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Case No: AC-2024-LON-001483

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

The Royal Courts of Justice
Strand
London WC2A 2LL
10 September 2024

B e f o r e :

MRS JUSTICE LANG DBE

THE KING	
(on the application of SAVE SMALLBROOK)	**Claimant**
- and -	
BIRMINGHAM CITY COUNCIL	**Defendant**
- and -	
COMMERCIAL ESTATES GROUP LIMITED	**Interested Party**

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(Official Shorthand Writers to the Court)

MR J CANNON KC and MR R CLAPP (instructed via Direct Access) appeared on behalf of the Claimant.
MR H LEITHEAD (instructed by the Legal and Governance Department) appeared on behalf of the Defendant.
MR J MAURICI KC and MR B FULLBROOK (instructed by Clyde & Co) appeared on behalf of the

Interested Party.

HTML VERSION OF JUDGMENT (APPROVED)

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1. MRS JUSTICE LANG: This is a renewed application by the claimant for permission to apply for judicial review of the decision made by the defendant ("the Council"), dated 14 March 2024, to grant planning permission to the interested party ("the IP") for its proposed development of the Ringway Centre at Smallbrook Queensway, Birmingham.

2. The claimant is an unincorporated association which coordinates a network of groups working together to oppose demolition of the Ringway Centre and to promote an alternative development.

3. Permission was refused by Mould J on the papers on 17 June 2024.

Jurisdiction

4. The council and the IP are no longer pursuing the preliminary jurisdictional point regarding service on the site owner.

Planning history

5. The Council granted the IP's application for a hybrid planning permission. Full planning permission was granted for a phased demolition of all the existing buildings (SBQ1, 2 and 3) and the erection of a 48-storey residential building (SBQ3) with lower and ground floor commercial spaces.

6. Outline planning permission was granted for the erection of two residential buildings (SBQ1 and 2) with lower and ground floor commercial uses, in a subsequent phase or phases of development.

7. During the planning application process, the claimant and others objected to the development on a number of grounds; in particular, that the Ringway Centre was a locally-listed Grade B Non-Designated Heritage Asset which could and should be adapted and regenerated instead of being demolished and replaced.

8. The carbon footprint of the proposed development was extensively considered in the course of the planning application process. The concerns raised by objectors about the embodied carbon which would result in the proposed demolition and construction of the buildings at the Ringway Centre were addressed in the IP's supplementary planning statement ("SPS"), dated March 2023, which considered measures to minimise embodied carbon and whole life carbon. It described the IP's initial assessment on the option of converting the existing buildings and the reasons why this option was not feasible.

9. In June 2023, the IP submitted a whole life carbon assessment ("WLCA") which expressly compared the carbon effects of the proposed development with the retention/refurbishment of the Ringway Centre. Obviously, the carbon effects of retention were considerably less than those of demolition and reconstruction. The WLCA explained, however, that the proposed development would deliver many more homes than reuse of the existing buildings. Those homes would then have to be delivered elsewhere, given the shortfall in the Council's housing land supply. When this was factored in, having express regard to embodied carbon, the retention and refurbishment of the Ringway would only

produce eight per cent less CO2 /m2 compared with the proposed development. The sustainability credentials of the proposed development would also provide further carbon benefits.

10. On 28 September 2023, the Council's Planning Committee accepted the recommendation in the first officer's report ("OR1") and resolved to grant planning permission, subject to securing an agreement under section 106 of the Town and Country Planning Act 1990.

11. OR1 contained a section entitled "Reuse of the existing building and embodied carbon". This explained that the council had carried out an independent third party review of the WLCA, which confirmed that the WLCA had been completed with the best practice approach and verified the assumptions made within the assessment (OR1/7.181).

12. At OR1/7.183 to 7.185, following an external specialist review of the SPS, the planning officer accepted that the accommodation on the site was poor and outdated and the existing buildings on site created operational difficulties. The conversion of the existing buildings to residential would likely deliver significantly fewer homes on site. The planning officer recognised that "refurbishment options have the lowest embodied carbon impact" but stated "there is no local policy basis to specifically consider embodied carbon", whilst acknowledging that the NPPF recognises that development should be transitioning to a low-carbon economy and the proposed development had been designed with good sustainability measures.

