FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 47
XA92/20

Lord President
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal under section 239 of the Town and County Planning (Scotland) Act 1997

by

NORTH LANARKSHIRE BIOPOWER LIMITED

Appellants

against

THE SCOTTISH MINISTERS

Respondents

Appellants: J de C Findlay QC, Colquhoun; Shepherd & Wedderburn LLP
Respondents: McKay QC, N McLean (sol adv); Scottish Government Legal Directorate

14 September 2021

Introduction

[1] This is an appeal, under section 239 of the Town and Country Planning (Scotland) Act 1997, against the respondents' refusal of an appeal against a refusal of planning permission for an energy-from-waste installation at Carnbroe, North Lanarkshire. The respondents had decided that they, rather than a reporter appointed by them, would

determine the appeal. The reporter, and the officials who were advising the respondents, had recommended that the appeal be allowed. On 18 May 2020 the responsible Minister emailed his officials that he was "not minded to accept the recommendation" for four reasons. The appellants contend that only one of these reasons was reflected in the ultimate decision letter of 3 November 2020. They say that the operative decision was made for the four reasons; three of which were unlawful. The respondents do not disagree that those three reasons may have been flawed, but they maintain that, in the absence of any challenge to the reasons given in the decision letter, the appeal is irrelevant.

The application

[2] The site consists of 3.6 hectares on the north side of the A8. The eastern boundary is the railway line between Motherwell and Coatbridge. Since 2014, under a planning consent granted on appeal on 17 May 2011, the appellants have operated a waste management facility on the site. The site is identified as an existing waste management facility in the North Lanarkshire Local Development Plan (see *North Lanarkshire Council* v *Scottish Ministers* 2013 SCLR 142). In 2018, planning permission was granted for a 400 dwelling residential development on the other side of the railway line. The boundary of the existing residential area in South Carnbroe is 200m from the north-east corner of the site.

[3] The main features of the existing facility are 30m-high buildings and two 27m ventilation stacks. The appellants' new application, for what they termed alterations to the existing permission, involved a change in the use of the site to the processing only of pre-treated residual waste. The new buildings would be closer to the existing and prospective residential areas; less than 100m from the latter. There would be one 80m high ventilation stack. The maximum waste processed per annum would increase from 24,000 to 204,000

tonnes. Left over waste, which would be sent to landfill (ie ash and metals), would be reduced from 31% to between 5 and 8%.

Planning Policy

[4] Scottish Planning Policy provides (para 191) that planning authorities should consider the need for buffer zones between houses and waste management facilities. As a guide, a buffer of 250m for the type of facility envisaged is recommended. For new installations, local authorities should (para 188) determine whether the development would constitute an appropriate use of land; leaving the regulation of permitted installations to the Scottish Environment Protection Agency.

[5] Policy 11 of the strategic development plan (the Clydeplan, 2017) states that, in order to meet the targets which are set by the respondents' Zero Waste Plan, waste management facilities "will generally be acceptable subject to local considerations" on industrial land and on sites on which there already are or were such facilities. Policy EDI3C of the North Lanarkshire Local Development Plan (2012) contains similar provisions. Policy DSP4 states in broad terms that any development should be in keeping with the existing visual amenity of the area. Criterion 3f requires that the development should integrate successfully into the local area and avoid harm to the neighbouring amenity.

The decision

[6] Contrary to their planning officials' recommendations, the Council refused the application on the grounds of air pollution and visual intrusion. The appellants appealed to the respondents. The respondents directed that the appeal should be determined by

themselves (1997 Act, Sch 4, para 3(1)). A reporter was appointed to make a recommendation (para 3(7)).

[7] The reporter's recommendation, in his report of 25 November 2019, was to allow the appeal. He regarded the application as a new one, rather than a variation of the existing permission. It had to be determined in accordance with the development plan (ie the Clydeplan and the LDP). The reporter reasoned that the fact that the site was allocated on the LDP as an existing waste management facility was a powerful factor in the proposal's favour. In relation to the site's location, there was significant support for it in Policy 11 of the Clydeplan and Policy EDI 3C of the LDP. The reporter noted the genuine concerns of the local residents about health and air quality. He held, however, that air quality and health impacts were within acceptable limits and would, in any event, be monitored by SEPA, who had not objected to the proposal.

