

IN THE HIGH COURT OF JUSTICE

Claim No. CO/1619/2022

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN: -

THE QUEEN

(o.a.o FEWS LANE CONSORTIUM LIMITED)

Claimant

And

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

Defendant

HOMES ENGLAND

Interested Party

DEFENDANT'S SUMMARY GROUNDS

FOR RESISTING THE CLAIM

Referencing is the same as in the Statement of Facts and Grounds

Suggested essential reading in addition to Claimant's documents (1hr): Minutes at CB/4/A545-A550; Cl.'s transcription of parts of Committee [CB/4/A551-A557]; Email from Friends of Cam to Councillors dated 27 January 2022 [CB/4/A538].

- 1 On proper analysis, none of the Grounds are arguable and permission should be refused under CPR 54.4. In any event, even if there were any merit to the Grounds, the Court is requested to consider whether it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred (s.31(3B) of the Senior Courts Act 1981). The Court is invited to find that permission should be refused under s.31(3C) of the same Act.

Relevant Background

- 2 The application formed part of the phased extension to Northstowe, a new settlement and strategic site, forming a major part of the development strategy in the Council's Local Plan adopted in 2018. As explained in the Officer Report for Phase 3A (OR), the application for Northstowe Phase 3A sought to complete the main site of Oakington Barracks which was originally identified in the Northstowe Area Action Plan and the earlier Development Plan Documents [CB/4/A134/§1].
- 3 Phase 3A proposed a further 4000 dwellings which would result in a total of 9000 dwellings being delivered on the main former Barracks site. The applicant, Homes England, was also the master developer on Phase 2. The OR considered that the proposal comprised sustainable development and recommended that outline permission be granted subject to necessary safeguarding conditions and the prior signing of a s.106 Agreement [CB/4/A135/§§3-4].
- 4 As a matter of law, it is the Environment Agency as Water Resources Regulation Authority whose primary duty is to secure the long-term resilience of water supply systems (s.22(3) of the Water Act 2014, amending s.2 of the Water Industry Act 1991). Specifically, it is for the EA to prevent the deterioration of the status of each body of groundwater as an environmental objective (Regs. 12 and 13(5)(a) of the Water Environment (Water Framework Directive) Regulations 2017).
- 5 The Environment Agency's formal stated position was that they did not object to the proposal [CB/4/A104]:
- 'We have no objection, in principle, to the proposed development, and offer the following recommendations, informatives and comments for your council and the applicant.'*
- 6 The EA did not depart from that position in subsequent correspondence or at the Council's Planning Committee.
- 7 The OR was comprehensive, running to 690 paragraphs plus Appendices [CB/4/A130-A248]. It contained a section on Drainage and Flooding (7(f)) covering Surface Water, Foul Water, Groundwater, and Water Quality issues (CB/4/A210-A216/§§458-502). The conclusion of that section was that, subject to conditions, the application was in accordance with the Development Plan, NPPF, and national guidance (ibid. §502).

8 It also contained a section on Utilities (7(l)) including a section on Potable Water [CB/4/A233-A236/§§608-613]. That section referred to the IP’s Utilities Report and the fact that Cambridge Water had confirmed that it had adequate water resources to serve the proposed development [ibid. §610]. It went on to refer to Cambridge Water’s Water Resources Management Plan (WRMP) in the following terms [ibid. §§612—613]:

‘The Water Resources Management Plan (WRMP) published by Cambridge Water in November 2019 sets out Cambridge Water’s draft long-term WRMP for the 25 years between 2020 and 2045 and describes how Cambridge Water will continue to meet the demand for water in the Cambridge region.

The growth in new properties and water demand as set out in the WRMP is based on South Cambridgeshire and Cambridge Local Plans, and as such includes the future demand which will be generated by allocated sites, including the application site. Officers are therefore satisfied that sufficient available resources will be available in the longer term to serve the site, and that the availability of wate [sic] is not a constraint for development.’

