CO/4499/03

Neutral Citation Number: [2003] EWHC 2977 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 27th November 2003

B E F O R E:

MR JUSTICE SULLIVAN

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THE QUEEN ON THE APPLICATION OF SAUNDERS

Claimant

-v-

TENDRING DISTRICT COUNCIL

Defendant

and

BARRETT HOMES LIMITED

Interested Party

- - - - - - -

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

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MR P BROWN and MISS D TRIPLEY appeared on behalf of the Claimant
MR R TAYLOR (instructed by Tendring District Council, Essex CO16 9AJ) appeared on behalf of the Defendant
MR T STRAKER QC and MR R WHITE appeared on behalf of the Interested Party

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J U D G M E N T
(As approved by the Court)

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1. MR JUSTICE SULLIVAN:

Introduction

2. This is an application for judicial review of two decisions of the Tendring District Council ("the defendant") dated 10th June 2003 to grant (a) an approval of details pursuant to an outline planning permission dated 15th August 2002, for 77 dwellings with associated parking, landscaping and open space at the Brickfield site, Una Road, Parkeston ("site A"); and (b) a full planning permission for the creation of 20 parking spaces, sewage pumping station and open space on adjoining land at Una Road ("site B").

3. Site A is 1.7 hectares in extent and site B, which is to the south-east of site A and rounds off its southern boundary, is 0.2 hectares in extent. The approval of details and the planning permission are linked: the pumping station will serve the 77 dwellings proposed in the approval of details, the open space will be available for use by the occupiers of the proposed dwellings, as well as by existing residents in the locality, and the 2002 outline planning permission contained a condition requiring the provision of 20 car parking spaces for public use. For convenience I will refer to sites A and B collectively as "the site", save where it is necessary to distinguish between them.

4. In order to understand the planning history of the site it is necessary to explain its geographical location. The site is on the western side of Parkeston at the edge of the residential area that lies to the west of Station Road. Access to the site from Station Road is obtained via two residential culs-de-sac, Una Road and Edward Street, which leads off Una Road.

5. To the north-north-west of the site is a large refinery complex operated by a Carless Solvents Ltd ("Carless") where there are processes and bulk storage installations. The Carless site contains various flammable liquids and gases and is a "notifiable installation". The site is within the consultation distance from the installation.

Planning history

6. By letter dated 15th December 1988 the Health and Safety Executive ("HSE") responded to a consultation in respect of an application for planning permission for residential development on site A:

> "HSE has concluded the risk would be sufficiently low that it does not wish to advise against the grant of planning permission on grounds of safety."

7. In due course the defendant refused planning permission on grounds other than safety and an appeal was made to the Secretary of State for the Environment. In a decision letter dated 30th September 1993 an inspector granted outline planning permission for residential development on site A. In paragraph 2 of his decision letter the inspector said:

> "There are no illustrative plans although you envisage a traditional development of 50 dwellings comprising a mixture of houses and bungalows as well as an amenity open space. I have considered the appeal on this basis."

8. Safety was not one of the main issues identified by the inspector, although in paragraph 14 he said:

> "I have taken into account all other matters raised at the hearing and in the representations including the proximity of the Carless Solvent works to the west.

> In this regard I note that the Health and Safety Executive does not advise against the development and I heard nothing to cause me to depart from that view."

9. The outline planning permission granted by the inspector did not contain any limit upon the number of dwellings that might be constructed on site A. In this sense, although it was subject to a number of conditions, it was a bare outline permission.

10. The 1993 outline planning permission was renewed (or, more accurately, fresh outlining permissions were granted containing the same conditions) on 27th January 1998 and 15th August 2002. Although the HSE was not consulted on the application that led to the grant of outline planning permission on 15th August 2002, it had been consulted in relation to the first renewal application and also in respect of an application for approval of details (for 74 dwellings) under the 1998 outline planning permission. The HSE's response to these consultations was to maintain the position set out in its letter dated 15th December 1988.

11. On 20th August 2002 Barrett Homes Ltd ("the interested party") made an application for approval of reserved matters seeking approval for 71 dwellings on site A, and an application for full planning permission for six dwellings together with associated car parking and a 20-space parking courtyard on site B. In due course these two applications were merged into one application for full planning permission for 77 dwellings on the site.

12. On 3rd December 2002 this application was reported to the defendant's Development Control Committee with an officer recommendation for approval. Members resolved to defer consideration to enable a site visit to be made. Members visited the site on 18th December. The matter came back before the committee on 2nd January 2003, again with a recommendation for approval, but again members decided to defer consideration to enable another site visit to be made, this time with representatives of the highway authority. The second site visit took place on 16th January. The HSE had been consulted and its reply dated 10th February 2003 said:

> "The ... HSE is a statutory consultee for certain developments within the Consultation Distance (CD) of major hazard installations, complexes and pipelines.
>
> The individual consultation has been considered using the details provided by you and HSE's assessment methodology. Consequently HSE does not advise on health and safety grounds, against the granting of planning permission in this case.
>
> I must emphasise that this does not mean that risks at the proposed development are negligible. If the site was a 'green field', then HSE would have advised against the granting of planning permission. In principle, HSE would encourage Planning Authorities to use the opportunity offered by redevelopments to decrease the numbers of people within the CD. However, this decision to not advise against the granting of planning permission in this case has taken into account the existing outline planning permission for housing development at the majority of the site."

13. On 11th February the committee met again and decided to refuse the application, contrary to their officer's recommendation. The somewhat discursive reasons for refusal were as follows:

> "The application site lies on the edge of Parkeston Village with vehicular access from Una Road and Edward Street which joins Una Road before Una Road

connects to the local highway network. Both Una Road and Edward Street are subject to heavy on street parking and Edward Street has a restricted carriageway width and right angled bend.

The site also lies within the Consultation Distance of a Major Hazardous Installation which lies to the north of the application site.

