Neutral Citation Number: [2022] EWHC 1476 (Admin)

Case No: CO/3569/2022

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 17/06/2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

R(on the application of HELEN STRIDE)	**Claimant**
- and -	
WILTSHIRE COUNCIL	**Defendant**

- -
- -

Mr Marc Willers QC and Ms Ella Gunn (instructed by **Watkins Solicitors**) for the **claimant**
Mr James Goudie QC and Mr John Bethell (instructed by **Legal Services Wiltshire Council)** for the **defendant**

Hearing dates: 26 May 2022
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ JARMAN QC:

Introduction

1. On the 21 July 2021, in a meeting of the executive of the defendant local authority, the executive resolved to commence master planning of a scheme called Future Chippenham. I shall refer to these as the meeting, executive, authority and scheme respectively. The scheme involves the building of thousands of new homes, and other mixed development, much of it upon land owned by the authority, but also upon land in private ownership. Crucially in this claim, the scheme also involved a major new distributor road serving the development, which was also aimed at connecting the major road network to the south of the town with that to the north. It was indicated in the scheme that such a connection would increase connectivity of the road network around the town and serve to ease traffic congestion in the town centre.

2. Three alternative routes of the proposed new road, called the inner, middle and outer routes, were the subject of public consultation. Respondents had to choose one preferred option, but were given the opportunity to comment. 75% of them rejected any route.

3. At the meeting, the executive also resolved to approve the new road along substantially the outer route from the south to the east, but which did not then continue to connect with the major network to the north.

4. The reason for the change was not made public at the time, but in these proceedings it has become clear that after the close of the consultation on the

three routes, it became apparent that agreement with a landowner to deliver a road bridge needed for the northern section of the new road was unlikely to be reached within an appropriate time frame. Accordingly the executive resolved to progress the southern part of the scheme only.

5. The claimant, who is a local resident, challenges those decisions, with permission granted by Lang J, on three grounds:

   i) The public were unlawfully excluded from part of the meeting at which the decisions were made and information was unlawfully not made public contrary to paragraph 9 of schedule 12A of the Local Government Act 1972 (the 1972 Act).

   ii) The public were not consulted on the proposed development on land owned by the authority and thus in public ownership.

   iii) The public were not consulted on the route of the new road as agreed at the meeting.

6. In considering those grounds, the distinction between the authority as landowner on the one hand and as local planning authority on the other must be kept firmly in mind. Where an authority as landowner applies for planning permission, there must be safeguards in place to ensure that the decision making process as landowner is kept separate from the decision making process as local planning authority. It is not in dispute that in the present claim those safeguards have been substantially complied with.

7. Nor is it in dispute that the meeting took place at a preliminary stage of delivering the scheme. A funder of the scheme, Homes England, has been

informed of the changes to the scheme but has not yet responded, and there will need to be further discussions about these. There will be detailed planning appraisal which will be subject to public consultation before the submission of a revised submission to an ongoing review of the Chippenham Local Plan (the local plan). Responses will be presented to the independent Government appointed planning inspector at an examination in public, where the public may put forward objections. If the inspector finds that the scheme is the best strategic solution to meet Chippenham's housing needs, there will still be opportunities for the public to comment on individual planning applications as and when they are made.

8. The authority contends that it was entitled to exclude the public from that part of the meeting in which information relating to ownership of the land in question and to its negotiations with other landowners was discussed. It also contends that it could withhold such information as that was sensitive information which amounted to exempt information within the meaning of the 1972 Act so as to be exempt from the general rule which allows public access to information in authority meetings. The claimant says it was not exempt because it was information which relates to proposed development which the authority as planning authority may grant to itself within the meaning of paragraph 9. This involves a novel point of interpreting that phrase as it appears in that paragraph 9.

9. Grounds 2 and 3 each involve an issue whether the public had a legitimate expectation to be consulted on development on public land as part of the scheme and on the changed route of the new road. The claimant says that there was a

clear promise by the authority within the scheme documentation that such consultation would be carried out. The authority says that at such a preliminary stage in the delivery of a scheme as major as this one, such delivery was a flexible and evolving process in which there will be further public consultation as outlined above. Accordingly references to consultation on these two points fell short of the necessary clear and unambiguous promises devoid of qualification so as to give rise to the legitimate expectation relied upon by the claimant.

