Neutral Citation Number: [2021] EWHC 2009 (Admin)

Case No: CO/823/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

The Civil Justice Centre
Manchester

Date: 22/07/2021

Before :

His Honour Judge Bird sitting as a Judge of this Court

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Between :

R (on the application of Rodwell)	**Claimant**
- and -	
(1) St.Albans City and District Council	**Defendant**
(2) Mr and Mrs Lee	

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Miss Constanze Bell (instructed by **Knights solicitors**) for the **Claimant**
Mr Andrew Parkinson (instructed by **St Albans District Council**) for the **Defendant**

Hearing dates: 14 June 2021

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Approved Judgment

His Honour Judge Bird :

1. I am asked to quash a planning permission granted by St. Albans City and District Council on 26 January 2021 (the permission is wrongly dated 26 January 2020) in respect of the Secret Garden Café, George Street in St. Albans ("the Café"). The Café stands on the southern side of George Street and backs onto At. Albans Cathedral. George Street is located within the St Albans Conservation Area and is within a designated Primary Shopping Frontage. The surrounding area is mixed in character with a diverse built form comprising commercial and residential land uses. The claimant, Mr Rodwell lives at Osborne House, 1A George Street, behind the shops of George Street to the North, the Cathedral yard to the South and the Cafe to the west boundary.

Planning History

2. On 4 December 1998 the Defendant granted planning permission for a change of use of the premises now occupied by the café from A1 retail to A3 tearoom subject to 6 conditions which included a requirement that the tearoom would only open between 8am and 6pm from Monday to Saturday and 1pm to 5pm on Sunday with no opening on bank Holidays (condition 3) and the area of the property to be used as a tearoom was to be limited to specified parts (condition 5).

3. On 28 January 2008 an application to vary condition 3 and condition 5 was approved. Condition 8 now provided that the Café/tearoom would be permitted to open between 8am and 6pm from Monday to Saturday and 10am to 5pm on Sundays and Bank Holidays. Patrons were to have vacated no later than 20 minutes after closing time. Condition 13 extended the area that could be used for the tearoom and external eating areas (to cover areas comprising the courtyard and rear garden) and condition 16 provided that no more than 6 tables accommodating a maximum of 24 people could be used in each of the courtyard and the rear garden. Condition 6 required that "no detriment to the amenity of nearby residents shall be caused by noise to other disturbance arising out of the use of the land and/or buildings and for the purpose(s) hereby authorised".

4. On 13 November 2019 an application to further vary conditions 8 and 13 and remove condition 16 was refused. On 1 September 2020 an appeal against the refusal was refused by the Planning Inspector ("the Jones Decision"). The applicant had applied to increase the area available for outdoor seating, to remove the limit on the number of outdoor tables and diners and to extend the opening hours to 8am to 9pm on Thursday to Saturday and 8.30am to 5pm on Sundays and Bank Holidays. The Inspector found that:

    a. Increasing the area available for outdoor seating would "create significantly louder noise levels than is presently experienced" and that such noise levels would be "significantly more intrusive".
    b. Increasing the number of diners and tables would increase noise levels and be "intrusive" and have a "harmful effect on the living conditions of neighbouring occupiers".
    c. In respect of hours of opening the Inspector found that the proposed extension (from 6pm to 9pm) on Thursday to Saturday would result in a significant, harmful noise intrusion to neighbours at a time of the day "when they would be expecting a reduction in activity and sound emanating from the café". The earlier opening hours were also found to be harmful to neighbouring living conditions. The Inspector noted that:

> *"the café's proximity to neighbouring residential occupiers requires careful control of the activity emanating from it, given the use involves the consumption of food and drink in an external open-air setting. The control of opening hours is one of the means of ensuring those neighbouring living conditions are safeguarded."*

d. The Inspector referred to letters in support of the proposal. He accepted that there would be some positive economic benefits of the proposals but concluded that those would be outweighed by the harmful effects the proposal would have on the living conditions of neighbours.

5. On 15 October 2020 an application was made to vary condition 8 and condition 13 and to remove condition 16 in terms very similar to those rejected in the Jones decision. The variation sought to condition 8 (opening hours) differed only slightly, seeking a closing time of 8pm on Thursday and Friday rather than 9pm. In every other material respect the application is the same as that which was rejected by the local planning authority on 13 November 2019.

