

Case Name: *Hawkhurst Parish Council, R (On the Application Of) v Tunbridge Wells Borough Council* [2020] EWHC 3019 (Admin) (11 November 2020)

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Commentary:

The High Court has rejected a legal challenge by Hawkhurst Parish Council ('HPC') to the lawfulness of the decision of Tunbridge Wells Borough Council ('TWBC') on 23 December 2019 to grant planning permission to the developer (McCarthy and Stone Retirement Lifestyles) for the development of 43 retirement apartments on the edge of the village of Hawkhurst in the face of strong objections concerning highway, heritage and environmental impacts. The site is in the High Weald Area of Outstanding Natural Beauty ('AONB'). The case provides helpful clarification on the correct approach to interpreting and applying national policy in the NPPF in relation to considering cumulative traffic impacts and development in AONBs.

HPC's judicial review was brought on 3 grounds all of which alleged that TWBC were materially misled by the contents and recommendations of the Officers' Report ('OR'). Ground 1 was that the OR had failed to deal with the issue of the highways impacts of the proposed scheme cumulatively with other committed development. Ground 2 was that the OR failed to address a particular heritage development plan policy (Policy EN4) concerning demolition and conservation areas. Ground 3 was that the OR had misinterpreted national policy on the protection to be given to AONBs and that the conclusion that there were 'exceptional circumstances' justifying development in the AONB was not reasonably open to TWBC.

As to ground 1, the High Court considered that paragraphs 108 and 109 of the NPPF require decision makers, in assessing an application for development, to ensure that significant impacts of development on the capacity and congestion of the highway network can be cost effectively mitigated to an acceptable degree, but there should only be a refusal on that basis if the residual cumulative impacts (which includes taking account of any mitigation that is proposed by the developer) on the road network would be severe. The High Court went on to state that "severe residual cumulative impacts" are not defined in the NPPF and the meaning is therefore a matter of evaluative judgment for the decision maker. This judgment is likely to require some technical information by way of modelling and calculations, the extent of which would differ depending on whether a full transport assessment or a 'lighter touch' transport statement was sufficient and proportionate. Against that policy framework, the High Court concluded, on the evidence, there was no basis for characterising TWBC's consideration of highway issues as irrational. The High Court noted that the developer had put before TWBC a detailed transport survey which predicted that the development would generate 'very low levels of traffic.' There was 'no specific challenge' to that prediction by HPC and the local highway authority, Kent County Council, (a statutory consultee) had

expressed itself 'satisfied' that, when the developer's public transport contribution was taken into account, there would be 'no material, let alone a severe, impact on the junction.'

As to ground 2, the High Court concluded that Policy EN4 was not applicable to the proposal, as it did not involve demolition of a building in a conservation area.

As to ground 3, HPC contended that that there were two errors made by TWBC being: (a) an error in relation to whether there were "exceptional circumstances" to justify the development in the AONB for the purposes of paragraph 172 of the NPPF and Policy HD1(B) of the Neighbourhood Plan; and (b) a failure to consider heritage matters in relation to the AONB, where paragraph 172 of the NPPF notes that the "conservation and enhancement of ... cultural heritage" is an important consideration in such areas. In relation to (a), the High Court rejected HPC's submission that the exceptional circumstances judgment was limited to the absence of a 5YHLS and Hawkhurst's role as a Tier 2 settlement in the Core Strategy. On a fair reading of the OR as a whole, the High Court considered that there were a number of factors which cumulatively went into the conclusion overall that exceptional circumstances existed for the proposed development which included, among other things, alternative locations for housing. In relation to (b), the High Court considered that the effect of the development on heritage assets was 'treated as important generally in the overall assessment' and, even had there been a material error in the OR, it was 'highly likely that the outcome would not have been substantially different' and therefore the High Court would have refused relief applying section 31(2A) of the Senior Courts Act 1981.

Case summary prepared by Paul Arnett