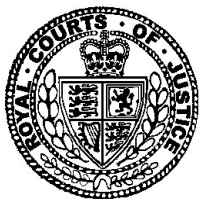

Neutral Citation Number: [2021] EWHC 3285 (Admin)

Case No: CO/644/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of JusticeStrand, London, WC2A 2LL

Date: 06/12/2021

Before :

THE HON. MRS JUSTICE THORNTON DBE

- -

Between :

REGINA
(on the application of EDWARD BLACKER) — Claimant

-and-

CHELMSFORD CITY COUNCIL

-and-

(1) **MR G SHARP** — Defendant

(2) **CHELMSFORD CARS & COMMERCIALS LTD**
(t/a CCC Property)

Interested Parties

- -

Mr Wayne Beglan (instructed by **Holmes & Hills LLP**) for the **Claimant**

Mr Josef Cannon (instructed by **Chelmsford City Council**) for the **Defendant**

Hearing dates: 02/11/2021 -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE THORNTON

The Hon. Mrs Justice Thornton :

Introduction

1.
The Claimant is a local resident who challenges the refusal of outline planning permission, by Chelmsford City Council, for 55 new dwellings on land in Roxwell Essex. The planning application was first considered by the Council's Planning Committee at a meeting in November 2020, at which the majority of Committee members were in favour of the application. It returned to the Committee at a second meeting, in January 2021, whereupon the Committee resolved to refuse permission.

2.
The Claimant brings the challenge on four grounds. He contends that the Planning Committee's decision making failed to follow the Council's constitution (Ground 1). In resolving to refuse permission at the second meeting, the Committee failed to grasp the "intellectual nettle" of its 'in principle' decision at the first meeting to grant permission (Ground 2). The Committee failed to follow a fair procedure (Ground 3). At the second meeting, the Committee's mind was closed to the business properly before it (Ground 4).

3.
In response, the Council contends that the claim misunderstands the decision made by the Committee at the first meeting, which was simply to defer the application for further consideration. The Council's constitution is not as interpreted by the Claimant. There was no unfairness in the procedure and the minds of Committee members were not closed. The Claimant's real complaint is that the Committee changed its mind about the application between the first and second meeting, as to which there is nothing unlawful.

4.
The issues raised by the claim are:

1)What the Planning Committee decided at its first meeting; 2)Interpretation of the relevant parts of the Council's constitution;

3)Whether the principle of consistency is engaged by the decision at the first meeting; 4)The fairness of the decision making; and

5)Whether the Committee's mind was closed to the business properly before it at the second meeting.

Factual Background

5.
The Claimant has been a resident of Roxwell since 1990. He lives opposite the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, Chelmsford, where the residential development was proposed. The Defendant is the local planning authority. The Interested Party is the applicant for planning permission. He plays no part in the proceedings.

6.
The application site is currently an industrial estate, allocated for employment use in the Chelmsford Local Plan. It includes a number of buildings, containers and areas of external storage. It includes an area of land that has been used unlawfully to store and process waste and other materials in a mound nearing 15m in height. This has been the subject of enforcement action.

7.
The Interested Party applied for outline planning permission for development described as “Demolition of all existing workshops and commercial buildings, and the removal of hardstanding. Proposed up to 55 new dwellings, alterations to vehicular and pedestrian

access. The formation of new estate roads, public footpaths, parking spaces, private amenity areas and public open spaces with children's play area and drainage infrastructure”. Had the planning application been successful, its effect would have been to extinguish the employment use of the site and introduce a residential use.

8.
A Planning Officer prepared a report on the application, recommending refusal. This was on the basis that the proposal is contrary to the local plan. In particular, residential development would be harmful to the intrinsic character and beauty of the countryside. It would represent an isolated and significant enclave of development that would conflict with the linear and sporadic development in the area. The development would remove the employment provision at the site. The report noted that planning enforcement action was the appropriate way to deal with unlawful development of the site.

