

Case Name: *Tesco Stores Ltd, R (On the Application Of) v Reigate and Banstead Borough Council* [2024] EWHC 2327 (Admin) (11 September 2024)

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Commentary:

This case concerns a claim for judicial review by Tesco Stores Ltd ("**the Claimant**") of a decision made by Reigate and Banstead District Council ("**the Defendant**") to grant full planning permission for proposed development that would involve the demolition of the Air Balloon Public House (a locally listed building) and the construction of a Lidl foodstore with associated car parking.

Importantly, in granting planning permission, the Defendant went against the recommendation for refusal in the officer's report ("**the OR**"). Committee members gave the following reasons for approval:

"The development hereby permitted has been assessed against the relevant development plan policies as set out in the committee report and material considerations, including third party representations.

It is considered that the public (social and economic) benefits provided by the development would outweigh the less than substantial harm to the designated heritage asset, total loss of the non-designated heritage asset, the schemes failure to promote and reinforce local distinctiveness and respect the character of the surrounding area and the potential impact on the town centre. It is therefore concluded that the development is in accordance with the relevant policies of the development plan and there are no material considerations that justify refusal in the public interest."

The Claimant sought to rely on two grounds of challenge to the Defendant's decision:

1. An allegation that in granting permission, the Defendant failed to comply with its statutory duty under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("**the Act**") in that it failed to give great weight to the preservation of the setting of a nearby Grade II listed War Memorial ("**Ground 1**").
2. An allegation that the Defendant failed to give any, or any adequate, reasons for finding that the identified harms arising from the development proposed were outweighed by the benefits of the proposal ("**Ground 2**").

Ground 1 was originally refused permission to proceed, however, the Claimant renewed its application for permission on that ground, which was heard with the substantive hearing of Ground 2.

The judge in this case refused permission for Ground 1 to proceed and rejected the Claimant's claim under Ground 2, thereby dismissing this claim for judicial review.

Ground 1

in refusing permission to proceed on Ground 1, the judge agreed with the reasons advanced by the Defendant and gave additional reasons for the decision. In summary, together these were:

- (a) The OR and addendum correctly summarised, and drew members' attention to, section 66(1) of the Act, and to the considerable importance and weight to be given to the desirability of preserving the setting of listed buildings when carrying out the heritage balancing exercise. There was no need for that analysis to be repeated in the reasons for approval that were given for deciding to grant planning permission.

The committee were not differing from the advice on the correct statutory and policy approach to apply, and so it was not a matter which needed to be covered in the resolution.

- (b) Members were consistently and correctly advised about the proper approach to adopt to the statutory duty and harm to heritage assets. To suggest they either ignored or misunderstood the approach in their debate or their decision would not be fair.

- (c) Whilst harm to the setting of a listed heritage asset attracts considerable importance and weight, and the balance is tilted in favour of the preservation of its setting, there is still a legitimate evaluative assessment of the nature and extent of that harm to be carried out by members.

- (d) Members are lawfully able to reach a different view in relation to harm to a heritage asset and whether that harm is outweighed by the benefits whilst also applying the correct approach that had been advised to them by officers.

- (e) In so far as appropriate to look at the tenor of members' debate, the judge did not see anything to suggest members had misunderstood or misapplied the legal advice they had been given. Caution should be had to applying a forensic approach to members' comments.

Ground 2

It was common ground between the parties on the facts of this case that the Council were under a duty to give reasons for their decision as a departure from the recommendation in the OR; however, the Claimant submitted that members failed to articulate in their reasons why they departing from the recommendations of the OR because they failed to articulate what the claimed benefits were and they failed to explain why those benefits convincingly outweighed the heritage harm.

The Defendant argued that the harms and the benefits were addressed in the OR, and that the members could rely on those even if not agreeing with officers as to the outcome of the balance between harms and benefits.

The judge, in agreeing with the Defendant and dismissing the claim, gave, in summary, the following concluding judgment on Ground 2:

- (a) There could be no doubt that members considered the proposal to have public benefits of the type summarised in the OR and the officer's tempering of those benefits in the OR did not strip them of being benefits at all.
- (b) The Committee was entitled to disagree with officers as to the overall outcome of the balancing exercise without having to provide additional reasons to those they gave.
- (c) Members were properly advised orally at the Committee Meeting as to the balancing exercise that needed to be undertaken in light of the correct legal approach to be adopted with respect to the heritage assets and that they were entitled to disagree with officers.

- (d) members could legitimately disagree with officers without having to elaborate further than they did in the resolution. It was inherent in the different judgment they reached to officers they attached greater weight to the same benefits that officers had identified, as they were entitled to.

- (e) Finally, the judge did not consider on a fair reading of the transcript for the committee meeting to identify the 'tenor' of the debate (which he did not, in any event, think was appropriate) that members' comments suggested anything otherwise than that members were undertaking balancing exercise required of them in a context where they had been correctly advised as to the legal approach to adopt to harm to heritage assets.

Case summary prepared by Matt Speed