The proposal falls to be considered under Policies BE1 and BE6 of the Essex and Southend on Sea Replacement Structure Plan and Policies TH3, TE14 TT1 and TD1 of the Tendring District Local plan.

As a result of a formal consultation under Circular 04/00, whilst the Health and Safety Executive does not specifically advise against the grant of planning permission it 'emphasises that it does not mean that the risks at the proposed development are negligible'.

In the opinion of the local planning authority the proposed erection of 77 dwellings on this site would be out of character with the area and in particular the activity and traffic generated by it would adversely affect the safety and free flow of traffic on Una Road and Edward Street to the detriment of the amenities of the occupiers of existing residential properties.

Furthermore, in view of the stated risk to the health and safety of potential occupiers together with the above highway concerns, it is considered that the proposal would adversely affect the amenity of those residents contrary to Structure Plan Plan Policy BE6 and Local Plan Policy TE14."

14. On 17th March the interested party appealed against that refusal. The appeal was dealt with by written representations and the council sent its written statement to the inspector on or about 1st May ("the statement"). In view of the manner in which events subsequently unfolded, it is necessary to set out the terms of the statement in some detail. Having described the site and surroundings, the statement summarised the planning history. Referring to the inspector's 1993 decision, it said:

> "Whilst no Specific number of dwellings was sought from representations made by the then appellants the Inspector made his decision based on a scheme of 50 dwellings."

15. The statement then referred to the renewals of planning permission in 1996 and 2002 and said apropos the later:

> "Accordingly there currently exist an extant outline planning permission ... that embraces most of the current application site subject of appeal."

16. After listing numerous policies, "the case for the local planning authority" is set out:

> "The council object to the development as set out in the decision notes [sic] on grounds of:
>
> 1) The adverse character of the development within the locality
>
> 2) The adverse character and effect upon amenities by the development, with particular regard to the activity and traffic generated by the development,

3) Its adverse effect upon the safety and adverse effect upon potential occupants in regard to highway, health and safety risks.

In regard to the Development Plan provisions, the appeal site lies within the housing settlement limit for Parkeston ...

The site has an 'edge of settlement' location on previously developed land. Under policy CS1 of the ESRP [Essex and Southend Replacement Structure Plan], it is an objective to achieve urban regeneration with existing urban areas [sic].

Accordingly (and also taking into account the [extant] outline planning permission) it is not disputed that the land may be properly considered as being appropriate in principle for residential development with the general location criteria of the Adopted Development Plans. The above policies are then specifically caveated to ensure development permitted is of a scale and nature compatible with the site and surroundings to safeguard the physical character of the area and to minimise adverse affects [sic] upon the community."

Various development plan policies are then referred to, and the statement continues:

"In regard to other particular aspects of the council's objection the decision-maker must ensure:

Policy TT1: proposals are considered in relation to road hierarchy etc ... and to the effects on the transport system including the physical and environmental capacity to accommodation the traffic generated.

Policy TE14 and BE6: to prudently control the types of development permitted in the vicinity of Hazardous Installation (in this case the Carless Refinery Works to the north, north west of the site), and not to permit development within the vicinity of such installation where this would cause material harm to the health and safety of people."

17. The statement then dealt with what it described as the three primary issues in reverse order, beginning with health and safety issues. Under this heading the statement said, in part:

"Also set within this same area [of] Parkeston is the long established Carless Refinery, its nearest installation being set only some 130 metres from the nearest site boundary. Much of that site is separated from the Refinery by a small ridge running east/west, with the Refinery to the north and the proposed development to the south.

The Refinery is a notifiable Hazardous Installation and the site falls wholly within the notifiable safeguarding area wherein new development is required to be referred to the [HSE].

Of particular note is the installation of a large chemical storage tank set 240 metres from dwellings [at] the end of Edward Street and near the brow of the ridge.

The comments received from the [HSE] stated it did not advise, on health and safety grounds against the grant of planning permission in this case.

However the Council was very mindful of the qualification of that advice given.

The HSE stated that

'if the site was Greenfield then it would have advised against the granting of planning permission'.

The HSE also stated in giving its advice that

'this does not mean that the risks of the proposed development are negligible'.

It also indicated that;

'In principle HSE would encourage planning authorities to use the opportunity offered by redevelopment to decrease the number of people in the CD'."

The statement continued:

"It must be appreciated that the extant outline planning permission (to which the HSE took into account in weighing its response) did not agree or specify a stated number of dwellings. That is a reserved matter.

In addition, when the outline development was previously examined in detail by an Inspector, the decision was based upon about 50 dwellings being built on the 1.9 hectare site. The current scheme is for 77 dwellings.

The Council in weighing the greater public interest and safety including potential crime and disorder ... and safety of a population, as it is required to do, is very mindful that the site's development is not without risk, and that the HSE was not probably in benefit of that consideration.

Part of the other material considerations in regard to this issue must be the suitability of the means of minimising such risks in the event of an incident where people may need to be evacuated, rescued or treated. In this location, as set out below, it is considered that due to the road network and proposed layout the scheme is deficient ...

Accordingly in considering the Development Plan provisions, the Council has correctly taken a precautionary approach and determined that with the qualified advice of the HSE the scheme presents a risk that it is not satisfied is minimised by the nature and intensity of development proposed."

The statement then dealt with highway considerations.

18. Having described the existing highway network and its deficiencies (in the defendant's view) in some detail, this part of the statement concluded by saying:

"... whilst in principle the Highway Authority has not raised objection to the scheme meeting basic highway safety and parking aspects in respect of Una and Edward Street the planning authority in its judgement (aided by its detailed inspection of the highway and taking account of the community's representatives prior to determination), consider the Highways Authority's observation, fail to take into account the environmental capacity Policy TT1 and T3. These policies specifically require that new development should not result in a deterioration of traffic conditions within surrounding areas and the need to create attractive environment for people to live in. The Council submits that the development by

reason of its scale and the nature and character of the existing highways would if permitted create such conditions contrary to the policy and objectives of Central Government in PPG3.