9 The position in the OR was consistent with the PPG on water supply¹, namely (emphasis added):

‘Early engagement with the local planning authority, the Environment Agency and relevant water and sewerage companies as appropriate can help establish whether particular water and wastewater issues need to be considered.

Planning for the necessary water supply would normally be addressed through authorities’ strategic policies, which can be reflected in water companies’ water resources management plans. Water supply is therefore unlikely to be a consideration for most planning applications.

Exceptions might include:

- *large developments not identified in plans that are likely to require a large amount of water; and/or*
- *significant works required to connect the water supply; and/ or*
- *where a plan requires enhanced water efficiency in new developments as part of a strategy to manage water demand locally and help deliver new development.’*

10 The application was considered by the Council’s Planning Committee on 28 January 2022.

11 The published Minutes of the meeting confirm that Daniel Fulton, a Director of the Claimant Company, was present and addressed the Committee. The Minutes record that Mr. Fulton

¹ Water supply, wastewater and water quality, PPG 34-016, which was referred to by officers [CB/4/A552], and reflects the fact that it is strategic policies that should make sufficient provision for infrastructure for matters such as water supply (NPPF, §20(b)).

'displayed visual materials showing the drying up of bodies of water in the area', and that he and 2 other objectors, *'expressed deep concern over the environmental impact of the development'* [CB/4/A547/top]. The Minutes summarise the issue raised as *'Environmental, ground and water supply concerns'* [ibid.]. After that, during the Debate section of the Committee, the Minutes record that water, groundwater and drainage formed a significant point of discussion and concern for the Committee [CB/4/A548/bottom]. The Claimant has provided its transcript² of parts of that discussion at CB/4/A551-A557.

- 12 Following its deliberations, the Committee first considered the potential reasons for refusing planning permission and in particular whether a further reason on building heights should be included. The Chair explained that the reasons for refusal had been discussed extensively, and summarised the first reason for refusal as [CB/4/A549/bottom]:

'Failure to comply with policy CC/7 (impact on water quality)'

- 13 A vote to add a reason for refusal on building heights - should the Committee vote to refuse permission - was passed. However, no motion to refuse the application was put forward at that stage. That was because the Committee first considered and approved a motion granting the application subject to the completion of a s.106 and conditions, by reference to recommendation in the OR and supplementary report [CB/4/A550].

Approach to Officer Reports

- 14 It is well recognised that an officer report should be read using a sensible approach and with common sense applying the principles summarised in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452 at §42 per Lindblom LJ.

- 15 As to the content of such reports:

'.. [T]he courts should not impose too high a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves.'

(R (Morge) v Hampshire CC [2011] UKSC 2 at §36 per Baroness Hale).

² [CB/A89/§16]

'The court should focus on the substance of the report .. to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively.'

(R (Maxwell) v Wiltshire Council [2011] EWHC 1840 (Admin) at §43, per Sales J)

Response to Grounds

16 In key respects, the Grounds do not own up to the facts:

- (1) A main part of the concern raised by the Claimant, as to whether the Committee could be satisfied that the quality of water bodies would not be harmed, was specifically raised by objectors at the Committee (para. 11 above). The relevant part of the EA's consultation response on this issue was specifically drawn to the attention of each member of the Committee in an email by Friends of the Cam sent the day before the meeting [CB/4/A538]. These matters formed part of the significant discussion on water supply and abstraction issues. They cannot be said to have been overlooked.
- (2) Not only was Policy CC/7 taken into account in the OR, as a relevant policy of the Development Plan listed at Appendix A [CB/4/A250], the Policy was also expressly drawn to the attention of the Committee when it came to making the decision on the application, as it formed the basis of a reason for refusal under a motion which the Committee considered (and rejected), before deciding to grant permission pursuant to the recommendation of the OR.
- (3) The EA is the statutory consultee responsible for water resource management [SB2/8/C279/§4.30]. The EA did not object to the application, whether on environmental harm to water bodies, or any other basis. Moreover, the EA's non-objection was confirmed by their representative at the Committee, as recorded in the Minutes [CB/4/A546/§4]. The Grounds unfairly seek to elevate an initial "recommendation" (made by the EA over 1 year prior to the meeting), in not objecting to the application, into something which the Committee was obliged to pursue further, in circumstances where the issues raised had already been considered.

