



Neutral Citation Number: [2021] EWHC 2185 (Admin)

Case No: CO/931/2021

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 2ET

Date: 03/08/2021

Before :

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court

Between :

MRS KAELY BACKLAND

Claimant

- and -

MONMOUTHSHIRE COUNTY COUNCIL

Defendant

- and-

MR AND MRS TIMOTHY NEWMAN

Interested Parties

Mr Kevin Leigh and Mr Philip Williams (instructed by **Sanders Whitherspoon LLP**) for the
Claimant

Ms Annabel Graham Paul (instructed by **Monmouthshire County Council**) for the
Defendant

The Interested Parties did not appear and were not represented

Hearing dates: 16 July 2021

Approved Judgment

HH JUDGE JARMAN QC :

1. By notice dated 2 February 2021 the defendant as local planning authority (the authority) granted planning permission (the permission) to the interested parties, Mr and Mrs Newman, for the demolition of an existing bungalow with outbuildings and the erection of two detached two storey dwellings at Homestead, Wainfield Lane, Gwehelog, Usk. Condition 7 of the permission provided that the development should be carried out in accordance with the agreed scheme of foul drainage. The stated reason for this condition was to ensure satisfactory facilities were made for foul drainage.
2. The agreed scheme is shown on a foul drainage layout plan on a scale of 1:200 submitted by the agents for Mr and Mrs Newman. In respect of the proposed dwelling to the north, marked as plot 1, the foul drainage is shown as being piped to the west to an underground treatment plant and then onto a drainage field at the west of the site. In respect of the proposed dwelling to the south, marked as plot 2, a similar scheme is shown but with the drainage field to the east of the site. There are also shown on the plan details of the drainage fields which includes underground rigid slotted pipes within a 300mm deep layer of clean stone. The notes to the plan provide in this regard, :

“Tank located min. 7m from dwelling in accordance with Building Regulations Part H.”
3. The plan shows most of the eastern drainage field and the southern part of the western drainage field as within 10-15 meters from the nearest point of the proposed dwellings. The claimant, Mrs Backland, lives in a house to the south called Ty Cwtch. The plan shows the northern wall of Ty Cwtch as close to the southern boundary of plot 2 and roughly equidistant from the two proposed drainage fields.
4. The officer’s report to the planning committee recommending the grant of the permission referred to objections, including that what referred to as a Building Regulations H2 document required drainage fields to be at least 15 meters from a building. The report responded that the authority’s building control inspectors had indicated that the drainage proposals met the requirement of Building Regulations and had commented that the drainage fields were required to be at least 10 meters from a building.
5. In her single ground of challenge to the grant of the permission by way of judicial review, Mrs Backland argues that that part of the officer’s report was substantially misleading, in that there is indeed guidance that suggests that such drainage fields should be at least 15 meters from a building. If that had been applied in this case, the effect would be that each of the proposed drainage fields would be required to be some 5 meters further away from Ty Cwtch and from the proposed buildings.
6. It will be necessary, therefore to examine in some detail guidance as to foul drainage in the planning context, and in the building control context. Although on the facts of this case there is a great deal of overlap between the two, the regimes are different.

7. In the planning context, Planning Policy Wales (PPW) requires at paragraph 6.6.9 that the adequacy of sewage infrastructure should be fully considered when proposing development. No further detail is given.

8. Further advice is given by the Welsh Government in Welsh Government Circular 008/2018 (the Circular) which came into force on 3 July 2018. At paragraph 1.2 the Circular provides:

“This Circular replaces Welsh Office Circular 10/99, updating references to legislation and other guidance. It provides advice on the exercise of planning controls on non-mains sewerage and associated sewage disposal aspects of new development in order to avoid public health, amenity or environmental problems. These can arise from the inappropriate use of non-mains sewerage systems, particularly those incorporating septic tanks and cesspools. Where proposed, the suitability of the use of such sewerage systems is likely to be a material consideration in reaching planning decisions. Planning authorities should aim to satisfy themselves the sewerage proposals for a development are suitable, and public health, amenity and environmental problems which might justify refusal of planning permission are unlikely to arise.”

9. At paragraph 2.1 it proceeds:

“The responsibility for demonstrating a new development is effectively served by a sewerage system rests with the developer. Before deciding a planning application, the planning authority needs to be satisfied the sewerage arrangements are suitable. If the non-mains sewerage and sewage disposal proposals are assessed as being unsatisfactory, this would normally be sufficient to justify refusal of planning permission.”

10. Paragraph 2.2 provides:

“Assessment by the relevant planning authority of the acceptability of the arrangements for sewerage and sewage disposal will need to take account of the views and information from interested bodies and parties. In addition to the views of relevant sections within the local authority, such as the Environmental Health Department and Building Control, the views of other key bodies listed below could also be material to assessing the suitability of sewerage and sewage disposal proposals...Natural Resources Wales..”

