

## **\*51 R. v Newbury District Council and Newbury and District Agricultural Society, Ex Parte Chieveley Parish Council**



Positive/Neutral Judicial Consideration

### **Court**

Court of Appeal (Civil Division)

### **Judgment Date**

23 July 1998

### **Report Citation**

[1999] P.L.C.R. 51

Court of Appeal

( Hobhouse , Pill, Judge, L.JJ. ):

July 23, 1998

*Validity of condition—Matters reserved in outline planning permission*

Since 1985, the second respondent, the **Newbury and District** Agricultural Society (“the society”) had held an annual show on land lying within the North Wessex Downs Area of Outstanding Natural Beauty and adjacent to the major road interchange between the M4 and A34 trunk road in the **parish** of **Chieveley**. In December 1992, the Society made an application for outline planning permission for the erection on the land of two exhibition halls with a total floorspace of 5,644 square metres. In February 1994, the first respondent, the **Newbury District Council**, granted permission for that development subject to a number of conditions. Condition 1 of the permission provided the “Full details of the siting, design and external appearance of the building(s) and other works, the means of access thereto, and the landscaping of the site (the reserved matters), should be submitted to the local planning authority not later than the expiration of three years beginning with the date of the permission, and shall be approved by the local planning authority before any building or other operations start. This condition shall apply notwithstanding any indications as to reserved matters which have been given in the submitted application.” In addition, condition 8 provided that “There shall be no occupation of the buildings until the existing Trencherwood and Trentham access from Priors Court Road have been stopped up and a new access constructed in accordance with details to be submitted to and approved by the local planning authority.”

The grant of outline planning permission also provided that the “**Newbury District Council** hereby grants planning permission for the proposal provided that the proposal is carried out strictly in accordance with the submitted application and plans and the above conditions.”

In November 1996, the society submitted to the first respondents an application for approval of reserved matters which were duly approved in January 1997.

The applicant then challenged by way of judicial review both the grant of outline planning permission and the approval of reserved matters pursuant **\*52** thereto. The judge, Carnwath J., held that (i) the outline planning permission was defective because reserved matters could not include matters of which particulars had been given in the application; (ii) notwithstanding this defect, the court should exercise its discretion and allow the permission to stand; and (iii) because matters of size and floorspace had been expressly reserved in the permission, the first respondent had been wrongly advised that traffic generation was no longer open to discussion, and accordingly, the approval of reserved matters given in January 1997 was unlawful.

By notice of appeal, the applicant claimed that the judge erred in holding the **council** to have acted unlawfully in approving the reserved matters. By a respondent's notice, the **district council** claimed that the judge erred in holding the outline permission to be unlawful.

Held, dismissing the appeal and allowing the cross-appeal:

1. There was no inconsistency between the requirement to carry out the development proposal strictly in accordance with the submitted applications and plans, with the conditions to which the permission was made subject. The permission could, on the facts, be given a sensible and ascertainable meaning.
2. The first respondent had no power to reserve those matters, as they had purported to as in condition 1, which had been particularised in the outline application. The judge was therefore right to hold that condition 1 was unlawful.
3. The outline planning permission had not been granted without due regard to a material consideration, namely PPG 7 .
4. In purporting to approve the application for approval of reserved matters, the first respondent did not leave out of account a material consideration, namely traffic generation, it being a matter of principle which had already been determined at the outline stage.
5. For reasons of undue delay in submitting the application for judicial review, the court would exercise its discretion not to quash the grant of outline planning permission by reason of the purported reservation of matters which there was no power in the first respondent to reserve. (See 2. above.)

## Obiter

Gross floor space cannot be brought within the words “siting” or “design”, especially when these words are read with the words “external appearance”, “means of access” and “landscaping of the site”. None of these terms is appropriate to govern the scale of development in the statutory context. If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. \*53

## Cases referred to:

- *Hall & Co. Ltd v. Shoreham-by-Sea U.D.C.* [1964] 1 W.L.R. 240 .
- *Fawcett Properties Ltd v. Buckinghamshire County Council* [1961] A.C. 636 .
- *Slough Borough Council v. Secretary of State for the Environment* [1995] 17 P. & C.R. 560 .
- *Kingsway Investments Ltd v. Kent County Council* [1971] A.C. 72 .
- *Boddington v. British Transport Police* [1998] 2 W.L.R. 639 .
- *R. v. Bassetlaw District Council, ex p. Oxby* [1998] J.P.L. 197
- *R. v. Criminal Injuries Corporation Board, ex p. A* [1997] 3 W.L.R. 776 .
- *R. v. Exeter City Council, ex p. J. L. Thomas & Co. Ltd* [1991] 1 Q.B. 471 .
- *Caswell v. Dairy Produce Quota Tribunal for England and Wales* [1990] 2 A.C. 738 .
- *Main v. Swansea City Council* (1984) 49 P. & C.R. 26 .
- *London and Clydeside Estates Ltd v. Aberdeen District Council* [1979] 3 All E.R. 876 .
- *R. v. London Borough of Lambeth, ex p. Sharp* (1988) 55 P. & C.R. 232 .