Factual background

10. Before those issues are dealt with in more detail, it is necessary to set out more of the background. The scheme seeks to address a long-term need for housing in the town. It is not in dispute that there is such a need, although the parties differed on the extent of the need. The scheme involves the construction of 7,500 new homes, whereas the claimant is of the view that the need is only for 2,500. That difference however is not material to the issues which I must determine.

11. In November 2019, the executive obtained central Government funding for a distributor road, and in December 2020 entered into a grant determination agreement (GDA) with Homes England, which is an executive non-departmental public body, sponsored by the Department for Levelling Up Housing and Communities. The GDA set the terms of funding and the delivery commitments for infrastructure and housing, with a funding draw down deadline in March 2024.

12. The authority produced documentation to explain the scheme and to promote community engagement, including the Future Chippenham Stakeholder and Community Engagement Strategy (the strategy) dated 13 October 2020. Paragraphs 1.1.1 to 1.1.3 states:

> "The Future Chippenham team are undertaking pre-application engagement and consultation ahead of submitting a Full Planning Application for the road and an Outline Planning Application for development on the council's land. This Stakeholder and Community Engagement Strategy sets out the council's, as Landowner and Highway Authority, approach to, and potential timetable, for engaging and consulting (both informally and formally) with all those with a possible interest in Future Chippenham, as part of the development of the proposal. This includes the new distributor road and the Masterplan for the council owned proposed development. These communications / engagements / consultations will be separate from the statutory consultation required by Wiltshire Council as Local Planning Authority which are governed by requirements in the Town and Country Planning Act 1990. It is recognised that engagement and consultations on Wiltshire Council's Local Plan Review have to and will take place. To avoid potential confusion, it is emphasised in this Strategy that our proposals are separate from this and the Future Chippenham team are representing the council's interest as landowner / promoter."

13. The strategy dealt with consultation in paragraph 3 and at 3.1.2 stated:

> "A flexible approach to pre-application consultation will be important so that issues identified throughout the process can be considered and any changes can be made prior to the planning application being finalised."

14. Paragraph 3.2.5, which is relied upon heavily by the claimant in relation to grounds 2 and 3, states:

> "To deliver these objectives we will be undertaking the following consultation process: • Formal public consultation on the road route options involving those stakeholders identified as part of the stakeholder identification mapping and management process. This will be accompanied by the broad Framework of proposed development on council owned land • Announcement of the preferred road route • Formal public consultation on the detailed road alignment and Future Chippenham Masterplan for

> council owned land involving those stakeholders identified as part of the stakeholder identification mapping and management process."

15. The authority issued a consultation leaflet and response proforma on the three road options, each of which crossed five zones to the south and east of the town. The consultation took place between 15 January and 12 March 2021. During a similar period, the authority as local planning authority undertook a review of the local plan, which also included public consultation during those months.

16. The agenda for the meeting, which was published on 13 July 2021, indicated that the scheme would be considered in public session and referred to some 2,700 pages of supporting documents. It also referred to a session with the press and public excluded, with seven further pages of supporting documents referred to in respect of that session. The reason for the session being held in private was stated to be the likelihood that information relating to the financial or business affairs of any particular person including the authority holding that information, would be disclosed. Such information related to agreement in principle with landowners and certain outstanding issues.

17. In an officer's report to the executive for the meeting, it was stated that those respondents objecting to the development and the road set out in the scheme did so on various issues including quantum, transport issues, climate change and environmental issues. The report also identified an opportunity to develop an alternative approach and to adapt the scheme so that it provides for the southern section of the distributor road and would deliver between 3,800 to 4,200 new homes and associated infrastructure.