6. In summary the position in respect of opening hours is this:

	Present position (per 2008 permission)	2019 rejected application proposed	The 2020 application
Monday	8-6	8-6	8-6
Tuesday	8-6	8-6	8-6
Wednesday	8-6	8-6	8-6
Thursday	8-6	8-9	8-8
Friday	8-6	8-9	8-8
Saturday	8-6	8-9	8-9
Sunday	10-5	8.30-5	8.30-5
Bank Holiday	10-5	8.30-5	8.30-5

7. The officer's report quoted extensively from the Jones Decision and noted (at paragraph 8.2.7) that the Inspector had concluded that the earlier opening hours on Sundays and Bank Holidays would be harmful to the amenity of neighbours. It was noted that "there has been no change to the site context since the previous application" and so the change would still be harmful to the amenity of neighbours. Dealing with the main difference between the rejected 2019 application and the 2020 application (the shorter opening hours on Thursday and Friday), the officer's report noted the "main consideration is therefore whether the reduction of 1 hour on Thursdays and Fridays would overcome the harm noted....by the inspector". The report concluded at paragraph 8.2.9 that the change in hours did not overcome the harm to amenity found by the inspector. The report recommends (by reference to policies 9 and 57 of the St. Alban's District Local Plan) that the application be rejected in its entirety.

8. Policy 9 of the Local Plan (Non-residential uses within residential areas) states 'redevelopment or extensions to existing sites will normally be permitted in residential areas, where they will not adversely affect their amenity, and character by reason of such factors as noise, smell, safety or excessive traffic'.

9. Policy 57 of the Local Plan (Service Uses) states "Use Class A3 (Food and Drink) proposals should not detract from the visual character of areas or cause serious problems in respect of the following.... noise, fumes, smell and general disturbances.... residential amenity".

10. The officer's report makes brief mention of the following parts of the Local Plan:

    a. Policy 39: parking standards, general requirements
    b. Policy 69: general design and lay out
    c. Policy 85: development in conservation areas
    d. Policy 87: locally listed buildings

11. Neighbours including the claimant objected to the application. Their reasons are set out in a bullet point note dated 16 December 2020. The objections refer to the Jones Decision and focus on the detrimental impact the proposed changes would have on the amenity of neighbouring residential occupiers.

The Decision

12. The Local Planning Authority granted the application on 26 January 2021. Condition 3 was varied and became condition 6. Condition 13 was varied and became condition 11 so that a larger area (shown on plan DG/1a received on 17 November 2020) was available for use by the café. Condition 16 was removed.

13. The grant contains the following reasons under the heading: "Justification for the grant of planning permission" ("the justification"):

> ***"that the application be granted as the reduction in proposed opening times are sufficient to overcome residents' concerns, granting the change in conditions would provide additional peak-time foot fall to a thriving independent retail area. New conditions would not have any negative impact on buildings or parking in the conservation area in line with policies 39, 69, 85 and 87."***

The Claim

14. Proceedings seeking judicial review were issued on or around 3 March 2021. Two grounds were advanced. Permission to proceed on each was granted by His Honour Judge Davies sitting as a Judge of the Planning Court on 14 April 2021:

    a. the decision was not supported by adequate reasons
    b. the decision to grant permission was perverse and irrational

The law

Reasons

15. The Defendant accepts there is a duty to give reasons arises. The duty seems to arise because the nature of the decision (namely a departure from the recommendations made by the officer) requires an explanation as a matter of fairness (see paragraph 14 of *R (Oakley) v South Cambridgeshire DC* [2017] 1 WLR 3765 and *R v Secretary of State for the*

Home Department, Ex p Doody [1994] 1 AC 531). It is clear that the duty will not arise in every case where there is a departure from a recommendation made by an officer (see *Oakley* at paragraph 19).

16. The relevant standard for such reasons is set out in the Supreme Court decision of *South Buckinghamshire District Council v Porter* (No.2) [2004] 1 WLR 1953 at paragraph 36 (that case concerned a statutory challenge to the decision of the Secretary of State on a planning appeal, but as we shall see from *CPRE* below, the essence of the guidance applies also to decisions made by local planning authorities). This passage represents "a broad summary of the authorities" including *Clarke Homes* referred to below (see paragraph 33 of the decision). Lord Brown said:

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

17. The following words of Sir Thomas Bingham MR in *Clarke Homes Limited v Secretary of State for the Environment* (1993) 66 P & CR 263 were described by Lord Brown in *South Bucks* as "felicitous":

> *"... I hope I am not oversimplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."*

18. The Supreme Court considered the standard of reasons when a planning committee departs from the advice given by an Officer in *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108 and concluded that the general guidance given in the *South Bucks* case applied. It is important to bear in mind that decisions of the Secretary of State or of an inspector are intended to be stand-alone documents "setting out all the relevant background material and policies, before reaching a reasoned conclusion", whereas in the case of a decision made by the local planning authority the function of setting out relevant background material and policies will normally be performed by the planning officers' report. If the officer's recommendation is accepted by the members:

> *"no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However, the essence of the duty remains the same, as does the issue for the court: that is, in the words of Bingham MR in the Clarke Homes case whether the information so provided by the authority leaves room for "genuine doubt ... as to what (it) has decided and why"".*

19. In *Oakley* the Court of Appeal decided that reasons should be given on the facts of that case for the decision to grant planning permission in the face of a recommendation by the officer to refuse permission. Dealing with the argument that it would be onerous to impose such a duty on the local planning authority, Elias LJ (with whom Patten LJ and Sales LJ agreed) decided it would not be at all onerous (paragraph 53):

> *"as Sullivan J pointed out in Wall's case [2005] 1 P & CR 33, the committee has the planning officer's report as a point of reference and a point of departure. It will often be relatively easy to indicate which aspects of that report it accepts and which it disagrees with, and why. [Also] the content of a common law reasons duty is likely to be less rigorous than where the duty arises in the statutory context. Finally, members have access to officers and lawyers who can assist them in the formulation of their reasons"*

20. I was referred to the case of *R (oao Clive Gare) v Babergh DC* [2019] EWHC 2041 a decision of Mr Martin Rodger QC sitting as a Judge of the High Court. There, the local planning authority had granted permission in the face of an officer's recommendation to refuse permission. The decision itself contained no reasons (see paragraph 26 of the decision). The Judge found that the duty to provide reasons was engaged (paragraph 35) but was not satisfied; the only indication of the committee's position was to be found in the minutes of the meeting and the Judge found that the minutes were insufficient. In that case the committee had to decide if the proposed development departed from the development plan and if so if the departure was justified. The minutes did not record the committee's approach.

21. The *Gare* case illustrates a well-established principle. A planning authority may depart from plans but if it does those affected by the decision must be able to understand why the departure is justified (see *Tesco Stores v Dundee CC* [2012] P&CR 9 at para.22). Similar considerations arise where a previous planning decision (here the Jones Decision) is a material consideration. If the previous decision is to be departed from, the reasons for departure should in my judgment be explained (see *North Wiltshire DC v SoSE* [1993) 65 P&CR 137 dealing with the position when an inspector departs from a decision of a previous inspector).

Rationality

22. A rationality challenge is not easy to make out. It is well established that matters of planning judgment are for the decision maker and not for the court.

The arguments

23. It is useful to start with the Defendant's argument on adequacy (and intelligibility) of reasons.

24. Mr Parkinson who appeared for the defendant suggested that a sensible reading of the justification made clear that the committee had expressed a view on the important controversial issue, namely: did the reduction in opening hours (compared to the proposal rejected by the inspector) address the inspector's amenity concerns? He submits that requiring the decision maker to go further would be impermissible and would amount to imposing a duty to give reasons for reasons. He points out that the two reasons for that conclusion are given: first other businesses have longer opening hours and secondly, there would be no "late evening noise". As to conditions 13 and 16 he submits that the decision makers must have agreed with the officer that such changes would be harmful to the amenity of neighbours (that is why policies 9 and 57 of the local plan are not specifically referred to). He says that on a proper reading and bearing in mind the content of the officer's report it is plain that decision makers balanced the economic benefits of approval against the harm to amenity approval would entail and came to the conclusion that the economic benefits prevailed.

25. Miss Bell, who appears for the claimant, submits that the defendant's explanation of the justification is precisely the type of exegesis (or detailed analysis) scorned since *Clarke Homes*. She submits, as far as the development plan is concerned that it is not clear if the decisions makers felt that the local plan had been complied with or if it had not been complied with, but that departure was justified. The conclusion that reduced opening hours were sufficient to address amenity concerns suggests that policy 9 and policy 57 were not engaged and so there was no departure from the local plan. On the other hand, the defendants argue that policies 9 and 57 were infringed but that a balancing exercise meant that the infringement was justified.

26. Miss Bell submits that the principal controversial issue the decision makers had to determine was whether the slight reduction in proposed opening hours when compared to the rejected 2019 application was sufficient to mean that the impact on amenity would be mitigated or addressed. The justification provides no reasons for the conclusion reached.

27. Miss Bell suggests that a Human Rights point arises and in effect seeks permission to raise the point now.

28. Dealing with the rationality challenge, Miss Bell says that it is irrational to conclude that a slight reduction in opening hours on two days could overcome amenity concerns arising from opening hours or generally in circumstances where the Inspector's concerns related to allowing local residents some quiet enjoyment on some days, in the morning and in the evening period throughout the week generally. The Inspector's observations, endorsed in the OR, were general in nature and not confined to a concern about a specific hour on two specific days.