## Representation

Robin Purchas, Q.C. and Susan Ornsby for the applicant.  
John Steel, Q.C. and Rabinder Singh for the first respondent.

PILL L.J.:

This is an appeal against the judgment of Carnwath J., given on June 23, 1997, whereby the judge refused to **Chieveley Parish Council** (“the **parish council**”) a declaration that an outline planning permission granted to the **Newbury** and **District Agricultural Society** (“the society”) on February 8, 1994 by **Newbury District Council** (“the **district council**”) was void. The judge also declined to quash an acknowledgement by the **district council**, on November 8, 1996, of an application for the approval of reserved matters made by the society pursuant to the outline planning permission. The judge had found that the outline planning permission was unlawful and also found that the **district council** acted unlawfully in approving the reserved matters without giving consideration to traffic generation. In declining to make the declaration sought by the **parish council**, the judge required an undertaking from the society to enter into an obligation that approval would not be sought, on the basis of the outline permission, for any development which exceeded 5,644 square metres floor space or “otherwise substantially departs from it”.

By a respondents' notice, the **district council** claim that the judge erred in holding the outline permission to be unlawful. By a notice of appeal, they claim that the judge erred in holding the **council** to have acted unlawfully in approving the reserved matters. In those submissions they are supported by a respondents' notice by the society.

The land the subject of this dispute is a site of about 54 hectares situated within the North Wessex Downs Area of Outstanding Natural Beauty \*54 ("AONB"). It is within the **parish** of **Chieveley** and is adjacent to the major road interchange between the M4 and the A34 trunk road (M4 Junction 13).

Since 1985, the society have held an annual show on the site during a weekend in September. The show was first held under permitted development rights but limited planning permissions for ancillary development were granted from 1985 onwards. The society made more ambitious proposals for development and in 1988 permission for a large office building was refused on appeal to the Secretary of State. In November 1991, permission for substantial exhibition halls was refused following consideration of a planning brief for the site prepared by **council** officers.

Application for the disputed outline planning permission was submitted on December 14, 1992. There were negotiations between the **district council** and the society and discussions with the county **council**, as highway authority. For a time, the Secretary of State exercised his power to prevent the **district council** from determining the application pending his consideration, but that restriction was removed on May 26, 1993. The proposal had included recreational provision for use by the **district council** but this was withdrawn on March 10, 1993, the **parish council** being notified on March 12.

On March 16, 1993 the **district council's** Development Services Committee resolved that "subject to no objection from County Highways and subject to authorisation of the Secretary of State, and upon completion of an agreement within 12 months (to include a head requiring that requests for permission for uses not covered by the agreement be referred to the Committee, and a head prohibiting helicopter flights), the Director of Development Services be authorised to grant conditional permission". The contemplated planning agreement (under what is now [section 106](#) of the 1990 Act) was signed on February 4, 1994 and a document containing the outline permission was issued by the responsible planning officer four days later (142156). Meanwhile, in December 1993, a local plan had been adopted by the **district council**.

In July 1994, the society submitted an application which purported to be for approval of reserved matters. The **parish council**, who had opposed the development throughout, submitted that the application was outside the scope of the outline permission and also that the outline permission was itself unlawful. On September 27, 1994, the **district council** concluded that the application was invalid, whereupon the society withdrew it as an application for approval of reserved matters and made a full application for planning permission in the same form.

On January 16, 1995, the new application was called in by the Secretary of State for his determination and an October date was fixed for a public local inquiry. On August 30, the society withdrew the application and said \*55 they would make a detailed application under the 1994 outline permission. That application for approval of reserved matters was made on November 5, 1996 and was accepted by the **district council** as valid on November 8. Application for judicial review of that decision was made on December 4, 1996. On January 8, 1997, the Area Planning Committee of the **district council** accepted the planning officer's report recommending approval of the reserved matters and on March 20, the **parish council** applied by way of judicial review to quash that decision. The society have undertaken not to implement any approval of reserved matters pending the decisions of the courts.

The issues have been somewhat differently stated by the opposing parties, though there is no difference of substance. A formulation was placed before the learned judge by leading counsel for the **parish council** and I have adapted it to reflect the current issues as I understand them to be:

1. Was the outline permission a nullity, being irreconcilably ambiguous and ineffective on its face?
2. Was the outline permission a nullity and/or unlawful in purporting to reserve matters particularised in the application in breach of the provisions of the [Town and Country Planning Act 1990](#) ("the 1990 Act") and the [Town and Country Planning General Development Order 1988](#) ("the 1988 GDO")? (The 1988 GDO has since been superseded.)
3. Was the outline planning permission unlawful in being granted without regard to material considerations, namely Planning Policy Guidance Note No. 7 ("PPG 7")?
4. In purporting to approve those details, did the **district council** leave out of account a material consideration, namely traffic generation, in considering the application for the approval of reserved matters?
5. Discretion.

- (a) Having found in favour of the **parish council** on Issue 2, did the judge err in declining to exercise his discretion to quash the acknowledgement and/or to declare the outline planning permission unlawful?
- (b) Upon a finding in the **parish council's** favour on Issue 3, should discretion be exercised to quash the outline permission? The judge did not make a finding upon issue 3 on the ground that, even if it was in the **parish council's** favour, he would not have exercised the discretion to quash.