- 17 In other respects, the Grounds mischaracterise the position.
- 18 First, the Grounds refer to the fact that Cambridge Water is included in the EA's final classification 2021 of Water stressed areas, moving from a "water stressed" area in 2013 to "seriously water stressed" in 2021 [CB/1/A25/§10]. The point adds nothing on planning matters. The Introduction to the EA document explains its scope, stating that local authorities can use the water stress determination to inform whether they can require the tighter standard of 110 litres per head per day in new developments³ [SB1/6/B37/top]. It continues (emphasis added):

'Otherwise the use of the water stress determination is only to allow water companies to consider compulsory metering in their water resources management plans. It must not be used for other purposes such as development planning or water resources planning.'

- 19 Secondly, the Grounds state that the OR did not report the substance of the EA's comments and concerns relating to water supply and the environmental effects of abstraction, referring only to the EA's clarification that the water supply company is Cambridge Water [CB/1/A27/§16]. This fails to read the OR fairly, or as a whole (*Mansell*). In the preceding paragraph to that referred to by the Claimant, the OR correctly summarised the EA's overall position: *'No objection subject to conditions'*⁴. Moreover, in the Water Quality section of the OR, the EA's position and the area of concern was fairly reflected (emphasis added):

'No objection has been raised by the Environment Agency on the grounds of water quality. It is also noted that concerns have been raised regarding the issue of water in Northstowe and environmental impacts in relation to abstraction.'

- 20 The full discussion on this issue at the Committee, which involved the representative of the EA, can leave no doubt that the issue of environmental impacts and abstraction⁵ was considered both in the OR and at the Committee. In any event, the EA's "recommendations" on water resources had been emailed to all members of the Committee [CB/4/A538].

³ Policy CC/4 of the Local Plan sets this threshold of water efficiency for new developments [SB3/C277], and it was secured by Condition 31 in this case [CB/A64].

⁴ The OR also stated that full detailed comments of those consulted were available on the Council's public access website [CB/4/A151/§94].

⁵ Properly considered at a regional level.

21 Thirdly, the Grounds suggest that Cambridge Water’s post-meeting response to a request to confirm its position, was ‘*flagging the fact that the issue of environmental deterioration may cause uncertainty as to availability and timings of any new supplies in respect of the development beyond 2025*’ [CB/1/A32/§25]. That is not a fair reading of the response by Cambridge Water, whether in its tone or its content. The points made were, as relevant [CB/4/A539-540]:

- The Northstowe development was included in the Local Plan, and so Cambridge Water had already allowed for the demand resulting from the development in their published 2019 WRMP.
- In the 2019 WRMP, Cambridge Water had committed not to increase the volume of water they abstract and to further reduce abstractions in the future. Additional demand is met in the WRMP by optimising existing supplies, and demand management options.
- Cambridge Water were committed to advocating that all new build developments were built with water efficiency levels of at least 100⁶ litres per person per day.
- Insofar as the EA had recently changed the approach to determine the baseline against which deterioration due to water abstraction is measured, whilst that may result in further reductions to available supplies from 2025, ‘*this will be addressed in our next water resources management plan*’, and the availability and timings of any new supplies required for development beyond 2025 would be determined in the revised 2024 WRMP.

22 In effect, the response repeats the assurance which Cambridge Water had given previously⁷, and officers had communicated at the meeting. It stretches any fair or reasonable reading of the reply to suggest that Cambridge Water were raising a material concern necessitating any further consideration by officers or the Committee.

