

Case Name: *Hardcastle, R (On the Application Of) v BDW Trading Ltd (t/a David Wilson Homes South Midlands)* [2022] EWHC 2905 (Admin) (16 November 2022)

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Commentary: This was a challenge to the award of outline planning permission for up to 170 dwellings by Buckinghamshire Council.

The planning application was heard at committee on 19 November 2020 and was recommended for approval subject to completion of a s.106 agreement, imposition of conditions as considered appropriate and the securing of a district licence to address protected species.

The November 2020 committee meeting had taken place in the wake of the Vale of Aylesbury local plan examination – in the draft version of the plan, the site was allocated for 170 homes but the draft was subject to a further hearing the following spring. Officers delayed determining the application under delegated powers until the site's formal allocation in the local plan. Following the adoption of the VALP in September 2021 and the inspector's report allocating the site for 170 homes, the Council decided that the planning application could be determined under delegated powers without a further referral back to committee. Officers approved the application in March 2022.

In approving the application, the officer's report noted that the applicant had submitted a revised BNG assessment in February 2022, however it concluded that this was not considered to be significant and would not require the application to be returned to committee for consideration by Members since it would not represent a material change to the original conclusions reached on this matter.

The Claimant challenged the award of planning permission on six grounds.

Ground 1: Failure to return to committee

The Claimant argued that the Council had breached its statutory duty in s.70(2) TCPA 1990 which provides that, in dealing with an application for planning permission, the planning authority shall have regard, inter alia, to (a) the provisions of the development plan, so far as material to the application and (c) any other material consideration. The Claimant argued that the reduction of developable area resulting from the developer's new BNG proposals (submitted after the November 2020 committee date) was a material consideration as it could result in a reduction in the number of dwellings that could be built on site and the relevant Local Plan policy required the site to be developed for at least 170 dwellings.

In dismissing this ground, Cranston J held that a material consideration is a consideration which the rational decision-maker would regard as "so obviously material" that it must be taken into account. The reduction in the habitat unit figure

from 11.51 percent as advised to the committee in the 2020 report, to 10.21 percent at the time of the decision to grant planning permission, was not one that a rational decision-maker would regard as so obviously material that the committee might have reached a different conclusion on the grant of permission if they had known.

Ground 2: Alleged unlawful consideration of New BNG

This ground overlapped with Ground 1 and rested on the basis that the 2022 officer's report did not consider the extent of the reduction in the developable area proposed; whether dwellings would be lost as a result; and whether the development might fall below the "at least 170" policy requirement in the local plan. In dismissing this ground, the court held that the question was whether the inquiry made by a planning authority was so inadequate that no reasonable planning authority could suppose it had sufficient material available to grant planning permission. That test was not satisfied in this case - after the revision of the BNG in 2022 the Council's ecologist was satisfied that the 10 percent BNG could still be achieved, but the exact layout and location of habitat and biodiversity sites would be subject to the detailed planning stage.

Ground 3: Breach of a legitimate expectation

The Claimant contended that the Council had, through its express statements and past practice, made a commitment to local residents that the developer's planning application would be returned to the committee for reconsideration and the council should abide by that. An email had been sent by the Council's director for legal and democratic services to a representative of a local interest group that stated that, in his view, some matters needed to be reconsidered. A letter had also been sent to this individual in February 2021 confirming that the application would go back to committee.

The court held that in order to amount to a legitimate expectation, the statement at hand must be an unambiguous undertaking. The email was sufficiently qualified so as not to mount to an unambiguous undertaking. However, the letter from the council's director for legal and democratic services of February 2021 referred expressly to the decision to take the application back to committee, the court found this to be a clear and unambiguous statement that the matter will be remitted to the committee.

Where a legitimate expectation is frustrated, Cranston J noted that it is for the authority to identify any overriding interest on which it relies to justify this, and it is then a matter for the court to weigh the requirements of fairness against that interest, asking whether that frustration was objectively justified as a proportionate measure in the circumstances. In dismissing this ground of claim, the court held that officers' decision not remitting the matter to the committee was a proportionate response to a legitimate aim pursued in the public interest. The intention to refer the application back to the committee expressed in the letter was in the context of the Council's expectation that

the position as regards the allocation of the site in the draft Local Plan could change. The allocation was however adopted without amendment. This, coupled with the court's earlier findings that no material considerations had arisen in the eighteen months since the committee's decision in November 2020, meant there was no good reason for remission to occur.

Moreover, there was no unfairness to the claimant and to others as they have not missed an opportunity to make representations. The 2020 officer's report has in its appendix many pages of representations. Objectors to the application, including the claimant, made oral representations at the November 2020 committee. Representations had also been made in relation to the Local Plan allocation. Given that that no new material considerations had arisen, the court held that it was difficult to see how further representations could have made a difference.

Ground 4: Delegated authority exceeded

The Claimant alleged that the decision of the officers to grant planning permission in 2022 exceeded their delegation as they had reassessed the proposal's planning merits - including compliance with the new statutory development plan following the adoption of the Local Plan and the 2021 NPPF. In dismissing this ground, the court held that an objective and realistic approach to understanding the planning committee's delegation was that when the officers were later considering whether they should grant permission, they were entitled to assess whether circumstances had changed in such a way as to require that the application be referred back to the committee. That was the context for their considerations and the authority to do so was implicit in the 2020 resolution. The officers could not therefore be said to have reassessed the planning merits and to have acted ultra vires.

Ground 5: EIA Screening

The Claimant advanced two broad errors in relation to the November 2015 EIA screening opinion. The first alleged error was that there were fundamental errors in the opinion in breach of the 2011 regulations – the court disagreed and did not find any errors of law. The second alleged error was that there was an unlawful failure to review the screening decision when circumstances had changed, and new information emerged. The court was not persuaded that the change in the size of the proposal would make a difference to the outcome of the screening opinion and accordingly dismissed this ground.

Ground 6: Misinterpretation of / misdirection on NPPF re BMV

The Claimant contended that the 2020 officer's report, confused paragraphs 170(b) and 171 of the NPPF and had consequently misinterpreted and misrepresented the NPPF

policy and materially misled the committee. Members should have been advised that NPPF policy on BMV decisions should contribute to and enhance the natural and local environment by recognising its economic and other benefits. Instead, they were advised that the loss of BMV land was not a weighty material consideration in terms of NPPF policy as the development was less than 20 hectares and therefore not significant development.

In considering these submissions, the court noted that officers' reports must be read not in an unduly critical way, but fairly and as a whole; and the question for the court is whether the officer has failed to guide the members sufficiently, or has significantly misled them on a material matter. In dismissing this ground, it was held that although members were not told the full story about the guidance proffered in the NPPF, the inaccuracy was not as to a relevant fact (or facts), or as to a statutory requirement. Further, while the loss of agricultural land was not a peripheral issue, the reality was that it was overshadowed by other issues such as housing supply and biodiversity. The officer's report could not therefore be said to have contained material errors, failed to guide the members sufficiently, or significantly mislead them on a matter material to their decision.

Case summary prepared by Emma McDonald