Neutral Citation Number: [2022] EWHC 3318 (Admin)

Case No: CO/1225/2022

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

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

THE KING (STEPHEN WHITESIDE)	**Claimant**
- and -	
THE COUNCIL OF THE LONDON BOROUGH OF CROYDON	**Defendant**
-and-	
(1) STARS HOMES LTD	**Interested**
(2) LIBERTY SPECIALITY MARKETS	**Parties**

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Mr George Mackenzie (instructed by **Kingsley Smith Solicitors LLP**) for the **claimant**
Mr Matthew Henderson (instructed by **Browne Jacobson LLP**) for the **defendant**
Ms Heather Sargent (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **interested parties**

Hearing date: 6 December 2022
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Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives..

HH JUDGE JARMAN KC:

Introduction

1. On the 25 February 2022 the defendant as local planning authority (the authority) granted permission to the first interested party's predecessor to demolish a dwelling and garage at 158 Purley Downs Road, South Croydon and to erect two three-storey buildings comprising seven residential units with associated parking, cycle and refuse storage, and landscaping. The proposal included seven car parking spaces on site. In order to encourage sustainable methods of transport, the authority made the permission subject to an agreement (the agreement) under section 106 of the Town and Country Planning Act 1990 to secure a financial contribution of £10,500 (based on £1,500 per unit) for sustainable improvements and enhancements. These include off site car clubs with electrical vehicle charging points, on street parking restrictions, removal of residential parking permits, and creation of cycle routes. Condition 10 of the permission required that prior to occupation, 20% active and 80% passive electric charging points were to be provided on site. The report of the planning officer to the planning committee indicated that part of the financial contribution would be used to provide every residential unit with a minimum three year free membership of a local car club scheme upon first occupation.

2. The claimant seeks judicial review of the permission on two grounds, which Mr James Strachan KC sitting as a judge of the High Court considered to be arguable, and which I permitted to be amended. The first is that because the agreement failed to secure the free membership of a car scheme, the grant of permission did not fall within the scope of delegation of the decision and/or the committee was materially misled on this point. The second ground is that there is inadequate evidence as to how the figure of £1,500 was calculated or how the £10,500 is to be spent, and thus a failure to comply with regulation 122 of the Community Infrastructure Levy Regulations 2010.

The decision making process

3. The application for permission was referred to the planning committee because of the number of objections received and referral from the ward councillor. One of the consultation responses to the application came from the authority's transportation team, who made as one of its general comments that the site has very poor public transport links. The first of fifteen essential comments related to improvements to sustainable transport including but not limited to on street car clubs with electric vehicle charging points as well as such points in general. The team required a section 106 agreement to secure a contribution of £1,500 per unit towards those improvements. Reference was made to Local Plan policy SP8.12 and it was indicated that the authority and its partners will enable the delivery of electric vehicle charging points "throughout the borough to improve air quality and decarbonise private transportation over the plan period."

4. Reference was also made to policy SP8.13 requiring new development to contribute to the provision of such points, car clubs and car sharing schemes. The response continued:

> "The funding will go towards traffic orders at around £2,500, signing, lining of car club bay, EVCP provision including electrics and getting the car club to come to this location so set up costs for the car club. General expansion of the EVCP network in the area of the application. Funding will also be used for extension and improvements to walking and cycling routes in the area. Membership of the car club if this application is approved, must be secured for 3 years."

5. The officer's report indicated that the site in question had a very poor public transport accessibility level, and that the proposed development would give rise to increased use of private cars. Paragraph 8.56 of the report sets out the requirements of the transportation team in this way:

> "A contribution of £10,500 will be secured via S106 agreement to contribute towards sustainable transport initiatives in the local area including on street car clubs with electric vehicle charging points (ECVPs) within the South Croydon / Purley Oaks area as well as general expansion of the EVCP network in the area in line with Local Plan policies SP8.12 and SP8.13. The funding would go towards traffic orders at around £2500, signing, lining of car club bay, EVCP provision including electrics and set up costs for the car club. Every residential unit to be provided with a minimum 3-year membership to a local car club scheme upon 1st occupation of the unit. Funding will also be used for extension and improvements to walking and cycling routes in the area and improvements to local bus stops to support and encourage sustainable methods of transport."

6. As indicated in the transportation team's response, polices SP8.12 and SP8.12 of the Croydon Local Plan 2018 provide:

> "SP8.12 The Council and its partners will enable the delivery of electric vehicle charging infrastructure throughout the borough to improve air quality and decarbonise private transportation over the plan period.
>
> SP8.13 New development will be required to contribute to the provision of electric vehicle charging infrastructure, car clubs and car sharing schemes."