Secondly, referring back to the HSE comments, and considering serving the community in the event of an emergency, because of the physical limitations of the carriageways, their cul de sac design they are not conducive to easy access for evacuation of the development, particularly the northern sector which can only be accessed via Edward Street, with its recognised deficiencies.

Thus taking into account the physical limitations of the highway network and the intensity of development proposed, the scheme would not enhance the amenity or character of the area, nor would it leave it unaffected, but it would adversely effect [sic] those facets to the detriment of the community."

19. The statement then dealt with the effect of the proposal on the character of the area. It noted that the scheme proposed 77 dwellings on a 1.9 hectare site, of which about 0.25 was to be public open amenity space. This equated to 40 dwellings per hectare.

> "At 30 dwellings to the hectare (57 dwellings) the site would still meet the government's general minimum level of hoped for reuse of residential development nor is significantly different from the 50 dwellings originally envisaged in the grant of outline consent."

20. The statement concluded by saying that the council had carefully examined and considered the implications of the proposed development and weighed the relevant policies, and found:

> "... the scale and nature of the development would if permitted be detrimental to the character of the area and the amenities and safety of present and future residents."

21. Pausing there, while the grounds for refusal were somewhat discursive and perhaps a little obscure, they were clarified and amplified in the statement. On any fair reading of the statement as a whole, four things are plain:

(a) The defendant was not objecting to residential development on the site in principle. It said so in terms and specifically acknowledged that the 2002 outline planning permission covered most of the site.

(b) The defendant was objecting to the number of dwellings proposed (77) and was comparing that number with the 50 dwellings which had been the basis on which the inspector had considered the application for outline planning permission in 1993, even though the statement acknowledged that the inspector had not imposed any limit on the number of dwellings in the outline permission that he granted.

(c) The defendant was objecting to the "scale" or the "intensity" of the proposed development on three grounds, two of which are relevant for present purposes. Those two grounds were:

(i) the risk posed by the Carless site in view of the HSE's advice that if the site was a greenfield site it would have advised against the granting of planning permission and would encourage planning authorities to use the opportunity offered by redevelopment to decrease the number of people in the CD. Part of this concern was based upon the alleged inadequacy of the access arrangements if there was to be a need for evacuation in the event of an incident ("safety/evacuation").

(ii) The defendant's assessment, aided by its two site inspections, that the environmental capacity of Una Road and Edward Street would be exceeded and that a proposal for 77 dwellings would therefore be detrimental to the amenities of residents in those roads ("environmental capacity").

(iii) The defendant relied upon policies T14 and BE6 in the Tendring District Local Plan in support of its safety/evacuation objection and upon policy TT1 in support of its environmental capacity objection.

22. Mr Straker QC on behalf of the interested party submitted that the statement was opposing residential development on the site in principle. He relied upon references in the statement to the "nature" of the proposed development. That submission plucks the word "nature" out of context. If the report is read as a whole it is plain that the defendant was objecting, not to residential development on the site in principle, but to the number of dwellings proposed in the application for planning permission and was comparing that number with the 50 dwellings that had been considered in 1993.

23. On 1st May there were elections in the defendant's district. As a result of those elections the membership of the Development Control Committee changed. The applications made by the interested party in August 2002 had been made in duplicate. After discussions with the defendant it was agreed that the duplicate (undetermined) applications should be amended, so that there were before the Development Control Committee on 10th June two applications: an application for approval of details for 77 dwellings on site A, and a full application for the 20 car parking spaces, public open space and pumping station on site B. Subject to the differences between an application for planning permission and an application for approval of details (see below), the substance of the development proposals did not change. As in February 2003, 77 dwellings, together with car parking, open space and sewage pumping station, were proposed on the site.

24. At the meeting on 10th June, seven out of the 15 members present had not been present at the meeting on 11th February. Members were provided with two reports. One report was made available to the public in accordance with section 100B(1) of the Local Government Act 1972 ("the 1972 Act") ("the public report"). The other was a confidential report which was dealt with in closed session as exempt information: under sections 100B(2), 100A(4), 100I(1) and paragraph 12 of Schedule 12A to the 1972 Act ("the confidential report").

25. The material parts of the public report are as follows. The report began by summarising the views of the parish or town council. It said that the parish council objected to the application, *inter alia*, upon the ground that access for emergency services would be difficult and that the site was in close proximity to Carless oil refinery.

26. When listing the responses of other consultees, the report said this in respect of the response of the HSE:

> "The executive has previously commented that 'Health and Safety Executive does not advise on health and safety grounds against the grant of planning permission'. It further commented that 'this does not mean that risks of the proposed development are negligible, however, the decision not to advise against the granting of planning permission in this case has taken into account the existing outline planning permission for housing development at the majority of the site."

27. Representations made by members of the public are then summarised. Amongst the points made by those who had signed a petition of objection containing 438 signatures were the following points:

> "Could be problems in access/egress in event of emergencies.
>
> Una Road is not suitable as only access to estate."

28. A long list of development plan policies is set out. That list includes a reference to policy TT1, which is described as "Development Affecting Highways".

29. The planning history is then summarised. The refusal of permission on 11th February 2003 is mentioned. The only comment is "appeal pending".

30. The proposal is described and under the heading "Appraisal" the report says:

> "It is considered that the principal planning issues to be taken into account are:
>
> 1) Housing policy and planning history
>
> 2) Highway and parking aspects
>
> 3) Private and public amenity aspects
>
> 4) Other technical considerations
>
> 5) Design and layout."

