Neutral Citation Number: [2019] EWCA Civ 1359

Case No: C1/2019/0254

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
PLANNING COURT
Mrs Justice Andrews DBE
CO47092018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th July 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE PETER JACKSON

- -

Between :

THE QUEEN (ON THE APPLICATION OF FULFORD PARISH COUNCIL)	**Appellant**
- and -	
CITY OF YORK COUNCIL	**Respondent**
-and-	
PERSIMMON HOMES (YORKSHIRE) LIMITED	**Interested Party**

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MR KILLIAN GARVEY (instructed by **Shoosmiths LLP**) for the **Appellant**
MR JONATHAN EASTON (instructed by **City of York Legal Services**) for the **Respondent**
MR GILES CANNOCK QC (instructed by **Walker Morris LLP**) for the **Interested Party**

Hearing date : 16th July 2019

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Approved Judgment

Lord Justice Lewison:

1. The issue on this appeal is whether the statutory power conferred by section 96A of the Town and Country Planning Act 1990 to make non-material changes to a planning permission includes power to make non-material changes to conditional approvals of reserved matters. In a reasoned order refusing permission to apply for judicial review, Andrews J held that it did. With the permission of Lindblom LJ, the Fulford Parish Council appeals.

2. Section 96A provides:

> "(1) A local planning authority in England may make a change to any planning permission, or any permission in principle (granted following an application to the authority), relating to land in their area if they are satisfied that the change is not material.
>
> (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission or permission in principle as originally granted.
>
> (3) The power conferred by subsection (1) includes power to make a change to a planning permission—
>
> (a) to impose new conditions;
>
> (b) to remove or alter existing conditions.
>
> (4) The power conferred by subsection (1) may be exercised only on an application made by or on behalf of a person with an interest in the land to which the planning permission or permission in principle relates."

3. Following a public inquiry and an inspector's report, on 9 May 2007 the Secretary of State granted outline permission for residential development of approximately 700 dwellings, the creation of public open space and community facilities, including local shops and associated works on land at Germany Beck, Fulford, York subject to a large number of conditions. Many of these conditions required matters to be subsequently approved by the local planning authority. These included a detailed scheme for a nature park, a scheme of archaeological work, noise mitigation measures, proposals for the disposal of foul and surface water, approval of highway design and so on.

4. The site in respect of which permission was granted was (or may have been) the site of the battle of Fulford, where in 1066 King Harald Hardrada and Earl Tostig defeated the northern earls Edwin and Morcar; before they in turn were defeated by King Harold at the battle of Stamford Bridge. One of the conditions attached to the grant of permission was the approval of an interpretative trail detailing the course of the battle.

5. The Fulford Parish Council is bitterly opposed to the scheme, and has mounted a number of unsuccessful challenges to it (including an unsuccessful attempt to register the site as a historic battlefield).

6. On 2 February 2012 the City of York Council ("York"), as local planning authority, received an application for approval of reserved matters relating to details of appearance, landscaping, layout and scale of 655 dwellings. It granted approval on 9 May 2013.

7. The grant of approval stated:

> "9. No development shall take place until a detailed Bat Mitigation Strategy and Method Statement have been submitted to and approved in writing by the Local Planning Authority. All works shall be carried out in accordance with the approved details, unless otherwise approved in writing by the Local Planning Authority and shall be retained unless otherwise agreed in writing with the Local Planning Authority."

8. It went on to specify what the plan should deal with. These included:

> "A timetable for implementing the above measures and construction showing any phasing of work carried out to avoid sensitive times of the year."

9. In April 2015 York approved a bat mitigation strategy. That strategy provided a timetable for implementing the various measures. One of the proposals involved the provision of bat "hop-overs." A bat "hop-over" is a trellis, with vegetation planted round it, to encourage bats to cross the road at a safe height. On 15 October 2018 York approved a further application described as:

> "Non-material amendment to permitted application 12/00384/REMM to alter approved plans and to amend approved bat mitigation strategy required under condition 9."

10. The amendments were changes to the approved house types and layouts of two of the phases of the scheme; and changes to the bat mitigation strategy. The amendment to the bat mitigation strategy involved a change in the timing of the provision of one of the bat hop-overs. The other one was already in place. By the time of that decision, the planning permission had been implemented, in the sense that the overall scheme of development had begun.