Ground 1: alleged failure to assess the proposal against CC/7, failure to take into account the EA’s “advice”, and failure to seek Cambridge Water’s assurance that they could meet the needs of the development without environmental deterioration

23 Policy CC/7 was taken into account in the OR by its inclusion in the list of relevant policies from the Development Plan [CB/4/A250]. It was also specifically drawn to the attention of

⁶ This appears to have been a minor typographical error, as the WRMP and EA figure is 110 litres, see para. 18 above and FN3.

⁷ [SB/6/B19/§4.5.5]

Committee when it came to its determination, when the Committee rejected a motion based on a failure to comply with its terms [CB/4/A549/bottom]. Policy CC/7(1)(a) and (b) were addressed appropriately.

24 Policy CC/7(1)(a) seeks demonstration of an adequate water supply or an agreement with the relevant service provider to provide the necessary infrastructure [SB2/C278]:

- The OR recorded Cambridge Water's position, that it had adequate water resources to serve the proposal. Off-site reinforcement works would be required to meet the capacity requirements and works for designing and constructing the infrastructure were progressing as part of Phase 2, in anticipation of this proposal in Phase 3. The WRMP 2019 described how Cambridge Water would continue to meet the demand for water. Growth in housing and water demand within the WRMP were based on the Local Plan, which included future demand [CB/4/A234/§§610-613].
- The OR properly reflected the Utilities Report provided by the IP: strategies for providing adequate supplies of water to serve both Phases 2 and 3 of the Northstowe Development had been established through consultation with the relevant statutory undertakers as part of the Phase 2 proposals; Cambridge Water had confirmed they had adequate water resources to serve the proposal (with off-site reinforcement works and additional Phase 3 water mains [SB1/6/B17/§§4.1.2; 4.5.5-4.5.7].

25 Policy CC/7(1)(b) seeks demonstration that the quality of water bodies will not be harmed, and opportunities have been explored and taken for improvements to water quality [SB2/C278]:

- The OR properly and fairly reflected the fact that the EA had not objected on the grounds of water quality, whilst also noting that concerns had been raised regarding the issue of water in Northstowe and environmental impacts in relation to abstraction [CB/4/A215/§497].
- The OR went on to explain that the impact of the proposal had been factored into existing water resource plans and into future demand planning, and that in the absence of an explicit EA objection, refusing the application on these grounds would not be justified.

26 As to abstraction and environmental deterioration, the OR correctly recognised that the EA was the relevant statutory consultee responsible for water resource management and the environment [CB/4/C279/§4.30]. It is fundamental to the good administration of planning applications that officers and the public should be able to rely on the stated position of a statutory consultee. Here, it was clear that the EA did not object to the proposal. Should there have been any doubt as to that position, the EA attended the Committee and were asked to comment on this issue. There was no change in its position, as recorded in the Minutes [CB/A546/§4].

27 In any event, the debate at the Committee covered this very issue. The concern was raised that there was a marked decline in the chalk stream systems and ponds, and whether this had been thought about. The response by officers⁸ comprehensively dealt with the concern, noting [CB/4/A551-A552, as relevant]:

- The site is a long standing allocation within the development plan, which the EA have recognised and not objected to.
- The Council had engaged an external water consultant (Stantec) to look at water supply issues for the new local plan, and that work included substantial engagement with the water companies who had given feedback that the future growth could be appropriately accommodated.
- The evidence base for the new local plan included short and long term mitigation measures to avoid concerns raised about the growth in abstraction and environmental consequences.
- The concerns raised were being dealt with at an appropriate strategic level.
- Government Guidance states that planning for necessary water supply would normally be addressed through strategic policies which can be reflected in WRMPs.

28 As to the particular recommendation by the EA to engage with Cambridge Water, officers stated that they had done that, noting that the impact of Northstowe was not significant in the overall needs of Greater Cambridge at a regional level, which is why officers had worked with Water Resources East on the next WRMP [CB/4/A553].