The first meeting of the Planning Committee

9.
The application came before the Planning Committee on 3rd November 2020. The Claimant was supportive of the planning application and spoke in its favour, explaining the difficulties faced by local residents due to the current use of the site:

“The site has been a problem, mainly due to the very poor planning conditions set to control the various activities on the site. This has allowed for seven day working and little control of hours worked. For us residents surrounding the site, this means we are unable to have what I would call normal use of our homes. For example, a barbeque on a weekend or bank holiday is not very pleasant with a large excavator and a concrete crusher in the background, and if the wind is in the wrong direction, a cloud of dust will be added to the mix. Just because we’re in a small rural community, it shouldn’t mean we have to grow up with this sort of disruption. On Monday to Saturday around 50 grab lorries a day enter and leave the site and machinery starts at 5:30 in the mornings. None of this is likely to change. As you know, planning permission cannot be rescinded.

The housing, as I see it, is part of normal village life, providing homes for the people in a pleasant, healthy environment. It is also – it is so obviously not where you put heavy industry. I’m sure this type of industrial area would never be granted planning permission today. This is a very rare opportunity to put right the mistakes of the past…….I can only see what I think is a choice between a site that has been turned into an environmentally damaging rubbish dump and the chance to turn that eyesore into something good for our community. Hope that common sense will prevail, and the members will grant permission for this development’

10.
Relevant extracts from the minutes of the Committee meeting record the following discussion and resolution on the application:

“Seven statements from members of the public and one from the local ward councillor were heard at the meeting. They argued that although the site was designated in the Local Plan as a rural employment site, and its redevelopment for housing would therefore be contrary to policy, the

proposed development would be an improvement on the current use, part of which is unlawful and which caused disturbance and nuisance to local residents. Further, they were of the view that enforcement action would not resolve the problems associated with the current use, that the impact of the proposed development on the countryside would be no more harmful than that of the present use, and that the site was in a sustainable location.

The Committee's ensuing discussion centred on whether material considerations associated with the application could justify a departure from the Local Plan. Some members argued that in this case the benefits afforded by the proposed development, in terms of additional housing and improving the amenity of residents, were material considerations. Others said that whilst there were other rural employments sites not far from the application site, this site had specifically been designated as such in recently adopted Local Plan, which as well as providing sufficient land to meet housing need during the Plan period, also sought to meet anticipated demand for land to support business and economic growth.

Members also expressed doubts about the effectiveness of the enforcement action taken or proposed against the unauthorised uses of the site. Officers said that enforcement action only concerned unauthorised use of the northern part of the site and that the use and operation of the rest of site complied with planning and operational requirements. The effectiveness of planned action involving other authorities could not be judged at this stage.

…

Members also expressed views that the proposed development would not be as detrimental to the appearance of the countryside as the current use, that residential development would provide economic benefits to the area and that it would be more beneficial to biodiversity. There were contrary arguments that whilst the site was brownfield it did not mean that it all of it should be developed for housing, nor that the whole of the site could be regarded as detrimental to the appearance of the countryside.

After votes on motions either to refuse the application or to defer its consideration to enable conditions to be presented on any grant of planning permission, it was:

RESOLVED that the Committee, being minded to approveapplication 19/02123/OUT in respect of the site at Ash TreeFarm, Bishops Stortford Road, Roxwell, defer it to enableofficers to report to a future meeting on conditions that could beattached to any grant of planning permission for thedevelopment." (underlining is the Court's emphasis)

Preparation of the further report

11.
On 15th December 2020, the planning officer tasked with drafting the further report, required by the resolution above, sent an e-mail to the Planning Development Services Manager ('Development Services Manager') and the Councillor who had chaired the first Committee meeting ('Committee Chair') in the following terms:

"I'm a little bit unsure of what you want the report to look like, but I've drafted this…"

12.
On 17th December 2020 the Committee Chair sent an email to the Development Services Manager and the Head of Planning in the following terms:

“I am hoping to speak to [email refers to the leader of Liberal Democrat Group and Cabinet member for planning] about the position the officers will be taking over the Roxwell site. You mentioned needing a steer from the Lib Dem side, the present position being that you will be giving the reasons to approve as per our decision.

Is there anything else I need to mention?

We also need to speak with [email refers to a Councillor who attended the first meeting and had objected to the scheme].”