11. The Parish Council contends that section 96A did not empower York to make that decision. The statutory power is limited to making non-material amendments to a "planning permission"; and an approval of reserved matters is not a "planning permission".

12. It is not easy to see where this argument leads. As the judge correctly said, the reserved matters approval specifically contemplated that the local planning authority might agree in writing deviations from the approved bat mitigation strategy. An

agreement in writing permitting such an alteration would not change the condition itself. It would be implementing it. I will return to this point later.

13. The argument for the Parish Council, ably presented by Mr Garvey, is that the legislative code maintains a clear distinction between a "planning permission" on the one hand, and an "approval" on the other.

14. The planning permission granted by the Secretary of State was an outline planning permission. That species of permission is defined by section 92 of the Act:

> "In this section and section 91 "outline planning permission" means planning permission granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority, the Welsh Ministers or the Secretary of State of matters not particularised in the application ("reserved matters")."

15. It can thus be seen, the argument runs, that there is a distinction between the planning permission on the one hand, and subsequent approval of reserved matters on the other. This distinction is maintained elsewhere in the Act. Section 62A enables certain applications (called "relevant applications") to be made directly to the Secretary of State. Section 62A (2) provides:

> "In this section "relevant application" means—
>
> (a) an application for planning permission, or permission in principle, for the development of land in England, or
>
> (b) an application for approval of a matter that, as defined by section 92, is a reserved matter in the case of an outline planning permission for the development of land in England,"

16. Once again, Mr Garvey points out, an application for planning permission is dealt with separately from an application for approval of reserved matters. Section 78 provides:

> "(1) Where a local planning authority—
>
> (a) refuse an application for planning permission or grant it subject to conditions;
>
> (aa) refuse an application for permission in principle;
>
> (b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions; or
>
> (c) refuse an application for any approval of that authority required under a development order, a local development order, a Mayoral development order or a neighbourhood development order or grant it subject to conditions,

> the applicant may by notice appeal to the Secretary of State."

17. Planning permission is dealt with under paragraph (a), whereas approval required by a condition is dealt with under paragraph (b). The same distinction can be seen in section 73 (5), and section 93 (2) and (3). The same distinction between a planning permission and a grant of approval of reserved matters is carried through into the Town and Country Planning (Development Management Procedure) Order 2015.

18. Mr Garvey also pointed to section 70. Section 70 (1) empowers a local planning authority to grant planning permission either unconditionally or subject to conditions. Section 70 (1A) empowers a local planning authority to grant or refuse permission in principle. There is no power to grant conditional permission in principle. Section 70 (2ZZB) applies to the grant of permission in principle. It provides:

> "An application for technical details consent is an application for planning permission that—
>
> (a) relates to land in respect of which permission in principle is in force,
>
> (b) proposes development all of which falls within the terms of the permission in principle, and
>
> (c) particularises all matters necessary to enable planning permission to be granted without any reservations of the kind referred to in section 92"

19. Mr Garvey made something of the fact that section 70 (2ZZB) provides in terms that an application for technical details consent is an application for planning permission. By contrast, there is nothing in the Act that says that an application for the approval of reserved matters is an application for planning permission. I do not think that this argument carries much force. Planning permission is defined by section 336 as:

> "permission under Part III, . . . but does not include permission in principle"

20. It follows from the exclusionary nature of this definition that, in order to bring permission in principle within the statutory planning code, there must be some part of the process that treats an application as an application for planning permission. The application for technical details consent fulfils that function.

21. As Mr Garvey submits, the distinction between an application for planning permission and an application for the approval of reserved matters is also embedded in the case law; and has been for over half a century. In *R (Boulton) v Bradford-on-Avon UDC* [1964] 1 WLR 1136 Widgery J said:

> "The other ground on which this argument must fail is that, in my opinion, the application for planning approval of details made in this case was not an application for planning permission at all, and therefore did not attract the need for a certificate under section 37. It will be remembered that when the original application was made, the certificate was signed by

> the builder, and no criticism has been laid against it. That was the certificate for the purposes of this application; no further or additional certificate was required when the application for approval of details was made, because that was not an application for planning permission within the meaning of the section."