[8] The reporter concluded that the impact on the local landscape was not significantly detrimental. There would nevertheless be important adverse visual effects. These would be most notably for the occupiers of the planned residential development, which would be only around 100m away, and persons travelling on both the M8 and the A8. That was a material consideration under reference to the guideline buffer of 250m in paragraph 191 of SPP. The proposal was contrary to criterion 3f of Policy DSP4 of the LDP, but the reporter's overall judgment was that the development plan supported the principle of the development and that was the more powerful factor.

[9] On 7 May 2020, the respondents' planning officials submitted the report to the Minister for Local Government, Housing and Planning, along with an invitation to agree with the reporter's recommendation to allow the appeal. On the following day, the Minister's Private Secretary replied to the officials stating that the Minister had noted the

submission and wished to discuss the matter with them at a scheduled meeting on 13 May. What was discussed at that meeting is not disclosed. On 18 May, the Minister's Private Secretary wrote to the officials stating that the Minister was:

> "… not minded to accept the recommendation for the following reasons:
>
> 1. This is not a variation on the previous application in his opinion, but is so materially different that it is a new application
>
> 2. An 80 metre high chimney stack will dominate the surrounding area and is a huge difference from 27 metre stacks
>
> 3. Having a chimney stack only 100 metres from the proposed housing is unacceptable and goes against planning policy
>
> 4. This is not an energy from waste plant, as while there is electricity generation proposed, there is nothing within the application to use the residual heat through a district heating scheme or for industrial use".

[10] On 28 October 2020, the planning officials submitted a new recommendation to the Minister to refuse the appeal. A draft decision letter was attached for his approval. The purpose of the new recommendation was to provide:

> "… a follow up submission given your previous advice rejecting the reporter's recommendation that the above appeal be allowed and that permission should be granted. We have considered the issues afresh and now seek your agreement to the attached draft decision letter."

The Minister agreed with the recommendation to refuse planning permission.

[11] The decision letter, dated 3 November 2020, intimated that the respondents had disagreed with the reporter's recommendation. They had identified four main issues: the principle of the use of the site for an energy-from-waste plant; air quality, emissions and public health; landscape and visual impact; and the proposal's benefits. They agreed with the reporter that the appellants' application was to be treated as a new proposal. It did have development plan support. The respondents accepted all of the reporter's conclusions

regarding air quality, emissions and public health, and the benefits of reducing landfill and renewable energy.

[12] The reason for disagreeing with the reporter was that the respondents placed more weight on the development's non-compliance with Policy DSP4 of the LDP. Adverse visual impacts significantly and demonstrably outweighed the support from other provisions of the development plan and the other benefits of the proposal. DSP4 required that the development should relate well to the surrounding area and avoid adverse impact on existing or proposed properties through loss of amenity. Four hundred houses, which would be only 100m from the ventilation stack, were planned. Existing houses were 350m away. The reporter had recognised that the distance from the proposed housing would be significantly less than the 250m guideline buffer, although it was recognised this was a factor to be considered on its merits and on a case by case basis. The facility's prominent industrial features would be seen from, and would be out of keeping with, the anticipated residential development. The ventilation stack would detract from the visual experience of road users on one of central Scotland's most important transport corridors. This impact would be high because of the volume of traffic. For these reasons, the respondents concluded that the significant adverse visual effects on residential and local amenity made the proposal unacceptable and non-compliant with the development plan.

Submissions

Appellants

[13] There were two main submissions in support of the appeal. First, the Minister's decision had been taken on 18 May on the basis of a combination of four reasons; three of

which were unlawful. Secondly, if the decision had been taken on 28 October, it was unlawful as material facts and/or considerations were not taken into account.