11. Further guidance as to how that assessment should be undertaken is given in paragraph 2.6, as follows so far as material:

“The assessment of private drainage proposals should include full and detailed consideration of the following factors: a)

Contravention of recognised practices: Any evidence which shows the proposed arrangements are likely to prejudice, contravene or breach any statute, Regulation, Directive, Code of Practice, Byelaw, water quality objective or any other authoritative standard (such as British Standards, Groundwater protection position statements research papers/reports with proven conclusions)...c) Health hazard or nuisance: Any evidence which indicates the proposed arrangements and the associated effluent disposal system is likely to lead to a risk to public health or cause a nuisance.”

12. Paragraph 2.7 makes clear that proposals for disposal of foul drainage which are likely to lead to a significant environmental, amenity or public health problem would normally justify refusal of permission:

“If on the basis of the information and evidence received, it can be demonstrated by virtue of one or more factors set out in paragraph 2.6 above, the private sewerage and/or sewage disposal proposals put forward for a proposed development are likely to lead to a significant environmental, amenity or public health problem in any area, it would normally be sufficient to justify refusal of planning permission for the development.”

13. The relevant regulations referred to in the Circular include the Building Regulations 2010 (the 2010 Regulations), made under ministerial powers conferred by the Building Act 1984. Regulation 4 requires building work to be so constructed as to comply with the relevant requirements set out in Schedule 1. The requirements as to the siting of waste water treatment plants are set out in section H2. So far as relevant, any waste water treatment system must be so sited that it is not prejudicial to the health of any person and will not contaminate any watercourse underground water or water supply.
14. There are no minimum distances set out in the legislation. However, The Welsh Government has adopted a series of documents to provide guidance as to the requirements set out above. The current version dealing with foul drainage is dated 2002 but which incorporates amendments made in 2010 (the Approved Document). Its status is dealt with in the introduction as follows:

“This document is one of a series that has been approved and issued by the Secretary of State for the purpose of providing practical guidance with respect to the requirements of Schedule 1 to and Regulation 7 of the Building Regulations 2010 (SI 2010/2214) for England and Wales. At the back of this document is a list of all the documents that have been approved and issued by the Secretary of State for this purpose. Approved Documents are intended to provide guidance for some of the more common building situations. However, there may well be alternative ways of achieving compliance with the requirements. Thus there is no obligation to adopt any particular solution contained in an Approved Document if you prefer to meet the relevant requirement in some other way.”

15. The limitation of requirements is also set out:

“In accordance with Regulation 8, the requirements in Parts A to K and N (except for paragraphs H2 and J6) of Schedule 1 to the Building Regulations do not require anything to be done except for the purpose of securing reasonable standards of health and safety for persons in or about buildings (and any others who may be affected by buildings or matters connected with buildings). Paragraphs H2 and J7 are excluded from Regulation 8 because they deal directly with prevention of the contamination of water.”
16. Paragraph H2 1.27 deals with siting of drainage fields serving treatment plants:

“A drainage field or mound serving a wastewater treatment plant or septic tank should be located: (a) at least 10m from any watercourse or permeable drain; (b) at least 50m from the point of abstraction of any groundwater supply and not in any Zone 1 groundwater protection zone; (c) at least 15m from any building; (d) sufficiently far from any other drainage fields, drainage mounds or soakaways so that the overall soakage capacity of the ground is not exceeded.”
17. This is likely to be the requirement referred to in the objections to the permission set out in the officer’s report.
18. Paragraph 1.72 refers to British Standards (BS):

“The requirement can also be met by following the relevant recommendations of BS 6297:1983 Code of practice for design and installation of small sewage treatment works and cesspools. The relevant clauses are in Section 1, Section 2, Section 3 (Clauses 6–11), Section 4 and Appendices.”
19. These are standards developed and published by the British Standards Institute, which is recognised by the UK Government as the national standards body.
20. The 1983 BS referred to provided that sewage treatment works should be as far away from habitable buildings as economically practicable. That edition was replaced in 2007, which in turn was replaced in 2008 (BS 6297 2007: A+1 2008), which is now the current standard. However the reference in the Approved Document, although amended after the 2007 and 2008 BS came into force, continued to refer to the 1983 BS.
21. The 2008 BS in its introduction makes clear that its purpose is to give guidance to those designing and installing drainage fields, and that particular requirements are determined by local conditions. Table 2 sets out good practice guidelines for the location of wastewater treatment equipment for a single dwelling. In respect of habitable buildings, the guideline is: “Position as far as practicable considering prevailing wind direction: Recommended minimum: 7 meters.”

