Claim No: CO/1664/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT AT LEEDS

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG

Date: 26/07/2019

Start Time: 13:49 Finish Time: 14:11

Page Count: 7
Word Count: 3121
Number of Folios: 44

Before:

HIS HONOUR JUDGE KLEIN
(Sitting as a Judge of the High Court)

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The Queen on the application of:

SALFORD ESTATES (NO. 2) LIMITED	**Claimant**
- and -	
DURHAM COUNTY COUNCIL	**Defendant**
- and -	
QUORA (PETERLEE) LIMITED	**Interested Party**

- -

- -

MR. P. TUCKER QC & MR. F. HUMPHREYS
(instructed by **Praxis Law**) for the Claimant
MR. J. BARRETT (instructed by Durham County Council)
for the **Defendant**
MR. S. HOCKMAN QC (instructed by **Knights Solicitors**)
for the **Interested Party**

- -

Approved Judgment

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JUDGE KLEIN:

1. This is the judgment following the oral reconsideration of the claimant's application for permission to proceed with its judicial review claim which was begun on 24th April 2019.

2. By the claim, the claimant challenges the planning permission granted by the defendant on 14th March 2019 on the application of the interested party. At this oral reconsideration, the claimant has been represented by Paul Tucker QC and Freddie Humphreys of counsel. The defendant has been represented by John Barrett of counsel and the interested party has been represented by Stephen Hockman QC.

3. I am grateful to them for the clarity and concision of their submissions and for the assistance they have provided to me.

4. In reaching my decision on the application, I have considered all their submissions and all of the documents which I was asked to pre-read and to which I have been taken at the hearing.

5. For the purpose of this judgment, the following is a sufficient background. The claimant is the owner of the Castledene shopping centre in Peterlee town centre. By this claim it seeks to challenge the decision of the defendant local planning authority, dated 14th March 2019, to grant permission to the interested party for the redevelopment of the site of the former East Durham and Houghall Community College at Burnhope Way, Peterlee, to provide a mixed use scheme consisting of three class A1 retail units; a class A3 and class A5 restaurant with drive-through and class A3 coffee house with drive-through, and associated infrastructure; in particular, car parking.

6. The development site is situated just north-west of Peterlee town centre. The development site is therefore an edge-of-centre location, as the claimant accepts.

7. The interested party's planning application was made on 3rd October 2018. On 23rd October 2018, the claimant gave notice of its objection and indicated that it had instructed Williams Gallagher to undertake a full review of the application. In November 2018, the claimant filed a planning objection report prepared by Williams Gallagher, on the face of it for Praxis Retail Estate Management Limited, which is in effect, it is sufficient to say for present purposes, another name for the claimant.

8. In December 2018, a supplementary retail impact statement was filed by the interested party and, thereafter, the claimant maintained its objections to the application.

9. Because of the high-profile nature of the application, in February 2019 the defendant obtained its own report prepared by Nexus Planning and, in the same month, the defendant's planning officer's report was made publicly available (on 22nd February 2019). As I have indicated, planning permission was granted on 14th March 2019 and this claim was begun on 23rd April.

10. The claimant challenges the planning permission on two grounds, which I paraphrase as follows:

i) Ground 1: that the officer, in his report, wrongly adopted the interested party's approach to the role of disaggregation in the application of the sequential test set out in NPPF 86 and 87, and that the interested party's approach to the role of disaggregation was that disaggregation should never have and could not have, on its application, any role. In fact, the claimant splits this ground into two parts, but, for the purposes of this judgment, I am satisfied that it is appropriate to consider the two parts at the same time.

I am satisfied that my paraphrasing has sufficiently accurately represented the claimant's case and quite properly, in my view, Mr. Tucker, in his oral submissions today, addressed ground 1 as a whole.

ii) Ground 2: that the officer's report misled the planning committee that the identity and characteristics of the intended occupants of the proposed development was a material consideration in its decision-making.

11. When she considered and rejected the application on paper, Judge Belcher took the claimant to be advancing a third ground; namely, this point: that whether or not disaggregation has any or any significant role to play in the sequential test is a matter of general importance on which clarification would be appropriate. Mr. Tucker properly accepted that this is not a third ground of challenge. Rather, he says, it reinforces the importance of anxiously scrutinising ground 1.

12. The claimant, in its counsels' skeleton argument, which is admirably brief, effectively acknowledges that grounds 1 and 2 require a consideration of how an officer's report should properly be read.