31. Under "Highway and Parking Aspects" the report says, in part:

> "Considerable concern has been expressed by the local community with regard to these matters, specially relating to there being only 1 principal access (Una Road) serving the existing dwellings and the 77 new properties together with the limited width of Una Road and Edward Street due to heavy on street parking.
>
> The Highway Authority has not raised objection in principle to the capacity of the streets to serve the development. In respect of the current scheme this remains the case although as previously it seeks a contribution to traffic calming improvements in Station Road. In regard to the detailed layout the scheme has been modified to meet its original objections.
>
> In respect of parking the Local Plan guidelines indicate a level of 148 spaces being required. The scheme provides 140 spaces, together with 20 unallocated spaces on a separate planning submission. In addition the roads are oversized, (5.5 metres) compared to 4.8 metres to facilitate casual on street parking.
>
> It is therefore considered that the scheme meets basic highway safety and parking aspects."

32. The report then deals with private and public amenity space, and design layout, and concludes by saying:

> "The site and locality has been the subject of two site visits by the Committee in the last six months (the last with a representative from the County Highways Department).

It remains your officer's advice to grant approval subject to conditions."

33. It will be noted that:

(1) Although the report refers to the fact that there was a refusal of planning permission in February 2003 and to the fact that there was an appeal pending, it does not set out the grounds of refusal and fails to inform members that those grounds were amplified by the defendant itself in a statement submitted as part of the appeal process.

(2) In consequence, the report does not mention, much less does it consider, the defendant's safety/evacuation and environmental capacity objections to the erection of 77 dwellings on the site as set out in the statement.

(3) In relation to the defendant's safety/evacuation objection, it is true that the HSE letter is summarised, but not merely are the issues raised by the defendant in its statement not discussed, the passages in the HSE letter upon which the defendant had particularly relied in its statement -- that the HSE would have advised against the grant of planning permission if this was a greenfield site and would encourage authorities to use the opportunity offered by redevelopment to reduce the number of people in the CD -- were for some unaccountable reason omitted from the summary of the HES's view.

(4) The policies relied upon by the defendant in support of its safety/evacuation objection, TE14 and BE6, are not even mentioned in the report.

(5) Although the report does refer to the parish council's and local residents' concerns in relation to evacuation, it fails to mention the fact that those very concerns were raised by the defendant itself in the statement.

(6) The environmental capacity policy TT1 is mentioned, but there is no indication that the defendant relied upon it in the statement and no indication that the concerns raised in the petition as to the adequacy of Una Road and Edward Street were accepted by the defendant as being justified in terms of the environmental capacity (as opposed to the highway capacity) of those culs-de-sac.

(7) While the report refers to the fact that the site and locality had been the subject of two site visits by the committee in the last six months, it fails to mention the fact that those two site visits had led the committee to refuse planning permission for 77 dwellings on the site on safety/evacuation and environmental capacity grounds.

34. There was further public report which dealt with the application for planning permission for 20 car parking spaces on site B, but that took the matter no further.

35. In that part of the meeting that was open to the public a representative of the local objectors, Mr Kirkman, was permitted to make brief submissions against the applications. This procedure was in accordance with the usual arrangements made for the conduct of the committee's meetings. Such arrangements, while not statutory, are not in the least uncommon, although the practices of individual local planning authorities vary in this respect.

36. The public were excluded whilst the confidential report was being considered by the committee. It referred to the two public reports and paragraph 1 explained its purpose:

> "The purpose of this report is to provide Members with other relevant background information regarding those applications and in particular to make them aware of Counsel's advice regarding the [February refusal]."

37. Paragraph 2 explained the background, referring to the 1993 planning permission, the renewals in 1998 and 2002 and said:

> "The principle of the residential development of the site has therefore been accepted."

38. Under the heading "consideration and refusal of the appeal application", paragraph 3 dealt with the application for planning permission that had been made in 2002. Having referred to the two deferrals and the site visits, paragraph 3 then set out in full the reasons for refusal dated 11th February 2003 (see above).

39. Paragraph 4, under the heading "appeal against refusal of the appeal application", said:

> "The developer has made it clear that any refusal would be appealed against. On 23 April 2003, the fact that an appeal had been lodged with the Planning Inspectorate against the Council's refusal of the appeal application was formally reported in writing to the DCC."

40. Paragraph 5 was headed "legal - counsel's advice" and explained that an experienced barrister, specialising in planning law and the conduct of planning appeals, had been asked to give advice. It said that counsel had taken into account all relevant matters, including in particular the letter from the HSE. Paragraph 5 continued:

> "Counsel advised that the Council's stated reasons for refusal do not justify a refusal and that, if the refusal is appealed against, there is a 'high likelihood of a costs award against the Council'. When your officers asked Counsel about the letter from the HSE, Counsel noted that the HSE, whilst somewhat equivocal in their response, did 'not advise against the granting of planning permission' and that the highway authority had no objection. Counsel advised that the HSE letter would carry very little weight at a planning appeal and that the most the Council could properly say on appeal in this regard is that it is not satisfied that there is no risk to health and safety. Counsel also advised officers that they were obliged to advise Members of the costs risk and of the substance of Counsel's advice."

The confidential report continues:

> "Costs are only awarded against a party to an appeal where that party has behaved in a manner which in planning terms is defined as unreasonable within the meaning of DOE Circular 8/93. The fact that Counsel has advised that there is high likelihood of an award of costs against the Council means, therefore, that he is firmly of the view that the Council's refusal of the appeal application was seriously flawed."

41. Part 6 of the report contains a conclusion:

> "Having appealed against the Council's refusal of the appeal application, the developer has formally elected for its appeal to be determined by written representations, primarily in the interests of speed. When an appeal is dealt with by written representations, normally an award of costs cannot be claimed. However, experience shows that, if the Planning Inspectorate considers that there is significant public interest (as indeed there was in this case), then the Inspectorate could well decide to change the process to that of a public inquiry. If there is a public inquiry, the Council will be subject to a substantial risk of a substantial award of costs against it and (potentially) strong criticism of its

> decision to refuse the appeal decision against a background where (a) it had previously granted permission, (b) the fact that the site is within the Parkeston settlement limits in the local plan and (c) the lack of any formal objection from the highway authority, statutory consultees or the HSE. A developer's costs at a public inquiry are often substantial and can run into tens of thousands of pounds.
>
> The current applications ... before the Council are very similar to the appeal application which was recently refused. Your officers have no alternative but to advise members that officers continue to be firmly of the view that there is no sustainable justification for refusing the current applications. Clearly, if the current applications were to be approved, then it is likely that the appeal would be withdrawn and the Council would no longer be at the risk of an award of costs against it."