7. At paragraph 8.58 the report indicated that the car parking arrangements comply with policy DM30. That deals with car parking in new development and provides, so far as relevant, that to promote sustainable growth in Croydon and reduce the impact of car parking, new development of nine or fewer residential units must provide one on-site car club/pool car parking space and that 20% of car parking spaces should have an electric charging point.

8. The recommendations of the officer were set out in paragraph 2 of the report under the heading "Recommendations:"

> "2.1 That the Planning Committee resolve to GRANT planning permission subject to the completion of a legal agreement to secure the following: A financial contribution of £10,500 for sustainable transport improvements and enhancements.
>
> 2.2 That the Director of Planning and Strategic Transport has delegated authority to negotiate the legal agreement indicated above.
>
> 2.3 That the Director of Planning and Strategic Transport has delegated authority to issue the planning permission and impose conditions and informatives to secure the following matters:"

9. The conditions then listed included submission of details of electric vehicle charging points, implementation of car parking as shown on plans, and provision of cycle parking in accordance with plans. The "informatives" listed included "Granted subject to a Section 106 Agreement" and "any other informative(s) considered necessary" by the director of planning.

10. A meeting of the planning committee to consider the application and the officer's report was convened on 29 July 2021. The minutes of that meeting record that one member proposed a condition for finished land levels to be submitted for approval, and the amendment of another condition to require details to be agreed including boundary treatments to ensure privacy. The motion was passed to grant permission "based on the officer's recommendation inclusive of the additional conditions." The additional conditions referred to those raised by the member. There was no express mention in the minutes of the committee of a car share scheme.

11. By a document called a deed of unilateral undertaking dated 9 February 2022 and signed by the owners of the site, their mortgagee, and the authority (the agreement) reference was made to the resolution made on 29 July 2021 and to the fact that the parties were satisfied that the obligations set out in the deed, so far as relevant, were necessary to make the development acceptable in planning terms and fairly and reasonably related in scale and kind to the development so as to satisfy the requirements of regulation 122. It was indicated that the agreement was made pursuant to section 106, other enabling powers therein set out and all enabling powers.

12. By the agreement the owners undertook to perform obligations including, as set out in schedule 2, to pay £10,500 to the authority prior to occupation of the development:

> "…to be utilised towards (which could but not limited to Council exercising absolute discretion) Off-Site Car Clubs with EVCPs and/or highway changes such as on street restrictions, improvements/creation of cycle routes, removal of residential parking permit entitlement for new residential units to the present, and any, controlled parking zones within the area

13. Off-site car club was defined in that schedule to mean a public scheme for sharing car facilities that will be made accessible to the occupiers of the development and

members of the car club operator generally which makes cars available to hire to members.

14. The decision notice granting permission is dated 25 February 2022.

Ground 1

15. Mr Mackenzie, for the claimant, submits that the committee must also be taken to have authorised the permission once the membership of a car scheme was secured by the agreement. He also submits that members of the committee were materially misled by the officer's report because they were led to believe by it that such membership would be secured by the agreement, whereas it is not.

16. Mr Mackenzie relies upon the well-established principles as to the approach which the court should adopt in assessing officers' reports set out in *R (Mansell) v Tonbridge and Malling Borough Council and Others* [2017] EWCA Civ 1314. Lindblom LJ, giving the lead judgment summarised these at paragraph 41, including the following:

> "Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge …Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (…The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

17. Mr Mackenzie submits that on a fair reading of the officer's report as a whole, it was intended that there would be free membership of a car share scheme as set out in paragraph 8.56, that is what the committee intended, and that as the agreement does not achieve this the committee has been misled.

18. Mr Henderson for the authority, supported by Ms Sargent for the interested parties submit that it was not necessary for the agreement to secure three years free membership of a car scheme. The claimant's case depends on reading the committee's delegation as being subject to the requirement of membership of a car share scheme, and there is no basis for doing so. The instrument of delegation is the resolution of the committee, not the officer's report, and the intention of members must be gleaned from that. Whilst the officer's report provides context, it is not automatically incorporated in the resolution. Here, there are no express words of incorporation of the relevant part of the report.

19. For these propositions, reliance is placed upon the lead judgment of Sir Keith Lindblom, with whom Baker and Lewis LJJ agree, in *R (Flynn) v London Borough of Southwark Council* [2021] EWCA Civ 827. In that case too, the committee delegated to the officers the responsibility for negotiating "an appropriate" agreement under section 106. At paragraph 42 of his judgment, Sir Keith said this:

> "But the resolution did not require the legal agreement to be on terms specified or indicated by particular paragraphs in the officer's report. And it did not require the application to be brought back before the committee for further consideration in the light of the draft section 106 agreement in its final form, to enable the members to see whether a particular provision had been inserted."

