IN THE MATTER OF :

KIRKLEES COUNCIL PLANNING APPLICATION 2020/92350

LAND SOUTH OF HEYBECK LANE, CHIDSWELL, SHAW CROSS, DEWSBURY

ADVICE

SUMMARY OF ADVICE

1. This planning application should be re-determined by the Council's Strategic Planning Committee in accordance with the principle in *Kides v South Cambridgeshire DC* [2002] EWCA Civ 1370 at [125]-[126]. A re-determination would also accord with the Council's constitution. There are strong prospects of success in a claim for judicial review of an outline planning permission re-issued under delegated authority.

INTRODUCTION

2. I am asked to advise Chidswell Action Group ("**CAG**"), the successful claimant in a recent judicial review[1] of the Council's decision to issue outline planning permission for the development[2] at Heybeck Lane ("**the outline permission**").

3. In December 2022 the SPC resolved to grant the outline permission subject to conditions and a section 106 agreement to be agreed by officers. The planning permission was issued in October 2024.

4. The outline permission was quashed on ground 5, namely the Council's failure to publish the section 106 planning obligation ("**the original s.106**") prior to the outline permission. There was no opportunity for consultee or public comment on the original s.106, which contains provisions on Biodiversity Net Gain (BNG) and management of the ancient woodland next to the development site. It is fair to say that the judgment is critical of the Council's conduct in failing to publish the original s.106, referring to an "*unexplained flagrant breach*" and a "*serious want of transparency*".

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[1] *R (Chidswell Action Group) v Kirklees Council and CC Projects* [2025] EWHC 2256 (Admin)
[2] Residential development (Use Class C3) of up to 181 dwellings, engineering and site works, demolition of existing property, landscaping, drainage and other associated infrastructure.

5. After the judicial review, on 23 September 2025 a further amended section 106 agreement ("**the consolidated s.106**"), which is the original s.106 as amended by SPO(1) and SPO(2), was uploaded to the Council's planning portal and is open for public comment for a period of 14 days.

6. I am now asked to advise on the legality of the Council's anticipated decision not to refer the planning application back to the SPC. In other words, officers would decide whether the consolidated s.106 is acceptable; if they decide it is acceptable, the outline planning permission will be re-issued under delegated authority.

7. It is important to note that CAG's claim for judicial review prompted the Council and the developer to draw up two supplementary section 106 agreements in order to remedy the shortcomings of the original s.106. These are referred to as SPO(1) and SPO(2) in the High Court judgment. Obviously, neither of these supplementary agreements were open to scrutiny by the public or by elected members. SPO(1) and SPO(2) were scrutinised in the judicial review case, but within limited legal parameters. Unlike planning officers or elected members, the court will not consider the planning merits.

LEGAL PRINCIPLES

8. Under s.70(2)(c) of the Town and Country Planning Act 1990, in "dealing with" an application for planning permission the authority must "have regard" to all "material considerations".

9. A consideration is material if *"it is a factor which, when placed in the decisionmaker's scales, would tip the balance to some extent, one way or another […] it must be a factor which has some weight in the decisionmaking process, although plainly it may not be determinative"*: *Kides* at [121].

10. In *Kides* the Court of Appeal considered the circumstances in which an outline planning application should be referred back to the committee which resolved to grant it, in order to comply with the authority's s.70(2) duty. Paragraphs [125]-126] of the judgment are key :

> […] where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, s.70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

> In practical terms, therefore, **where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of s.70(2) , it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor**. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would reach* (not *might reach*) the same decision.

11. Thus, if new material considerations have arisen since the SPC's resolution to grant planning permission in December 2022, the planning application should be referred back to the SPC - unless the SPC would reach the same conclusion in the light of those considerations.

ANALYSIS

12. The first point to note is that in the judicial review case the court was not asked whether the planning application should be referred back to the SPC in the event that the outline permission was quashed. The Hon Mr Justice Kerr did not give any view on that issue.

13. At [170] the Judge did find "*quite a strong likelihood"* that the application would have gone back to committee for further consideration and public debate about the adequacy of biodiversity safeguards and the achievability of 10% BNG, if the original s.106 had been lawfully published before the outline permission.

14. The Judge noted at [174] that three of the seven SPC members who voted against the resolution to grant outline permission back in December 2022, did so because they thought the Committee lacked sufficient information about the gaps to be filled at reserved matters stage (on BNG and ecological mitigation). He found *"it is likely that those three members, at least, would have wished to reconsider the proposals with the benefit of a draft section 106 agreement, especially one not including the provision later added by SPO(1) and SPO(2)".* Plainly, the Judge is not ruling out the possibility that members would want to consider the consolidated s.106, i.e. the one including SPO(1) and SPO(2), which is now open for public comment.

15. Moreover, the Judge rejected the Council and the developer's argument that SPO(1) and SPO(2) rendered ground 5 academic. In other words, they argued[3] that because the flaws in the original section 106 agreement had been remedied by SPO(1) and SPO(2), it no longer mattered that the original section 106 agreement was not

[3] IP(1) hearing skeleton paragraphs 44-46

published. The Judge did not accept that argument. If the Judge had accepted that argument, he would not have allowed the claim on ground 5.