13.
Modifications were made to the draft of the further report by the Development Services Manager on 21st December 2020 (Versions 2, 3 and 4 of the draft). He then emailed the Head of Planning, the Committee Chair and the Cabinet Member (Planning) in the following terms:

“Please see draft report attached, and in particular para 1.6. The original report will be attached as an appendix. I’ve also beefed up 1.3 and 1.4 a bit. Is this ok or do you want something more overt?”

14.
The Cabinet Member responded by email on the same day commenting:

“…following discussion with [Head of Planning] today we agreed that it be made clearer to the Committee that the original recommendation was still available to the Committee if they were not satisfied with the reasons…”

15.
The Committee Chair responded by email on 22nd December in the following terms:

“I am pleased with 1.3 and 1.4. I agree more emphasis on being able to go back to the recommendation to refuse will help.”

16.
In light of the comments received from the Councillors, the Development Services Manger proposed further amendments by email dated 22nd December 2020:

“I could amend para 1.6 as follows:

1.6 Although the application was deferred to allow officers to prepare conditions and heads of terms for a S106 Agreement, the Committee has not yet made a formal decision on the application. The previous report recommending refusal is attached as an appendix so the Committee has all the information available to make an informed decision on the application.

Or

1.6 Although the application was deferred to allow officers to prepare the conditions and heads of terms for a S106 Agreement, the Committee has not yet made a formal decision on the application. The officer recommendation is for refusal in accordance with the previous report (attached).

Please advise, or amend as necessary.”

17.

Further amendments were made to the draft of the Further Report by the Development Services Manger on 22nd December 2021 to create version 5 and version 6 (which was the final version). He sent an email to the two Councillors and Head of Planning in the following terms:

“Please see final version attached following discussion with David. You will see that the introduction has been beefed up. (The list of conditions gets removed before publication).

Last call for amendments.”

18.
The Committee Chair responded by email confirming that she was happy with the final draft.

The further report

19.
The final version of the Officer’s further report on the application was published on the Council’s website on 4 January 2021. Paragraph 1.1 of the report stated:

“The application is referred to the Planning Committee following a meeting of the Committee on 3rd November where the Committee were minded to approve the application and asked for planning conditions to be prepared. Under the Council’s constitution thePlanning Committee has not yet made a formal decision on theapplication and all options are available to the Committee, subjectto the normal voting procedures.”

20.
The constitutional point was repeated at paragraph 2.5:

“Although the application was deferred to allow officers to prepareconditions and heads of terms for a S106 Agreement, theCommittee has not yet made a formal decision on the application. The previous report recommending refusal is attached as an appendix so the Committee has all the information available to make an informed decision.”

(underlining is the Court’s emphasis)

21.
The report included a list of proposed conditions, and addressed the agreed heads of terms for the section 106 agreement. It also included a further letter of representation objecting to the development and addressed the contents of that representation.

Communications with the Interested Party

22.
The Interested Party (via his agent) requested the opportunity to speak at the second meeting. He was told by officers that the opportunity to make statements and put questions in person to the Committee had now passed, although he could submit written representations or information. The agent duly provided a written update on the conditions and section 106 agreement.

23.
The Interested Party was provided with a copy of the updated information to be put before the Committee, including the representation objecting to the proposal. His agent responded by email dated 12 January 2021, expressing concern about the representation:

“Thank you for this and for providing it in advance of the meeting. I know that you must report any correspondence up to the point that the decision is made. I am, however, quite uncomfortable here because the objector (the adjacent landowner I understand) is really seeking to have the Committee’s minuted decision: it being minded to approve the application and thus to defer for conditions to be formulated, changed to one of refusal. I am not entirely sure that the Court would see it the same way as the objector suggests, given that Councils must act consistently and have voted on the matter three times to achieve clarity of decision. The singular purpose of the Committee’s deferral in November 2020 was solely so that conditions could be formulated. It was not to provide a platform for a third party, encouraged by whomever, to seek for a different outcome.”

The second meeting of the Planning Committee meeting

24.
The application returned to the planning committee on 12th January 2021. The minutes of the meeting and resolution record that:

“At its meeting on 3 November 2020 the Committee had been minded to approve application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, contrary to the recommendation of officers that the application be refused. It had deferred the application to enable officers to report to a future meeting on conditions that could be attached to any grant of planning permission for the development.

