Case Name: *Gill, R (On the Application Of) v London Borough of Brent* [2021] EWHC 67 (Admin) (18 January 2021)

Full case: Click Here

Commentary:
The case was a judicial review of the grant of outline planning permission by the London Borough of Brent (the "Defendant") for the redevelopment of a library for residential flats in Wembley.

The claimant, a local resident, contended that the officers' report to the planning committee significantly misled the members on three grounds, as follows: firstly, it wrongly advised them that the proposed development complied with Policy DMP19 of the adopted Development Management Policies Development Plan Document in terms of amenity space (Ground 1); secondly, it failed to assess the amenity space available for each flat in a manner consistent with the Defendant's Design Guide Supplementary Planning Document ("SPD") without giving an explanation for taking a different approach (Ground 2); and, finally, it wrongly advised them that the expectation under Policy DMP19 for private amenity space for family housing above ground floor level was 20 sqm, rather than 50 sqm, and failed to apply Policy DMP19 consistently in this respect with other planning decisions (Ground 3).

Of note is that the decision to grant planning permission followed a redetermination of the planning application by the Defendant; the Defendant had previously consented to the quashing of its earlier grant of planning permission (following a claim for judicial review by the same claimant) on the basis that the previous officers' report had taken an erroneous approach by misapplying policy DMP19.

The claim was dismissed on all three grounds. Mr James Strachan QC (sitting as a Deputy Judge of the High Court) set out the legal and policy framework, prior to assessing each of the three grounds in turn. He noted that the relevant legal principles which the court will consider when criticism is made of a planning officer's report to committee were not in dispute, being those summarised by Lindblom LJ in Mansell v Tonbridge & Malling BC [2019] PTSR 1452.

In essence, the question for the court is whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing on their decision, and the error has gone uncorrected before the decision was made. Further, "it is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice". The judge added that, when determining the conformity of a proposed development with a local plan, the correct focus is on the plan's detailed policies; the supporting text is relevant to the interpretation of a policy but does not have the force of policy and cannot trump the policy. He also acknowledged that relevant policies of a development plan, read together, may sometimes pull in different directions and, where this is the case, it does not

necessarily mean that a particular policy will have primacy over the others. In the absence of any direction in the plan as to the primacy of certain policies, it is a matter for the decision-maker to decide which policies should be given greater weight and to establish not whether a proposal complies with each and every policy, but rather whether the proposal is in accordance with the development plan as a whole.

The judge then applied these principles to the facts of the case, taking each ground in turn. As regards Ground One, the judge found that the officers' report did, in fact, identify the officers' view that the shortfall in amenity space rendered the proposal non-compliant with Policy DMP19, albeit to a limited degree, but this limited conflict was considered to be outweighed by the overall benefits of the proposed development. As such, read together and as a whole, the report did advise members that there was a conflict with the policy, notwithstanding an inaccuracy stated in one paragraph.

As regards Ground Two, the judge found that this involved attaching undue status to the SPD (which was not part of the adopted development plan and comprised planning guidance) and the way it is expressed, particularly where no objector had placed reliance on this point at any earlier stage. The report identified the SPD as a material consideration and it was reasonable to assume it was taken into account; there is no legal obligation for the report to provide detailed advice on every material consideration. The SPD principle prescribed that new development should provide "good levels of private outdoor space" and the supporting text referred to the normal expectations as the amount of such space, included within Policy DMP19. By extension of the principle concerning the need to distinguish between policy and explanatory text, this planning guidance could neither be treated as part of Policy DMP19 nor impose additional development plan policy criteria. The judge concluded that he was not satisfied that members had been materially misled simply because the report failed to calculate the amenity space provision as against the criteria imported from Policy DMP19 in the supporting text to the SPD.

Finally, in relation to Ground 3, this turned on the correct interpretation of the provision in Policy DMP19 that the normal expectation as to private amenity space for new dwellings would be 20 sqm per flat and 50 sqm for family housing (including ground floor flats). The Defendant argued that the bracketed wording was clearly intended to exclude flats above ground floor from the normal expectation whereas the Claimant submitted that this makes clear that the expectation of 50 sqm of private amenity space will apply to all family housing, including ground floor flats. The judge accepted the Claimant's interpretation of the policy; however, he found that the report acknowledged the alternative interpretation and alerted members to the consequences of it. He did not accept that the judgment made by officers would have been any different based on the greater shortfall in amenity space which arose from the correct, alternative, interpretation. Officers took the view that the conflict with Policy DMP19 due to the shortfall in amenity space did not result in the proposal being in breach of the development plan as a whole and this would have been the case on either interpretation.

This case is a useful reminder for Councils and practitioners alike of the approach taken by the courts to challenges of decisions on the basis of officers' reports to committee.

Case summary prepared by Victoria McKeegan