The committee approved both applications.

42. It will be noted that:

(1) Although the report sets out the grounds of refusal and therefore refers to the policies that are relied upon in the grounds, including TT1, TE14 and BE6, it does not, save by way of summarising counsel's advice, discuss or deal with the merits of those grounds.

(2) Counsel had been instructed to advise on the merits of the reasons for refusal on 7th March. He advised in conference on 13th March. There was no written advice, hence the need for a summary of counsel's advice in the report.

(3) The defendant's statement was not sent to the Inspectorate until 1st May, so it was not available to counsel when he advised in conference.

(4) It is not surprising therefore that counsel's advice in conference, whilst it dealt in general terms with the reliance that could be placed (in counsel's view) upon the letter from the HSE, did not deal with the way in which the defendant was advancing its safety/evacuation and environmental capacity objections. The aspects of the HSE's letter relied upon by the defendant were not dealt with in terms, and the issues of evacuation and environmental capacity were not addressed at all.

43. All this might have been of no practical consequence if the defendant's safety/evacuation and environmental capacity objections had been rejected by an inspector on appeal, but they were not. Despite the advice in the confidential report that if the current applications were approved it was likely that the appeal would be withdrawn, it was not.

44. In a decision letter dated 12th August 2003 an inspector, following a site visit made on 30th July 2003, dismissed the appeal. He considered that the main issues were:

> "(a) whether, in view of the proximity of the site to a major hazardous installation, the proposal would place occupiers of some of the proposed dwellings at unacceptable risk.
>
> (b) the impact of traffic generated by the proposal on the safety and free flow of traffic on Una Road and Edward Street, and
>
> (c) the impact of the proposed development on the character of the area."

45. When dealing with issue (a), the inspector referred to the HSE letter, to the grant of planning permission in 1993 and to the subsequent consultations with the HSE. He then said:

> "7. ... What is clear, however, is that the outline permission reserved for later approval the number of dwellings to be erected on the site. Moreover, the Inspector noted in 1993 that the proposal envisaged at that time a traditional development of 50 dwellings; the illustrative plans indicating a mixture of 1 to 3 bed-roomed houses, and bungalows.
>
> 8. By contrast, this appeal proposal envisages some 77 dwellings. While these may be smaller, on average, than those originally envisaged, the overall number of people to be housed on this site would be likely to be greater than envisaged in 1993. In view of HSE's 'in principle' position to encourage LPAs to decrease the numbers of people within CDs, I would have expected HSE to have recommended against the granting of planning permission for the appeal proposals. In the light of the absence of approved details pursuant to the outline application, I would also have expected HSE to indicate those areas of the site which they would wish to see remain undeveloped for housing in an attempt to minimise the risks envisaged. In this respect, increasing housing densities in accordance with guidance in PPG3 could have taken place, while at the same time not increasing the numbers of people living within the CD over and above that envisaged in the original outline application.
>
> 9. I am also concerned at the prospect of the difficulties that could arise in the event of properties on the appeal site needing to be evacuated in an emergency at the same time as emergency vehicles needed to gain access to the area, a matter of concern also raised by some local residents."

46. The inspector then described the means of access to the site from Una Road and Edward Street, and concluded by saying:

> "I consider the potential for delay to emergency services to be unacceptable. Circumstances in Edward Street are similar, although exacerbated along its first 100m length by the steepness of the gradient down to its junction with Una Road."

47. He considered the proposal to provide 20 unallocated parking spaces within the site, but concluded in paragraph 11:

> "The Council Member's decision to take a precautionary approach to this issue of public safety is entirely understandable. I consider this issue to be so serious as to justify the refusal of the full application for planning permission on this issue alone. I conclude that the proposal would be in conflict with RSP policy BE6, and TDLP policy TE14, and I shall dismiss the appeal."

48. When considering issue (b), the inspector said this in paragraph 12:

> "While I accept that [the provision of the 20 unallocated parking spaces] would contribute to some reduction in congestion in Una Road, the traffic generated by a further 25 or so dwellings, when compared with the level envisaged at the time of the first approval of the outline planning permission for the site, would tend to militate against that benefit. While not sufficient reason in its own right for a refusal of planning permission it is a further factor which on balance goes against

the proposal, and as such conflicts with RSP policy T3."

49. The inspector then considered, but rejected, the defendant's case on issue (c). In doing so, he made it clear, in the final sentence of paragraph 14 of his decision letter, that he accepted that the principle of residential development on the site was established:

> "While the scale and detailed form of that development has yet to be finalised, the principle of redevelopment for housing has been established."

Submissions

50. Against that background, Mr Brown's submissions on behalf of the claimant may be summarised as follows:

(1) In deciding whether to grant or refuse the two applications, for approval of details and for full planning permission on 10th June, the committee were obliged to have regard to material considerations.

(2) The defendant's own safety/evacuation and environmental capacity reasons for refusing the application on 11th February were not merely material, but highly material considerations.

(3) Upon the premise (which he did not accept, see below) that the members' reasons for changing the defendant's stance between February and June were those set out in the officer's reports, those reports did not address the defendant's safety/evacuation and environmental capacity objections.

(4) It followed that the committee on 10th June had failed to take those material considerations into account.

