Neutral Citation Number: [2023] EWHC 1533 (Admin)

Case No: CO/4627/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2023

**Before** :

**MR JUSTICE CHAMBERLAIN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**THE KING**
**on the application of**
**CAMILLA SWIRE**

**Claimant**

**- and -**

**CANTERBURY CITY COUNCIL** **Defendant**

**-and-**

**REDROW HOMES LIMITED** **Interested Party**

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**Alex Goodman KC** (instructed by **Richard Buxton Solicitors**) for the **Claimant.**
**Noémi Byrd** (instructed by **Canterbury City Council**) for the **Defendant.**
**Andrew Tabachnik KC** (instructed by **Redrow Homes Limited**) for the **Interested Party.**

Hearing dates: 25 May 2023

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# Approved Judgment

This judgment was handed down remotely at 10.00am on 22 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

## Mr Justice Chamberlain:

## Introduction

1. This claim concerns a site at Cockering Road, Thanington, to the south-west of Canterbury. It is allocated for residential development in the Local Plan ("the Site"). On 12 November 2018, Canterbury City Council ("the Council") granted outline planning permission ("OPP") for a mixed use development comprising up to 400 new homes, together with associated development. The application for outline consent was supported by an Environmental Statement ("ES"). The Council carried out an Environmental Impact Assessment ("EIA") under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations").

2. The claimant, Camilla Swire, challenged the OPP by judicial review. Permission was refused by Stuart-Smith J, who described some of the arguments as "lacking either realism or merit" and "more than faintly ridiculous". Permission to appeal to the Court of Appeal was refused. The claimant then brought two further claims challenging consequential decisions, the first relating to the approval of a Masterplan under condition 8 of the OPP, the second an amendment to the timing of the initial earthworks. Those challenges were dismissed by Holgate J in January 2022: [2022] EWHC 390. The arguments were variously described as "excessively legalistic" (see [91]), "hopeless" (see [98]), "untenable" (see [107]) and "wholly wrong" (see [122]). Five further claims by the claimant for judicial review of approvals under the OPP's conditions were subsequently withdrawn.

3. This is the claimant's ninth claim for judicial review relating to the Site. The claimant challenges the decision of 19 October 2022 to grant reserved matters approval for a spine road pursuant to condition 10 of the OPP. Permission was refused on the papers by Lang J. The application was renewed orally before me. Like Lang J, I have concluded that it is not reasonably arguable that there is a public law flaw in the decision and that permission should therefore be refused.

4. The arguments for the claimant were advanced by Alex Goodman KC for the claimant. The defendant was represented by Noémi Byrd. Submissions for the interested Party were made by Andrew Tabachnik KC. I am grateful to all counsel for their excellent submissions.

5. Although I listened carefully to the arguments and spent a great deal of time reading the papers to which my attention was drawn, I am conscious that this is an application for permission. It would not, therefore, be right to go into the kind of detail appropriate in a case where permission was granted.

6. There were originally two grounds, 1 and 2, but ground 2 is no longer pursued and the new ground 1A is, as Mr Goodman accepted, essentially another way of putting ground 1.

## Ground 1

7. Ground 1 is that the Council failed to consider whether certain changes to anticipated infrastructure which, it is said, were key to the granting of the OPP amounted to a change of circumstances such that a revised EIA was required. It is said that this failure amounted to a failure to take account of a material consideration and/or a breach of reg. 9 of the EIA Regulations.

8. The law is clear. Regulation 3 of the EIA Regulations prohibits a local planning authority from granting planning permission "or subsequent consent" for "EIA development". Everyone agrees that the OPP was for EIA development and that the grant of reserved matters approval for the spine road was a "subsequent consent" for these purposes unless an EIA has been carried out in respect of that development. The claim therefore turns on reg. 9(2) and (3), which provide as follows:

> "(2) Where it appears to the relevant planning authority that the environmental information already before them is adequate to assess the significant effects of the development on the environment, they must take that information into consideration in their decision for subsequent consent.
>
> (3) Where it appears to the relevant planning authority that the environmental information already before them is not adequate to assess the significant effects of the development on the environment, they must serve a notice seeking further information in accordance with regulation 25."