22. In the present case it was accurate of the officer's report to say that building control inspectors considered that the drainage proposals met the requirement of Building Regulations and had commented that the drainage fields were required to be at least 10 meters from a building.
23. However, Mr Leigh, for Mrs Backland submits that this was misleading, as the report did not go on to refer to the Circular or the Approved Document and the guidance contained therein that drainage fields should be at least 15 meters away from any building. Accordingly, the members of the planning committee did not fully consider the adequacy of the foul water drainage proposal.
24. The principles of law relevant to the courts approach to officer's reports in this context were summarised by Holgate J in *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) , adopting as part of his summary the observations of Hickinbottom J, as he then was, in *R (Zurich Assurance Ltd v North Lincolnshire Council* [2012] 3708 (Admin) as follows:
 - i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted;
 - ii) An application for judicial review based on such criticisms will not normally merit consideration unless the overall effect of the report significantly misleads the committee about material matters which are left uncorrected;
 - iii) Such reports should be read as a whole and in a common-sense manner, bearing in mind that they are addressed to an informed readership, in this case the planning committee.
 - iv) Courts should not impose too demanding a standard upon such reports.
 - v) It is the job of the democratically elected councillors to weigh competing public and private interests involved, and not that of the court.
25. Ms Paul, for the authority, does not dispute that those principles are applicable. Her primary submission is that the authority's building control officers were not obliged to have regard to Approved Document H2 and were entitled to assess compliance by reference to the BS.
26. Even if that is right in the context of building control, in my judgment it does not follow that the same approach could or should be adopted by the planning committee. It is clear from the 2010 Regulations Schedule 1 H2, that so far as the effect on persons is concerned, the focus is upon whether the proposal is prejudicial to the health of any person.
27. However, it is also clear that in the planning context the focus is not just upon public health, but also upon amenity. Amenity is expressly referred to in paragraphs 1.2 and

2.7 of the Circular as a consideration to which regard should be had in the planning context, as well as health. Paragraph 2.6 refers to any evidence which indicates the proposed arrangements and the associated effluent disposal system is likely to lead to a risk to public health or cause a nuisance.

28. In my judgment those references make it clear that in the planning context, even if there is no risk to public health, so that building control requirements are fulfilled, regard should also be had to amenity and the risk of nuisance. These are, classically, material considerations in the determination of an application for planning permission. They are particularly relevant in the present case. Mr Leigh focussed upon the proximity of the drainage fields to Ty Cwtch. However in my judgment these considerations are also material to future occupiers of the proposed dwellings.
29. Moreover, PPW requires the adequacy of sewage disposal to be fully considered in determining such applications. The Circular at paragraph 2.6 says that such an assessment should be carried out by having regard to Regulations and to BS, but also to any other authoritative standard. In my judgment that includes the Welsh Government's Approved Document H2 and the suggested minimum distance of 15 meters between drainage fields and any building.
30. The reference in the officer's report to the position of the building control officers, without more, in my judgment shows that the adequacy of the sewage disposal was not considered and the guidance as to the minimum distance of 15 meters from the drainage fields to any building was not considered. It is reasonable inference, that the members of the planning committee, giving due allowance for their experience as members of the committee, followed the reasoning that it was sufficient to have regard to the views of the building control officers.
31. Ms Paul also submits that members cannot be expected to be concerned with technical detail of building control. That may be true in some respects, but in my judgment in considering amenity and the risk of nuisance from the siting (as opposed to technical details) of drainage fields they should have regard to the matters set out in the preceding paragraphs.
32. Reading the officer's report as a whole, which incorporated a previous report, the concerns in relation to foul drainage from objectors and the local community council are noted and these include references to the history of drainage issues in the area and to the site being predominantly on clay. In dealing with amenity, the report deals only with visual amenity and privacy. In my judgment, by not referring to the Circular or the Approved Document H2, the members, even as informed readers, are likely to have been left with the impression that as the building control officers were satisfied that the drainage proposals satisfied the requirements of the 2010 Regulations, that was the end of the matter in respect of such proposals. In the planning context, in my judgment, it was not. To leave it there without fully dealing with the adequacy of the drainage proposals in that context was in my judgment significantly misleading.
33. Ms Paul also submits that any errors cannot justify the quashing of the permission as it is highly likely that they did not make a significant difference to the outcome of the decision within the meaning of section 31 (2A) of the Senior Courts Act 1981. For the reasons set out above, I do not accept that that level of likelihood has been shown. It will ultimately be a matter for the planning judgment of the planning committee when

all the above factors have been taken into account, and that is not a matter for the court. Nothing in this judgment should be taken as indicating which way this issue should be determined, but it should be determined taking the above material considerations into account.

34. Accordingly the permission must be quashed. Counsel helpfully indicated that any consequential matters which cannot be agreed can be dealt with on the basis of written submissions. Any such submissions, together with a draft order agreed so far as practicable should be filed within 14 days of handing down of this judgment.