Case Name: *R (Walsh) v Horsham District Council and Another* [2024] EWHC 2640 (Admin) (21 October 2024)

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Commentary:

This was an unsuccessful claim for judicial review by Mr Rory Walsh ("the **Claimant**") of the decision of Horsham District Council ("the **Defendant**") to grant planning permission to YMCA Downslink Group ("the **IP**") for the conversion of its existing grass football pitch at Horsham YMCA Football Club to an artificial 3G surface, with new perimeter paths, fencing, floodlighting and goal storage.

Background

The principal issue in the claim was the deterioration and loss of a veteran ash tree as a result of the proposed development. While planning officers recommended refusal of the application on the basis that the IP had failed to demonstrate "wholly exceptional reasons" for the "loss or deterioration" of a veteran tree, as required by paragraph 186(c) of the National Planning Policy Framework ("the **NPPF**"), the Defendant's Planning Committee North ("the **Committee**") resolved to grant planning permission.

By way of background, paragraph 186(c)of the NPPF provides:

> "*When determining planning applications, local planning authorities should apply the following principles:*
>
> *[…]*
>
> *(c) development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists*".

The NPPF includes footnote 67, which provides the following examples of "wholly exceptional reasons": "*For example, infrastructure projects (including nationally significant infrastructure projects, orders under the Transport and Works Act and hybrid bills), where the public benefit would clearly outweigh the loss or deterioration of habitat*".

Grounds and judgment

The Claimant initially pursued the following three grounds:

1. The Defendant failed to give legally adequate reasons for its finding that the test at paragraph 186(c) of the NPPF was met;
2. The conditions attached to the permission failed to secure one or more measures which the Defendant considered to be necessary; and
3. The Defendant's decision to grant the permission was irrational.

Following the completion of a s.106 agreement to impose additional obligations on the IP to address any deficiencies in the conditions attached to the planning permission, Ground 2 was not pursued at the final hearing.

Ground 1: Failure to give legally adequate reasons

The Claimant identified three reasons in the hearing why the reasons given by the Defendant were legally inadequate.

First, the reasons did not explain why Members concluded that the proposed development would "enable" the financial viability of the club and why this amounted to a "wholly exceptional reason", as required by para. 186(c) of the NPPF. Nor did Members explain why they disagreed with the officers' assessment that the development would only "help to secure the viability" of the club and that this was not a "wholly exceptional reason".

Second, the reasons given did not explain what the proposed "significant new infrastructure" was or why it amounted to "wholly exceptional reasons" sufficient to grant planning permission. This also was not a factor identified by planning officers. The Claimant argued that this cast substantial doubt as to whether Members had understood the extent of the infrastructure being provided and the nature of the wholly exceptional reasons envisaged by paragraph 186(c) and in particular footnote 67, which refers to nationally significant infrastructure projects where the public benefit outweighs the loss of habitat.

Third, the Claimant submitted that the provision of compensatory measures by the IP wrongly formed part of the "wholly exceptional reasons" identified by Members, eliding what are supposed to be distinct requirements.

Lang J found that the reasons given by Members, though brief, met the required standard of intelligibility and adequacy.

Lang J agreed with the Defendant's submission that there was no real, as opposed to forensic, difference between the officer's conclusions that the proposal would "*help to secure the viability of the Football Club*" and the Members's conclusion that it would "*enable the viability of the Club*" [underlining added]. There was also no suggestion in any of the evidence that Members disagreed with the officers' financial viability analysis. She found that it was sufficiently clear from the stated reasons of the Committee that they were satisfied that the proposed development would enable the club to become more financially viable, and that the additional facilities would benefit the community. Members were lawfully entitled to exercise planning judgment and to differ from the officers in their conclusions when applying the test in para.186(c): the same community benefits were identified by the Defendant's planning officers, but the Members differed in the weight that they gave those benefits.

The judge also held that there was no basis for the Claimant's suggestion that Members misunderstood the extent of the new infrastructure that the proposal would provide.

Only by "*excessive and hypercritical scrutiny*" of the decision could one arrive at such a conclusion. Similarly, there was no basis for the Claimant's submission that the Defendant had misapprehended the import of footnote 67, which merely served as an illustrative example, not a requirement, of what would amount to "exceptional circumstances".

Finally, the Court found that there was no proper basis for the Claimant's criticism that the provision of compensatory measures formed part of the "wholly exceptional reasons" identified by the Committee, which should properly be separate and cumulative requirements in the policy test. There was nothing in the evidence to suggest that Members disagreed with or overlooked the officers' advice that compensation measures should only be considered once the principle of the loss or deterioration of the tree has been accepted and cannot form part of the justification to lose the tree in the first place. In fact, the suggestion that the Committee had blurred those discrete requirements was "*an example of excessive legalism which has been deprecated by the courts in planning cases*."

Ground 3: Irrationality

This ground was dealt with much more briefly, perhaps reflecting the fact that challenging planning decisions on rationality grounds is a "formidable task."

The Claimant submitted that given the localised and limited benefits of the proposal, no reasonable planning authority could conclude that those benefits were exceptional, let alone wholly so. Lang J disagreed: numerous benefits would flow to members of the local community, and the conclusion that the proposals demonstrated wholly exceptional reasons for the loss or deterioration of the tree was within the range of reasonable responses open to the Committee.

Conclusion

Given the above, the claim for judicial review was dismissed.

Case summary prepared by Gregor Donaldson