Case Name: *Davies, R (On the Application Of) v Vale of Glamorgan Council* [2023] EWHC 3161 (Admin) (08 December 2023)

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Commentary: This decision related to an unsuccessful judicial review challenge by Dr Tudur Davies ("the Claimant") against the decision of Vale of Glamorgan Council ("the Council") to grant planning permission for the proposed demolition of an existing school, development of 34 dwellings and associated works including the construction of a bespoke bat roost ("the Development").

Background

The planning application was originally lodged on 17 December 2018, and following concerns raised by Council, the application was amended in early 2020. Planning permission was eventually granted in December 2022. The Claimant was a nearby resident objector.

One of the issues with the application was the development needed to show it would not harm the conservation status of bat species that were present on the site. Natural Resources Wales ("NRW") were a statutory consultee on this issue and initially objected to the proposal, however, they removed their objection subject to the eventual approved plans and the recommendations in an ecology letter. NRW were made aware of the judicial review claim and did not seek to become involved in the proceeding.

Relevant to the background for Ground 1 was an iteration of the plans that showed two mitigation measures to protect the bats from artificial lighting, being 1) a 2000m high timber close boarded fencing and 2) a 2000m high facing brick wall ("Rev. D Plans"). The Rev. D plans were never provided to the Council (nor NRW) during the application process and were provided informally to the Council after the granting of planning permission. On a subsequent set of plans that were provided to the Council during the application process, there was no timber fence or brick wall shown on the plan, however, a small annotation referring to the timber fence incorrectly remained ("Rev. E Plans"). The Rev. E Plans were the basis for the final consultation response from NRW removing their objection.

Grounds and Judgment

Ground 1: The decision to grant planning permission was made on a false or inconsistent basis, namely that a 2-metre fence along the western side of the proposed car park would not be erected, whereas in fact the objection to the Scheme on the part of NRW, had been resolved precisely on the basis that the 2-metre fence would be constructed for the purpose of preventing harm to the bat species.

The Claimant argued that NRW might reasonably have assumed the fence was being proposed, given they assessed the Rev. E Plans showing the timber fence annotation but not the Rev. D Plans; meaning they could not make the easy comparison to see that the fence had not been replicated on the Rev. E Plans.

HHJ Keyser KC found this ground “completely hopeless” as:

1) The plans NRW based its final consultation response on did not show the fence, and whilst they had the annotation, this did not correlate with any feature on the plan;
2) the list of revisions on the plans explained the fence had been removed;
3) none of the other application materials (including the ecology letter) provided to NRW showed a fence; and
4) NRW never referred to a fence in its correspondence.

For these reasons, permission was refused for Ground 1.

Whilst not necessary for his decision, HHJ Keyser KC also regarded the decision of NRW not to become involved in the proceedings as “significant”.

Ground 2: There was a legal requirement for drainage approval under the Flood and Water Management Act 2010 Act (“2010 Act”), because the Scheme did not comprise "construction work in respect of which, before 7 January 2019 ... a local planning authority received a valid application for planning permission".

The Claimant argued that as the amended planning application was lodged after 7 January 2019, there was a legal requirement for drainage approval under the 2010 Act. The Claimant did not argue that the application for planning permission had been invalidly amended, but rather claimed it should have been subject to drainage approval under the requirements of the 2010 Act.

HHJ Keyser KC referred to the claim form lodged, which identified that only a decision to grant planning permission can be challenged, and to the Statement of Facts and Grounds, which sought judicial review of two decisions. Given this, it was found the fundamental problem with Ground 2 was that it did not relate to any decision. The Council had only received an application for planning permission and did not have before it an application for drainage approval, nor did it make any decision in respect of drainage approval. It was found that the most that could be said was the planning officer gave oral advice to the Planning Committee to the effect that the requirement of drainage approval did not apply to this application. Whether that was right or wrong, it did not constitute a decision of the Council. Permission was refused for Ground 2 on this basis.

Conclusion

This decision provides that 1) In relation to Ground 1, the Claimant needs to show clearly on what basis the statutory consultee was misled (this could not be shown in this case for the reasons above), especially in circumstances where they do not become involved in the proceeding and 2) In relation to Ground 2, the importance of demonstrating that there is a decision being challenged.

Case summary prepared by Jack Curnow