Case Name: *Swire, R (On the Application Of) v Canterbury City Council* [2022] EWHC 390 (Admin) (25 February 2022)

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Commentary:
This was a judgment dismissing two claims for judicial review. Canterbury City Council (the "Defendant") had granted outline planning permission for up to 400 homes, commercial and community floorspace, highways infrastructure and associated works on a site to the west of Canterbury. A local resident (the "Claimant") brought these claims following two previous unsuccessful attempts to challenge decisions made in relation to this site. On this occasion, the first claim was founded on the premise that the approval of a masterplan (pursuant to a condition) was unlawful because it strayed beyond the details approved in a parameter plan at the outline permission stage. The second claim challenged a decision under Section 96A of the Town and Country Planning Act 1990 to vary conditions of the outline permission. Both of the claims were brought on multiple grounds.

Claim 1
The first ground turned on the interpretation of the outline permission, with the Claimant contending that the precise location of a road within the development site had been fixed on the drawings approved at the outline stage and that a later plan showing a variation to the indicative route should not have been approved. Holgate J rejected this, noting that a condition requiring the submission of a more detailed plan according with a plan approved at the outline stage does not require "rigid adherence" to the earlier plan.

The second ground concerned the approval of the masterplan in the context of the EIA Regulations and the Habitats Regulations. It was submitted that the approval of the masterplan was unlawful firstly because the Defendant did not have sufficient environmental information before it, which Holgate J rejected as an "excessively legalistic argument" relying on a misconstruction of the officer's report. It was secondly argued that the decision was unlawful because a Habitats Regulations Assessment ("HRA") had not been carried out. This submission was rejected on the basis that a HRA could be carried out at the reserved matters stage: this is in contrast to EIA, which must be carried out at the earliest possible stage of considering a proposal.

The third ground was not pursued at the hearing. Ground 4 was predicated on alleged discrepancies between the masterplan and technical details for later approval. Given that the officer was satisfied with the level of detail provided on the masterplan and that this satisfaction was not itself Wednesbury unreasonable, this ground was rejected on the basis that it was not open to challenge in Court.

Claim 2

The non-material amendment ("NMA") that was the subject of this claim sought to amend the timing upon which approvals pursuant to eight conditions were required to be sought. It was proposed (and agreed to be non-material by the Defendant) that "initial earthworks" could be carried out prior to seeking those approvals. The first ground of challenge was that "initial earthworks" was not a defined term and so the conditions amended by the NMA were therefore void for uncertainty. This ground was rejected on the basis that "initial earthworks" would be set out and approved pursuant to a condition and that this would occur before details were submitted in relation to the eight conditions altered by the NMA.

The Claimant next argued that the Defendant was unable to conclude, not knowing what the "initial earthworks" would comprise, that the approval of the NMA would not prejudice the satisfaction of the amended conditions. By way of example, the Claimant attempted to demonstrate that the initial earthworks might be capable of affecting the proper consideration of SUDS details, by impacting on site levels and ground conditions. In determining that the proposed changes to the conditions were non-material, the officer had concluded that they would not prejudice the proper operation of the conditions, and this would be subject to challenge only if that planning judgment was irrational. Additionally, Holgate J noted that the Defendant retained control over the approval of the "initial earthworks" and could decide at that stage whether any of the details submitted would prevent the proper operation of the amended conditions.

Finally, the Claimant attempted to resurrect ground 4 of their claim, which had earlier been refused permission by Swift J and was again refused permission here. This ground was based on a separate component of the NMA, which altered a condition relating to the timing of the approval of design code parameters: it had previously been the position that no application for reserved matters approval for any phase could be submitted until the design code parameters for that phase had been approved, but the condition was amended to allow the submission of reserved matters (but not their approval) prior to the approval of the design code parameters. The Claimant's argument that this amendment would give rise to piecemeal development, and that the design code parameters could no longer meaningfully influence the reserved matters, was rejected. Holgate J concluded that whether or not the amendment to the condition was non-material was a matter of judgment for the Defendant and that there was no basis for arguing that it was irrational.

The Claimant has five other claims for judicial review in relation to this site outstanding, having been stayed by the court pending the outcome of these two dismissed claims. A number of the grounds for the remaining claims are understood to have been parasitic, but the Claimant has been invited to identify the standalone issues for them to be determined by the Court in due course.

Case summary prepared by Aline Hyde