenure mix, and the mechanism for potential payment in lieu) until after permission was granted.

The Interested Party then withdrew their application, in order to submit a similar application with less affordable housing, relying on the concept of 'vacant building credit'. Officers found vacant building credit was not applicable and permission was refused. In July 2019 the Interested Party submitted a third application, essentially the same as the first. Members were advised by the new officers' report that the "tilted balance" in favour of development under the NPPF was engaged since the policy dealing with housing numbers and distribution in the Core Strategy (policy SP2) was out of date. Planning permission was granted in November 2019, with Condition 10 deferring details of affordable housing provision as considered above.

The Claimant alleged that the Council: (1) erred in its approach in relation to affordable housing; and (2) incorrectly applied the tilted balance in determining the planning application. The first ground was largely based on arguments that the Council should not have deferred the details of affordable housing under Condition 10, as it gave the Council too wide a discretion and relinquished control of the provision to the Interested Party.

James Strachan QC (sitting as a Deputy Judge of the High Court) rejected these arguments. There was nothing unlawful about deferring details of affordable housing under Condition 10 – to serve such a purpose was an "intrinsic feature of conditions". This did not relinquish any control to the Interested Party, as the Council could simply refuse to accept the Interested Party's application to discharge the condition if they were not satisfied. In terms of policy compliance, it was first affirmed that supporting text does not form part of policy itself, and

that emerging plan policy does not fall into the analysis of policy compliance. It was held that, regardless, the permission was policy compliant, not only because the mix of affordable housing was yet to be determined, but also because the tenure mixes set out represented a target for the area and not a requirement on every scheme. Furthermore, even if the Council were to go on to approve a scheme that was not policy-compliant, this would not necessarily be unlawful – LPAs are entitled to decide that material considerations override the presumption of compliance with the development plan. It was further held that the members were not misled and were well informed of all material considerations, with the Judge pointing to the fact that three applications for the development had been considered, involving numerous reports, meetings and objections.

On the second ground, the Claimant relied on the fact that, after the committee found that policy SP2 was out of date (but before the Council's decision), an unrelated Inspector decision held that the policy was in fact not out of date. The Claimant argued that, consequently, the matter needed to be referred back to committee. The Court dismissed this argument, holding that even if SP2 should have been considered not out of date, this would have only reinforced the application of the first limb of para 11 of the NPPF, i.e. the presumption in favour of sustainable development means approving development proposals that accord with the up to date development plan. The Court was satisfied that it was highly likely that the outcome would be the same.

The case affirms the ability of LPAs to deal with details of affordable housing provision under condition, and their ability to ultimately reach decisions contrary to policy, provided all material considerations are considered and justify the decision.

Case summary prepared by Jed Holloway