In the course of submissions on those issues, other questions arose. The most important of them was whether the scale or quantum of development was a reserved matter within the meaning of that term in the legislation. \*56

### Issue 1: Ambiguity

This issue turns upon the wording of the document issued by the **district council** on February 8, 1994. It is entitled Notice of Planning Permission. The application number is stated followed by the word “outline”. The location, **Newbury** Show Ground, and the identity of the applicant, the society, are stated and the proposal is described as “Erection of exhibition halls at showground (Class D1) for showing of cattle, other livestock, machinery etc. Plus assembly and leisure uses (Class D2)”. The document provides that “subject to the following conditions”, “**Newbury District Council** hereby grant planning permission for the proposal provided that the proposal is carried out strictly in accordance with the submitted application and plans and the above conditions.” The first condition provides:

“Full details of the siting, design and external appearance of the building(s) and other works, the means of access thereto, and the landscaping of the site, (the ‘reserved matters’) shall be submitted to the Local Planning Authority not later than the expiration of three years beginning with the date of this permission, and shall be approved by the Local Planning Authority before any building or other operations start. This condition shall apply notwithstanding any indications as to the reserved matters which have been given in the submitted application.”

The reason given for the condition is that “the application is not accompanied by sufficient details of the reserved matters to enable the Local Planning Authority to give proper consideration to those matters”.

Condition 8 provides that:

“There shall be no occupation of the buildings until the existing Trencherwood and Trentham access from Priors Court Road have been stopped up and a new access constructed in accordance with details to be submitted to and approved by the Local Planning Authority.”

Plans were submitted with the application. They included a figure for gross floor space (5,644 square metres), a plan showing the siting of the proposed halls and the retention of the existing access. The submission of the **parish council** is that the requirement to carry out the proposal “strictly in accordance with the submitted application and plans” is inconsistent with the conditions to which the permission is made subject. The requirements are mutually contradictory and the permission fails for ambiguity and uncertainty.

In *Hall and Co. Ltd v. Shoreham-by-Sea U.D.C.* [1964] 1 W.L.R. 240, Willmer, L.J., at p. 245, stated that planning conditions should be \*57 benevolently construed and adopted the view expressed by Lord Denning in the House of Lords in *Fawcett*

*Properties Ltd v. Buckinghamshire County Council* [1961] A.C. 636 that: “A planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results.” It will be necessary to consider further the judge's reasoning on Issue 1 when Issue 2 is considered, but in my judgment the judge reached the correct conclusion on Issue 1. The permission can and should be read as providing that the matters expressly reserved in conditions 1 and 8 prevail, in so far as is necessary to give effect to those conditions, over details in the submitted applications and plans. The detail in the applications and plans is incorporated into the permission only to the extent that it does not conflict with express reservation by condition. Subject to points raised on Issue 2 the permission can, on the facts of this case, be given a sensible and ascertainable meaning.

## Issue 2

The planning application of December 14, 1992 was submitted on the **district council's** printed form. In answer to question 7, “What kind of application is this?”, the words “outline permission”, as distinct from “full permission” and “approval of details (reserved matters)” were ticked. Question 8 asked, “If this is an outline application, which details, if any, do you wish to be considered as part of the application?” The words “siting” and “means of access” were ticked. In answer to question 6 it was stated that the application involved “new building” and the site of the proposed buildings was shown on the accompanying plan. Thus, in an outline application, details of siting and means of access were provided. The submission of the **parish council** is that the **district council** had no power to reserve matters, as they purported to do in condition 1, which had been particularised in the application for outline planning permission.

Sections 91 and 92 of the 1990 Act make every planning permission subject to time-limits and the only definition of the expression outline permission in the Act is in section 92. It provides in subsection (1) that “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 or the Secretary of State of matters not particularised in the application (“reserved matters”). Reference to the 1988 GDO is required and in article 1(1) it is provided that “outline planning permission means a planning permission for the erection of a building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters”. Reserved matters \*58 are stated to mean, in relation to an outline permission, or an application for such permission, “any of the following matters in respect of which details have not been given in the application, namely—

- (a) siting,
- (b) design,
- (c) external appearance,
- (d) means of access,
- (e) the landscaping of the site.”

Article 7 empowers an authority upon an application for outline planning permission to grant permission subject to a condition specifying reserved matters for the authority's subsequent approval. It also empowers the authority to decline to determine the application unless further details are submitted. Article 8 provides, *inter alia*, that an application for approval of reserved matters “shall include such particulars, and be accompanied by such plans and drawings, as are necessary to deal with the matters reserved in the outline planning permission”.

The **parish council's** submission is supported by Departmental advice in Circular 11/95 paragraph 44. Distinction is made between “reserved matters” and conditions reserving other matters. Of reserved matters, it is stated:

“An applicant can choose to submit as part of an outline application details of any of these ‘reserved matters’. Unless the applicant has indicated that those details are submitted ‘for illustrative purposes only’ (or otherwise indicated they are not formally part of the application), the Local Planning Authority must treat them as part of the development in respect of which the application is being

made; the Authority cannot reserve that matter by condition for subsequent approval, unless the applicant is willing to amend the application by withdrawing the details.”