13. The proper way to read an officer's report is not, apparently, in dispute on the present application. In any event, how properly an officer's report should be read was explained most recently, as far as I am aware, by Lindblom LJ twice in 2017.

14. In the earlier 2017 case, *R (on the application of Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43 at [22], Lindblom LJ said this: "The law that applies to planning officers' reports to committee is well-established and clear. Such reports ought not to be read with undue rigour but with reasonable benevolence and bearing in mind that they are written for councillors with local knowledge…The question for the court will always be whether on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way, for example, by failing to draw their attention to considerations material to their decision, or bringing into account considerations that are immaterial, or misinforming them of the relevant facts or providing them with a false understanding of relevant planning policy, that the court will be able to conclude that their decision is rendered unlawful by the advice they were given…Unless there is evidence to suggest otherwise, it may reasonably be assumed that if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave". Lindblom LJ made the same points in *Mansell v Tonbridge and Malling Borough Council* [2018] JPL 176.

15. Holgate J said the same in the case referred to in the claimant's statement of facts and grounds, that is, *R (on the application of Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at [90] to [95], although in that case, Holgate J made the point, referring to the Court of Appeal decision in *Oxton Farms v Selby District Council*, that councillors' local knowledge "includes 'a working knowledge of the statutory test' for determination of a planning application".

16. I remind myself of a further uncontroversial point; namely, that the court will refuse permission to proceed with a judicial review claim unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success.

17. I turn, then, to the officer's report. In it, the officer advised as follows.

18. At paragraphs 94 to 96, he said this: "The NPPF provides more up to date guidance in the planning sequential and impact tests. NPPF at paragraph 86 states that local planning authorities should apply sequential tests on planning applications for main town centre uses which are neither in an existing centre nor in accordance with an up to date plan. Main town centre uses should be located in town centres, then in edge-of-centre locations and only if suitable sites are not available or expected to become available within a reasonable period, should out-of-centre sites be considered. NPPF paragraph 87 confirms that when considering edge-of-centre and out-of-centre proposals, preference should be given to accessible sites which are well-connected to the town centre. Applicants and local planning authorities are required to demonstrate flexibility on issues such as format and scale so that opportunities to utilise suitable town centre or edge-of-centre sites are thoroughly explored".

19. At paragraphs 100 to 102, the officer said this: "Paragraph 86 of the NPPF sets out the order of preference in a planning sequential approach. The first preference is for main town centre use developments to locate in town centres, followed then by edge-of-centre locations and only if no other suitable sites are available should out-of-centre sites be considered. Paragraph 87 indicates that when considering edge-of-centre and out-of-centre proposals, preference should be given to accessible sites that are well-connected to the town centre. Applicants and local planning authorities should demonstrate flexibility on issues such as format and scale. Additional guidance on the application of the sequential approach is provided by the Ensuring the Vitality of Town Centres Planning Practice Guidance. Paragraph 10 of the PPG provides a check list for the application of the sequential test in decision-making. It indicates the following considerations. With due regard to the requirements to demonstrate flexibility, has the suitability of more central sites to accommodate the proposal been considered? Is there scope for flexibility in the format and/or scale of the proposal? It is not necessary to demonstrate that a potential town centre or edge-of-centre site can accommodate precisely the scale and form of development being proposed, but rather to consider what contribution more central sites are able to make individually to accommodate the proposal".

20. Then, at paragraphs 105 to 112, the officer said this: "Notwithstanding their stated position, the application has provided a sequential assessment which is focused on the area around Peterlee town centre on the basis of identified operator and consumer demand and the scale of the proposed development. The scope of the sequential assessment is considered to be acceptable…Sequential test - disaggregation, Praxis —" that is, I interpolate, the claimant: "— consider that the development should be further