18. Accordingly the report asked the executive at the meeting to note the consultation response to the road route options and to agree what was termed the preferred road route. Decisions were also requested to agree to enter into contract with landowners to facilitate the delivery of the new road on the preferred route, subject to the local plan review and Home England's agreement, to initiate master planning of the scheme including entering into detailed design and planning negotiations with other landowners, to implement as compulsory purchase order strategy, and to discuss with Homes England the changes to the scheme.

19. At the meeting, members of the executive heard oral objections from the claimant and three other members of the public, and responded to questions on the scheme including the route of the new road. There was some concern amongst members about the process, and the minutes record that one member observed that the preferred road route did not form part of the consultation nor did the no road option, therefore these point should be consulted on before the scheme proceeded.

20. The resolutions passed included agreement to each of the requests referred to above. It was also agreed to exclude the public from the part of the meeting referred to in the agenda for the reasons given. In respect of that item, the minutes record that the leader of the authority presented an appendix which summarised the key elements of the proposed land assembly transactions with the various landowners with an interest in the scheme. It was then noted that in the event of a planning application being submitted and considered in

connection with the scheme, the regulations concerning exempt information do not apply.

21. It is apparent from the minutes of the meeting, and the evidence from the claimant about it, that the reason for the preferred road route not extending to connect with the network to the north of the town was not given in public. It may be that this was discussed in the private session.

The law in relation to public access

22. I now turn to deal with the law, which was not substantially in dispute before me. The statutory framework for access to information at principal local authority meetings, including when the public may be excluded, is set out in the 1972 Act. Section 101A provides, so far as material, that such a meeting shall be open to the public unless excluded by resolution during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information, as defined in section 100I below.

23. That in turn provides, so far as material, the descriptions of exempt information are those for the time being specified in schedule 12A, the relevant parts of which provide:

> "3. Information relating to the financial or business affairs of any particular person (including the authority holding that information)…
>
> 9. Information is not exempt information if it relates to proposed development for which the local planning authority may grant itself planning permission or permission in principle pursuant to

> regulation 3 of the Town and Country Planning General Regulations 1992."

24. That regulation, so far as material, provides:

> "3… an application for planning permission by an interested planning authority to develop any land of that authority, or for development of any land by an interested planning authority or by an interested planning authority jointly with any other person, shall be determined by the authority concerned, unless the application is referred to the Secretary of State under section 77 of the 1990 Act for determination by him."

25. The proper approach to statutory interpretation is well established. Although not cited to me, the approach is summarised by the House of Lords in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349. Lord Nicholas at page 396E said:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used."

26. At page 397B, he continued:

> "In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and individual freedoms: see section 3 of the Human Rights Act 1998."

27. And at page 397E:

> "Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of language,

> courts seek to identify and give effect to the purpose of the legislation."

28. Section 100I and paragraph 3 of Schedule 12A of the 1972 Act are among specified confidentiality provisions inserted by the Local Government (Access to Information) Act 1985. It was not in dispute before me that the purpose of these provisions is to allow greater public access to local authority meetings and documents, but to balance against such access the need to avoid prejudice by the disclosure of information relating to the financial or business affairs of any person including the authority.

The law in relation to consultation

29. As to consultation, the claimant's case is not put on the basis of a statutory duty to consult or any duty other than that arising on the basis of a promise to consult. Such a promise will only give rise to a duty where it is clear, unambiguous and devoid of relevant qualification (see *R (Patel) v General Medical Council* [2013] EWCA Civ 327). Accordingly, where the promise is made in circumstances where it would no longer hold good if the circumstances changed, no duty will arise (see *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government and another* [2012] EWCA Civ 379). The extent to which detrimental reliance has been placed on such a promise will also be a factor to be considered (per Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at paragraph 70).