[14] The purpose of the submission to the Minister on 28 October, and the draft decision letter, was to put into effect the Minister's decision of 18 May. The letter provided a detailed justification which had not been found in the email of 18 May. The respondents' officials had not drawn the Minister's attention to, or advised him of the illegality of, or otherwise provided guidance on, the three unlawful reasons.

[15] Three of the reasons were unlawful. Whether the application was a new one, or a variation of an existing permission, was irrelevant. The reporter had characterised the application in the same way as the Minister, but recommended allowing the appeal. The Minister did not suggest that any different planning issues arose. If the Minister was to be taken to be indicating that that was an issue, that would result in unfairness as the appellants had not been offered an opportunity to address the point.

[16] SPP (para 191) did not say that a distance of 100m was impermissible. It was a guideline only. The Minister was entitled to disagree with the reporter's judgment on amenity, but was wrong in taking the view that the proposal was thereby contrary to SPP. The Minister was not entitled to depart from the reporter's determination that the ventilation stack was within permissible limits.

[17] It was incorrect to say that the appellants' facility was "not an energy from waste plant". Use was not of the essence of an energy-from-waste facility. Such usage may be installed in addition to, or instead of, electricity generation capacity.

[18] If the operative decision had been contained in the letter of 3 November, it would have been taken in ignorance of material facts and/or without regard to material considerations. The Minister failed: adequately to consider whether the decision letter

reflected his own reasons for refusing the appeal; and to reconsider that decision and/or unlawfully delegated his decision making powers to officials.

[19] Officials were entitled to take decisions in the name of their minister (*Carltona* v *Commissioners of Works* [1943] 2 All ER 560), but this decision purported to have been taken by the Minister. The knowledge and expertise of officials may be imputed to a minister who was taking decisions under a delegated statutory power (*Bushell* v *Secretary of State for the Environment* [1981] AC 75, at 95), but that general principle did not apply where the minister himself made the decision (*R (National Association of Health Stores)* v *Department of Health* [2005] EWCA Civ 154, at paras 33 and 72). The Minister's ignorance could not be cured. The careful drafting of the decision letter, which was not itself susceptible to successful challenge, could not cure an unlawful decision.

[20] The Minister did not require to have read all of the relevant papers in deciding the appeal, but, where a departmental summary, upon which he may otherwise have legitimately relied, failed to apprise him of a material fact which he was bound to consider, he could not be taken to have been aware of that fact because of his officials' awareness (*Minister for Aboriginal Affairs* v *Peko-Wallsend* (1986) 66 ALR 299 at 302; *R (Transport Action Network v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at paras 60 - 79). The Minister had not been made aware that his earlier views were flawed. That was obviously a material consideration for him to take into account (*R (Friends of the Earth)* v *Heathrow Airport* [2021] PTSR 190, at paras 119 and 120), but he could not have done so. Officials had, on instruction, produced a coherent decision letter rejecting the appeal, but the basis for that instruction had been flawed.

Respondents

[21] The appeal did not question the validity of the decision of 3 November 2020 on a challengeable basis under section 239 of the 1997 Act. The appellants did not contend that there was anything unlawful about that decision. The email of 18 May 2020 did not represent a decision of the respondents. What was being challenged were reasons which did not form part of the decision. The appellants' analysis, of what were said to be the true reasons, was irrelevant to the decision actually taken. The documents and correspondence, which were relied upon by the appellants, constituted administrative work in advance of the decision letter. The Minister did not fail to reconsider matters, nor did he unlawfully delegate. The respondents decided to refuse the appeal, having been provided with advice that there were sound planning reasons for so doing.

[22] The Minister had been supported in his understanding of the planning issues by the collective knowledge, experience and expertise of his officials (*Bushell* v *Secretary of State for the Environment* at 95). The amount of information required in order to determine a planning application was a question of planning judgment (*Simson* v *Aberdeenshire Council* 2007 SC 366, at 379). Although fuller reasons were required for disagreeing with a considered and reasoned recommendation (*Horada* v *Secretary of State for Communities and Local Government* [2016] EWCA Civ 169, at paras 36 and 37; *North Lanarkshire Council* v *Scottish Ministers* 2017 SC 88, at paras [27]-[44]), the respondents were entitled to reject the reporter's and the officials' recommendations. The respondents differed from the reporter on: the weight to be attached to the visual impact of the development; whether the proposed development was, on balance, in accordance with the development plan; and the extent to which conflict with the development plan was outweighed by other material considerations. The decision letter contained adequate reasons for disagreeing with the reporter.