22. That distinction was approved by this court in *Castlebay Ltd v Asquith Properties Ltd* [2005] EWCA Civ 1734, [2006] 2 P & CR 22. That case concerned the enforceability of a contractual option. The judge at first instance said at paragraph [41] of his judgment:

> "My conclusions are as follows. I am satisfied, that, as a matter of planning law, firstly outline planning permission is planning permission and the grant of approval of reserved matters is not a planning permission. Secondly, an application for outline planning permission is an application for planning permission, and an application for reserved matters of approval is not."

23. Having reviewed the applicable legislation in some detail, Chadwick LJ said at [34] that the judge's summary was "plainly correct". As Mr Garvey put it in oral argument: if you successfully apply for apples, you do not end up with oranges.

24. In the light of the provisions of the Act and the case law, I accept that the approval of reserved matters is not, itself, a planning permission and that an application for such approval is not, itself, an application for planning permission. But in my judgment that is not the answer to the question raised by this appeal.

25. The primary source of the power to grant planning permission is contained in section 70 (1) of the Act which provides:

> "Where an application is made to a local planning authority for planning permission—
>
> (a) subject to section 62D(5) and sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission."

26. Sections 91 and 92 impose requirements about conditions prescribing time limits within which development must be begun; or, in the case of outline planning permission, by which an application for approval of reserved matters must be made. The conditional grant contemplated by section 70 (1) (a) is a grant of planning permission "subject to" conditions. Two points flow from this. First, the grant of outline planning permission is the grant of planning permission as defined by the Act. Second, since the grant is "subject to" conditions, the conditions must be seen as an intrinsic part of the grant.

27. In *R (Stevens) v Newbury DC* (1992) 65 P & CR 438 Roch J held that it was within the power of the local planning authority under the Town and Country Planning Act

1971 to grant conditional approval of reserved matters (a point that had been left open by Browne J in *Chelmsford Corporation v Secretary of State for the Environment* (1971) 22 P & CR 880). In so deciding he upheld a practice that had been going on for years. He said:

> "Section 36(3) empowers the Secretary of State, subject to the following provisions of section 36, to allow or dismiss the appeal or reverse or vary any part of the local planning authority's decision, and to deal with the application as if it had been made to him in the first instance. Then section 36(5) confers on the Secretary of State the powers given to local planning authorities by section 29(1)(a) to grant permission "either unconditionally or subject to such conditions as they think fit."
>
> The interpretation of the Act on this issue, in my judgment, turns on the meaning of "planning permission" in section 29(1). Is it confined to outline planning permissions or does it include "approvals of reserved matters?" As section 290 does not recognise "approval" or "approval of a reserved matter" as something separate from a "planning permission" and as "planning decisions" apply to decisions made on application under Part III of the Act, which I take to mean all decisions made under Part III of the Act, I conclude that Mr Gray is correct in his submission. "Conditional approval of a reserved matter" is a creature known to the law, and the local planning authority and the Secretary of State can give such approval."

28. It seems to me, therefore, that the nub of the reasoning is that the conditional approval of reserved matters is itself a condition subject to which the planning permission has been granted.

29. As Mr Garvey pointed out, a developer may make multiple applications for reserved matters. In support of that proposition, he relied on the decision of this court in *Heron Corporation Ltd v Manchester City Council* [1978] 1 WLR 937. The question in that case was whether approved reserved matters could be revised or varied after the date of approval. This court held that they could. Lord Denning MR said at 943-4:

> "Suppose that a condition required the design and material of a house to be approved: and, on the first application, the planning authority approved a particular style of facing brick or a two-storey house. But it afterwards appeared that those facing bricks were not obtainable, or that the applicant had to live on one floor and wanted a bungalow. I should have thought it plain that he could make a second application for approval. The planning authority could grant it if it thought fit — leaving the first approval still standing — in which case the applicant could use whichever approval he liked: or the planning authority could grant the second application, *subject to the first not being proceeded with*." (Emphasis added)

30. The last part of the citation plainly contemplates conditional approval of revised reserved matters. In *R (Redrow Homes Ltd) v First Secretary of State* [2003] EWHC 3094 (Admin) at [44] Sullivan J also took the view that a condition may lawfully be imposed upon an approval of details. The point did not arise on the subsequent appeal: [2004] EWCA Civ 1375, [2005] JPL 502. In addition, section 78 (1) (b) confers a right of appeal where, on an application for "any" approval, the local planning authority "grant it subject to conditions". That, too, recognises a power to give conditional approval to reserved matters.