29 Importantly, the EA was present and asked to comment.

⁸ Stephen Kelly, Joint Director for Planning & Economic Development for Cambridge & South Cambridgeshire

- 30 On the adequacy of the water supply, the officer from the EA⁹ agreed with Mr. Kelly's initial summary, and confirmed that the sustainable supply was considered appropriate at this time [CB/4/A554].
- 31 Mr. Kelly also referred to the EA's ability to maintain or change levels of abstraction through licensing, stating that it was not appropriate to prevent the progression of an allocated site within the development plan on that basis [CB/4/A555]. In response, Mr. Ireland did not demur from Mr. Kelly's assessment of the position, whilst noting that the EA was currently going through a review of abstractions across the whole of East Anglia, and that he was limited in what he could say on that issue because of an ongoing judicial review. It is a mischaracterisation of the EA's position to state that this raised any concern, and it is an unfair reading of the comments to suggest that the EA was raising the potential for harm to water bodies through these comments. Fairly read, the comments of the EA at the Committee were consistent with its position that it did not object to the proposal.
- 32 As a result, there was no failure to assess the proposal against Policy CC/7, and no failure to take account of the EA's advice.
- 33 The EA had recommended that the Council ascertain whether Cambridge Water would be able to meet the needs of the development without causing deterioration. Mr. Kelly confirmed that there had been engagement with Cambridge Water, explaining that the water needs were being dealt with at a strategic level, and referring to the OR and Cambridge Water's confirmation that it has adequate water resources to serve the proposal following off-site reinforcement works and infrastructure works associated with Phase 2 [CB/4/A553].
- 34 The Council asked Cambridge Water to confirm its position on whether the needs of the Northstowe development could be met without causing further deterioration. On any fair reading of Cambridge Water's response, that assurance was given (paras. 21-22 above). In those circumstances, and where a resolution had been passed to grant permission following the recommendation in the OR, there was no change in circumstances that might have had a material effect on the decision, and there was no requirement to refer the matter back to Committee (*Wakil* at §94 per Lindblom J [SB2/7/C231]).

⁹ Adam Ireland, the EA's Sustainable Places Team Leader

Ground 2: Advice as to deferral of the application in order to seek further information, and alleged failure to seek the information sought by the EA

35 Considered in the light of the full and proper consideration given to water supply and abstraction issues set out under Ground 1 above, the advice given by officers was not misleading. The key piece of advice was that *'there was not a sound basis for deferral...'*, and that is evident from the ventilation and full discussion of the water supply and abstraction issues. That discussion involved the EA and made appropriate reference to Cambridge Water's position.

36 The comments made as to the uncertain timescales for obtaining further information were equally not misleading or unsound. The wider context here, which was referred to by Mr. Kelly¹⁰, was that the means to address concerns around abstraction for the East of England region was the Water Resources East Strategic Water Strategy. Officers had been and were engaging with Cambridge Water, Anglia Water, and Water Resources East, and it was noted that the WRE plan would not be published until 2023. It would not be reasonable to defer a planning application on an allocated site in the Local Plan pending that strategic exercise. These comments reflected proper considerations as to the need to make administrative decisions in a timely fashion, where all of the information reasonably required was before the Committee, as part of the good administration of local government.

37 Officers' advice that there was no sound basis for a deferral was in any event proved right, since Cambridge Water's subsequent response served only to confirm the position outlined by officers at the Committee. There was no change in circumstances and the information was adequate.

Ground 3: Alleged irrationality in failing to require the EIA to include information as to the potential significant environmental effects caused by water supply needs of the proposal

38 There was nothing irrational in the Council's approach to the EIA.

39 As to the contents of the EIA, it was for the Council to decide whether the EIA met the requirements of the regulations (*R (Khan) v LB Sutton* [2014] EWHC 3663 at §119 per Patterson J). Given this was a strategic allocated site within the Development Plan, there was

¹⁰ [CB/4/A556/bottom]

nothing irrational in the Council treating water supply and abstraction issues as addressed as part of the strategic environmental assessment of the Local Plan, pursuant to the PPG and NPPF (see para. 9 above).