30. The requirements of consultation, however the duty arises, were summarised by Hickinbottom LJ in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098 as follows:

> "i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted…
>
> ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told enough – and in sufficiently clear terms – to enable them to make an intelligent response…Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal…; or where the consultation paper is materially misleading …or so confused that it does not reasonably allow a proper and effective response.
>
> iii) As I have indicated…, the content of the duty – what the duty requires of the consultation – is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose...
>
> iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed…
>
> v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, "clear unfairness must be shown"… or as Sullivan LJ said in *R (Baird) v Environment Agency* [2011] EWHC 939 (Admin) at [51], a conclusion by the court that: "… a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong."
>
> vi) The product of the consultation must be conscientiously taken into account before finalising any decision…"

31. As to the duty to re-consult where there is a change in a proposal, it is recognised that a legitimate expectation to be re-consulted may arise if entirely different proposals were made from those consulted upon (see Hodgson J in *R v. Brent LBC ex parte Gunning* (1985) 84 LGR 168 at 198). In *R (Smith) v East Kent Hospital NHS Trust, Kent and Medway Health Authority* [2002] EWHC 2640 (Admin), Silber J observed at paragraph 43 that a matter of crucial importance

in determining whether there should be re-consultation is the nature and extent of the difference between what was consulted on and the proposal accepted, and found on the facts of that case that there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt (paragraph 45). In *R (Elphinstone) v Westminster CC* [2008] EWCA Civ 1069, Rix LJ at paragraph 62, giving the lead judgment of the Court of Appeal, referred to Silber J's test of fundamental difference and said:

> "We agree that on any view this change could not be described as fundamental, or as such a change as should properly vitiate a consultation process, and we do so even if the change should properly be regarded as "significant."

32. Having dealt with the legal principles to be applied, I now turn to do so in respect of each of the three grounds of challenge.

Ground 1

33. Each party relies upon the natural meaning of the words in paragraph 9 to support its case on the correct interpretation. Mr Willers QC, for the claimant, points to the fact that the paragraph applies to meetings of a principal council and accordingly applies if information relates to proposed development for which a local planning authority may grant itself planning permission, even if it is not then considering whether to do so at that meeting. As the scheme includes a new road for which planning permission will be needed if the scheme progresses, then the information withheld from the public at the meeting relates to proposed development for which the local authority may, possibly, at some time in the future, grant itself planning permission.

34. Mr Goudie QC, for the defendant, submits that as the paragraph refers to the local planning authority, and proposed development, what is contemplated is information relating to an application for planning permission which is being considered by a local planning authority. The meeting was not such a meeting, but a meeting of the executive in which it was considering, amongst other matters, how to proceed as a landowner in negotiation with other landowners to initiate the scheme as changed.

35. Mr Goudie QC continues that under the legislative scheme, a local authority meeting is either one on at which it is possible that planning permission could be granted, in which case paragraph 9 would apply, or it is one at which it is not possible that planning permission could be granted in which case, paragraph 3 would apply. There is no basis whatever to read into paragraph 9 the word "subsequently", as the claimant's interpretation would require. The information did not relate to proposed development for which planning permission might be granted, but only to a road route. The proposal was only a preliminary step in the scheme which remains subject to formalisation before it could be considered as a proposed development by the local planning authority.

36. As Mr Willers QC points out, although paragraph 9 refers to the local planning authority, it also refers to the grant of permission to "itself." Such wording does not respect the separation of decision making referred to above, and can only sensibly be taken to mean the authority as such and not as local planning authority.

37. In my judgment the meaning of the words permit both a wide meaning or a narrow interpretation, although perhaps not as wide as Mr Willers QC contends

or as narrow as Mr Goudie QC contends. The wording does in my judgment suggest some temporal connection between information relating to a proposed development and the grant of permission for that development. It does not suggest that as soon as an authority as landowner proposes development, then information relating to it cannot be exempt, however far in the future and however unlikely a grant of planning permission may be. On the other hand, it does not suggest that it is only at a meeting where the grant of planning permission will be decided that such information must be disclosed. There may be a meeting of the executive to discuss proposed development on its land where a planning application has already been made, and it is difficult to see why the wording or paragraph 9 should not apply in those circumstances.

38. In my judgment, it assists in this case to have regard to the purpose of the statutory scheme, which is to promote public access on the one hand, but to safeguard the financial and business interests of anyone, including the authority, on the other. It is clear that in the interests of transparency, once the authority is applying for planning permission for development on its own land, then such safeguards should no longer apply and the public should have access to relevant financial and business information.