(5) Insofar as the defendant's safety objection was dealt with in the confidential report (by reference to counsel's advice as to the weight that he considered could be attributed to the HSE letter), it was procedurally unfair to deal with such a significant part of the planning merits in a confidential report, which was considered whilst the public were excluded under section 100A(4) and paragraph 12 of Schedule 12A to the 1972 Act.

51. In addition to those submissions, Mr Brown further submitted that in relying upon the risk of costs, given the manner in which that issue was addressed in part 6 of the confidential report, the committee had had regard to an irrelevant consideration; and that the committee was under a duty, in the particular circumstances of this case, to explain why it had departed from the February decision.

52. For the reasons set out below, I have found it unnecessary to consider those two further submissions. I propose to consider Mr Brown's principal submissions upon the premise that the proper inference to be drawn is that the members changed their minds in June 2003 because they agreed with the reasoning set out in the officer's reports. It follows that if those reports failed to deal with a material consideration, the members's decision is also flawed, since they have not provided any separate reasons of their own for the defendant's change of mind.

53. Proposition (1) above is not in dispute. On behalf of the defendant, Mr Taylor was prepared to accept that the defendant's earlier reasons for refusing planning permission were a material consideration. He submitted that, upon analysis, the reports did consider the defendant's safety/evacuation and environmental capacity objections. The public report mentioned that the parish council and those signing the petition were concerned about emergency access; in dealing with the capacity of Una Road and Edward Street and with car parking standards the

report had addressed the substance of the environmental capacity objection; the HSE letter had been referred to, it was unnecessary to mention the passages that had been relied upon by the council because they were purely hypothetical since the site was not a greenfield site, but a site having the benefit of an outline planning permission; and upon analysis of the text of policies TE14 and BE6 they were of no application, so it was unnecessary to mention them. The confidential report had set out the February reasons for refusal so that members in June would have been aware of them. It was acceptable for the confidential report to set out background matters so that counsel's advice and the advice received internally from the defendant's legal department as to costs could be considered in context. Counsel's advice, even though it dealt with the planning merits, and the internal advice relating to costs, were both properly described as exempt under paragraph 12 of Schedule 12A to the 1972 Act.

54. Schedule 12A defines "exempt information". Paragraph 12 is as follows:

> "Any instructions to counsel and any opinion of counsel (whether or not in connection with any proceedings) and any advice received, information obtained or action to be taken in connection with-
>
> (a) any legal proceedings by or against the authority, or
>
> (b) the determination of any matter, affecting the authority, (whether in either case proceedings have been commenced or are in contemplation)."

55. He relied upon the decision of Otton J in NJ Stoop v Council of the Royal Borough of Kensington and Chelsea and London and Edinburgh Trust Plc [1991] JPL 1129. The defendant's committee had decided in open session that it would refuse planning permission. It went into private session to hear advice from the defendant's Director of Legal Services (Mr Phillips) and having done so decided, when the meeting resumed in open session, to grant planning permission. The decision to grant planning permission was challenged by way of judicial review. Various points were taken in relation to the propriety of the committee's having received Mr Phillips' advice in closed session. On page 1141 Otton J said this:

> "The second point taken by [counsel for the claimant] related to the advice actually given. He accepted that part of the advice was legitimate legal advice, namely (1) the council's prospects on appeal if planning permission were refused; (2) the prospect of having to pay costs and (3) the prospect that Mr Stoop might move for judicial review. He submitted that none of the advice as to whether there were sound and clear cut reasons for the refusal was legal advice. The reasons for refusal amounted to planning advice all of which should have been given in public. The council thus had acted unlawfully in tendering such advice in private and Mr Stoop was prejudiced in that a decision vitally affecting his interests was taken following, *inter alia*, privately given planning advice which he was entitled to see members receive and consider in public and which he ought to have been given in advance so that Mr Powdrill [his planning consultant] could respond to it.
>
> On this issue he (Otton J) had considered in detail the advice as recorded. However, he was satisfied that the advice given went predominantly to the prospects on appeal and to the possibility of an award of costs against the council. There was some advice on the planning issue but it only went to reinforce the views of the officers on the prospect of appeal and its consequent risk as to costs.
> ...

> He had studied the terms in which that advice was given. He was satisfied that the officers had not abused their position. The advice was not improperly couched. He rejected the suggestion that Mr Phillips used language which was meant to and might have frightened the members into changing their minds. In summary the receipt of advice on the prospects of an appeal and costs fell within the statutory provisions. The fact that some planning advice was given did not amount to a material irregularity or flaw the decision. Such advice was a material fact to be taken into account by the committee and it was a reasonable exercise of their discretion to receive the advice in private session."

56. On behalf of the interested party, Mr Straker QC acknowledged that there were differences between the manner in which the defendant had determined the application for planning permission in February and the manner in which the applications were determined in June. He submitted that this was not the issue. The differences in treatment were explained by the fact that in June the committee was considering an application for approval of reserved matters, not an application for planning permission. Thus the principle of development was not in issue. He submitted that it was unnecessary for the defendant to have considered the February grounds of refusal as amplified in the statement, because the statement was opposing residential development on the site in principle. Its contents were therefore not a material consideration when determining the application for approval of reserved matters. He further submitted that the observations of the HSE in relation to reducing the numbers of people within the consultation distance were irrelevant when considering the numbers of dwellings or the layout proposed in a reserved matters application. Thus, for example, it would not be open to the local planning authority at the reserved matters stage to require a layout which sought to reduce the number of dwellings or which sought to ensure that they were sited as far as reasonably possible from the Carless boundary. He further submitted that the local planning authority could not rely upon its environmental capacity objection as a reason for refusing to approve details of 77, rather than say 50, dwellings on the site. In support of this submission he relied on the decision of the Court of Appeal in R v Newbury District Council and Newbury District Agricultural Society *ex parte* Chieveley Parish Council [1999] PLCR 51. In that case the society had applied for outline planning permission for two exhibition halls with a total floor space of 5,644 square metres. Plans accompanying the application showed the siting of the proposed halls. The application was approved, but the reserved matters in condition 1 included siting, design and external appearance. The Court of Appeal concluded that condition 1 was unlawful, insofar as it reserved siting for subsequent approval. It had also been argued that the gross floor space of the development could be controlled under condition 1. Pill LJ (with whom the other members of the court agreed) rejected this argument, saying at page 60:

> "Gross floor space cannot in my view be brought within the words 'siting' or 'design' as submitted by Mr Purchas, especially when those words are read with the words 'external appearance', 'means of access' and 'landscaping of the site'. None of these words is appropriate to govern the scale of development in the statutory context. If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance."