40 Further, the Council could only require such information as is reasonably required to assess the environmental effects of the development and which the applicant can reasonably be required to compile having regard to current knowledge (*Khan*, at §121 per Patterson J). The EA's response to the scoping opinion, prior to the submission of the EIA did not request any assessment of the potentially significant environmental effects caused by water supply or abstraction issue as part of the ES.

41 The EA's consultation response to the application did not change the position. It made no request for an update to the EIA, but only a "recommendation" to seek assurance from Cambridge Water as to the adequacy of the water supply and abstraction. That is because, as a matter of law, it is the EA as Water Resources Regulation Authority whose primary duty is to secure the long-term resilience of water supply systems and to prevent the deterioration of the status of each body of groundwater as an environmental objective (see para. 4 above). In those circumstances, it was perfectly rational response not to translate the EA's recommendation into a requirement for an update to the EIA.

Ground 4: Statutory duty to provide a statement of the main reasons and considerations on which the decision is based, and a summary of the results of the consultations undertaken, and how those results have been addressed.

42 The Council accepts that it is currently in breach of the statutory duty under Reg. 30 of the EIA Regulations.

43 As to the statement of the main reasons and considerations for the decision, it is plain from the Minutes that the resolution to approve the application was in accordance with the recommendation in the OR, and was therefore consistent with the assessment of the planning balance in the OR [CB/4/A246-A247/§§677-683].

44 As to the results of the consultation, these were fairly set out in the OR and Supplemental Report [CB/4/A151-A162/§§94-178; CB/4/A509-A536], which the Committee followed, and the analysis of the issues therein.

- 45 The Claimant's assertion that it is prejudiced by the above procedural errors is entirely unevicenced and unsubstantiated. As a matter of fact, the Claimant has been fully engaged in the application process and has been able to bring its challenge. Any prejudice caused by the lack of a statement was not raised in the PAP letter, which would have been the obvious time to raise such prejudice [CB/4/A558-A562].
- 46 The Council is in the process of preparing a statement pursuant to Reg. 30 of the EIA, in conjunction with the members of the Committee who voted for the resolution. The duty under Reg. 30 applies after the decision to grant permission. The Council is taking steps to comply with the duty now. The Council anticipates that this will be filed and served with a supporting witness statement by 5pm on 8 June 2022. A quashing of the permission would not be justified (*R (Richardson) v North Yorkshire CC* [2004] 2 P&CR 15 at §53, per Simon Brown LJ). Further there is no basis for a mandatory order or declaration to be made in the circumstances of this case.

Other matters

- 47 The PAP letter, to which the Council responded, raised 3 Grounds which bear no resemblance to the Grounds raised in this claim [CB/4/A558-A562; A563-A569]. Nor was the PAP letter issued in good time before making the claim; it did not provide the Council with the normal response time of 14 days envisaged by the Pre-Action Protocol (PAP for Judicial Review, paras. 14, 20). Had any issue of prejudice arising from the breach of Reg. 30 of the EIA Regulations been raised at that stage, the Council would have had an opportunity to remedy the same. Each of these issues should bear on the question of costs, if permission is refused.
- 48 The Claimant was more than capable of raising these matters in a timely fashion. The Claimant has issued a series of judicial review claims against the Council over the last 2 years.
- 49 As to costs, it is accepted that the claim comes within the scope of the Aarhus Convention and that the costs cap applies (the Claimant's costs exposure is limited to £10 000, since the Claimant is a limited company CPR 45.43(2)(b)).

Conclusion

- 50 For the above reasons, the Court is invited to refuse permission on the merits and / or on the basis that it is highly likely the outcome for the Claimant would not have been substantially

different applying s.31C of the Senior Courts Act 1981. The Council seeks the costs of its Acknowledgment of Service subject to the costs cap (see Costs Schedule enclosed).

ASITHA RANATUNGA

6 June 2022

Cornerstone Barristers, 2-3 Gray's Inn Square, London