How to Avoid High Court Challenges

1. My talk aims to provide an overview of some areas where local authority decisions may be vulnerable to challenge and to give some practical guidance about how challenges might be avoided.

2. I cover the following topics:

    a. Summary reasons for the grant of planning permission

    b. EIA

    c. Delegated Decisions

    d. Going back to the Planning Committee

    e. Conduct of Meetings

    f. Notifications and Consultations

Topic 1 – Summary Reasons for the Grant of Planning Permission

3. There is a growing body of caselaw relevant to this requirement. My experience suggests that many local authorities are still exposing themselves to challenge on the ground that they have not provided adequate summary reasons for the grant of planning permission.

The requirements

4. Article 22 of the Town and Country Planning (General Development Procedure) Order 1995/419 (as amended) states:

"(1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters and—

(a) planning permission is granted, the notice shall include a summary of their reasons for the grant and a summary of the policies and proposals in the development plan which are relevant to the decision;

(b) planning permission is granted subject to conditions, the notice shall:

(i) include a summary of their reasons for the grant together with a summary of the policies and proposals in the development plan which are relevant to the decision to grant permission; and

(ii) shall state clearly and precisely their full reasons for each condition imposed, specifying all policies and proposals in the development plan which are relevant to the decision;

(c) planning permission is refused, the notice shall state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision."

5. Article 22 therefore imposes requirements to state the summary reasons for the grant of planning permission in the decision notice and also to give a summary of the policies in the development plan relevant to the grant of planning permission.

Key Practical Points

- The decision notice must contain a summary of the relevant policies. A simple list is not enough.

  See:

  (R. (on the application of Tratt) v Horsham DC [2007] EWHC 1485 (Admin); at paragraph 18,

R. (on the application of Midcounties Co-operative Ltd) v Forest of Dean DC [2007] 2 P. & C.R. 30 at paragraph 30

"Article 22(1) requires a summary of the policies. That is not the same as a list of the policies. The purpose behind the requirement for a summary is I believe to enable the reader to see the relevance of the policy. All that is needed is an indication of what the policy deals with insofar as it is material to the permission in question."

R. (on the application of Aldergate Projects Ltd) v Nottinghamshire CC [2008] EWHC 2881 (Admin); (QBD (Admin)) at paragraph 54

Midcounties Co-operative) v Wyre Forest DC [2009] EWHC 964 in which it was confirmed that listing policies with subject matter identified (eg "CA1 (Development in Conservation Areas)", "NR10 (Air Quality)", "TR9 (Impacts of Development on the Highway Network)) was insufficient to comply with article 22.
Ouseley J said at 194-5:

"It is possible to see the topic covered by the policy, but it is not possible to see more, so the reader of the list could not see the nature of the policy, what it favoured or inhibited, nor would it be possible to see its relevance from what was provided. The question is: is this a summary of policies? I do not think it is. A summary of the substance or point of the policies is required. I appreciate that could be a lengthy exercise for the 40 plus policies but no more than a short single sentence is required in a summary or shortened style. The summary would be such as would enable the reader to see how the policy would or could be relevant. Its particular relevance or role for the case does not need to be described".

(However, Ouseley J indicated that in his view the remedy for breach of that part of article 22 should be a mandatory order requiring a very short summary; rather than the quashing of the permission).

- It is not sufficient for the decision notice to refer to the committee report for the reasons.

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R. (on the application of Chisnell) v Richmond upon Thames LBC [2005] EWHC 134 (Admin); – summary reasons quashed which stated:

"This decision has taken into account the relevant policies of the Unitary Development Plans and all other material considerations where appropriate. Full reasons are given for the imposition of any conditions attached to this notice. For a full understanding of the reasons for reaching this decision reference should be made to the application report and any accompanying minutes".

Newman J states (at paragraph 40):

"[Counsel] submits that simply to refer the public, or any interested party, to the application report and any accompanying minutes, is not a proper compliance with Article 22 . In my judgment it is not in this case and it is not likely to be, in the majority of cases. I should not be understood as attempting to cover the circumstances which can arise in all cases, but great care should be taken to provide what can be read as a summary of reasons which inform the interested parties as to how and why the committee has reached its decision. Where there has been a range of argument over different issues, which occurred in this case, and there were matters of detail to be resolved, simply to refer to a document which preceded the committee's deliberations such as the report of the advising reporting officer, is not likely to shed light on how a particular decision was reached by the committee".

- The reasons should be specific to the case in hand rather than a standard formula.

Sir Michael Harrison in Ling at paragraph 52 –

"I would, however, add a warning that planning authorities should guard against the temptation to trot out a standard formula for reasons for the grant of permission like a mantra without considering the individual circumstances of the case".

- The reasons do not need to be detailed but should be particular and address important points.

Ouseley J in R (Midcounties Co-operative) v Wyre Forest DC [2009] EWHC 964 (Admin)

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at paragraph 186.

"What is required is a summary of the conclusions on the principal issues"

at paragraph 190.