A Green Sheet of additional information containing the comments of a local resident and business owner and a letter of representation from the applicant’s solicitor had been circulated to the Committee before the meeting.

There was extensive discussion on the application. Several members who had expressed the view at the previous meeting that the application should be granted said that, having considered the matter further, they were now of the opposite view. Their reasons for this varied but included the precedent that would be set by going against, for inadequate reasons a policy in the recently adopted Local Plan and that the development would encroach on green field land. Other members reiterated opinions expressed at the previous meeting in opposing the application and referred to the loss of a rural employment site; the harm the proposed development would do to the countryside; that the development was not sustainable development; and the view that the suggested conditions would not make good what was otherwise a poor application.

On being put to the vote, it was

RESOLVED that the application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell be refused for the reasons set out in the report to the meeting on 3 November

2020.”

25.The refusal notice was issued on 13 January 2021.

The legal framework

26.
Paragraph 4.2.25 of the Council’s constitution is headed “Rules specific to certain Committees”. Paragraph 4.2.25.3 provides as follows:

“The Committee’s consideration of planning applications shall operate in accordance with the Planning Code in Part 5.2”.

27.
Part 5.2 is headed ‘Planning Code of Good Practice’. Paragraph 5.2.7 is headed ‘Decisions contrary to officer recommendation’. Paragraph 5.2.7.1 provides that:

“If the Planning Committee wants to make a decision contrary to the officer’s recommendation the material planning reasons for doing so shall be clearly stated, agreed and minuted. The application should be deferred to the next meeting of the Committee for consideration of appropriate conditions and reasons and the implications of such a decision clearly explained in the report back.”

28.
Paragraph 5.2.7.2 provides that:

Only those Members of the Committee present at both meetings can vote on the reason for the decision. Exceptionally, the Committee may decide that circumstances prevent it from deferring the decision but its reasons must be clearly stated and recorded in the minutes. The Committee may be asked to nominate a ‘member witness’ at any subsequent appeal hearing in order to justify their decision.”

Submissions of the parties

29.
The Claimant submits that the Planning Committee accepted the principle of the development at the first meeting, subject only to the production of suitable conditions. In accordance with its constitution, the Defendant was required at the second meeting to either; (i) grant planning permission subject to execution of a s.106 agreement; or (ii) refuse permission on the basis of a properly reasoned explanation as to why the conditions were not acceptable. No such explanation was provided and permission should therefore have been granted (Ground 1). The principle of consistency applied as between the decisions at the first and second meetings. The committee was reconsidering exactly the same application at the second meeting which it had previously decided to grant in principle. The Council did not grasp the “intellectual nettle” of its first decision. Nor did it provide adequate and intelligible reasons for departing from its first decision (Ground 2). The Defendant’s procedure was manifestly unfair in taking account of further material planning considerations at the second meeting without permitting those supporting the application to address those new matters orally or by questions to the members and in not permitting the Interested Party to address the meeting (Ground 3). A number of features of the overall decision making process and particularly the second meeting illustrate that there is a risk that the Committee’s mind was closed to the business properly before it, namely the issue of conditions and the s.106 agreement (Ground 4)

30.
The Defendant submits that the claim is in reality no more than a complaint about the exercise of planning judgment, formulated as a series of complaints about the procedure by which the impugned decision was reached. The claim proceeds on a central misunderstanding as to what happened at the first meeting. The decision made at the first meeting was to defer determination of the planning application. The Committee did not determine the application on that date. The claim misunderstands the terms of the Council’s constitution and the requirements of fairness. The facts show the Committee’s mind was open not closed.

Discussion

The decision at the first meeting

31.
The central dispute between the parties, which underpins all four grounds of challenge, is the nature of the decision reached by the Planning Committee at its first meeting in November 2020. The Claimant contends that the Planning Committee decided to approve the principle of the development, subject only to the production of suitable conditions. Accordingly, the purpose of the second meeting was solely to discuss and agree the conditions; the terms of the section 106 agreement and the reasons for the grant of permission. The Council contends that the only decision reached at the first meeting was to defer consideration of the application until a future meeting where it could consider proposed conditions produced by officers in the meantime, to inform its further consideration of the application.