9. It is common ground that, on an application for subsequent consent, the question whether the environmental information is adequate is one for the local planning authority, subject to challenge on public law grounds only: see Holgate J's decision in the claimant's previous claim, at [74] and [77]. Whether the test is met is to be decided on a case-by-case basis: *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, [17]-[19].

10. There are four reasons why this ground of challenge is not arguable.

11. First, two of the aspects of infrastructure relied upon in the Statement of Facts and Grounds as key to the grant of OPP (the provision of a fourth slip road off the A2 at Wincheap and a major extension to the existing Park & Ride car park at Wincheap) were in fact not key at all. The possibility that these may not be delivered was considered at the time when the OPP was granted and modelling was requested by the Highway Authority on that basis. The modelling is contained in a sensitivity analysis, which is set out in Technical Note 2 ("TN2") and appended to the officers' report at the OPP stage. Having considered this analysis, the Highway Authority was satisfied that the development was acceptable in traffic terms, as was the Council. On the face of it, therefore, it does not matter that the new draft local plan gives rise to some uncertainty about whether these aspects of infrastructure will go ahead.

12. Second and relatedly, no condition was imposed making commencement or continuation of the development dependent on the construction of the fourth slip road or the extension of the Park & Ride. A nearby development by another developer at Thanington Park does have a condition permitting only 449 out of 750 units in the event that the fourth slip road is not forthcoming. The consequence is that, in that event, overall traffic numbers will actually be lower than envisaged if the fourth slip road goes ahead.

13. Third, the complaint that the Council never considered whether a further ES was required to take account of the changes since the OPP fails on the facts. The Council was well aware of the claimant's view that a new ES was required: see the claimant's letters of 21 February, 14 May and 31 July 2022. The officers' report addressed the issue directly at para. 11. This left no room for doubt that, in the view of officers, the accumulated information already before the Council was adequate and no further information was required. There is no proper basis for inferring that the Council failed to consider this issue.

14. Fourth, reliance on the additional ES filed by the interested party after the reserved matters approval takes matters no further. Such material is not relevant to the rationality of the challenged decision when taken. In any event, the additional ES does not say that the changes since the OPP are significant; it says the opposite, but then goes on to suggest mitigations in case the Council take a different view. A report submitted after the challenged decision which takes the same view as the challenged decision on the key question is an inauspicious basis on which to impugn the decision. The Council's failure to consider mitigations only advanced in case the Council disagreed on the key question gave rise to no public law error. The suggestion that consultation would have been necessary if the mitigations had been considered does not in any way undermine a decision that mitigations did not need to be considered.

## Ground 1A

15. Ground 1A alleges that the application for reserved matters approval was in breach of the EIA Regulations because it involved "salami slicing".

16. The meaning of the term "salami slicing" was recently explained in *R (Ashchurch Rural Parish Council) v Tewksbury Borough Council* [2023] EWCA Civ 101, at [78], as follows:

> "The identity of the 'project' for these purposes is not necessarily circumscribed by the ambit of the specific application for planning permission which is under consideration. The objectives of the [EIA] Directive and the [EIA] Regulations cannot be circumvented (deliberately or otherwise) by dividing what is in reality a single project into separate parts and treating each of them as a 'project' – a process referred to in shorthand as 'salami-slicing': see e.g. the observations of the CJEU in *Ecologistas en Accion-CODA v Ayuntamento de Madrid* [2008] ECR 1-6097 at [48] (adopting the approach taken in para [51] of the Advocate-General's opinion)."

17. It can immediately be seen that what happened here is not an example of salami-slicing. The impact of the whole development, including the spine road, was considered at the time when the OPP was granted, on the basis of a full ES; and the continuing adequacy of the environmental information was considered at the reserved matters stage (as para. 11 of the officers' report shows). For the same reasons as I have given in relation to ground 1, the additional ES – filed after the challenged decision – does not affect the position.

## Conclusion

18. For these reasons, I have concluded – as Lang J did – that neither ground now relied upon is reasonably arguable. Permission to apply for judicial review is therefore refused.