29. Mr Parkinson submits that the irrationality challenge is hopeless and reveals nothing more than a disagreement with the decision makers' planning judgment.

Discussion and Conclusion

Reasons Challenge

30. The officer's report (see paragraph 7 above) identifies the impact of reduced opening hours (compared to the failed 2019 application) on the amenity of neighbours as "main consideration" for the decision maker. The defendant decided that the reduction was good enough to address the neighbours' concerns. The claimant is entitled to know "why the matter was decided as it was".

31. The decision maker has correctly proceeded on the basis (as pointed out by the officer) that there has been no material change in context since the rejection of the 2019 application. The decision maker, in my judgment, was required to explain why the October 2020 application should be approved when the November 2019 application had been rejected. The only difference between the applications was in respect of opening hours. In reality then, the decision maker had to explain why an application to extend opening hours by two hours later into the evening on Thursday and Friday, three hours later into the evening on Saturday and one-and-a-half hours earlier in the morning on Sundays and Bank Holidays should succeed when an application (in exactly the same factual context) to extend opening by three hours later into the evening on Thursday, Friday and Saturday and one-and-a-half hours earlier in the morning on Sundays and Bank Holidays had failed.

32. The words "the reduction in proposed opening times [is] sufficient to overcome residents' concerns" is a conclusion not a reason. Reading the decision in the manner required by the authorities, I am satisfied that there no reasons for that decision are given. The only possible reasons for the decision that could be extracted from the decision are:

    a. Peak-time footfall to a thriving retail area would increase and
    b. Local policies 39, 69, 85 and 87 are not infringed

33. Neither of these points has any obvious connection to the "main consideration". The reasons leave the informed reader confused and with more questions than answers: How does an increase in footfall address amenity issues? Is the decision maker proceeding on the basis that any reduction in opening hours from those proposed in 2019 would be enough to overcome amenity concerns? If so, why? Local policies 39, 69, 85 and 87 have nothing to do with amenity.

34. Taking (for the moment) the approach suggested by the defendant (an approach which in my judgment is impermissibly legalistic and exegetical), the reader should proceed on the basis that the defendant accepted the officer's recommendations that policies 9 and 57 militated against a grant of permission. In that case, the reasons would need to address why it was appropriate to depart from the policy (see *Tesco v Dundee*). It might be arguable that the increase in footfall point begins to explain that the defendant felt that on balance, the economic benefits of extended opening hours (compared to the 2008 present position) would outweigh amenity issues. Even if that was arguably so, the problem is that the reasons then become internally contradictory. If the reduction in opening hours addresses amenity concerns, then how are policies 9 and 57 engaged? If amenity issues have been addressed why is there a need to consider if permission should be granted in the face of the engagement of policies 9 and 57?

35. The suggested interpretation of the reasons advanced by the defendant in my view cannot be accepted for a number of reasons: first, it leads to an internal contradiction (are amenity issues dealt with or not?), secondly, it is a prime example of the type of exegetical, overly legalistic approach which is impermissible.

36. *Porter*, *Clarke* and *CPRE Kent* each make clear that for a reasons challenge to succeed the claimant must show he has suffered substantial prejudice as a result of the failure. I am satisfied that on the facts of the present case he has. Most obviously, absent an explanation as to why the decision was reached, the claimant cannot decide if he has any grounds of challenge. Further, the absence of reasons means he is unable to gauge the prospects of successfully opposing a further future application seeking extension of opening hours by a further short period.

37. For all of these reasons I accept the submission of Miss Bell and find the first ground of challenge is made out. The appropriate relief in my judgment is to quash the decision.

38. In the circumstances there is no need to deal with the Human Rights challenge. In my view in any event, it adds little.

Rationality challenge

39. If the reasons challenge had failed, I would have dismissed the rationality challenge. In my view the grounds relied upon in support of the rationality challenge underline the need for adequate reasons to explain why the decision was made.

40. In short, it is surprising that the defendant felt that a minor change to the opening hours for 2 out of 7 days rejected in 2019 could possibly lead to the conclusion that there was no longer an interference with amenity. Opening hours would remain as set out in the rejected 2019 application for Saturday, Sunday and Bank Holidays. It is wholly unclear how changing the opening hours for Thursday and Friday would impact on a loss of amenity felt on other days. Adequate reasons would have addressed that point.

Conclusion

41. If the defendant is called upon to reconsider this application afresh it would be helpful to address the increase in opening hours from the present (2008 permission) position compared to the fresh application.

42. Reference was made during argument to some of the conditions which attach to the present permission. I have not found it necessary in disposing of this application to deal with those points.

43. I am very grateful to both counsel for their helpful submissions. They should attempt if possible to agree an order. If they do so I will hand judgment in the absence of the parties.