32.
It was common ground that a local authority planning committee expresses itself by voting on a resolution and the minute then forms the public record of its decision; R(Shelley) v Carrick DC [1996] Env. L.R. 273, recently followed in R (Cross) v CornwallCouncil [2021] EWC 1323 (Admin) at [57].

33.
The resolution passed at the first meeting was as follows:

"RESOLVED that the Committee, being minded to approve application 19/02123/OUT in respect of the site at Ash Tree Farm, Bishops Stortford Road, Roxwell, defer it to enable officers to report to a future meeting on conditions that could be attached to any grant of planning permission for the development." (underlining is Court's emphasis)

34.
In my assessment, the meaning of the resolution makes clear that the Committee decided to defer further substantive consideration of the application (and its decision) to a further meeting, on the basis of a preliminary view in favour of the application. Contrary to the Claimant's submissions, the Committee's decision making had not got as far as an 'in principle' decision, only a preliminary view. That the decision making was more inchoate is apparent from the wording of the resolution to the effect that "…defer [the application]…to enable officers to report… on conditions that could be attached to any grant of planning permission" (underlining is the Court's emphasis).

35.
The Claimant took the Court through the transcript of the meeting and pointed to excerpts which, it was said, showed clearly that Councillors, the Chair of the Committee, its legal adviser and the senior planning officer all approached the discussion on the basis the Committee was deciding whether to approve the application or not. However, the transcript of the meeting cannot usurp the Committee's resolution, for the reasons explained by Schiemann J in R(Beebee) v Poole Borough Council [1990] 2 PLR 27:

"All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may have changed them because of what was said subsequently in debate".

36.

It might be said that the rationale for the proposition in Beebee is apparent from a review of the transcript of this particular meeting. There was, at times, considerable confusion amongst participants as to what members were supposed to be voting on. This may have been due to fact the meeting was conducted via Zoom during the Covid-19 pandemic. Nonetheless, by the end of the meeting, the confusion had been resolved. Participants were advised by the Head of Democratic Management that:

“Bearing in mind that if there is a vote against the Officer recommendation and in support of

Councillor’[s]…recommendation in whatever form, then in effect, that is going to defer the application to a subsequent meeting of the

Committee. It won’t refuse it, as you know, from the Code of Conduct, because the Committee can’t make an actual decision to refuse it on the night without agreeing the conditions. So, all I was going to suggest, Chair, is that it doesn’t much matter which way you do it. I think you would need to have a clear understanding of members’ wishes and how they, you know, how they want to vote, and then, that will either defer the application to come back with conditions and things like that, or it will agree the recommendation”

37.
Consistent with this advice, members approved a resolution to defer the application.

The Council’s constitution

38.
It was common ground that a failure to comply with a constitution established pursuant to section 37 of the Local Government Act 2000 renders the resultant decision unlawful and liable to be quashed: R (Domb) v Hammersmith & Fulham LBC[2009] LGR 340 and R (Bridgerow Ltd) v Cheshire West and Chester Borough Council[2015] PTSR 91. The Council’s constitution is to be interpreted objectively according to the natural and ordinary meaning of the words used in context and according to common sense (Lambeth London Borough Council v Secretary of State for Housing Communities andLocal Government [2019] 1 WLR 4317 at §19).

39.
In my assessment, the natural and ordinary meaning of paragraphs 5.2.7.1 and 5.2.7.2 of the constitution is that the decision making is deferred in circumstances where a Planning Committee is minded to go against an Officer’s recommendation. Paragraph 5.2.7.1 says plainly that: “The application should be deferred to the next meeting of the Committee for consideration of appropriate conditions and reasons and the implicationsof such a decision clearly explained in the report back.” (underlining is the Court’s emphasis). Further support for this interpretation comes from paragraph 5.2.7.2 which provides that “exceptionally the Committee may decide that circumstances prevent it from deferring the decision”. Accordingly, the outcome is a pause or a ‘breathing space’ in the decision making.

