Case Name: *Chidswell Action Group, R (On the Application Of) v Kirklees Council [2025] EWHC 2256 (Admin)*

Full case: Link here

Facts: This decision relates to a judicial review claim brought by Chidswell Action Group (**Claimant**) against Kirklees Council's (**LPA**) decision to grant outline planning permission (**OPP**) on 23 October 2024 for residential development of up to 181 dwellings on a 7-hectare site at Heybeck Lane, Dewsbury (**Site**).

The Officer's Report recommended that approval be delegated to complete the list of conditions and the s106 requirements within three months. All matters except access were to be reserved, and the s106 was to cover 12 matters, including Biodiversity Net Gain (**BNG**) contributions and requirements.

The Claimant objected throughout the process on the basis that the LPA did not have adequate and reliable information relating to BNG and ecological impacts and that it was not appropriate to leave gaps to be filled as "Reserved Matters". Following a Council Meeting that took place on 8 December 2022, the Councillors narrowly voted in favour of the proposal. Following this, the Claimant regularly followed up with the LPA regarding the status of the application and queried the lack of information available on the LPA's planning portal, including a copy of the draft s106 agreement.

Once finalised, the s106 included Schedule 5, which set out a BNG requirement for a 10% gain in the number of Biodiversity Units and provided that development of the Site was not to begin until various updated management plans and surveys were approved by the LPA.

On 23 October 2024 the LPA granted the OPP under the delegated powers, and both the OPP and finalised s106 agreement were published by the LPA's on 24 October 2024.

Proposed Challenge: Following the grant of OPP, the parties exchanged correspondence pursuant to the pre-action protocol. To address the Claimant's concerns, the developer and the LPA entered a supplementary planning obligation (**SPO (1)**).

The Claimant then sought judicial review of the LPA's decision. Deputy High Court Judge Ms Karen Ridge granted the Claimant permission on two of four grounds:

- Third ground: that the LPA erred by taking future ecological surveys into account without sight of the relevant condition, or that ecology conditions which were imposed were ineffective; and

- Fourth Ground: that when the LPA made the decision that it took into account an inaccurate BNG assessment and/or it issued a decision notice without legally adequate provision to secure BNG.

Ridge DHCJ did not accept that SPO (1) overcame the issue proposed, given that Condition 1 of the OPP would not prohibit the developer from commencing enabling works that could have unintended ecological impacts. Following the grant of permission, the developer and the LPA entered a second supplementary planning obligation (**SPO (2)**) to clarify that developer would not commence enabling works prior to carrying out the necessary surveys in relation to the ecological conditions.

After the grant of permission, and prompted by the Court of Appeal's decision in *Greenfields (IOW) Limited v Isle of Wight Council* [2025] EWCA Civ 488, the Claimant sought leave of the Court to rely on a Fifth Ground of challenge for the failure of the LPA to publish a draft of the s106 agreement in accordance with Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (**2015 DMP Order**), which it says renders the grant of permission invalid.

Decision: At [147] of the decision in relation to the Third and Fourth Grounds, Kerr J found that, due to the effect of SPO (1) and (2), these grounds had become academic in nature, and, in isolation from the Fifth Ground, were not necessary to decide.

However, Kerr J granted the Claimant permission to rely on the Fifth Ground, noting that it was common ground between the parties that publication of a draft s106 agreement at some point was mandatory, had not been complied with. Kerr J found that the other parties were not prejudiced by the Claimant's lateness in bringing the ground [162].

Kerr J decided that the failure to publish the draft s106 meant that it was not subject to public scrutiny, which could have allowed the defects that the parties sought to rectify via SPO(1) and (2) to be dealt with earlier. Kerr J accepted that the non-publication of the draft s106 had caused real prejudice to the Claimant and other potential objectors, and further that "*there was a serious want of transparency in the period leading to the decision challenged, while the developer and the LPA were negotiating with each other and shielding the product of their negotiations from the public*" [173]. It was held that, had the draft s106 been published "it is an open question what the outcome would have been" and there was at least a strong possibility that the outcome would have been substantially different.

Given these conclusions, the LPA's decision in breach of art 40(3)(b) of the 2015 DMP Order rendered the OPP invalid. The decision was quashed, and the claimant awarded its costs pursuant to Aarhus limitations.

This decision, applying the Court of Appeal's decision of *Greenfields,* serves as a reminder of the consequences of LPA's not publishing draft s106 agreements for public review. It will be interesting to see whether this leads to objectors more regularly making representations in respect of draft s106 agreements. Developers and LPAs should keep this decision front of mind when nearing completion of s106 agreements to ensure obligations under the 2015 DMP Order are met.

Case summary prepared by Emily Clapp