

No5 Counsel Preserve Hereford Rugby Club's Planning Permission in the Court of Appeal

The Court of Appeal today dismissed an appeal by Hampton Bishop Parish Council against the decision of the High Court (Hickinbottom J; [2013] EWHC 3947 (Admin)), which upheld the decision of Herefordshire Council to grant planning permission to Hereford Rugby Club to develop new rugby grounds in open countryside outside of the city. The development includes 190 houses in order to subsidize the construction of the new rugby grounds. The decision also provided, by way of a section 106 agreement, that the Club's former grounds are to be transferred to the Council for £1.

Richard Kimblin and **Nina Pindham** appeared on behalf of the Respondent, Herefordshire Council.

Ian Dove QC and **Jack Smyth** appeared on behalf of the Interested Parties, Hereford Rugby Club and Bloor Homes Limited (who is carrying out the development).

There were two main issues before the Court of Appeal:

(1) whether the Council failed to comply with the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 to determine a planning application in accordance with the development plan unless material considerations indicate otherwise; and

(2) whether the Council acted in breach of regulation 122 of the Community Infrastructure Levy Regulations 2010 in taking into account as a material consideration a planning obligation entered into pursuant to section 106 of the Town and Country Planning Act 1990 to transfer the Rugby Club's existing grounds to the Council for the nominal sum of £1 on completion of the move to the new site.

Acknowledging it was a finely balanced decision, and in light of an officer's report recommending refusal, the Council's Planning Committee resolved to grant planning permission. The summary of reasons concluded:

"In summary, the approval of the development is a departure from Herefordshire Unitary Development Plan Policy H7. However, having regard [to] the requirements of the National Planning Policy Framework and its presumption in favour of sustainable development, compliance with other Herefordshire Unitary Development Plan policies and particularly the creation of new sports facilities meeting an identified need, the delivery of additional housing and affordable housing in the context of current shortfall in the Council's deliverable housing land, the sustainability of the development and the sustainable location of the site, the provisions of the planning obligation and the acceptable environmental, landscape and biodiversity impact of the proposals, the development is considered acceptable."

The First Issue: the Application of Section 38(6) of the 2004 Act

The Court of Appeal (Richards LJ delivering judgment, with whom Christopher Clarke LJ and the Chancellor of the High Court agreed) was satisfied that the Planning Committee approached their section 38(6) duty in accordance with the general approach set out by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447). Though it is up to the decision-maker how precisely to comply with its duty, it must act within its powers and make the determination in accordance with the development plan unless material considerations indicate otherwise. As a general rule, the decision-maker must also decide at some stage whether the proposed development does or does not accord with the development plan (although, as set out below, it is not fatal if this is not explicitly stated).

Richards LJ accordingly stated that it would have been preferable for consideration of the UDP policies and other material considerations to have been carried out separately. This can be contrasted with Hickinbottom J's approach in the High Court, which held that in practice a number of factors blur the distinction between policy guidance found within the development plan and that found outside it (i.e. the NPPF). Thus, it could be difficult if not impossible - particularly in complex planning applications - to keep considerations within the parameters of the development plan separate from material considerations found outside it.

Richards LJ did not follow Hickinbottom J's practical approach. The NPPF did not affect the approach to section 38(6): whilst it may affect the *weight* to be given to policies in the development plan, the duty to determine applications in accordance with the development plan unless material considerations indicate otherwise remains the same. Therefore it is necessary to make a distinction between development plan policies and other material considerations (including considerations that affect the weight to be given to the development plan policies). The decision must disclose the nature and extent of any departure from the development plan and, if applicable, whether the departure is justified by other material considerations. Richards LJ had regard to the minutes of the Planning Committee and concluded that in substance the decision demonstrated that the proposed development complied with all the relevant UDP policies except Policy H7 and that the departure from Policy H7 was justified by material considerations.

Richards LJ, in response to the Appellant's submissions that at some point a decision had to be made as to compliance with the development plan, stated that, based on the facts, it was clear to him that the Council *had* determined that the development was not in accordance with the development plan. This was because Policy H7 stood out as a key policy of the development plan and thus the conflict was a major departure from the development plan. He went on, however, to say that even if he was wrong in his conclusion, the only logical alternative was that the Council had concluded that the proposed development was in accordance with the development plan taken as a whole, which in itself was a perfectly lawful conclusion to have come to. Therefore, if there was an error in the formulation of the Council's summary reasons for the grant of planning permission, it was not material and the decision should not be quashed on that basis.

The Second Issue: the Transfer of the Existing Ground to the Council

The obligation to transfer the existing grounds was taken into account by the Council as a material consideration weighing in favour of the grant of planning permission. The issue was whether the Council thereby acted in breach of regulation 122 of the CIL Regulations, in particular whether it could be said to be directly related to the proposed development, and necessary to make the development acceptable in planning terms.

Richards LJ concluded that Hickinbottom J was right to find that the transfer was directly related to the development. The future use of the existing grounds was one of the land use consequences of the very decision that the Council was making. The Appellant complained that there was no provision within the section 106 agreement which obliged the Council to maintain the use of the site for sporting use following the transfer. Richards LJ held that such a restriction was not necessary: the transfer to the Council alone would help to safeguard that outcome. The transfer was thus far removed from “buying” planning permission and fit comfortably within the requirement that the planning obligation be directly related to the development. As to the argument that the transfer was not necessary to make the development acceptable in planning terms, Richards LJ held that the conclusion should be drawn that the obligation was considered necessary to make the development acceptable as it plainly did attract weight as one of the material considerations justifying a departure from Policy H7.

Richards LJ concluded that, though it would have been helpful if the officer’s reports and the members’ summary reasons had been explicit about the requirements of regulation 122, there was no evidence that the Planning Committee failed to approach their decision on a proper basis, and therefore the High Court’s decision not to quash the decision to grant planning permission was correct and the appeal was dismissed.

Monday 1st July 2014

Commentary by Nina Pindham