20. The facts of *Flynn* were different to the present case. The development there involved one of the biggest projects of regeneration in Southwark. The resolutions of the committee were set out in five paragraphs, which included a reference to "an appropriate legal agreement."

21. However, in my judgment, the observations of Sir Keith set out above are apposite on the facts of the present case. If the intention was that the agreement should contain the provision of free membership of a car share scheme, it would have been very easy for the members to make that clear or to require the draft agreement to come back before them before it was signed. The members resolved to grant permission based on the recommendation of the officer, inclusive of the additional conditions proposed. That recommendation did not expressly include that the section 106 agreement should include the free membership of a car share scheme.

22. Although this is something that the transportation team required in its consultation response, and was repeated in the officer's report, it was not a requirement of policy. What policy required was a contribution to electric vehicle charging infrastructure, car clubs and car sharing schemes. The resolution of the council required a financial contribution to be made, and the permission was conditioned to require 20% active electric vehicle charging points to be provided on site. So far as car clubs and car sharing schemes are concerned, the officer's report stated that policy DM30, which required one on-site car club/pool car parking space to be provided, was complied with and the contrary was not argued before me.

23. In my judgment, there is no room to read into the resolution such a requirement, and ground 1 is not made out.

Is ground 1 academic?

24. In the hope of avoiding argument, the owners, their mortgagees, the authority and relevant interested party have executed (in the case of the latter two parties a matter of days ago) a supplementary agreement. Under the supplementary agreement, which was made under the same enabling powers as the agreement, such membership will be offered to the residents of the proposed development. Mr Mackenzie submits that this is not what was envisaged in the officer's report, which was the provision of such membership. I see no material difference between the word "provide" and "offer" in

this regard. It seems to me that even if such membership were to be provided, it could not be compulsory to take it.

25. Mr Mackenzie took other points on the supplementary agreement, such as whether there is evidence of delegated authority to sign it and whether it is within the powers of section 106. In my judgment there is nothing in these points. The supplementary agreement has been signed by the authority's attorney. Section 106 (1)(d) includes, as the type of planning obligation within that section, the requirement to pay a sum to the authority.

26. Accordingly, even if am wrong on the primary issue on ground 1, it has now been rendered academic.

Ground 2

27. Turning to ground 2, it is not in dispute that details of how the £1,500 contribution is calculated were not expressly brought to the attention of the committee as part of the process which led to the permission being granted. There is no particularisation as to how the £10,500 total will be spent specifically or when the initiatives will be delivered. Mr Mackenzie submits that only two such initiatives were identified and then only in broad terms. The first is the provision of an on street car club with electric vehicle charging points and the second is extension and improvements to walking and cycling routes in the area.

28. Regulation 122(2) of the 2010 Regulations, so far as material, provides that a planning obligation such as the provision of the financial contribution in this case may only constitute a reason for granting permission if the obligation is -a) necessary to make the development acceptable in planning terms; b) directly related to the development; and c) fairly and reasonably related in scale and kind to the development.

29. He submits that this lack of particularisation means that there was no sufficient evidence for the committee to conclude that the requirements of regulation 122, and in particular 122(2)(c) were made out. The lawfulness of a decision must be judged on the basis of evidence before the decision maker, and not evidence subsequently placed before the court.

30. In *R (Tesco Stores Ltd) v Forest of Dean District Council* [2015] EWCA Civ 800, the Court of Appeal considered regulation 122(2). Sullivan LJ, giving the lead judgment said at paragraph 12:

> "…while a planning decision-maker must approach the assessment of the three requirements in regulation 122(2) with appropriate rigour, what is appropriate will vary depending on the circumstances of each case. There will be cases where some form of quantification will be necessary because the decision-maker will have concluded that an adverse impact has to be reduced by a certain amount, or to a particular level, or in a certain way, if it is to be acceptable in planning terms; but it does not follow that "quantification" will be necessary in every case, or that it was necessary in this case given the basis upon

> which the Members' decided that this application should be approved."

31. Mr Mackenzie submits that there was in this case an absence of the required rigour.

32. Mr Henderson and Ms Sargent submit that it was not necessary for the committee to be told precisely of how the contribution was calculated or to be given further details of the type of measures it could fund. For the purposes of regulation 122(2)(c) there is no need to quantify the effect of the obligation. It was clear that the financial contribution was just that, a contribution, to a variety of sustainable transport initiatives, and the committee may be taken to be familiar with the need to promote sustainable transport, the 2010 regulations, and the application of the figure by the authority's strategic transport team which is a matter of expert judgment.

33. I prefer the latter submissions in this regard. Had the contribution proposed been a very large or a very small sum, the committee might have needed further information about its calculation before being satisfied that it fairly related to the scale and kind of the development. However, the contribution suggested, £1,500 per unit, is modest and the committee was entitled to take the view that it was fairly and reasonably related to the scale and kind of the development.

