

Case Name: *Liverpool Open And Green Spaces Community Interest Company, R (On the Application Of) v Liverpool City Council [2020] EWCA Civ 861 (09 July 2020)*

Full case: [Click Here](#)

Commentary:

An appeal was allowed only in part in the Court of Appeal. This appeal considered whether Liverpool City Council ("LCC") had, in granting two planning permissions for development of housing in two listed buildings and on land within their setting, (1) misinterpreted development plan policy for development proposed within a Green Wedge and (2) failed to comply with the duty in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

The first permission originally granted by LCC (the applicant being the first interested party, Redrow Homes Ltd.) was to provide 39 dwellings on land at Harthill Road, and to convert Beechley House and Beechley Stables – both grade II listed buildings – into 12 apartments. The site lies in the Calderstones/Woolton Green Wedge and an area of Green Space. The second permission (the applicant being the second interested party, Arthur Brooks, on behalf of Merseyside Live Steam and Model Engineers) was to relocate the miniature railway on the land. The permissions were granted on 9 January 2018 and 10 August 2017, respectively, and the respondent, Liverpool Open and Green Spaces Community Interest Company, was an objector to both proposals. It challenged the two planning permissions in separate claims for judicial review and was successful. LCC then appealed against the order of Kerr J. dated 4 February 2019, quashing the two planning permissions.

This appeal judgement firstly addressed whether the appeal was academic. LCC maintains that neither of the planning permissions will actually be implemented but contends that in a wider context the appeal is not academic. Appeals which are academic should not be heard unless there is a good reason in the public interest for doing so i.e. it would 1. raise a point of general importance, 2. the respondent agrees to it proceeding (or is indemnified) or 3. the court is satisfied that both sides of the argument will be fully and properly ventilated.

Lord Justice Lindblom agreed that the second and third requirements are both satisfied, or can be. As for the first requirement, although there is no wider importance in the section 66(1) issue (which is already the subject of ample authority), the Policy OE3 issue is of a different kind. It is a question of policy interpretation, not previously considered, not confined to the particular circumstances of this case, but with significance across the city and potential consequences in other areas where similar policies are in place. It is also a point of some general importance, whose determination by this court is likely to be of benefit elsewhere. This is enough to support the conclusion that this appeal is not wholly academic, and, in the public interest, ought to be heard.

Next the first of the two main points was addressed; whether the LCC had misinterpreted Policy OE3. Policy OE3 of the UDP, under the heading "GREEN WEDGES", states that the City Council will protect and improve the open character, landscape, recreational and ecological

quality of the Green Wedges at Calderstones/Woolton and Otterspool and includes a number of measures to follow.

The committee reports in respect of both permissions show that proposed developments' "Impact on Green Wedge and Green Space" was considered, concluding that the Interim Head of Planning is satisfied that the proposed development does not constitute a departure from the UDP in relation to saved policies OE3 and OE11, given it is considered that there will be only limited impacts.

Kerr J. was persuaded that there was a clear conflict between the proposals and policy OE3 and the officer's report was wrong to conclude otherwise.

It was Lord Justice Lindblom's view that the officer's assessment of the proposal against the provisions of Policy OE3 was based on a correct interpretation of that policy, and the policy was lawfully applied in a sequence of rational and clearly reasoned conclusions. This is not one of those cases where a LPA has misunderstood a policy in its own development plan but a matter of planning judgment for the officer and ultimately for the committee itself. On this ground, therefore, it was concluded that the appeal is good.

On the second of the two main points in this appeal, the conclusion was different.

Section 66 of the Listed Buildings Act provides the general duty in respect of listed buildings i.e. in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses. The question is whether the LCC failed to apply this duty seeing as the committee report had not set out all consultation responses fully on this point and full responses were not made available to the members at the meeting. In particular, Kerr J. was troubled by the officer's failure to mention the "strong conservation objections" raised by the Urban Design and Heritage Conservation team (a team of professional officers employed by the LCC for their expertise in the conservation of heritage assets, including listed buildings and their settings). Lord Justice Lindblom considered that the judge was rightly troubled this and right to conclude that this was enough to displace the presumption that the section 66(1) duty had been properly performed.

It was reasoned that omitting to take into account the response of the Urban Design and Heritage Conservation team was not only to ignore their objection. It was also to disregard national policy and guidance relevant to the section 66(1) duty. The objection was, in the circumstances, an "obviously material" consideration. It could have made a difference to the outcome, but it was overlooked and that was an error of law. It indicates and leaves one in "substantial doubt" that the duty was not complied with. Lord Justice Lindblom also agreed with Kerr J. that the court is not in a position to conclude, under section 31(2A) of the Senior Courts Act, that it is "highly likely that the outcome ... would not have been substantially different" if the section 66(1) duty had been complied with, and the Planning Committee,

when performing that duty, had considered the objection of the Urban Design and Heritage Conservation team, giving it appropriate weight. On this ground, Lord Justice Lindblom concluded that Kerr J. was right to uphold the challenge to the planning permission for Redrow's proposal.

The appeal by the LCC is therefore allowed only in so far as it seeks to overturn the judge's order quashing the planning permission for the relocation of the miniature railway, otherwise it is dismissed and the order quashing the permission for the development proposed by Redrow upheld.

Case summary prepared by Amy Fender