40.
The Claimant submitted that the only matters deferred are the conditions and the reasons for approval with the in-principle decision having already been made by the Committee. However, this interpretation does not accord with the last sentence of paragraph 5.2.7.1 (“the implications of such a decision must be clearly explained in the report back”). There would be no point in a report on the implications of the Committee’s decision if it had already been made. Accordingly, the purpose of the

pause in decision making “for consideration of appropriate conditions and reasons and the implications of such a decision” is to ensure that members have all the necessary information, including conditions (which in the circumstances of this case were not before them given the Officer had recommended refusal) and understand the implications of their proposed course of action when they subsequently come to take their decision. In appropriate cases, the purpose may also be to ensure the decision can be properly defended at any appeal. It was common ground that it is open to a local planning authority to revisit its resolutions prior to the formal grant of planning permission, yet the Claimant’s interpretation of the constitution would effectively prohibit the Council from revisiting its decision after the first meeting, even if an obviously material consideration arises between the first and second meetings. Such a material consideration did in fact arise in this case, with the decision on the outstanding enforcement appeal by a Planning Inspector.

41.
Given that I have found that the Committee resolved at the end of its first meeting to defer consideration of the application in light of the fact members were minded to act against Officer advice, it follows that there was no failure by the Committee to follow its Constitution and Ground 1 fails.

The Committee’s change of mind between the first and second meetings – the principle of consistency

42.
The Planning Committee changed its view on the application between the first and second meetings. At the first meeting the majority were minded to approve it. At the second meeting, the majority voted to refuse it. The minutes of the second meeting explain that “several members who had expressed the view at the previous meeting that the application should be granted said that, having considered the matter further, they were now of the opposite view”.

43.
It was common ground that it is open to a local planning authority to revisit resolutions made in relation to planning applications before a formal grant of permission is made, even in the absence of a material change in circumstances: King’s Cross Railway LandsGroup v London Borough of Camden[2007] EWHC 1515 (Admin), St Albans City andDistrict Council v Secretary of State for Communities and Local Government & Anr[2015] EWHC 655 (Admin). A decision on a planning application does not take effect until it has been notified to the applicant, and not upon a resolution to grant or refuse: R (Burkett) v Hammersmith & Fulham LBC (No.1)[2002] UKHL 23. A previous planning decision in relation to the same land is capable of being a material consideration in a subsequent application: North Wiltshire DC v SSE (1993) 65 P&CR 137.

44.
The Claimant relied on the proposition that where a previous decision has been subject to proper consultation and detailed consideration, and where the principle of consistency is engaged, (i) the previous decision is a material consideration; and (ii) the decision maker should consider (carefully) the weight to be given to the previous decision. It is necessary, in such cases, to grasp and address with reasons “the intellectual nettle of the disagreement”: (St Albans City & District Council v Secretaryof State[2015] EWHC 655 (Admin)) at [24] – [27] and [32]).

45.
The Claimant relied, in particular, on the case of R(Davison) v Elmbridge BoroughCouncil [2020] 1 P&CR 1 to submit that the Council failed to engage with the principle of consistency or grasp the ‘intellectual nettle’ of its earlier approval in principle. He submitted that it was difficult to imagine a

clearer case where the nettle ought to have been grasped. The application site and planning application were the same. All the planning issues had been before the Committee at the first meeting. This was not a case, for example, where material information was outstanding.

46.
In Davison, the local planning authority had granted planning permission for a sports facility. That decision was subsequently quashed by a Court in judicial review proceedings whereupon the local authority made a fresh decision to grant planning permission. The second permission was also challenged in a second set of proceedings. The question whether a previous decision is a material consideration is highly fact sensitive (§39 of the judgment). The specific, fact sensitive, reasons why the principle of consistency was engaged in the particular circumstances of the decision making in that case were explained at § 60 and 61 of the judgment.

