Case Name: *Fiske, R (On the Application Of) v Test Valley Borough Council* [2023] EWCA Civ 1495 (15 December 2023)

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Commentary: This was an unsuccessful appeal against the first instance judgment of HHJ Jarman KC, who had dismissed the claim of a local resident ("the Appellant") relating to a Council's decision to grant planning permission for a substation.

The Council had granted planning permission in 2017 for the development of a solar park, which had included a substation ("the 2017 Permission"). There was subsequently a section 73 permission sought and granted in 2019, but this was quashed. The 2017 Permission was implemented in 2020. In 2021 a new planning permission ("the 2021 Permission") was granted for a substation and other development on a smaller area of land included within the red line of the 2017 Permission. In April 2022 a further planning permission ("the 2022 Permission") was granted under section 73 to vary conditions on the 2017 Permission. The purpose of the 2022 Permission was to overcome inconsistencies between the 2017 and 2021 Permissions. There were a number of physical incompatibilities: for example, in the plans associated with the 2021 Permission the substation was shown in an area where solar panels were shown on the plans approved by the 2017 Permission, and the solar panels on the 2021 Permission drawings were shown in an area which was anticipated to accommodate new tree planning on the 2017 Permission plans.

The 2021 Permission was the subject of these particular proceedings and the appeal was brought on three grounds. The main issue, however, was whether the incompatibilities between the 2017 Permission and the 2021 Permission, and the risk of a breach of planning control arising from these incompatibilities, was something so obviously material to the determination of the 2021 Permission that it should have been considered before the 2021 Permission was granted. HHJ Jarman KC had concluded that this was not a matter the Council had been obliged to deal with, and that the developer needed to decide how to proceed in such a way that there would not be a breach of planning control.

The Court of Appeal agreed. Giving the leading judgment, Sir Keith Lindblom SPT noted that the extent and significance of the incompatibility between the two permissions was irrelevant – the Appellant's case was that the simple existence of an incompatibility was an obviously material consideration. For a consideration to be "obviously material", it would need to be Wednesbury irrational for the Council to fail to have regard to it. In this case, the court held that it was "not incumbent" the officer to identify the inconsistencies between the two sets of plans, or to speculate as to how they might be addressed. The officer had advised the Planning Committee correctly as to the relationship between the 2017 Permission and the 2021 Permission, and the Planning Committee had duly assessed the planning merits of the proposal.

In helpful commentary the SPT noted that it is not unusual for development to have changes made in the course of design and construction, and that the expectation is that when that happens the developer will make changes through the planning process. He added that "the general presumption should be that the planning system will function lawfully, not that it will fail to do so" and so he dismissed the argument that the Council was obliged to have regard to the significant risk of a breach of planning control arising from the incompatibilities (noting obiter that there was nothing in these particular facts to suggest that there was indeed a significant risk).

This may not be the end of the Fiske-related case law arising from the same site. The 2022 Permission was quashed in September 2023, and the Council has sought permission to appeal against that order.

For further discussion see Simonicity.

Case summary prepared by Aline Hyde