31. In *Pressland v Hammersmith & Fulham LBC* [2016] EWHC 1763 (Admin), Mr John Howell QC, sitting as a judge of the Planning Court, said at [24]:

> "Planning permissions are granted subject to such conditions as may be imposed when either the permission or any subsequent required approval is granted."

32. At [34] he said:

> "A local planning authority may grant an application for any consent, agreement or approval required by a condition imposed on a grant of planning permission (referred to in paragraph (b) of section 78(1)) subject to conditions. It is no doubt the case that such a condition may serve merely to define what the development permitted is in greater detail or to preclude the carrying out of development until something occurs: carrying out the development otherwise than in accordance with such a condition may mean that the whole development is carried out without the planning permission required for it. But other conditions may be imposed which, without unlawfully modifying the permission that has been granted without compensation, may provide for things to be done or not done which, if breached, would not cause the development to be carried out without permission. If such conditions were not ones "subject to which planning permission has been granted", however, they would be unenforceable under Part VII of the 1990 Act."

33. At [36] he added:

> "Mr Buley's submissions [for the local planning authority] assume that the only conditions subject to which planning permission has been granted are those imposed at the same time as the grant of that permission. The fact that a condition subject to which a subsequent required approval was given was not imposed *when* the permission was granted does not mean in my judgment, however, that the permission has not been granted *subject to it* as a result of that conditional approval. Thus, for example, in the case of an outline planning permission granted subject to the approval of reserved matters, the permission is granted subject to compliance with what is approved (which may serve to define what the permission is for), and given that

> any approval may be conditional, subject to any conditions that may be imposed on that approval. That is what the legislation entails. Once imposed such a condition is one subject to which planning permission has been granted. Planning permissions are granted subject to such conditions as may be imposed when either the permission or any subsequent required approval is granted. Again, in my judgment it makes no difference in principle whether the approval granted subject to a condition is one required by a condition imposed by a planning authority on the grant of a planning permission or one required by a condition imposed on the grant of planning permission by a development order made by the Secretary of State. In each case the planning permission is granted subject to any conditions that may be imposed on the required approval. Once imposed, it is a condition subject to which planning permission has been granted." (Emphasis in original)

34. I agree. That, to my mind, is without doubt the assumption upon which section 96A is drafted. It follows, in my judgment, that Mr Garvey's argument that there is no power to approve reserved matters subject to conditions is wrong.

35. In my judgment, the "planning permission" to which section 96A refers is the package consisting of the grant of planning permission itself, together with any conditions to which the grant is subjected, whether the conditions are imposed at the time of or subsequent to the grant of permission. An application for an amendment to an approval (or conditional approval) of reserved matters is, in my judgment, an application for the alteration of an existing condition; which is expressly permitted by section 96A (3) (b). The power under section 96A is restricted to *non-material* changes. It follows that a change in approved reserved matters can have no material impact. In those circumstances, I can see no policy objection to this interpretation. Mr Garvey laid some stress on the statutory time limit within which applications for approval of reserved matters is made. He pointed to section 73, which applies to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted. The one condition that cannot be dispensed with under this power is a condition limiting the time within which development must be begun or an application for the approval of reserved matters must be made: section 73 (4). Section 96A should not be interpreted so as to override section 73 (4). He also referred to the lack of requirements for public advertisement where an application is made under section 96A. That, he said, deprived the public of a valuable right to participate in environmental decision-making.

36. It seems to me to be clear from section 96A (2) (which requires the planning authority to consider "previous changes" made under section 96A (1)), that the section specifically contemplates sequential changes. Provided that the initial application for approval of reserved matters is made within the time limit imposed by the Act, I can see no good reason for outlawing non-material changes made later. In *Inverclyde DC v Secretary of State for Scotland* (1982) 43 P & CR 375, 397 Lord Keith of Kinkel said:

> "This is not a field in which technical rules would be appropriate, there being no contested *lis* between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon. There is, however, one obvious limitation upon this freedom to amend, namely that after the expiry of the period limited for application for approval of reserved matters …an amendment which would have the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent."