16. In his reasoning on ground 4 the Judge observes at [142] that issues about the achievability of 10% BNG :

> "[..] would in any case be for officers **and if necessary the committee** to consider once the updated Biodiversity Assessment has been obtained. If the 10 per cent BNG, measured from the July 2020 baseline, were manifestly not achievable, **or not without substantial off-site interventions,** the LPA might well, at officer level, decline to bestow its approval of the Biodiversity Assessment, **or it might decide to refer the BNG issue back to the committee.**"

17. Plainly, the Judge accepts that if 10% BNG cannot be achieved without "substantial" offsite interventions, then the application can legitimately go back to the committee. The question I am asked now is whether, as a matter of law, it should go back to committee because new material considerations have arisen and it cannot be said that the SPC would reach the same conclusion. That question must be answered by looking at the provisions of the consolidated s.106, which was not before the SPC.

<u>The consolidated s.106</u>

18. Schedule 5 contains the BNG provisions. Paragraph 3.1 makes clear that the 10% BNG requirement is to be satisfied by the BEMP (biodiversity management and enhancement plan) and off-site BEMP "together".

19. While paragraphs 4.1 and 4.2 are headed "*On-site Biodiversity Net Gain"* and prevent the occupation of more than 90% of dwellings until the works of habitat creation and/or enhancement set out in the BEMP have been completed, there is <u>no percentage requirement</u> for BNG on site. The on-site BEMP could provide 9.99 % net gain, or it could provide 0.09% net gain, and still fulfil the requirements of Schedule 5. Plainly, the latter is not what the SPC were led to expect in December 2022.

20. Further, the list of definitions in schedule 5 provides that the "offsite BNG Land" is the "Ancient Woodland Land", i.e. Dum Wood. This means that any BNG which cannot be achieved on-site will need to be achieved within the ancient woodland. However, Schedule 3 of the consolidated s.106 also provides for public access and associated works to the ancient woodland (section 6).

21. It is clear from the officer reports and meeting transcript that when the SPC resolved to grant outline planning permission in December 2022, delegating agreement of the

section 106 terms and the planning conditions to officers, they did not know that the consolidated s.106 would:

1) Allow for the 10% BNG to be achieved primarily offsite.

2) Provide for the ancient woodland to be used to achieve the BNG which could not be achieved on site.

3) Allow for the ancient woodland to be developed and managed for public access.

22. These are all material planning considerations which have arisen since the SPC's resolution to grant permission in December 2022. I do not think it can rationally be concluded that the SPC would resolve to grant outline permission even in the light of these considerations. Applying the principle in *Kides,* set out above, the Council will be in breach of its duty under s.70(2) of the Town and Country Planning Act 1990 if the planning application is not referred back to the SPC.

23. Moreover, a referral back to Committee would accord with the Council's constitution.

24. Section F of the constitution contains the scheme of delegation to officers. This is founded on the principle of delegation "by exception", i.e. every decision which can lawfully be delegated, is delegated, save for the exceptions listed in the scheme. The relevant exception here (under 'Investment and Regeneration' Section A 1) is *"any Major Planning Application (Full or Outline) which receives a significant number of representations against officers recommended decision or if a Ward Member refers a Major Planning Application to Strategic Planning Committee with the Chairs agreement […]".*

25. The planning application came before the SPC in December 2022 because of this exception. In my view, given that the planning permission has been quashed by the court, the exception still applies : there is an outstanding planning application for major development, which has received a significant number of objections against officer advice. Further, the SPC's resolution to grant outline permission was made without sight of the consolidated s.106, containing provisions on BNG and ancient woodland which they knew nothing about. On top of that, the High Court judgment contemplates a referral back to committee if 10% BNG cannot be achieved without substantial off-site interventions (which the consolidated s.106 allows for).

26. Even if I am wrong that the planning application still falls within the 'major applications' exception outlined above, I am aware that a number of councillors are preparing a request for the application to be referred back to committee, with reference to Art 13.2

of the Council's constitution (principles of decision making). In my view those principles clearly support a call-in.

27. Finally, in these unusual circumstances, it is at the very least questionable whether officers can consider the consolidated s.106 with an open mind. The developer's team and officers have been negotiating the terms of a section 106 agreement for nearly three years. The original s.106 was not only unlawfully kept from the public, but found to be inadequate in its provision for BNG and ecological mitigation. The Council and the developer's team then worked together in the judicial review case – which is entirely usual, and I do not suggest any impropriety. They worked together to produce SPO(1) and SPO(2), and have now worked together again to prepare the consolidated s.106 – which again is all entirely usual. However, in my view a "fair minded and informed observer" would conclude there is a real possibility that officers have already made up their minds that the consolidated s.106 is acceptable, notwithstanding any further public comments or consultation responses.

28. If the consolidated s.106 is entered into and outline planning permission issued under delegated authority, there are in my view strong prospects of a successful claim for judicial review on the grounds that the Council acted in breach of its duty under s.70(2) of the Town and Country Planning Act 1990, and its own constitution, and that the decision to issue the outline permission was tainted by apparent bias and/or predetermination.

29. Against that background, and given the local significance of the site and the controversy around the planning process, it is difficult to understand why there is any doubt that the application should go back to committee. It may well be that members find the consolidated s.106 to be acceptable and resolve to issue the decision notice granting planning permission. In my view that is clearly a decision for them, for the reasons outlined in this advice.

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