39. In this case, the authority accepts that once that stage is reached, there must be public access to, and hence scrutiny of, such information before planning permission is granted. Given that that will happen, the question is whether in balancing the competing interests of public access and private interest, the purposes will be served by disclosure of such information when the proposals are at an early stage. In my judgment, it is not difficult to see why proposals

may be prejudiced by the early disclosure of such information. In this case, that applies in particular to the negotiations and contracting with other landowners.

40. Accordingly, I conclude on ground 1 that paragraph 9 on its proper interpretation did not apply so as to render the information withheld from the public in the private session of the meeting as not exempt. The executive was entitled to proceed on that basis, and did not in so doing act unlawfully.

Ground 2

41. Ground 2 is based upon the indication in the strategy that the authority would consult the public in early 2021 not only upon the road route options, but also upon the broad framework of proposed development on authority owned land. It has not yet done so. Accordingly, the claimant's case is that the public has not been provided with any indication of the proposed built environment on the authority's land.

42. The reason which the authority gives for this is a delay in the local plan consultation timetable and the consultation which took place on that plan. The decision was taken not to consult on the framework at that time, but since the meeting, the master planning will develop "the context for the road route" which will be the subject of consultation.

43. It is submitted on behalf of the defendant that the overall approach to the consultation process outlined in the strategy was stated to be flexible and the indicative timescale for consultation was stated to be subject to change. The strategy itself was to be reviewed as the programme progresses to ensure it

remains fit for purpose. Accordingly, any assurance as to consultation was qualified.

44. Moreover, the defendant submits, there is no prejudice as there will be consultation as part of the planning process.

45. In my judgment, at the preliminary stage which had been reached at the time the strategy was developed, the consultation and its timescale referred to was, unsurprisingly, qualified in terms of flexibility and subject to change. The references did not amount to a clear and unqualified assurance. Moreover, the consultation in the local plan review and in respect of any planning application means that the public will in any event have a sufficient opportunity to scrutinise and comment upon the development proposals when formulated.

46. Accordingly ground 2 also fails.

Ground 3

47. The strategy is also relied upon in ground 3 by the claimant when submitting that there was a promise to consult on road route options, which was not limited to the three options put out to consultation. Accordingly a no road option and the preferred road route should also have been the subject of consultation. The preferred road route is about half the length of any of the options put out to consultation and includes two new sections of road that were not consulted upon. It represents a fundamental change.

48. The defendant submits that the strategy makes clear that the authority intended to seek views on various identified road route options, in order to decide its preferred option. That is what happened, and the route options were over 5 zones

from the south to the north. The executive considered the responses, and decided to adopt a compromise hybrid route for the road, over some of the zones only, taking account of factors for and against each of the identified route options. Moreover the change was not a fundamental one.

49. In my judgment, the promise in the strategy was to consult on road options, not a no road option. It was fair to do so by identifying three routes over five zones from south to north. This in my judgment did not tie the authority to only one of those routes over all zones. Responses may show that one route in one zone was more acceptable in that zone, and that another route was more acceptable in another zone, or that no route was acceptable in one or more zones. I take the point that the preferred route does not achieve the envisaged connectivity with the major road network to the north of the town, but that does not make the consultation unfair.

50. There was no duty to reconsult on the preferred route in my judgment, which does not amount to a fundamental change. The preferred route follows substantially a mix of the routes consulted upon, albeit with two new sections, and for only half of the length of the options consulted upon. If the preferred route had been double the length of the options consulted, that might have represented a fundamental change, but not where it is for less than the lengths consulted upon.

51. Accordingly, ground 3 is not made out.

Conclusion

52. In conclusion the claim fails and the issue of relief does not arise. In those circumstances it is not necessary to deal with the defendant's arguments on delay or whether the result is highly likely to have been the same even if the decision was flawed.

53. I will hand down judgment in writing. Counsel helpfully indicated that any consequential matters not agreed can be dealt with on the basis of written submissions, which should be filed within 14 days of hand down, together with a draft order agreed so far as possible.

54. I am grateful to all counsel for their submissions, written and oral.