(Similar advice appeared in superseded Circular 1/85, paragraph 37 .)

Mr Purchas, Q.C. submits that the statutory provisions are plain and that an outline permission which purports to be subject to a condition requiring subsequent approval of reserved matters is beyond the powers of the **district council** because the condition can only be imposed in respect of matters of which details have not been given in the application. It was open to the applicant to amend the application by withdrawing the details, as contemplated in the Circular, and it was open to the **district council** to require further details, as contemplated in [Article 7 of the 1988 GDO](#) . What was not permissible was to grant an outline permission with a reserved **\*59** matters condition when details of some of the reserved matters had been included with the outline application.

For the **district council** reference is made to [section 70\(1\)](#) of the 1990 Act which empowers a local planning authority to grant planning permission “either unconditionally or subject to such conditions as they think fit”. This is a general power which is not constrained by the procedure for reserved matters. Alternatively, the defect was a mere technicality which caused no prejudice to the **parish council** and did not invalidate the outline permission. The provision in [Article 7](#) was intended as protection for the applicant for planning permission, which he may waive, and did not provide a means for third parties to invalidate the permission. There was no prejudice to the **parish council** who, upon the finding on Issue 1, were protected by [paragraph 8 of Schedule 1](#) to the 1990 Act to the extent that they were entitled to be notified of applications for approval of reserved matters. The relevant application for approval of reserved matters did not attempt to go beyond what had been sought in the outline application so that no prejudice resulted from the failure to follow the correct procedure.

I agree with the judge that condition 1 was unlawful. Upon the wording of [article 1](#) , there was no power to reserve matters of which details had been given in the outline application. I do not accept the submission that the details should be treated as withdrawn. I am not able to treat this requirement as a technicality which can be ignored, even though, at any rate with respect to “means of access”, there is no complaint of substance about the detail as such. The procedure whereby application may be made for outline permission is a valuable one in that, subject to the power of the local planning authority under [Article 7](#) to decline to consider an outline application in the absence of detail, and the power to require more detail, it enables the principle of development and land use to be established without the need to investigate detailed matters at that stage. If the planning authority wish to determine the scale of development at that stage, they may impose conditions, for example as to the number of houses per hectare in a residential development, or the permitted floor space of a building.

Because of its value, it is important that the correct procedure be followed. If the applicant wants reserved matters such as siting and means of access to be decided at that stage, he may apply accordingly. The procedure has value only in so far as the provisions of [article 1](#) are followed. It is important to be clear as to what has been applied for and what has and has not been granted. Whether, in this case, the outline permission should be quashed for this defect remains for further consideration. I only add that I am not doubting the legality of the practice of including details “for illustrative purposes only” with an outline application as contemplated in Circular 11/95 . **\*60**

Before leaving Issue 2, I should comment upon the judge's finding, supported by Mr Purchas, that the scale or quantum of development, in this case the gross floor space, is a reserved matter. I do not accept that conclusion. Gross floor space cannot in my view be brought within the words “siting” or “design” as submitted by Mr Purchas, especially when those words are read with the words “external appearance”, “means of access” and “landscaping of the site”. None of these words is appropriate to govern the scale of development in the statutory context. If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance. I do not read Stuart-Smith L.J. as having said more than that in *Slough Borough Council v. Secretary of State* [1995] 17 P. & C.R. 560 when he said that “it is possible when detailed application is considered that the size of the development can properly be reduced having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping.” While I agree with the conclusion of Carnwath J. on Issues 1 and 2, I consider wrong his conclusion that, as a result, floor space is still to be determined. Floor space could not be treated as a reserved matter.

The issues so far considered depend on statutory construction (Issue 2) and construction of documents (Issue 1). The fact that the **district council** members and officers may have believed that they were reserving scale of development for future consideration and the fact that their reasons for condition 1 (lack of detail) are either misplaced or incomprehensible cannot influence the decision upon those issues. Neither can many of the background events, to which we have been referred and which clearly have created considerable ill-feeling in the locality, influence the decision. It is not alleged that the **district council** have acted in bad faith such that the permission could be quashed on that ground.

### Issue 3

The judge declined to address the merits of this issue in his judgment on the ground that the challenge was in any event made too late. I propose to address the merits, in defence to the submissions of Mr Purchas and the strength of the feelings of his clients. The submission is based on the absence of any reference in the planning reports which preceded the grant of outline permission to PPG 7 and the alleged failure of the **district council** to take the guidance in that note into account.

PPG 7 is entitled “The Countryside and the Rural Economy” and the **\*61** relevant note, issued in 1992, states in its introduction that it “provides policy guidance” on that subject. A part of the note gives advice on planning policies in areas with special countryside designations, including areas of outstanding natural beauty, such as the North Wessex Downs AONB.