"But the fundamental test is this: can an interested person see why planning permission is granted and what conclusion was reached on the principal issues?"

- There will be some circumstances in which the duty to state summary reasons in the decision notice is particularly important (and doing so effectively may be a valuable way of fending off a potential challenge).

  Note the examples given by Sullivan J in R (Wall) v Brighton and Hove City Council [2005] 1 P. & C.R. 33

  at paragraph 55

  "The new requirement to give summary reasons for the grant of permission will be particularly valuable in cases where members have not accepted officers' advice, where the officer has felt unable to make a recommendation, where the officer's report fails to take account of a material consideration, but that omission is said to have been remedied by the members during the course of their discussions, or where an irrelevant factor has been relied upon by some members during the course of their discussions and it is important to ascertain whether it was one of the Committee's reasons for granting planning permission".

- The courts have given guidance as to how reasons should be formulated in the decision making process:

  - The simplest way is (as per Sullivan J in Wall at paragraph 58):

    "The new requirement does not impose an undue burden upon local planning authorities. Officers' reports customarily include recommended reasons for refusal of planning permission or for the imposition of conditions. Members are free to debate those recommendations and agree or disagree with them, adding or striking out

reasons for refusal or conditions. When officers recommend the grant of planning permission there is no reason why their reports should not similarly contain recommended summary grounds for so doing. Very often the conclusions in an officers' report will in effect be a summary of the grounds for granting planning permission. The members will be able to adopt or amend the officers' summary grounds, but the requirement to set out summary grounds in the decision notice will ensure that the members decide in public session why they wish to grant planning permission".

- However, if this has not been done then reasons can be formulated subsequently provided that they represent the Council's reasons for the issuing the decision notice:

see R (Governing Body of Langley Park School for Girls v Bromley LBC [2009] EWHC 324

At paragraph 30:

"On a plain reading of the language of Article 22, therefore, it seems to me that the obligation of the local planning authority is to give a summary of the reasons which motivated the issue of the notice which granted planning permission".

At paragraph 33:

".....it seems to me to be beyond argument that the decision maker could formulate a summary of its reasons for the grant of planning permission at any stage prior to the completion of the decision making process".

At paragraph 35:

"As a matter of process it is obviously possible that planning officers can provide draft reasons for the grant of permission (or for that matter refusal of permission) in advance of a vote being taken. No doubt, in straightforward cases that could be done very simply. It does not seem to me, however, to be impermissible for planning officers to listen to the debate which occurs, take account of the detailed report of the planning officer and then produce reasons for approval by the members which seem to them to reflect the views of the members. If, thereafter, the members adopt those reasons and, do so publicly, I find it very difficult to see how it can be said that those

> are not the reasons which motivated their vote in favour of the grant of planning permission".

- Poor reasons expose decisions to an easy ground of challenge (from a Claimant's perspective) and carry with them a real danger that the decision will be quashed if Claimant can show that the decision might have been different. (Currently there is some difference of approach to the exercise of discretion for breach of article 22– compare Tratt (highpoint) with Sales J in R (Loader) v Poole BC (18 March 2009).

Topic 2: Environmental Impact Assessments

6. This is a big topic in its own right. Covering all of the procedural requirements contained in the relevant regulations (SI 1999/293) is beyond the scope of this talk. I will simply identify a few areas where I perceive that mistakes can easily be made.

- Negative screening opinions
    - Must be in writing in order to be a screening opinion:
        - A screening opinion is defined in Reg.2:
          "'Screening opinion' means a written statement of the opinion of the relevant planning authority as to whether development is EIA development."
        - See R (Lebus) v South Cambridgeshire District Council [2002] EWHC 2009 (Admin); [2003] Env. L.R. 17 for an example where the Court quashed the planning permission holding that there was no screening opinion in the absence of a contemporaneous written document purporting to be one.
    - ECJ has now confirmed that no duty to give reasons in negative screening opinion itself unless requested. Case C-75/08 R (Mellor) v SSCLG (April 2009)

1. there is no need for a negative screening decision to itself contain reasons;
2. but there is a duty to provide further information on the reasons for the decision if an interested person subsequently requests the same;
3. that request need not be met by a formal statement of reasons but also by providing "information and relevant documents";
4. reasons, when given, can be very short.

- Check delegated authority to give screening opinion:

  R v St Edmundsbury Borough Council, ex parte Walton [1999] Env LR 879 (where a decision that an EIA was not required was quashed due to lack of vires to make the decision under delegated authority).

- Voluntary EIA should be treated as if required under the rules (see Regulation 4(2))

  Regulation 4(2) of the 1999 Regulations (SI 1999/293) provides that where an environmental statement is submitted the development is to be treated as EIA development pursuant to the 1999 Regulations. Therefore, even though the ES has been submitted voluntarily, all of the procedures and formalities set out in the 1999 Regulations apply.

Topic 3: Delegated Decisions

7. In practice, a great many decision are made under delegated authority. Claimants may seek to challenge reliance on delegated authority.