34. One of the original grounds of challenge was that because there was no mention in the report or the minutes of regulation 122, the committee must have ignored it. Another of the original grounds was that the contribution was not related to the development. Permission to advance those grounds was not granted, and although these points were relied upon by Mr Mackenzie as context, as he put it, he made clear that he was not seeking to advance them.

35. In my judgment it is clear from the policies referred to in the officer's report and the wording of the report itself that all that was required was a financial contribution towards sustainable transport initiatives. It was not suggested that a particular initiative should be wholly funded under the agreement. Clearly such initiatives may vary from time to time and from place to place.

36. In the *Tesco* case, it was clear that subparagraphs a) and b) of regulation 122(2) were met. The real issue was whether the contribution could be said to reasonably relate in scale and kind to the development within subparagraph c), and what level of detail was necessary for that requirement to be made out. The development involved a large out of centre retail store close to Lydney. The planning officers recommended refusal on the basis that the proposal did not make provision for contributions to mitigate the impact on the town centre. Members disagreed. The challenge to the subsequent grant of planning permission was put on the basis that because of lack of detail in proposed mitigation measures it was not possible to make an informed judgment as to how the package would mitigate the impacts of the proposal in whole or in part. That was rejected by the Court of Appeal in the terms set out above.

37. In my judgment, the present case is not the sort of case where the committee concluded that the impact of the development in terms of car use had to be mitigated to a certain level or in certain way. Members are to be taken as being aware of the sort of contribution being required in similar applications in the borough. The level of detail as to its calculation or as to how it would be spent, to the extent suggested by

Mr Mackenzie, is not necessary in order for the committee to be satisfied that it related reasonably in scale and kind to the proposed development. Some financial contribution to such initiatives was required to make the development acceptable given the increase in private car use that it would entail.

Evidence not before the committee

38. In case that argument was not accepted, evidence filed on behalf of the authority in these proceedings included a witness statement by Ben Kennedy, the authority's strategic transport manager. He sets out how the figure of £1,500 per unit was arrived at. This was based on a transport assessment study commissioned by the authority in its Kenley ward. This involved sustainable schemes to accommodate level of housing growth in the ward. Schemes specific to that ward were excluded so as to give a figure which could be applied across the borough. The resulting figure was then divided by the number of dwellings coming forward in that ward.

39. One of the points he makes is that there is other funding for sustainable transport schemes in the borough, apart from financial contributions from home builders, such as from Transport for London. He says that this was withdrawn in 2020, although it is not in dispute that this has now been reinstated but to a lower level.

40. Mr Mackenzie submits this evidence seeks to justify the decision after the event, and that that ward is not representative of the ward in which the present site is located, Sanderstead, in terms of physical and policy characteristics or in terms of suburban growth and intensification. He also submits that there is still a lack of detail as to such matters as the costings, the number of dwellings, and the specific schemes excluded.

41. The approach of the court to evidence such as this, which was not expressly put before the committee when considering the proposal, is well settled and summarised by the Court of Appeal in *R (United Trade Union Action Group Ltd) & Anor v Transport for London & Anor* [2021] EWCA Civ 1197 at paragraph 125. As relevant to the present case, the court should be cautious about admitting such evidence. The focus must be on the reasons given at the time of the challenged decision. There is no reason in principle not to admit such evidence if its function is to elucidate and not to alter fundamentally or contradict. Evidence to fill a gap in explanatory reasoning in the decision-making process is unlikely to be appropriate. The approach should be realistic and not over exacting. The best way is to simply disregard irrelevant or superfluous evidence rather than assessing strict admissibility.

42. Mr Henderson and Ms Sargent submit that this evidence is not to contradict the decision or to fill a gap, but to elucidate the factual background to the contributions towards sustainable transport initiatives and what those initiatives were at the time the decision was taken. I accept those submissions, and if it were necessary to rely upon such evidence in dealing with ground 2, then I would do so.

Relief

43. Finally they submit that even if the decision was flawed in the way submitted under ground 2, then relief should be refused under 31(2A) of the Senior Courts Act 1981 as the decision of the committee is likely to have been the same, given the evidence of Mr Kennedy and Ms Furnell. The decision was a close one, being decided by the

chair's casting vote. It is noteworthy that the grounds of challenge were not raised as objections before the committee. In my judgment, it is highly likely that if that evidence was before the committee the result would have been the same.

44. Accordingly the claim fails. Counsel helpfully indicated that any consequential matters which cannot be agreed can be dealt with on the basis of written submissions. A draft order agreed if possible, and any necessary written submissions, should be filed within 14 days of hand down of this judgment.