“3.9 In general, policies and development control decisions affecting AONBs should favour conservation of the natural beauty of the landscape. In all cases the environmental effects of new proposals will be a major consideration, though it will also be appropriate to have regard to the economic and social well-being of the areas. It would normally be inconsistent with the aims of designation to permit the siting of major industrial or commercial development in these areas. Only proven national interest and lack of alternative sites can justify an exception.”

**Section 70(2)** of the 1990 Act provides that, when dealing with an application for planning permission, the local planning authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.

**Section 54A** of the Act provides that “where, making a determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise”.

The Structure Plan for Berkshire approved by the Secretary of State in 1988 provides, in Policy EN 8, a presumption against any development outside the existing built-up areas of towns and villages in the AONB. Exceptions are provided. The **Newbury Local District Plan**, approved after the disputed outline permission, contains a similar policy. The M4/A34 junction is noted to be of “regional significance”, but further development in its vicinity was considerably restricted in a site specific policy (Policy CH 1).

Mr Purchas submits that PPG 7 was a material consideration which was ignored. It could not be established that there was a proven national interest in or lack of alternative sites for the proposed development. Moreover, the **council's** proposal for the provision of recreational facilities on the site, which had been claimed as a factor in support of the development, was withdrawn before it was resolved to grant outline permission and yet there was no reappraisal of the proposal following that withdrawal.

For the **district council**, Mr Steel, Q.C. relies on the fact that AONB considerations featured prominently in discussions between **district council** and **parish council** representatives. In his affidavit the chairman of the **district council's** Development Services Committee says that the **\*62** committee was well acquainted with policies for AONBs. Relevant considerations had been set out in the planning brief of September 1990. An officer's report dated February 3, 1993 stated that a “judgment has to be made whether the harm to the AONB and any impact on residents is outweighed by continued support for the **Newbury Show** and

new recreational provision”. Upon the wording of paragraph 3.9 of PPG 7, Mr Steel relies upon the reference to the “economic and social well-being of the areas” and the economic value to the **Newbury district** of development at a strategic site.

Berkshire County **Council** considered the application for outline permission on March 3, 1993 under the heading “Strategic Consultation”. As a result, they entered a strategic objection to the application on the ground that it conflicted with the environmental and recreational policies of the County Structure Plan. They also raised a strategic highway objection “in view of the lack of a traffic impact assessment and the concerns of a potential impact on the strategic highway network”. Parts of paragraph 3.9 of PPG 7 were quoted in the officer's report to the development control committee of the county **council**, but there was no reference to PPG 7 in the committee resolution that the **district council** be informed of the strategic objection.

Mr Purchas understandably lays stress on the absence of any reference to PPG 7 in the numerous reports which **council** officers made to the **district council** and to the absence of any reference to it during relevant **council** meetings (Lady Knill's affidavit). This is both surprising and regrettable. I have, however, come to the conclusion that the resolution to grant outline permission could not have been quashed on that ground, even had it been made promptly. The sentence in 3.9 upon which reliance is placed is specific in terms but must be read in its context as departmental advice to **councils** who have the duty to act as local planning authorities giving primacy (by virtue of [section 54A](#) of the 1990 Act) to the development plan.

The guidance in the last sentence of paragraph 3.9, albeit specific, does not dictate a particular decision on a specific site or deprive the local planning authority of its power to grant planning permission in circumstances in which general AONB considerations were undoubtedly in mind before and when the relevant decision was taken. Paragraph 3.9 does itself recognise the appropriateness of having regard to the economic well-being of the area and does not define major development. The apparently specific advice in the last sentence of the paragraph does not in the circumstances require the quashing of the permission for failure to follow the guidance or even to have regard to that sentence. Moreover, I find it inconceivable that reference to the sentence in reports to **council** members would have altered their view of the proposal. \*63

While the development plans are certainly restrictive in tone, they do not specifically adopt the sentence relied on and in my judgment the **district council** were not disentitled by it from granting permission on this site. In considering the purpose and effect of paragraph 3.9, it is of some significance that in their strategic objection to the **district council**, made shortly before the relevant decision was taken, the county **council** did not refer to it.

Before leaving the issue, I would venture to comment that I find it surprising that a sentence as apparently specific as that under consideration should appear in a guidance note when the planning system is intended to be “plan-led” ( PPG 12, paragraph 1.3 ). The sentence was not incorporated into the County Structure Plan approved by the Secretary of State.

#### Issue 4

The resolution of March 16, 1993 authorising a **council** officer to grant conditional permission was subject amongst other things to there being “no objection from county highways”. The county **council** were of course the highway authority under the then existing division of functions. The society had sent to the **district council** a traffic impact assessment report prepared by traffic consultants. The “update report” submitted by officers to the **District Council** Committee on March 16, 1993 included the statement that “a traffic impact assessment has been submitted and the response of county highways is awaited”. In September 1993 the county **council** withdrew their objection on highways grounds to the proposal.

In my judgment that left it open to the **district council** to issue the outline permission (subject to fulfilment of the other conditions in the March 16 resolution) and they did so on February 8, 1994. The submission of the **parish council** is that traffic generation should have been reconsidered by the **district council** upon receipt of the application for the approval of reserved matters in November 1996. The **district council** were advised by officers:

“The principle of this development is established under outline permission No. 142156. This application relates solely to the reserved matters of design, landscaping, levels, lighting, access and

parking details. Matters of principle, including traffic generation, and the use of the buildings are not open to discussion at this stage.”