13. On 1 December 2023, the claimant invited the Planning Committee to reconsider its resolution on the ground, inter alia, that OR1 was materially misleading on the correct approach to the climate impact of the proposed demolition. Among other things, the claimant alleged, in reliance upon the Secretary of State's decision on the Marks and Spencers (M&S) store in Oxford Street, that the Council had erred in not adopting a presumption in favour of the retention of existing buildings, which the claimant said was imposed by paragraph 152 of the NPPF. The claimant also alleged that the IP had failed properly to consider retaining the existing buildings as an alternative to the proposed development.

14. The Planning Committee considered the claimant's application at a meeting on 1 February 2024, together with a second officer's report ("OR2").

15. The Council was already aware of the decision of the Secretary of State in relation to the M&S store in Oxford Street. It was referred to in OR1/7.187. Officers had advised that the M & S decision was based on the circumstances of that particular case.

16. In OR2, the planning officer explained that the Council did not agree that it had made any legal error in OR1. It advised that paragraph 152 of the NPPF (September 2023 version) did not create any presumption in favour of the retention or the reuse of buildings. It also explained that no local development policies created such a presumption. However, despite this, OR2 invited members to proceed to decide the application on the basis that the M&S decision by the Secretary of State was correct. Specifically, members were asked "If there is a strong presumption in favour of repurposing or reusing the existing buildings, should permission for this scheme still be granted?". OR2 then went on to relate the significant benefits of the proposed development and to make reference to the SPS and its conclusions about the viability of retaining the Ringway. It concluded:

> "It is the firm view of officers that the application should be granted, even if there is a strong presumption in favour of the repurposing and reuse of the existing buildings".

17. The Planning Committee accepted the officer's advice in OR2, read together with OR1, and resolved to grant the permission on 1 February 2024.

18. In the event, the Secretary of State's decision in the M&S application was subsequently quashed by the High Court in *Marks and Spencer PLC v Secretary of State for Levelling Up, Housing and Communities* [2024 EWHC 4542 (Admin). At [54], Lieven J held that paragraph 152 of the NPPF, which states, inter alia, that the planning system should "encourage the reuse of existing resources, including the conversion of existing buildings", gives some encouragement for the reuse of buildings but nothing that comes close to a presumption.

19. The claimant applied to the Secretary of State asking him to call in the application but he declined to do so. The formal grant of planning permission was issued on14 March 2024.

Grounds of challenge

20. The claimant relies on two grounds of challenge in support of the claim for judicial review.

Ground 1

21. Under Ground 1, the claimant submits that the planning officer made a material error in OR1/7.185 when she advised the planning committee:

> "7.185 The existing buildings on the site create operational difficulties and the argument advanced by the applicant is that the accommodation is poor and outdated, this is accepted. It is recognised that refurbishment options have the lowest embodied carbon impact. However, there is no local policy basis to specifically consider embodied carbon. However, the NPPF recognises the development should be transitioning to a low carbon economy. The existing policy with regards to sustainable construction are met, and the new building has been designed with good sustainability measures".

22. Then at OR1/ 7.240, when undertaking the planning balance, the planning officer stated:

> "7.240 Moderate weight is afforded to the sustainability credentials of the built development. I note the carbon impact of demolition, however given the existing BDP Policies, this carries limited weight in this context…"

23. The claimant submits that the planning officer erred because there was a local policy basis for the specific consideration of embodied carbon impact in the Birmingham Development Plan ("BDP"). Alternatively, the planning officer excluded a material consideration and/or misled the planning committee and/or failed to give intelligible reasons and/or acted irrationally.

24. The claimant submitted that the Birmingham Design Guide (2022) is a supplementary planning document which is part of local policy. It provides under the section on "Design Themes" at page 59:

> "Developers must create the most sustainable, efficient and futureproof buildings wherever possible, ensuring energy efficiency and climate adaption measures are embedded in the design process.
>
> Successfully achieved, this will create buildings and places that require less energy to build and operate, in turn helping the city meet its carbon reduction targets, whilst reducing the energy burden for occupants. They should also enable users and occupants to adapt buildings; to respond to changes in climate and user needs".