Conclusions

57. There is an important distinction between the Newbury case and the present case. In the Newbury case the outline planning permission specified the permitted gross floor space. In

those circumstances it is not surprising that the Court of Appeal concluded that the permitted floor space could not be cut down by means of a condition reserving design details for subsequent approval. The details to be approved would have to be details of a building of the permitted size. The present case would be analogous with Newbury if the 1993, 1998 and 2002 outline planning permissions had specified the number of dwellings permitted on the site. They did not. No upper or lower limit was specified. In those circumstances, it was open to the local planning authority to control the number of dwellings to be erected on the site by controlling not merely their design, but also their siting, and indeed the amount of landscaping to be provided on the site. The public report effectively acknowledges that it is open to a local planning authority to control the numbers of dwellings to be erected on a site that has the benefit of a bare outline planning permission by referring under housing policy and planning history to the advice relating to density in PPG3. The report makes the point that PPG3 seeks densities of between 30-50 dwellings per hectare, and that the density of the proposed development was 40 dwellings per hectare. Those observations would have been entirely irrelevant if there was no power, at the approval of details stage, for a local planning authority to seek to increase or reduce the number of dwellings proposed on a site with the benefit of a bare outline permission.

58. At times Mr Straker seemed to be submitting that at the approval of details stage the local planning authority was simply concerned with the amenities of those who would be living on the application site itself. If environmental conditions would be acceptable on the site with a given number of houses, then the wider impacts of that number of houses were irrelevant.

59. Insofar as that submission was being advanced on behalf of a responsible house builder, I have no hesitation in rejecting it. In deciding what density is appropriate on a particular site, the relationship of that site to adjoining land uses, both residential and non-residential, is plainly relevant. Thus, if there was a noisy or a smelly use adjoining the northern boundary of the site the local planning authority might seek at the reserved matters stage to ensure that there was a layout which kept dwellings as far to the south of the site as possible, and, for example, placed the landscaping on the northern boundary. If reducing the number of dwellings or relocating the dwellings on the site would reduce the risks of an incident by making evacuation easier, I can see no reason whatsoever why the local planning authority should be precluded from considering such a factor at the reserved matters stage. Similarly, the effect of a proposed layout on adjoining land uses will be a relevant consideration. If placing too great a number of dwellings on a site would cause harm to the amenities of adjoining occupiers by reason of, for example, overlooking, or unnecessary loss of sunlight or daylight or undue visual intrusion (always bearing mind that the site is accepted as being suitable in principle for some form of residential development), then there is no reason why such factors cannot be considered at the approval of details stage. Since the outline planning permission in the present case leaves the detail of the relationship between the residential development approved in principle on the site and its neighbours entirely at large, I can see no reason why the defendant should not have been able to seek a reduction in the numbers of dwellings proposed on the site on the basis of its safety/evacuation and environmental capacity objections.

60. For the reasons explained above, I reject Mr Straker's submission that the statement was not a material consideration because it was an objection to residential development in principle, and the "pass had been sold" in that respect. The statement explained, with some care, why the defendant considered that 77 dwellings on the site would be too many. It is true that it did not specify a lower figure, but it gave pretty broad hints as to what would be appropriate by referring to the basis of the inspector's determination in 1993 (50 dwellings) and the result of adopting a density of 30 dwellings per hectare (57 dwellings).

61. While there will very often be significant differences in the factors to be taken into consideration when determining an application for approval of details, as opposed to an

application for planning permission, on the facts of this case the differences were more apparent than real, since the statement had acknowledged that the site was suitable in principle for residential development because of the 2002 outline planning permission, and had therefore argued against that background for a reduction in the number of proposed dwellings in the application for planning permission.

62. For these reasons, I am satisfied that the defendant's safety/evacuation and environmental capacity reasons for refusing planning permission in February 2003 were material considerations which the committee should have taken into account in June 2003. In so concluding, I do not suggest that members were bound to reach the same conclusion in June as their predecessors had in February, nor do I suggest that officers should not have set out their own professional judgment. However, the members in June should have been given a proper opportunity to consider whether or not they adhered to the objections made in February, and if not why not. They were not given that opportunity. I will not repeat the catalogue of omissions in the public report. They are set out above. Those omissions made the public report seriously (I do not say deliberately) misleading. In effect, the report simply ignored the defendant's own safety/evacuation and environmental capacity objections. It is no answer to say that the report mentioned that similar objections were being advanced by others, the parish council and petitioners, since the report gave no indication whatsoever that those third party objections had been endorsed by the defendant itself and were being actively pursued in the appeal proceedings. If the policies relied upon by the defendant in the statement were not considered by officers to be relevant, or if officers considered that a particular construction was to be placed upon the HSE letter, then the report should have explained the officers's position, rather than simply ignored the points made in the statement.

63. Those omissions were not remedied by the confidential report. It ignored the defendant's evacuation and environmental capacity objections and dealt with the defendant's safety objection thorough the reported views of counsel on the planning merits. I intend no disrespect to counsel's views when I say that, as in every case, they were as good as the instructions upon which they were based. Those instructions did not include the statement which amplified and clarified the, perhaps less than impressive on its face, refusal notice. Understandably, counsel was not able to grapple with the way in which the safety/evacuation objection was being advanced by the defendant (which would in due course be accepted by the inspector).

