

Case Name: *Secretary of State for Levelling Up, Housing and Communities v Smith & Anor* [2023] EWCA Civ 514 (16 May 2023)

Full case: [Click Here](#)

Commentary: This Court of Appeal case considered whether an appeal planning officer offering a professional judgment to a planning inspector on a planning appeal could make the procedure for determining the appeal unfair.

The Secretary of State for Levelling Up, Housing and Communities successfully appealed the decision by Mr Justice Kerr in the High Court to quash the Inspector's decision.

Background

Mr Smith (the Respondent) applied for consent from the local planning authority to erect an illuminated advertisement on Shoreditch High Street. The application was refused by the local planning authority in 2021 and Mr Smith appealed the decision to the Secretary of State pursuant to s.78 of the Town and County Planning Act 1990. An inspector was appointed to determine the appeal and the procedure for the appeal was via written representations. The Inspector appointed an appeal planning officer to assist him in determining the appeal.

In the current case, the appeal planning officer ("the APO") appointed undertook a site visit, both prior to and following which, the APO discussed and reviewed the documents and the overall appeal, including the site visit. The APO then produced a reasoned written recommendation as to her views on the appeal and she concluded, in her opinion, that the appeal should be dismissed due to harm to the visual amenity of the area. The Inspector, having regard to all the evidence in front of him and the recommendation provided by the APO, concluded that the appeal should be dismissed.

Grounds of challenge

Mr Smith challenged the Inspector's decision on the grounds that the procedure used to determine the appeal was unfair. The reasoning for this was, Mr Smith contended, that the APO's role is restricted to one which only allows them to assist with reporting, document handling and carrying out site visits. The APO in this instance, however, went further in providing a professional judgement on the appeal itself, which went beyond the confines of their role. This argument was successful in the High Court and Mr Justice Kerr found for Mr Smith. Mr Justice Kerr held that, although the APO was "qualified" in the sense that she possessed an undergraduate degree and received training, she was "seriously underqualified" for the purposes of exercising the evaluative professional judgement required to determine a matter such as visual amenity. Further, he held that providing a reasoned recommendation to the Inspector amounted to a "powerful steer".

In the Court of Appeal, the Court overturned the decision of Mr Justice Kerr and found for the Secretary of State. Lord Justice Lewis noted the following key points as to why the procedure was not unfair:

1. It is for the decision-maker to decide on the procedure to be followed provided that the procedure is fair and that it provides decision-maker the necessary material to make a decision ([18]);
2. There is no evidential basis to conclude that the APO was “seriously underqualified” to exercise evaluative professional planning judgement. Moreover, it is not for the Court, exercising supervisory functions by way of judicial and statutory review, to determine the appropriate level of qualifications for appeal planning officers ([20]);
3. Notwithstanding that the APO gave her reasoned recommendations, the decision-making power rested with the Inspector and it was open to the Inspector to agree or disagree with the Officer’s recommendation – the ultimate decision was the Inspector’s ([19-20]);

In an appeal process which is conducted via written representations, procedural fairness does not require the APO to provide their recommendations to the parties for comment, prior to the Inspector taking a decision – she was part of the “internal machinery within the planning inspectorate” to enable the Inspector’s decision ([22]).

Case summary prepared by Chatura Saravanan