25. Design Principle 25 of the Design Guide (page 61) states

> "Allied with the policy requirements of the BDP (TP1 to TP5), where viable and appropriate, the design of development must effectively incorporate measures and infrastructure to help create buildings and spaces that reduce their environmental burden; and the long term financial burden for occupiers. In seeking to achieve this, proposals must demonstrate they have integrated or considered the following within their design process:
>
> […]
>
> Building re-use and sustainable materials - utilising modular building methods, effectively integrating existing buildings into a scheme and using low carbon materials".

26. The explanatory text adds at page 61 of the Design Guide:

"Allied with the efficient running of a building, due consideration must also be given to the sustainability of the construction process to be utilised. This should extend from an appropriate assessment of whether any existing buildings could be effectively re-used, to utilising off-site build methods and sustainably sourced materials".

27. Design Principle 25 refers to BDP policies TP1 to TP5 which give effect to the overarching strategy on climate change. Policy TP1 is titled "Reducing the City's' carbon footprint". The explanatory text to the policy confirms that "Birmingham is committed to taking action to tackle climate change and has set itself demanding CO2 reduction targets" and goes on to state, at paragraph 6.3, "planning does have a significant role to play and it is important that full advantage is taken of this. This policy highlights the key areas where planning can make a contribution".

28. Policy TP1 then states that the City Council is committed to a 60% reduction in total carbon dioxide (CO2) emissions produced in the City by 2027 from 1990 levels, and states that actions to help achieve this target will include "requiring new developments to reduce CO2 emissions and water consumption (Policy TP3)".

29. Policy TP3 provides that "new development should be designed and constructed in ways to which will maximise energy efficiency and the use of low carbon energy" and "consider the type and source of the materials used" and "minimise waste and maximise recycling during construction". It then states that "developers will be encouraged to find innovative solutions to achieve the objectives of this policy" and that "measures to adapt and enhance the sustainability of existing buildings and neighbourhoods … will also be encouraged".

30. The explanatory text of policy TP3 states, at paragraph 6.4, that "ensuring that development is constructed in the most sustainable way, will require consideration to be given to the inclusion of measures reducing energy and water consumption, reducing waste and using sustainable building materials".

31. In my view, Ground 1 is unarguable for the reasons given by Mould J and by the Council and the IP. As Mould J said in his reasons for his order, the principles set out *in R (Mansell) v Tonbridge and Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 152, per Lindblom LJ at [42], are applicable here. There is no policy in the Council's Development Plan, in particular in policies TP1 to TP3, and the very general references at 2.18, 3.5, 3.8 and 3.26 relied upon by the claimant, which specifically require consideration of embodied carbon.

32. Supplementary planning documents, such as the Design Guide, are not part of the statutory development plan and are not local plan policies (see the *M&S* case per Lieven J. at [40].). They can only amount to material considerations. Therefore, OR1 was correct in stating that there is no local policy basis for specific consideration of embodied carbon.

33. Design Principle 25 in the Design Guide does require consideration of building reuse and effectively integrating existing buildings into a scheme. The Council clearly did consider building reuse at length in OR1 and, therefore, complied with the Design Guide. I agree with Mould J. who said in his reasons that the whole thrust of the ORs was to test the case for demolition and redevelopment. The Planning Committee was aware of the Design Guide, as it was referred to in OR1 (see 6.4 and 5.3), albeit not expressly on the point which is in issue in Ground 1. Therefore I do not consider that the planning committee was even arguably misled by OR1 on this issue, applying *Mansell* principles. The reasoning in OR, which accepted the conclusions in the IP's supplementary planning document, was intelligible and adequate and so, too, was the reasoning in OR2. It can be assumed that the reasons in OR1 and OR2 were the reasons for the Planning Committee's decision. The weight which the Planning Committee gave to the material considerations arising from the building reuse, as opposed to demolition and rebuilding, were matters for its planning judgment and it is not the role of this Court to substitute its judgment for the planning judgment of the local planning authority. In my view, the Council's conclusions cannot be characterised as even arguably irrational.

