Case Name: *Watton v Cornwall Council* [2023] EWHC 2436 (Admin) (04 October 2023)

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Commentary:
This was a successful judicial review of the defendant council's grant of planning permission for the construction of a very large crematorium in open countryside at Poundstock near Bude, within sight of the Atlantic Coast.

Two claimants – Ms Watton and Mr Cameron – reviewed the decision and their claims were heard together. Both claimants had previously provided detailed objections, backed by expert evidence in the case of Mr Cameron.

The case turned on the content and reasoning of the officer's report to the planning committee, which recommended that planning permission be granted. The claimants alleged that the report was flawed in relation to several aspects, including the need for and viability of the development, the interpretation of relevant local plan policies, whether the development was in accordance with the development plan, whether legal requirements relating to protect bat species had been met, the effect of proposed conditions and the purported environmental benefits of the scheme.

Summarising the law on quashing planning permission on the basis of errors in an officer's report, Sir Duncan Ouseley (sitting as a High Court Judge), referred to the judgment in Mansell v Tonbridge and Malling Borough Council, including the principle that the question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision. If the decision might have been different but for the flawed advice, the court will be able to conclude that the decision was rendered unlawful by that advice.

The claimants successfully argued that the officer's report was sufficiently flawed to render the decision unlawful. More specifically, the decision was quashed on the following grounds of challenge:

Viability
The judge held that the viability of the proposed development was material in this case. Viability was considered in the report at some length, but it did not explain the potential planning risks arising from permitting unviable development (for example causing harm without delivering the supposed benefits, or creating a precedent for development at the site which would otherwise be considered unsuitable). Rather the report stated that viability was ultimately a matter of commercial interest, which was wrong and misleading. Overall, the way the report dealt with viability involved sufficiently significant omission or error as to make the decision unlawful.

Policy 5 – scale and location

Policy 5 stated that proposals for new employment land in the countryside should be of a scale appropriate to its location.

The judge found that the officer's report considered the scale of the development in relation to its purpose, not its location as required by the policy. It balanced the implied harm of the large scale against mitigating factors and scheme benefits, when what the policy required was an assessment of whether there was in fact no harm due to the scale being appropriate to the location. Overall, the report contained very significant errors of interpretation and was inadequate in analysis and advice on this key policy and principle important issue in controversy.

Travel distances and emissions benefits
The judge found that the report was seriously misleading as it identified emissions benefits arising from reduced travel by those who would use the development as the nearest crematorium, but was silent about emissions disadvantages because of other users who would divert to the development despite having nearer alternatives for other reasons.

The "finely balanced" decision on the planning balance could have been different but for this error, and as such the decision was quashed on this ground.

Policy 23 – Effects on the natural environment
Policy 23 required development to avoid adverse impacts on designated and undesignated landscapes, avoid adverse impacts on protected species and mitigate adverse impacts where they are unavoidable.

The proper interpretation of the officer's report was that it did not conclude that the development was in compliance with the landscape aspects of Policy 23. Its wording seemed to suggest there was a breach due to adverse landscape impacts, but this was not clearly expressed. As such it did not reach a conclusion on a principal issue in controversy and provided inadequate advice to members on a key policy.

Accordance with the development plan
The duty in s38(6) of the Planning and Compulsory Purchase Act 2004 (that planning determinations must be made in accordance with the development plan unless material considerations indicate otherwise) means that decision makers must consider and reach a conclusion as to whether the proposal before them does or does not accord with the development plan as a whole.

The judge held that this duty was not met as no conclusion was reached on whether Policy 23 had been complied with, and the officer's conclusion on compliance with Policy 5 was based on a serious misinterpretation of the policy. Policies 5 and 23 were key

policies on two key issues central to the question of accordance with the development plan as a whole. As such there could not have been a lawful decision on the matter.

Ecology and bats

The officer's report identified disturbance to bat species protected under retained EU and UK law. Derogation from this disturbance is permitted if there is no satisfactory alternative, the derogation is not detrimental to the maintenance of population and where there are imperative reasons of overring public interest (IROPI). The report stated that such IROPI were present.

The judge held that this process has been correctly followed and the committee's conclusion that the derogation tests had been met was not irrational and was a matter of planning judgment. However, as the report had overstated the carbon emissions benefits of the development (as noted above), the IROPI assessment was flawed and the balance was wrongly undertaken. That provided a further ground for quashing the decision.

Condition 11 (Lighting scheme)

Condition 11 required the approval by the council of an external lighting scheme prior to the installation of any lighting. The scheme was to "reflect" the recommendations of the various ecological reports. One such report advised that Lux level of no more than 0.5 was the acceptable maximum to prevent light spill on hedgerows which would adversely affect protected species. A maximum light level was not specified in the condition.

The judge found that by failing to specify a maximum level, the condition did not achieve what the officer's report said would be the case with respect to protected species. Having failed to specify a maximum level in the condition the council could not subsequently insist on it prior to approval of the lighting scheme and might lose an appeal fought on such an issue. As such the decision to grant permission was made in ignorance of the true effect of the condition, which was a further ground to quash the permission.

In respect of other contested aspects, the judge found that the officer's report was adequate, or, though flawed, the decision would not have been different if the errors had not been made. However, the above grounds of challenge having succeeded, the judge quashed the permission accordingly.

Case summary prepared by Dougal Ainsley