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DC/20/05895

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12 February 2023

Dear Bron

Planning application DC/20/05895 - Land to the east of the Channel, Burstall, IP8 4JL in Suffolk: Committee Report Item 7A for 15 February 2023 Planning Committee meeting

At the 8 February meeting of the Babergh planning committee, at which the applicant's concurrent application for the above development was considered, a number of councillors appeared uncertain about whether to cast their vote for or against the proposal.

MSDC councillors may also feel uncertain about how to vote at the committee meeting on 15 February and might be inclined simply to follow Babergh's lead. I suggest, however, that Babergh's decision was procedurally flawed, making it vulnerable to challenge by way of judicial review, and that there is a different way forward that MDSC councillors might wish to follow.

The debate at the Babergh meeting addressed only the planning balance. It was opened by Cllr David Busby who suggested that it was a question of food or energy. He thought councillors should go for food. But in the vote they went six/five for energy.

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MSDC councillors will have been encouraged to determine the application in favour of grant by the officers' assessment of it in the Committee Report. That assessment, in line with other examples of what seems to be becoming common practice, discusses the relevant Policies only in terms of the planning balance, ascribing a variety of weights to the Policies mainly according to whether they accord with the NPPF, and not whether the application accords with the development plan.[1]

The practice, however, of going straight to the planning balance in this way and giving primacy to the NPPF is not consistent with the statutory framework within which planning applications fall to be determined.

As the Report itself says, section 38(6) of the PCPA 2004 requires that applications for planning permission be determined in accordance with the development plan unless material considerations indicate otherwise. So far, so good. But by focusing on the planning balance and the NPPF, the assessment proceeds on the basis of the balance of material considerations and leaves out what is needed for a proper performance of the prior duty imposed by section 38(6), which is to consider whether the proposal is in accordance with the development plan in the first place.

Neither the Babergh nor the MSDC Committee Report gives an account of the meaning and effect of their respective development plan as a whole and not surprisingly the debate at the Babergh committee meeting did not address the matter. Both Committee Reports identify a number of relevant Policies but the plans consist of much more than just the Policy wording.

It is well settled as a matter of legal principle that the meaning and true effect of a policy in a development plan is to be derived from the plan as a whole. Context is important. Further, its interpretation is not a matter of planning judgment, as the Committee Reports appear to assume with their references to weighting and the NPPF, but is a matter of law of which the courts are the ultimate arbiter. A planning committee may exercise planning judgment in identifying and weighing material considerations but that is an exercise which takes second place to the primary duty under section 38(6) which is to establish whether the proposed development accords with the plan, read as a whole.

I suggest with all due respect that the Babergh councillors and the Reports have gone astray, misled by a procedural practice that is not well founded, because the proposal does not accord with either the Babergh or the MSDC plan when read as a whole.

The relevant legal principles are conveniently summarised in two paragraphs of a unanimous judgment of the Court of Appeal in April 2019. Both paragraphs are set out in full (apart from citations of the relevant authorities) in the Appendix to this letter, along with a link to the full judgment so that that too can be read in context.

As will be apparent from the Appendix, it is well settled that the development plan has statutory primacy and a statutory presumption in its favour, which government policy in the

[1] See paragraphs 5.5 to 5.10 of Part Three – Assessment of Application.

NPPF does not. The first duty in deciding an application is to establish whether or not the proposal accords with the plan, read as a whole, including not only the stated policies but also their objectives and the supporting text.

It is perhaps helpful to recall that the MSDC development plan is the fruit of many years' deliberations by councillors who, as they were bound by statute to do, took account of both government policy and local conditions to establish a plan that, in their words, aims to "strike an appropriate balance between the social, environmental and economic elements of sustainability in the local context."[2]. Within the statutory scheme, the development plan embodies the result of a detailed balancing exercise by the Council and section 38(6) imposes on the Planning Committee a primary statutory duty to determine planning applications in accordance with it. Only if material considerations indicate otherwise can they depart from the plan, thereby providing a safeguard in the event that, for example, the plan is out of date.

In the present case, there is no evidence that the plan is out of date so far as renewable energy is concerned. The net zero agenda is new but the fundamentals have not changed, as the draft JLP illustrates by carrying forward similar policies for the future. The MSDC plan has focused on the challenge of climate change since at least 2008. Responding to the implications of climate change was set as a Core Strategy Objective[3] and promoting renewable energy resources was one of its Strategic Policies.[4] The Council has done all this in a way which aims to strike the appropriate balance of sustainability by tailoring the plan to the local Mid Suffolk context, including among other things:

- supporting decentralised renewable energy schemes, either as stand alone developments for homes and small businesses or integrated into the built environment;[5]
- recognising as a "key local consideration" in striking the balance of sustainability that grid-scale renewable energy schemes of the kind proposed by the applicant are unlikely to be capable of being acceptably accommodated in Mid Suffolk having regard to its environmental and landscape sensitivity;[6] and
- protecting greenfield sites by firmly resisting any development on high quality agricultural land: "Development will be refused on high quality agricultural land".[7]

When considered against the true meaning and effect of the plan, it becomes apparent that the proposal is not remotely in accordance with it. I commend to members of the Committee the succinct summary of the relevant legal principles as set out in the Appendix below for any necessary confirmation of what I have said above about them.

The final question is whether a departure from the plan is justified. That is a matter of planning judgment for the Committee as discussed above but in the absence of any

[2] Focused Review paragraph 3.6.
[3] Core Strategy Objective SO 3.
[4] Core Strategy paragraph 3.5.
[5] Policy CS 3.
[6] Focused Review paragraph 3.7.
[7] Core Strategy paragraph 1.40.

compelling reason to substitute their view of the matter for that which is embodied in the development plan, I suggest the answer is clear. The application should be refused.

I should be grateful if you would bring the contents of this letter to the attention of the members of the Planning Committee.

Yours sincerely

Tony Ballard

Bron Curtis

12 February 2023

APPENDIX

Extract from the judgment of the Court of Appeal in *Gladman Developments Ltd v Canterbury City Council* [219] EWCA Civ 669 at paragraphs 21 and 22.

To avoid overburdening the text, the lengthy lists of authorities have been omitted. They can be read in the original, which is readily available online: https://www.bailii.org/ew/cases/EWCA/Civ/2019/669.html.

21. The correct approach to determining an application for planning permission has been considered several times at the highest level, and this court has amplified the principles involved. Section 38(6) of the 2004 Act requires the determination to be made "in accordance with the [development] plan unless material considerations indicate otherwise". The development plan thus has statutory primacy, and a statutory presumption in its favour – which government policy in the NPPF does not. Under the statutory scheme, the policies of the plan operate to ensure consistency in decision-making. If the section 38(6) duty is to be performed properly, the decision-maker must identify and understand the relevant policies, and must establish whether or not the proposal accords with the plan, read as a whole. A failure to comprehend the relevant policies is liable to be fatal to the decision [authorities cited].

22. If the relevant policies of the plan have been properly understood in the making of the decision, the application of those policies is a matter for the decision-maker, whose reasonable exercise of planning judgment on the relevant considerations the court will not disturb [authority cited]. The interpretation of development plan policy, however, is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to discern from the language used in formulating the plan the sensible meaning of the policies in question, in their full context, and thus their true effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text. The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making, in the public interest [authorities cited].