Case Name: *Whitley Parish Council, R (On the Application Of) v North Yorkshire County Council & Anor* [2023] EWCA Civ 92 (03 February 2023)

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Commentary: Whitley Parish Council ("the Appellant"), challenged the grant of planning permission by North Yorkshire County Council ("the Respondent") for the extraction and export of pulverised fuel ash, on a Green Belt site. This gave rise to three issues:

(1) Whether the Respondent had failed lawfully to take into account and apply the "Best Practicable Environmental Option" policy in the development plan ("the BPEO Policy") due to misleading advice from the planning officer ("Ground 1");
(2) Whether the Respondent had erred in law in failing to consider "alternatives" to the proposed development ("Ground 2"); and
(3) If an error of law is demonstrated on the above two issues, under s.31(2A) of the Senior Courts Act 1981, should relief be refused.

The Court ruled that the appeal failed on both Grounds 1 and 2, therefore the third issue above was not materially considered.

Ground 1

The Appellant submitted that the planning officer in her report had misled the Respondent's planning committee ("the Committee") in advising that no weight can be given to the BPEO Policy. This advice was based on the reasoning that although the BPEO Policy was previously reflected in the National Planning Policy for Waste (2006), it had subsequently been removed from the National Planning Policy for Waste (2014). The Appellant argued that the inconsistency of a development plan policy with subsequent national planning policy does not in itself, as a matter of law, justify the view that no weight can be given to said policy. Therefore, it was submitted that the way the advice was formulated excluded and/or limited the freedom of the Committee to exercise its own planning judgement in deciding the appropriate degree of weight to be attached to a policy. The Court rejected this submission.

The Court observed that although the Committee is under a statutory obligation to give priority to a development plan, that priority may be outweighed by national planning policy. Some provisions of a local development plan may become outdated as national policies change (see [31]). Therefore, the Court held that the planning officer was entitled to conclude to give no weight to the BPEO policy, exercising her planning judgement; such a conclusion can only be subject to challenge on Wednesbury basis.

The Court concluded that the planning officer did not mislead the Committee, in that it was clear from reading the report as a whole that she was providing planning advice

based on her planning judgement and was not suggesting that it was legally impermissible for the Committee to give any weight to the BPEO Policy. The Committee happened to agree with the planning officer's advice, exercising its planning judgement as decision-maker. In arriving at this conclusion, the Court considered the following matters.

First, it considered the fact that the planning officer had clearly and repeatedly reminded the Committee, in her report, of their statutory obligations to have regard to the development plan and determine an application in accordance with the plan unless material considerations indicated otherwise (see [38]).

Second, the Court held that the nature of the advice is relevant, and, in this instance, the advice specifically dealt with the "weight" to be attached to a policy, which is a matter for the decision-maker. The advice given here was on the specific question of whether a local plan policy should be considered, given the departure from it in the national policy; it was not a question that had a range of possible answers, therefore, the Committee was entitled to expect clear advice and that was what the officer gave (see [49]).

Third, the Court considered that, in the report, the use of the passive voice and phrases such as, "it is considered that" or "can be given", when attributing weight to considerations, clearly indicate that the planning officer was merely giving planning advice based on her planning judgement (see [50]).

In addition, the Court noted that the planning officer did not cite case law and the conclusions she arrived at were not formulated as guidance on a matter of law, thus indicating that she was not advising the decision-maker as to what they were or were not legally empowered to do (see [51]).

As a result, the Court concluded the report was not misleading and was merely providing rational planning advice.

Ground 2

The Appellant argued that this was an "exceptional circumstances" case which required the consideration of alternatives since the BPEO Policy required exactly that. However, the Court, having already concluded that there was nothing unlawful or irrational in the Committee giving no weight to the BPEO Policy, held that the development plan does not necessitate that alternatives must be considered. Further, the Court noted that the government policy on development in the Green Belt does not state that the "very special circumstances", necessary for the grant of planning permission for "inappropriate development" on the Green Belt, can only be justified in the absence of a suitable alternative site that was not on the Green Belt (see [56]).

Given the above, the Court held that there was no legal requirement on the Respondent to take the exceptional course to identify and consider alternative sites to that of the proposal. Further, it noted that no specific alternative sites had been referred to during the current proceedings or in the court below, and that it is not the Court's task to speculate about the possible existence of such sites. The Court also noted that the Respondent had considered the possibility of alternative proposals for the need for pulverised fuel ash and the alternative methods of carrying out the proposed operations at the chosen site (see [58]).

As a result of the above, the appeal was dismissed.

Case summary prepared by Chatura Saravanan