47.
The facts of the other cases relied on by the Claimant may be distinguished from the facts of the present case. In St Albans City and District Council v Secretary of State forCommunities and Local Government & Anr [2015] EWHC 655 the 'intellectual nettle' that had to be grasped was a previous appeal decision in 2008, following a lengthy public inquiry with cross examination of 17 experts and a 206-page report from the

Planning Inspector: "Given, the conclusions in 2008 of the Inspector and the Secretary of State were the result of that process, it would be wholly unsurprising if considerable weight were to be given to their judgment and evaluation in the determination of the second application." (Holgate J at § 29).

48.
In King's Cross Railway Lands Group v London Borough of Camden [2007] EWHC 1515 (Admin), the 'nettle' to be grasped was a previous resolution to grant planning permission (subject to the completion of a section 106 agreement) by a planning committee following a two-day meeting with the benefit of an officer's report and appendices nearly 900 pages long. It was common ground that this resolution engaged the consistency principle.

49.
I am not persuaded that the principle of consistency is engaged by the facts of the present case. I have concluded that the decision by the Committee at the end of the first meeting was to defer further substantive consideration of the application, on the basis of a preliminary view in its favour. The decision making was inchoate. This was made clear by the second Planning Officer's report which stated that the principle of the application was still at large (see paragraphs 1.1 and 2.5 of the report). I have also found that the Constitution prohibited a substantive decision at the first meeting, save in exceptional circumstances which no-one suggested applied here. There was therefore no 'intellectual nettle' to the first decision which needed to be grasped. The first decision amounted to no more than a procedural decision to defer further consideration, albeit based on a preliminary view in favour of the application.

50.
The Claimant emphasised that there had been 104 minutes of detailed debate and consideration of the application by the Committee at the first meeting in November 2020. I accept that the debate may have been lengthy but the decision making remained inchoate. It did not reach a sufficiently concluded view so as to engage the burdens of the principle of consistency. I do not accept the Claimant's submission that this view reduces the debate at the first meeting to 'nought'. It is apparent from a review of the transcript of the second meeting that Councillors had the first debate in mind. It

played its part in their developing thinking. Several members had changed their minds since the first debate but that is an entirely normal and ordinary aspect of decision making.

51.
It follows that Ground 2 fails.

The Committee's procedure – fairness

52.
It was common ground that in deciding a planning application a fair process must be followed (Regina (Wet Finishing Works Ltd) v Taunton Deane Borough Council[2018] PTSR 16; Wokingham Borough Council v Secretary of State for Communitiesand Local Government[2018] PTSR 303 at [110]; Grafton Group (UK) plc v Secretaryof State for Transport[2017] 1 WLR 373 at [41]).

53.
The Claimant submitted that the Council's procedure was manifestly unfair in taking account of further material planning considerations at the second meeting without permitting those supporting the application to address those new matters orally or by questions to the members and in not permitting the Interested Party to address the meeting

54.
What fairness requires is acutely fact sensitive and depends on all the circumstances of the case (Wokingham Borough Council v Secretary of State for Communities and LocalGovernment[2018] PTSR 303 at §54). Fairness must therefore be assessed in light of my conclusion that the decision making was deferred at the end of the first meeting and continued into a second meeting. Viewed in this context there is nothing unfair about the procedure at the second meeting. The Claimant and the Interested Party had addressed the Committee at the first meeting. The Claimant did not express a wish to speak at the second meeting. It was common ground that there is no proposition of law or fairness that requires one third party to be given the opportunity to comment on the representations of another third party. The Interested Party was provided with an update on developments since the first meeting prior to the second meeting. He was permitted to submit written representations at the second meeting. There was no suggestion that the Council had failed to follow any relevant procedural rules. Both the Claimant and the Interested Party were given a fair opportunity to put their case.

55.
Ground 3 fails.

Closed Minds

56.
It was common ground that a process which leads to the conclusion that there was a real risk minds were closed is unlawful: R (Lewis) v Redcar and Cleveland BoroughCouncil[2009] 1 WLR 83 at [68]; R (Miller) v Health Service Commissioner forEngland[2018] PTSR 801 at [57], [66].