64. Insofar as the defendant's safety objection was dealt with at all, it was dealt with in closed session, upon the basis of counsel's advice as to its merits in a confidential report. It is unnecessary for the purposes of this judgment to consider the ambit of paragraph 12 of Schedule 12A to the 1972 Act, or the decision of Otton J in Stoop. The provisions of sections 100A(4) and 100B(2) do not apply in a vacuum. In deciding whether and how to operate those provisions, which confer a discretion, a local planning authority must not lose sight of the underlying requirement that what is done should be procedurally fair to the applicant for planning permission and to third parties who support or oppose the development.

65. Whatever the scope of paragraph 12, it was manifestly unfair to deal with the defendant's safety objection (insofar as it was dealt with at all) solely in a confidential report which was considered in closed session from which the public, including Mr Kirkman, were excluded. I do not suggest that the procedure adopted was deliberately unfair, but that was the practical effect of the way in which the subject matter was split between the public and the confidential reports. In effect, the merits of the defendant's earlier objection to 77 dwellings on the site were dealt with (insofar as they were dealt with at all) behind Mr Kirkman's back. His opportunity to make representations was limited (understandably given the amount of business with which the Development Control Committee had to deal), but he could not hope to make effective

representations if a major part of the case against the development on the merits was not referred to at all in the public part of the proceedings.

66. For the avoidance of doubt, I do not suggest that counsel's advice, including his advice on the merits, could not have been fairly dealt with as an excluded item. What fairness required was that the defendant's reasons for refusal and the officers' response thereto were also dealt with in the public report and discussed in open session. I should make it clear that I do not doubt that the officers acted with the best of motives. They were genuinely (albeit mistakenly as it turned out) concerned that the defendant's reasons for refusal had no substance and were anxious that the position should be rectified so that the defendant would not be exposed to the risk of costs. The manner in which they set out to achieve that objective was, however, very seriously flawed.

Conclusion

67. For these reasons, which are in essence that the way in which the matter was presented to members on 10th June was both seriously misleading and unfair, I quash both the approval of details and the grant of planning permission.

68. MR BROWN: My Lord, I am very grateful. In the circumstances I would ask for an order that the defendant pay the claimant's costs of today. My Lord, the defendant, as you will have noted, is legally aided and therefore summary assessment is not an option that is open to the court.

69. MR JUSTICE SULLIVAN: No.

70. MR BROWN: I think the proper order is that the costs be paid on the standard basis, subject to detailed assessment, if not agreed.

71. MR JUSTICE SULLIVAN: And then what I call a legal aid assessment still?

72. MR BROWN: Yes, I think it is assessed in accordance with the Community Legal Service Costs Regulations 2000, but your Lordship has the point.

73. MR JUSTICE SULLIVAN: Any objection to that Mr Taylor?

74. MR TAYLOR: My Lord, I do not resist that application.

75. MR JUSTICE SULLIVAN: Then the application is granted. The defendant to pay the claimant's costs on a standard basis, such costs to go for detailed assessment. There is to be what I still call a legal aid assessment and what the associate will put me right on in the proper form.

76. Anything else?

77. MR TAYLOR: My Lord, I do not make an application at this stage for leave to appeal because the council obviously needs to consider its position formally and that will involve going back to members.

78. MR JUSTICE SULLIVAN: Yes.

79. MR TAYLOR: That raises a certain practical difficulty, given the time limits that exist for making an application. I believe it is 28 days.

80. MR JUSTICE SULLIVAN: I think actually it is less, is it not? I thought it was 14.

81. MR TAYLOR: I think you are right, it is 14.

82. MR JUSTICE SULLIVAN: It does cause a problem. I will obviously hear what Mr Brown has to say about it, but rather than try to bounce you into making an application, I would have no objection to extending the period so that the council has an opportunity to consider my judgment. If they think there is any real prospect of success after reading the terms of the judgment, then, well, they are welcome to try.

83. MR TAYLOR: I am grateful for that indication. What I was going to suggest was an order that the defendant has 28 days from the date when the transcript becomes available.

84. MR JUSTICE SULLIVAN: That is quite a long time. You normally only have 14 days from now. I should have thought 14 days from when the transcript becomes available -- in fact if I gave 28 days from now, because the transcript I suspect will be within a week and I generally turn them round on the same day.

85. MR TAYLOR: On that basis I have to accept that. It is difficult to get members together sometimes.

86. MR JUSTICE SULLIVAN: I am sure that there must be something in the standing orders about chairman's action or something like that which may well assist you.

87. MR TAYLOR: I am obliged.

88. MR JUSTICE SULLIVAN: Wait a minute. We are in a slightly odd position because you are not asking for permission, you are asking really in fact for an extension of time within which to make an application for permission.

89. MR TAYLOR: Indeed.

90. MR BROWN: I do not know if my learned friend envisages whether that application would first of all be made to your Lordship or straight to the Court of Appeal. If he is going to make an application, he may as well make it now.

91. MR JUSTICE SULLIVAN: Quite frankly, I think the better thing for you to do is to make the application to me now. I am quite happy, if I refuse the application, to give you an extended period of time to renew it to the Court of Appeal, so that you do not feel obliged to rush off precipitantly, as it were, and renew just to preserve your position. I think that actually is the better way of doing it, Mr Taylor.

92. MR TAYLOR: Certainly.

93. MR JUSTICE SULLIVAN: You have made your application. Do you want to say anything in support of the application?

94. MR TAYLOR: I shall not take any further time in that.

95. MR JUSTICE SULLIVAN: Thank you very much. I hope you will not think me discourteous if I refuse permission because I do not think there is any real prospect of success and I do not think the case raises any issue of principle or importance. It turns entirely upon the facts.

96. So I refuse you permission Mr Taylor, but what I do do is to extend your time for applying to the Court of Appeal for permission to appeal from 14 to 28 days.