34. Building reuse was reconsidered in OR2, which advised the Planning Committee to apply a strong presumption in favour of repurposing or reusing the existing buildings. Even applying that

presumption, which went much further in the claimant's favour than was required by law, both the planning officer and the Planning Committee were satisfied that permission should be granted.

35. In those circumstances, even if contrary to my view it is arguable that the Council erred as alleged on Ground 1, I consider that section 31(3D) of the Senior Courts Act 1981 applies. It is highly likely that the outcome would have been the same and planning permission would have been granted notwithstanding the alleged error, because the committee granted planning permission on the basis of a strong presumption which favoured reuse of the building.

Ground 2

36. Under Ground 2, the claimant submits that it is impossible to understand how the planning office considered the counterproposal presented by some objectors (Brutiful Birmingham, Birmingham Modernist Society and Zero Carbon House, with the support of the Twentieth Century Society) for developing the Ringway Centre, as the reasoning in OR1 and OR2 is unintelligible and inadequate on a principal controversial issue.

37. The claimant's criticisms were summed up in paragraphs 32 and 33 of its skeleton argument, which include substantive issues. At the hearing it was confirmed that Ground 2 was only a reasons challenge.

38. In my view, Ground 2 is unarguable for the reasons given by Mould J and by the Council and the IP. The relevant legal principles on a challenge to an officer's report are set out in the case of *Mansell*. The legal principles on the duty to give reasons may be summarised as follows. There is no general common law duty to give reasons for granting planning permission *R(CPRE Kent) v Dover DC* [2018] 1WLR 108, at [59]. At common law where reasons are required, they must be intelligible and adequate, enabling the reader to understand why the decision was made, as it was, and what conclusions were reached on the "principal important controversial issues". The reasons must not give rise to a substantial doubt as to whether the decision maker went wrong in law, but the reasons need refer only to the main issues in the dispute, not to every material consideration: see *South Bucks District Council and Another v. Porter(No 2)* [2004] 1WLR 1953.

39. Regulation 30 of the EIA Regulations imposes a duty on local planning authorities to publish "the main reasons and considerations on which the decision is based".

40. As to consideration of alternatives, the EIA Regulations 2017 impose limited obligations in relation to alternatives to a scheme for EIA development. Regulation 18(3)(d) requires environmental statements to provide "a description of a reasonable alternative study by the developer which are relevant to the proposed development and its specific characteristics, and an indication of the main reason for the option chosen, taking into account the effects of the development on the environment".

41. There is no general principle of law that the existence of alternative schemes is inevitably a mandatory material consideration in any case, even where the proposed development would cause adverse effects, but these are held to be outweighed by its beneficial effects: see *R(CPRE) v Secretary of State for Transport* [2023] EWHC 2917 (Admin) at [65].

42. Even where alternatives might be relevant, "vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant or, where relevant, should be given little or no weight": see *R (Save Stonehenge) v Secretary of State for Transport* [2022] PGSR 74, at [270].

43. Applying these legal principles to this application, the IP complied with the requirements of the EIA Regulations in the Supplementary Planning Statement. The Council accepted the IP's conclusion that it was not viable to re-occupy or reuse the Ringway Centre, in the exercise of its planning judgment. In the light of that conclusion, the counter proposal, which was indicative only and inchoate, was not a reasonable or realistic alternative and the Council was not required to treat it as a material consideration and assess it against the IP's application. It follows that the counter proposal was not a principal controversial issue for which more detailed reasons had to be given. The Council's reasoning in OR1, under the subheading, "Reuse of the existing building and embodied carbon" at OR1/7.179 - 7.189, was both intelligible and adequate.

44. For the sake of completeness, as the IP correctly submits, the embodied carbon costs and the likely capacities in terms of residential dwellings in the proposed development or in any alternative were considered in the WLCA (pages 176, 190 to 195 of the hearing bundle) and referred to at OR1/ 7.180 - 7.182, 7.186. For these reasons, I consider Ground 2 is unarguable.

45. But, even if, contrary to my view, it is arguable that the Council erred, as alleged, by failing to give adequate reasons, I consider that section 31(3D) of the Senior Courts Act 1981 applies. It is highly likely that the outcome would have been the same and planning permission would have been granted, notwithstanding the alleged error.

46. For these reasons, permission to apply for a judicial review is refused.

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