disaggregated as there is no physical or trading reason why any of the units proposed need to be located on the same site…With regards to the issue of disaggregation, it is useful to consider relevant appeal decisions. In recommending that the Secretary of State grant planning permission for a retail development in Northamptonshire in 2014, a planning inspector found that with regards to disaggregation: 'There is no longer any requirement stated in the NPPF. Had the government intended to retain disaggregation as a requirement, it would and should have explicitly stated this in the NPPF. If it had been intended to carry on with the requirement, then all that would have been required is the addition of the word 'Disaggregation' at the end of NPPF 24.' Further clarification on this issue can be found in a subsequent appeal decision in 2015 at the site in Braintree, Essex—" that is, I interpolate, the Rushden Lakes site: "— in respect of which the inspector took the same approach. Paragraph 24 has now become paragraphs 86 and 87, and although the wording is slightly different, the general thrust of the paragraph remains unchanged and crucially continues to make no specific reference to disaggregation. This issue is also further considered in an appeal at Tollgate Village, Colchester, in 2017, where it was found that the NPPF requirement is for the sequential test to 'demonstrate flexibility', and that in some cases, particularly where proposed developments are large-phased, open-ended and have no identified operators, this may amount to disaggregation. However, it was also found that it does not follow that disaggregation is always required in order to demonstrate flexibility and that alternative sites in order to be considered as suitable, should be capable of accommodating development which is recognisably closely similar to what is proposed…As a result, it is considered that there is not any general requirement for the applicant to disaggregate the elements of the proposal in order that it can fit on alternative sites. It is considered that there is not any persuasive argument which justifies a different approach being taken in respect of the food and drink units such that they would be excluded from the sequential test or indeed the disaggregation of any part of the scheme".

21. At paragraph 119, the officer said this: "Finally, the site of the former Aldi store on Bede Way amounts to approximately 0.4 hectares, which is significantly smaller than the 2.6 hectares of the application site…[T]he former Aldi site would remain incapable of accommodating a development of a similar nature to that proposed and the site is dismissed by the applicant, a conclusion with which officers agree".

22. The claimant says this, in paragraph 22 of its statement of facts and grounds. In relation to the requirement of flexibility demanded by NPPF paragraph 87: "It is the broad type of development that needs to be considered'". That can hardly be a controversial point in light of what Ouseley J said in *Aldergate Properties Limited v Mansfield District Council* [2016] EWHC 1670 (Admin) at [35], about what is a suitable site. The Judge said: "In my judgment, 'suitable' and 'available' generally mean 'suitable' and 'available' for the broad type of development which is proposed in the application by approximate size, type and range of goods. This incorporates the requirement in NPPF 24 and excludes generally the identity and personal or corporate attitudes of an individual retailer".

23. The claimant also says this, at paragraph 26 of its statement of facts and grounds: "Accordingly, whilst it is right to say the NPPF does not mandate disaggregation nor is it prohibited…" It follows, therefore, and it was not disputed, that whether or not disaggregation had a role in the application in this case, was a matter planning judgment

which can only be impugned on public law grounds; in this case, the claimant contends, on the ground that, on a proper reading of the report, the officer closed his mind to the possibility of disaggregation in this case, and, in the report, advised the planning committee that it did not need to consider the role of disaggregation in this case, because it could have no role to play in the application in issue.

24. Adopting the proper approach to reading an officer's report I have set out above, in the light of the passages of the report in this case I have quoted in particular, I am not satisfied that it is sufficiently arguable that:

    i) the officer advised that disaggregation should never have a role to play in the sequential test; or, more significantly,

    ii) the officer closed his mind to the possibility that disaggregation might have a role to play in the sequential test in this case.

    Rather, as I read the report, the officer merely concluded that disaggregation did not, rather than could not, have a role to play in the sequential test in this case.

25. For these reasons, I do not give permission on ground 1.

26. I can deal with ground 2 briefly. I have come to the clear conclusion that this ground has no prospect of success. As I have indicated, it is necessary to read an officer's report with reasonable benevolence, conscious that its intended principal audience, the planning committee, has a working knowledge of the statutory test.

27. In this case, it is not suggested that the officer wrongly identified the intended occupants of the proposed development.

28. In any event, it is patently clear, on my reading of the report, that the officer was reporting that particular businesses were intended occupants and no more than that, and, that the association of particular units with particular businesses was largely:

    i) a shorthand for easily identifying particular units;

    ii) to give the planning committee a better background understanding of how the applicant then intended the completed development might present;

    iii) so that the planning committee could better understand the claimant's objections, which called for a consideration of the intended occupiers;

    iv) because the identity of known intended occupiers was relevant to the impact assessment, as NPPF 89 recognises when it calls for an assessment of: "the impact of the proposal on town centre vitality and viability, including consumer choice and trade", and as the claimant itself apparently recognised in its objection (see the tenth bullet point in paragraph 62 of the officer's report).

29. It is not sufficiently arguable, in my view, that it was impermissibly suggested anywhere in the report that the identity or characteristics of the intended occupants was a material matter when it was not.

30. Despite Mr. Tucker's engaging and, if I may say, very well-presented submissions, I have concluded that there are insufficient grounds to give the claimant permission in this case.

This judgment has been approved by the Judge.

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