[23] The respondents agreed with the reporter that this was an application for a new planning permission. That was not, however, a basis on which the appeal was refused. They accepted the reporter's conclusion that the proposal received considerable in-principle support from the development plan. They did not treat the application or appeal as incompetent, but determined it on its merits. The decision accepted that what was proposed was an energy-from-waste plant and that it drew support from the relevant provisions of the development plan, but that it was contrary to its provisions on visual impact. The latter consideration significantly and demonstrably outweighed the others.

Decision

[24] The process which was followed by the respondents is not capable of successful challenge. A reporter recommended allowing the appeal and granting planning permission. In doing so, he treated the application as if it were for a new facility, although the existing facility being on the site was a powerful factor in favour of the proposal. Air quality and health impacts were within acceptable limits. There would be adverse visual effects on the proposed new housing and on the A8 and M8; the former being in conflict with SPP's guideline buffer zone. The proposal conflicted with LDP policy DSP4 but, overall, the support from the development plan in general outweighed the concerns about visual impact.

[25] The respondents' planning officials sent the report to the Minister and, in essence, echoed its terms in inviting the Minister to agree with the reporter's recommendation. The details of exactly what happened between then and the issue of the decision letter in November 2020 are unclear, but nothing which has been said by the appellants detracts from the simple fact that the respondents' decision, and the reasons for it, are contained

exclusively in that decision letter. The reasons are not challenged. On that simple basis the appeal must be refused.

[26] The appellants recovered the email of 18 May from the Minister's Private Secretary to the respondents' planning officials. This set out the Minister's thinking at that time; presumably following the scheduled meeting. It gives four reasons behind that thinking; that the Minister was "minded" (inclined) to refuse the appeal. That may be interesting background, but these were not the reasons why the Minister, as the delegate of the respondents, did in fact refuse the appeal several months later. The decision followed the second submission by the officials which had been drafted having "considered the issues afresh". No doubt the officials would have taken into account the content of the email, and any discussions which occurred before or after that email, but their ultimate recommendation and reasons were clear. In authorising the issue of the decision letter, the Minister must be taken to have accepted that new recommendation and approved of the reasons for it. In the absence of an allegation of bad faith or some form of deception on the part of the Minister or his officials, which the appellants did not advance, the decision letter must be taken to represent the whole basis for the decision taken. There is no basis for a contention that the Minister's reasoning at the time of the decision letter was not that contained in that letter.

[27] The Minister may have had four reasons in mind at some point earlier in the process, but those did not form part of the eventual decision. There is nothing unusual about that. If one or more of these reasons was considered unlawful or otherwise bad, the Minister's officials might have been expected to advise him to that effect, and the Minister would have had to put them out of mind. Alternatively he could have ignored the advice and insisted in it being in the decision letter. The alternative was not adopted. The evolution of ministerial

thinking, such as that seen in the present case, is part of the ordinary process of dialogue, consideration and reconsideration, that often takes place within government as views pass back and forwards between ministers and their officials. Eventually the minister reaches a decision. That final decision cannot normally be picked apart later by reference to some aspect of the dialogue which led up to it.

[28] The appellants submit that the Minister was not told that three of the four reasons were unlawful. There is simply no basis for this proposition. It is speculation and contradicted by the terms of the second submission from the respondents' officials which attached the draft decision letter. That letter contained one fundamental reason for refusal of planning consent. That was that the respondents disagreed with the reporter in balancing the adverse visual impact with the other factors for and against the proposal. The Minister endorsed the refusal of the appeal for that reason and that reason alone. There is no ground for a contention that, in so doing, the Minister took into account any irrelevant consideration or failed to have regard to a relevant one. The considerations are those, and only those, in the decision letter itself.

[29] The appeal is refused.