57.
It is for the court to assess whether Committee members did make the decision with closed minds or that the circumstances gave rise to such a real risk of closed minds that the decision ought not in the public interest be upheld. When taking a decision Councillors must have regard to material considerations and only to material considerations, and to give fair consideration to points raised, whether in an Officer's report to them or in representations made to them at a meeting of the

Planning Committee. However, in doing so the Court must recognise elected Councillors are entitled, and expected, to have, and to have expressed, views on planning issues. They are not required to cast aside views on planning policy that they formed when seeking election or when acting as Councillors. In the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. The test is a very different one from that to be applied to those in a judicial or quasi-judicial position. Given the role of Councillors, “clear pointers” are required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision (§62-63 Lewis).

58.
The Claimant advances twelve factors which amount collectively, it is said, to a demonstration that the Committee’s minds were closed to the business properly before it at the second meeting, namely the issue of conditions and the section 106 agreement:

1)the absence of any substantive discussion of conditions during the second meeting. 2)the absence of any discussion of the s.106 agreement during the second meeting.

3)
the absence of any framing or discussion of potential reasons for approval in the further report from the Officer or during the second meeting.

4)
the absence of any significant attempt to “grasp the intellectual nettle” of the decision at the first meeting.

5)
The fact that there had been significant ‘interchange’ between officers and key elected members in relation to the contents of the further Officer’s report and hence the advice given to members at the second meeting.

6)
the failure of the separation of duties of officers and members that occurred as a result of that interchange and interventions by key members.

7)
the Committee adopted a procedure which prevented any supporter of the proposed development from making further representations during the second meeting, or asking any questions of members (as to their change of position or otherwise).

8)
the Committee – knowing an 8-6 vote had decided the matter at the first meeting - decided to proceed notwithstanding the absence of two members who had previously voted in favour of the proposed development, and knowing a third who had previously supported it felt bound to abstain due to late arrival. There was no material available to those observing to suggest those members were aware that the committee members present intended to revisit the substance of the proposal.

9)
the reversal or change of their position by members of the committee who had previously supported the proposal in ‘vivid and forceful terms’.

10)

the atypical nature of the further report compared with examples of reports generated after in principle decisions to grant planning permission, contrary to officer advice in other applications.

11)
the decision to entertain a further representation dealing with the principle of development, after that issue had been determined by the first decision.

12)
the overall approach to the second meeting, which created an impression of railroading the proposal to a refusal.

59.
The Claimant faces an inherent difficulty in advancing his submissions on this ground, given the conclusions I have arrived at in relation to the nature of the decision making and the Council's constitution. The Committee had not reached a concluded decision by the end of the first meeting, save that it was minded to act against Officer advice. It deferred consideration, as required by the constitution. Accordingly, at the second meeting, the principle of the application remained 'live' for consideration. This had been made clear to members in the further report circulated prior to the meeting and to which no-one had objected. At the second meeting, several members had changed their minds on the application since the first meeting. This might be said to be evidence of open, rather than closed, minds. In these circumstances, discussion of conditions or the s106 agreement was otiose.

60.
This then deals with the bulk of the propositions advanced by the Claimant under this ground, several of which are simply a restatement of the other grounds advanced by the Claimant. I am not persuaded that the remaining factors can be said to amount to 'clear pointers' of a closed mind (Lewis at §62), either singly or collectively. Proceeding with the second meeting in the absence of members who had been supportive of the application at the first meeting does not have the significance ascribed by the Claimant in circumstances where the decision making at the first meeting had only reached the status of a preliminary view. The reports from other planning applications provided by the Claimant ranged from 2013 to 2020. They were written by different authors, unsurprisingly they differed in tone, style and content. There was nothing wrong in officers updating the Committee with the representation received after the first meeting, as the Interested Party's agent accepted at the time in correspondence with the Planning Officers. Before me, the Council accepted that it could not be said to be best practice for Officers to have communicated with the Chair of the Committee after the first meeting as to the content of the second report. However, I am satisfied, on careful consideration of the relevant emails, that the communications in question concerned the procedural position (i.e. that all options remained open to the Committee) and were not about the substance of the application. In summary, I am not persuaded that this ground meets the threshold required to demonstrate that the Committee's mind was unlawfully closed to the business before it at the second meeting.

61.
Ground 4 fails.

Conclusion

62.For the reasons set out above, the claim fails.