In the meantime, in November 1995, the **parish council** had obtained traffic appraisal reports from consultants. These expressed “very serious concerns which need to be addressed in respect of the traffic impact which \*64 would arise” from the development and expressed the view that the concerns had not been adequately addressed to date.

In my judgment the **district council** were not obliged to conduct a further study of traffic generation, or to treat it as a material consideration upon consideration of the application for approval of reserved matters. The submission of the **parish council**, which found favour with the judge, depends on a finding that the scale of the development—and it is common ground that in the present case gross floor area denotes that scale—was open for consideration as a reserved matter. For reasons I have given, it was determined with the outline permission and cannot be treated as a reserved matter. As to traffic generation, the advice given to the **district council** by its officers was correct and it was not open to the **council** to reassess the scale of the development in 1996. The power to approve reserved matters cannot be used as a means of revoking or modifying a permission already given (*Kingsway Investments Ltd v. Kent County Council* [1971] A.C. 72, per Lord Morris at p. 96).

Moreover, I cannot agree with the judge's view that in 1993 the **district council** had failed in its duties to consider traffic generation “since it could not delegate the planning decision to the county”. It was the county **council** which had the duties and enjoyed the expertise in highway matters and the **district council** were entitled, as they did in their resolution, to accept the advice of the county **council**. They had submitted to the county **council** what appeared to be a comprehensive report by traffic consultants.

## Issue 5

There remains the question whether the outline planning permission should be quashed by reason of the purported reservation of matters which there was no power to reserve. The submission of the **parish council** is that the outline planning permission should have been declared to be unlawful and the acknowledgement of an application for reserved matters based on an unlawful permission should be quashed. A difficulty faced by the **parish council** is in the requirement that applications for judicial review be made promptly. Section 31(6) of the Supreme Court Act 1981 (“the 1981 Act”) provides:

“Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—

- (a) leave for the making of the application; or
- (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the \*65 rights of, any person or would be detrimental to good administration.”

Mr Purchas rightly accepts that the court has a discretion not to declare the outline permission unlawful and not to quash it. That discretion is not in present circumstances removed by the decision of the *House of Lords in Boddington v. British Transport Police* [1998] 2 W.L.R. 639, which is concerned with the rights of defendants in criminal proceedings and not with discretions available upon judicial review. It is submitted that no hardship or prejudice has been established by the society. Further, because the 1994 permission was outline only, no development could proceed and proceedings were commenced promptly once the **council** purported to deal with reserved matters. It is submitted that the **district council** were themselves confused about the effect of their decisions. The conduct of the **council**, and of the society in pursuing different proposals at different times, was such that the delay was not culpable. Notice of intention to apply for judicial review, if the **district council** considered a detailed application, was given on September 9, 1994. Moreover, the **parish council** were unable to fund legal proceedings at an earlier

stage. Reference was made to the allegedly unsatisfactory circumstances in which the **council** withdrew support for a sports centre as part of the development but I cannot find that the circumstances bear significantly upon the point now at issue. The document of December 5, 1995 prepared by the **parish council** and entitled “Development on the showground site: why it has gone wrong” contains, if I may say so, a powerful critique of the handling of the matter by the **district council**, and in particular of changes of mind, but does not add significantly to points otherwise made. While it may have been the withdrawal of the **district council's** proposals for a sports centre which led the Secretary of State to withdraw the restriction on development he had imposed (no reasons were given), that does not bear upon the question whether the declarations sought should now be granted.

Mr Purchas relies upon the decision of this Court in **R. v. Bassetlaw District Council, ex p. Oxby** (transcript, December 11, 1997), decided after the judgment now appealed. That was a case where a **council** sought to quash planning permissions granted by the **council** itself. This court found that the applicant had “presented a strong case in support of his application that the two relevant planning consents were rendered invalid by bias or apparent bias” (Hobhouse L.J. at p. 26H): “It was improperly and invalidly granted”. Delay was found to be undue, but only marginally so (p. 20E). Following the approach of Simon Brown L.J. in **R. v. Criminal Injuries Compensation Board, ex p. A** [1997] 3 W.L.R. 776, the court found that the critical factor was the hardship, prejudice and detriment to the \*66 parties who had obtained the planning permission (“H”). Hobhouse L.J., with whose judgment Millett and Otton L.JJ. agreed, stated at p. 20H: “No point arises in the present case on whether the making of the orders asked would be detrimental to good administration.” Hobhouse L.J. added that counsel seeking to uphold the permission “somewhat faintly argued that it would be. But in the present case it is the **council** that is seeking the remedy and it is doing so in what it regards as the needs of good administration—that invalid planning decisions should be declared to be what they in truth are and should be set aside” (21A). It was in those circumstances that the court decided that “the relevant question for examination therefore is to what extent their [H's] rights will be substantially prejudiced by the granting of the relief sought” (21E). The court concluded that the lapse of time had not altered “the balance of justice as between the **council** and H. In my judgment justice requires that, as between the **council** and those whom the **council** represents on the one hand and H on the other, these consents should be declared void and that it would be unjust if the courts were to refuse to do so or were to require the **council** to pay compensation to H as a condition of achieving that result” (p. 28C to D).