- Decisions under delegated powers must be properly recorded

  (R (Carlton Conway) V Harrow LBC [2002] 3 P.L.R. 77 (CA) at paragraph 29:

  "I only add that I regard it as unfortunate in this case that the planning officer did not set out in writing the factors which led him to the decision he took which has led to the quashing of the planning permission. Anyone who has been involved in decision making knows that it is a valuable guide to clarity to set out the factors which are relevant before taking the decision".

- Decisions under delegated powers should address the terms of the scheme of delegation to demonstrate why it is appropriate to take decision under delegated powers.

  see Carlton Conway at paragraph 21:

  "It is important that a planning officer purporting to exercise delegated powers should give careful and genuine consideration to the question whether the particular application with which he is concerned comes within the delegation".

- Whether a decision has been made under appropriate delegated authority is a matter of law. However, where the terms of delegation include judgments (eg that the proposal is not contrary to policy) then the court will defer to the decision maker as to the exercise of that judgment (provided that the decision has been appropriately and contemporaneously recorded) - see R. (Springhall) v Richmond upon Thames LBC [2007] 1 P. & C.R. 30 CA (distinguishing Carlton Conway). In Springhall the Court of Appeal upheld a properly recorded decision made under delegated powers and emphasised that where the issue as to whether a category of decision should be dealt with under delegated powers raised questions of judgment, they were for the decision maker to resolve subject only to review by the Court on grounds of perversity.

Topic 4 –Not too Late to go back

8. The decision making process stops at the issue of a planning permission. It does not stop once the planning committee has resolved to grant planning permission. It may therefore be appropriate to go back to the planning committee if new issues arise after they have resolved to grant planning permission but before the planning permission has been issued.

9. The Court of Appeal have given guidance on this in R. (on the application of Kides) v South Cambridgeshire DC [2003] 1 P. & C.R. 19 at paragraph 124-6.

   "124 At one extreme, it cannot be a sensible interpretation of s.70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated* , prior

to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could* not have regard prior to the issue of the decision notice.

125 On the other hand, 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.

126 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".

Key points

- Decision making process is not complete until planning permission has been issued.
- If new material consideration arises after resolution to grant planning permission then it may be appropriate to refer the matter back to planning committee.
- This may be an effective way of addressing complaints about decision making process at the resolution to grant stage where the planning permission has not yet been issued.
- If in doubt, it is safest to refer the matter back to the committee.
- It is possible to formulate summary reasons after resolution to grant and before issue of permission (see R (Governing Body of Langley Park School for Girls v Bromley LBC [2009] EWHC 324 (Admin) – discussed above).

Topic 5: Conduct of Meetings

10. There are 2 relates points to address here. First, the issue of whether members should be excluded from the decision making process. Second, the way the meeting is conducted should not increase the risk of challenge by creating a sense of unfairness.

11. The Court of Appeal has given a recent leading decision as to the scope for apparent bias in local authority decision making.

12. In R (Lewis) v Redcar and Cleveland [2009] 1 W.L.R. 83 the Court of Appeal rejected the appellant's invitation to decide that the concept of apparent bias which is well established in relation to judicial and quasi judicial decisions does not apply to decision makers such as local authority members.

13. However, the Court of Appeal gave guidance as to how such a test should be applied/watered down in a local authority decision making context. See Pill LJ at 68-71, Rix LJ at 93-6 and Longmore LJ at 106-7.

Rix LJ stated: at para 96

> "So the test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself".

Practical Points (bias)

- Avoid councillors making statements which suggest pre-determination of application.

- Ensure that relevant interests have been declared.

- Ensure that anyone with a direct personal interest in the outcome of the decision does not take part in the decision making process.

Practical Points (general conduct of meeting)

- Allowing objectors to have their say promotes perception of fairness and also will help demonstrate that their concerns have been considered in decision making process.

- The courts do understand need to cap time for presentations provided that this has been done in an even handed way.

- Make sure advice to members is carefully worded and properly recorded.

- Make sure that close votes are properly recorded and also that it is clear what members are voting on.

- Make sure that minutes properly record decision making process including advice given to members at meeting.

- Don't publish draft minutes on the internet before they have been properly checked.

Topic 6: Notifications and consultations

14. The basic point is that these need to be done properly otherwise any consent granted could be open to challenge.

15. These should be checked carefully as mistakes may well be treated as errors of law in respect of which the Court will be inclined to quash (see R (Pridmore) v Salisbury DC 2005] 1 P. &

C.R. 32 – High Court quashes planning permission due to failure to comply with mandatory requirement to serve prior notice of planning application on owner of part of site.

Practical Points

- Always allow sufficient time for consultation responses.
- If in doubt re-consult on revisions to the planning application.
- Do not be seen to be preparing the officer's report before the consultation period has been completed and certainly do not publish it.
- Make sure that any reference to or production of consultation responses is up to date.
- Where late consultation responses have been received record these in supplementary report and make sure that this is made available to those affected/attending meeting.

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