Browne Jacobson

Planning to use ones discretion

The Supreme Court gave judgment on the decision related to the interpretation of paragraph 90 of the National Planning Policy Framework 2012 (NPPF 2012) and the openness of the green belt. Despite the fact that the NPPF 2012 has since been revised, the provisions in the current NPPF are almost identical.

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The Supreme Court gave judgment on 5 February 2020 in the case of R (on the application of Samuel Smith Old Brewery (Tadcaster) and Others)(Respondents) v North Yorkshire County Council (Appellant) [2020] UKSC 3. This decision related to the interpretation of paragraph 90 of the National Planning Policy Framework 2012 (NPPF 2012) and the openness of the green belt. Despite the fact that the NPPF 2012 has since been revised, the provisions in the current NPPF are almost identical.

Background

Darrington Quarries wished to extend the operational face of Jackdaw Crag Quarry. Jackdaw Crag Quarry is a magnesian limestone quarry 1.5 km to the south-west of Tadcaster, North Yorkshire. The planning application was considered by the local Minerals Planning Authority: North Yorkshire County Council. Although the site was in the Green Belt, paragraph 90 of the NPPF 2012 provides that *"certain other forms of development are not inappropriate in the Green Belt provided that they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt. These are:*

- *the extraction"*

Almost identical wording is included in paragraph 146 of the current National Planning Policy Framework (NPPF 2019).

Paragraph 79 of the NPPF 2012 states that *"The Government attaches great importance to Green Belts.The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence"*

Paragraph 80 of the NPPF 2012 states that the *"Green Belt serves five purposes:*

- *to check the unrestricted sprawl of large built-up areas;*
- *to prevent neighbouring towns merging into one another;*
- *to assist in safeguarding the countryside from encroachment;*
- *to preserve the setting and special character of historic towns; and*
- *to assist in urban regeneration, by encouraging the recycling of derelict and other urban land"*

Paragraphs 79 and 80 of the NPPF 2012 are now paragraphs 133 - 134 of the NPPF 2019.

The officer's report for the County Council detailed a wide range of planning considerations. The report included headings titled 'Landscape impact' and "Impacts of the Green Belt". These headings considered potential landscape impacts and the need to ensure that mitigation measures were maximised. They also referred to comments made by consultees regarding openness. However there wasn't a section which specifically analysed visual impact. The High Court found that there was no error on the basis that the officer's report was not required to take into account the visual impact of the development. The Court of Appeal disagreed and quashed the planning permission. This was on the basis that the officer's report failed to make clear that visual impact was potentially relevant. The matter was then appealed to the Supreme Court.

The Supreme Court's decision

It was alleged that the officer's report was deficient in that the officer did not include a visual as well as spatial element in her assessment of impact on openness when concluding whether the development would qualify as appropriate development. It was argued that these deficiencies were such that it rendered the grant of planning permission unlawful.

However the Supreme Court decided that on a proper reading of the NPPF 2012 the visual quality of the landscape is not itself an essential part of the openness for which the Green Belt is protected.

The primary purpose of the Green Belt is the prevention of urban sprawl, and when considering openness it is this purpose which is important. The officer's report was detailed and the Supreme Court determined that the relevant paragraphs on openness should be read together. It was important that at no point did the officer say that visual impact was not relevant. The Court decided that the matters included as part of the report were matters of planning judgement and not law.

Implications

It is important to note that this case does not alter the interpretation of the National Planning Policy Framework. Instead it highlights the reluctance of the Court to intervene in setting out how professional decision-makers structure their decisions and the weight they give to certain factors. Whilst the concept of significant discretion being given to decision-makers is well established, many successful challenges are based on material considerations not being considered.

There is an element of conflict between these concepts. It is in my opinion correct that the Courts shouldn't get involved in the minutiae of how decisions are made: the decision should be made by the statutory decision-maker, not the Courts. However it must also be correct that if a decision maker fails to review something which is plainly relevant then it is appropriate for the Court to quash that decision and ask them to remake it. The line between failing to take into account the relevant consideration and allowing discretion to the decision maker is usually clear, however sometimes that line becomes blurred.

This case confirms that the Court will read decisions as a whole, and allow significant discretion to decision-makers. Despite this, planners are well advised to provide detailed reasons for their recommendations, especially in those cases which are likely to be controversial. In this case issues of visual impact had been raised in the consultation. It would have been wise to address these directly to reduce risk of defending an expensive challenge.

Although the Court may be inclined to allow decision-makers significant discretion, it is clearly best to avoid situations whereby those wishing to challenge the permission have grounds to do so!

This article was first published by Mineral and Waste Planning.

Contact

Ben Standing

Partner

ben.standing@brownejacobson.com

+44 0330 045 2400

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