The lapse of time between the grant of outline permission and the application for judicial review approached three years. Notwithstanding the points made on behalf of the **parish council**, including the fact that the permission was outline only and would not be implemented without approval of reserved matters, that lapse of time did in my judgment constitute “undue delay” within the meaning of that term in [section 31\(6\)](#) of the 1981 Act. I agree with the approach of Simon Brown J. in **R. v. Exeter City Council, ex p. J. L. Thomas & Co. Ltd** [1991] 1 Q.B. 471, 484 :

“I cannot sufficiently stress the crucial need in cases of this kind of the significance to proceed with the greatest possible urgency, giving moreover to those affected the earliest warning of an intention to proceed. In this connection it should be remembered that there is conspicuously absent from the legislation any right to appeal in fact or law from a planning authority's grant of planning permission. And even when a right of challenge is given—the right of statutory application under [section 245](#) [of the [Town and Country Planning Act 1971](#) ] to challenge a ministerial decision—it might be exercised within six weeks. Only rarely is it appropriate to seek judicial review of a section 29 permission (section 70 of the 1990 Act); rarer still will be the occasions when the court grants relief unless the applicant has proceeded with the greatest possible celerity.”

A reason for that approach is that a planning permission is contained in a public document which potentially confers benefit on the land to which it \*67 relates. Important decisions may be taken by public bodies and private bodies and individuals upon the strength of it, both in relation to the land itself and in the neighbourhood. A chain of events may be set in motion. It is important to good administration that, once granted, a permission should not readily be invalidated. As confirmed in the House of Lords, [section 31\(6\)](#) recognises that there is an interest in good administration independent of hardship, or prejudice to the rights of third parties. The court is entitled to look at the interest in good administration independently of those other matters. It is important that citizens know where they stand and how they can order their affairs in the light of the relevant decision ( *Caswell v. Dairy Produce Quota Tribunal for England and Wales* [1990] 2 A.C. 738 ). In my judgment, weight should be given to this aspect of the case notwithstanding the absence of convincing evidence that the applicants for planning permission have

been prejudiced by the delay. In *Oxby*, in so far as the interests of good administration were held to be relevant, they were held to be relevant in the direction of quashing the permission. On a finding of bias, the court felt entitled to deal with the issue as one between the local planning authority and the holder of the permission. In the present case, no allegation of impropriety is made. I have no doubt that the interests of good administration, which, as contemplated in *Caswell*, extend beyond the interests of the parties to the litigation, should constitute an important factor in the decision.

I would adopt the same approach as did Parker L.J. in *Main v. Swansea City Council* (1984) 49 P. & C.R. 26, 37, basing himself upon the speech of Lord Hailsham in *London and Clydeside Estates Ltd v. Aberdeen District Council* [1979] 3 All E.R. 876 :

“In our judgment, the most significant observation in Lord Hailsham's speech, indeed in the whole of the *Clydeside* case is that the court must consider the consequences in the light of a concrete state of facts and a continuing chain of events. This recognises that the court looks not only at the nature of the failure but also at such matters as the identity of the applicant for relief, the lapse of time, the effect on other parties and on the public and so on.”

Citing that passage with approval in *R. v. London Borough of Lambeth Council, ex p. Sharp* (1988) 55 P. & C.R. 232 at 240, Woolf L.J. accepted that the approach introduces an element of uncertainty as to what will be the consequences of a breach of regulations in a planning context. Regard should be had to what the particular statutory provision was designed to achieve.

I have indicated what I regard as the object of the procedure for reserved matters. This is not a case where bad faith, or conduct which can \*68 be categorised as improper, has been alleged. While the **parish council** strongly disagree with the view taken by the **district council** on the merits of the proposal, the merits were considered by the **district council** before resolving to grant a permission they were entitled to grant. It is not a case in which the nature of the failure can be said to strike at the heart of the decision to grant outline permission.

There is scope for prejudice to third parties in the local planning authority purporting to reserve matters, such siting and means of access, which they have no power to reserve or in otherwise failing to follow the correct procedure. Third parties may be misled as to what has been granted and as to when to object to particular features of the development but it would be a rare case in which quashing was merited upon a third party application. In the course of events in this case, I do not consider that the **parish council** have been prejudiced significantly. Their objection is essentially to the principle of development and its scale. Moreover, upon the finding on Issue 1, they could object to siting and means of access upon application for approval of reserved matters.

Having regard to those factors and the substantial passage of time, this is not in my judgment a case in which the court should now declare the outline permission invalid. The judge reached the correct conclusion. As to Issue 5(b), if, contrary to my view, the outline permission could have been challenged for failure to have regard to a material consideration, the delay has been such as to render the permission immune from the declaration sought.