37. Moreover, if (as in the present case) some matters that could have been dealt with at the outline permission stage as reserved matters, have in fact been given full approval, it would make no sense for a local planning authority to have power to make non-material changes to those matters but not to matters that had been reserved but subsequently approved. If a change in approved reserved matters were to be a *material* change, things might be different.

38. I accept that public participation in environmental decision-making is important. But section 96A is concerned with a situation in which the environmental decision has already been taken, with the public participation that is required. The power under section 96A is confined to changes which are not material. The need for public participation in *non-material* changes does not seem to me to be so pressing.

39. It is also to be observed that if, instead of applying for outline planning permission, a developer applies for permission in principle, followed by approval of technical details, there is no doubt that non-material changes can be made to the technical details. Since both are processes for determining what development may be carried out, it would be capricious for two wholly different sets of power to be given to local planning authorities. As there is no time limit on the making of non-material changes to technical details, both the timing mischief and the lack of public involvement mischief on which Mr Garvey relies would exist. I cannot regard these as weighty policy reasons for adopting the interpretation that he advocates.

40. In addition, as Mr Cannock QC for the developer submitted, in deciding whether or not to exercise the power under section 96A the local planning authority must be satisfied that the proposed change is not material. It cannot in practice make that assessment without considering not merely the original outline permission and its conditions; but also the details of reserved matters that have been subsequently approved. If Mr Garvey's argument is right, the approved reserved matters need not be considered. If a developer were to ask: what development is permitted by the outline permission, the only possible answer is that the permitted development is to be found in the package consisting of the outline permission, any approval of reserved matters, and any subsequent non-material changes.

41. Although the local planning authority has the power to give conditional approval to reserved matters, its power to do so is limited by the scope of what has been reserved

for subsequent approval. It is not open to an authority to impose additional conditions falling outside the scope of what has been reserved. It may be that, as Mr Easton for York suggested, it was a fear of falling foul of this principle that spurred the developer to apply for formal amendment under section 96A rather than simply asking York for written approval under the conditional approval of the bat mitigation strategy. We were referred to a number of cases that illustrate that principle; but it is not necessary to discuss them further; since it is not suggested that the change in the bat mitigation strategy made under section 96A falls outside the scope of the permission.

42. Mr Garvey also argued that the power to approve non-material changes to a planning permission cannot be used retrospectively. Section 73A of the Act provides:

> "(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.
>
> (2) Subsection (1) applies to development carried out—
>
> (a) without planning permission;
>
> (b) in accordance with planning permission granted for a limited period; or
>
> (c) without complying with some condition subject to which planning permission was granted.
>
> (3) Planning permission for such development may be granted so as to have effect from—
>
> (a) the date on which the development was carried out; or
>
> (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period."

43. Mr Garvey contrasts section 73A with section 96A which contains no wording expressly permitting a retrospective amendment. In the present case, he says, the planning permission, taken as a whole, has been implemented. It follows, therefore, that the power under section 96A cannot be exercised. I do not accept this argument. When a successful application is made under section 73A, it results in the grant of planning permission which did not exist before. In the present case, the planning permission (taken as a whole) has already been granted. The effect of the exercise of the power conferred by section 96A is merely to make a non-material amendment to an existing planning permission. The two sections are, therefore, concerned with entirely different circumstances.

44. One of the purposes of section 96A was surely to formalise minor differences between, say, approved layout plans and "as-built" development. In days gone by this used to be dealt with informally by planning officers; and principles of private law (such as estoppel) would be relied on to validate their representations (e.g. *Lever Finance Ltd v Westminster CC* [1971] 1 QB 222). But that possibility was, for all

practical purposes, brought to an end nearly thirty years later by the House of Lords (*R (Reprotech (Pebsham) Ltd) v East Sussex CC* [2002] UKHL 8, [2003] 1 WLR 348). So a statutory power to achieve the same results was needed; and in my judgment section 96A fills that gap.

45. But in any event, on the facts of this case, I am not persuaded that the power is being used retrospectively. The bat mitigation strategy has yet to be put in place; at least fully. Although it is true that the planning permission has been "implemented", all this means is that development has *begun*; so as to comply with the time limit imposed by section 92. It does not mean that the whole of the permitted development has been "carried out" as that expression is used in section 73A.

46. For these reasons, I would dismiss the appeal.

Lord Justice Floyd:

47. I agree.

Lord Justice Peter Jackson:

48. I also agree.