The consequences of the delay cannot be avoided by attacking the acknowledgement of the reserved matters application, rather than attacking the outline permission directly. The court should look to the decision which in substance is being challenged and not the claimed acknowledgement of its validity. The outline permission not having been declared invalid, it was open to the society to apply for the approval of reserved matters and I would hold that application to have been made validly.

Upon those findings, the need for the undertaking required of the society by the judge does not arise. The scale of the permission, by way of gross floor area, was determined in the outline application. Had the court come to a different conclusion on that point, Mr Steel would have sought to justify the requirement for an undertaking on the basis that, in deciding to exercise his discretion as he did, the judge was entitled to require an undertaking as to floor space. Mr Steel did not advance the general proposition that the validity of an administrative decision may be saved by an undertaking from a party to litigation and nothing in this judgment is intended to support that proposition.

I would dismiss the appeal and allow the cross appeal. \*69

JUDGE L.J.:

I agree.

HOBHOUSE L.J.:

I also agree.

*Solicitors* —Berwin Leighton; Irwin Mitchell.

*Reporter* —Victor Moore.

### Commentary

The Court of Appeal has upheld the main legal issue decided by Carnwath J. in the High Court; see [1997] J.P.L. 1137. The principle decided is that, if an outline application includes details as to any of the “reserved matters” and it is not made clear that these details are for illustrative purposes only, the local planning authority cannot reserve any of those details for subsequent approval. This ruling flows from the wording of [section 92](#) which defines an “outline” permission as permission granted subject to the reservation of reserved matters which have “not been particularised in the application”. The judgment of Pill L.J., however, does not make clear whether this principle only applies to reserved matters and whether if details are submitted about other aspects of the development, later approval can be reserved by condition. Presumably such a condition can be imposed as there is nothing in the Act or subordinate legislation to restrict the application of the normal wide power to impose conditions set out in [section 70](#). So if the scale or size of the development is not a reserved matter (as the Court of Appeal has held), where the scale is set out in the application, it would still be possible to impose a condition requiring later approval of the size and scale.

On the question of whether the size and scale is a reserved matter, Pill L.J. is undoubtedly right that the gross floor space of a development does not naturally come within the meaning of the words “siting” or “design” or “external appearance”. On the other hand, the question of size is inevitably *related* to such matters, as for example the size of a building inevitably affects its appearance, as does the limitation on the siting of the building. All these matters run one into another. For example, if outline permission were to be granted for housing and the subsequent details were to set out the number and size of dwellings, it would seem strange if the local planning authority could not control the number and size when considering the siting and design. It is therefore submitted that if this ruling goes unchallenged, the Department will have to consider amending legislation. In the meantime, as I have suggested, the solution will be for local planning authorities to impose conditions reserving the actual size to later approval even perhaps if the size is set out in the application. \*70

The scale issue also relates to the question of the relevance of traffic generation at the detailed approval stage. Once scale is not considered to be a reserved matter, the traffic to be generated by the development clearly becomes less relevant at the detailed stage. However, it is hard to see how matters of access can be properly considered without reference to the amount of traffic generated.

A point not addressed by Carnwath J. but of great potential importance is the significance of the site being an Area of Outstanding Natural Beauty and the status of PPG 7 as a material consideration. In this regard paragraph 3.9 advises that permission for major industrial or commercial development in an AONB can only be justified where there is proven national interest and the lack of alternative sites. It appears that the **District** Planning Authority did not refer to PPG 7 in any of the numerous reports or in **council** meetings. Now it is trite law that PPGs are material considerations and if relevant should be regarded by planning authorities under [section 70](#). [Section 54A](#) has, however, raised the status of the development plan as opposed to other material considerations and it is equally trite law that local planning authorities do not *have* to follow Government guidance. In holding that the absence of reference to PPG 7 did not potentially invalidate the grant, Pill L.J. appeared not to be denying that it was a material consideration. Yet he stated:

“The apparently specific advice in the last sentence of the paragraph [3.9] does not in the circumstances require the quashing of the permission for failure to follow the guidance or *even to have regard to that sentence.*” [My emphasis.]

What he appears to be saying, is that while the **council** was required to have regard to the fact that the site was in an AONB, they did not have to apply or even have regard to the specific guidance as to when permission should be granted. This approach, in the opinion of this commentator, goes against the established view that where the Government gives specific advice as to how particular applications should be determined, this specific advice (where relevant) must be regarded and departures justified. It would seem to be tantamount to stating that while a local planning authority had to pay regard to the fact that a site was in the green belt, they could ignore the more specific advice in PPG 2 as to how applications were to be decided in the green belt and simply rely on the development plan.

Finally there is the matter of the court's discretion to refuse to quash the permission which was accepted to be invalid. The difficulty from the point of view of the **parish council** is that it does seem that the error of law was a technical one and that there was no real evidence of prejudice by the decision to reserve all the reserved matters; indeed this mistake in a sense benefits them as they can now object to the details which should not technically have been reserved. This argument would not automatically apply to the absence of **\*71** reference to the PPG 7 argument but of course even here it can be both argued that the failure made no difference to the actual decision and that too much time has elapsed since the grant of the outline permission.

*Commentary by—Michael Purdue. **\*72***