



Walsall Council

PLANNING COMMITTEE

22 March, 2018

Report of Head of Planning, Engineering and Transportation

PLANNING DECISIONS AND THE NEED FOR REASONS

SUPREME COURT DECISION: DOVER DISTRICT COUNCIL–V- CPRE KENT

1.0 PURPOSE OF REPORT

- 1.1 Following the recent court case decision in December between Dover District Council and CPRE Kent, the Supreme Court has set out the role of reasons in the determination of planning applications.
- 1.2 In summary, there is an expectation that with all decisions made by the Local Planning Authority whether by officers using delegated powers or through Planning Committee, reasons need to be given for the decision made on planning applications.

2.0 RECOMMENDATIONS

- 2.1 That Planning Committee notes the findings of the Supreme Court case of Dover District Council v CPRE Kent, December 2017 with particular reference to the requirement to provide reasons for planning decisions and the standards which should be met for those reasons.

3.0 BACKGROUND

- 3.1 This report provides an update on the recent court case between Dover District Council and CPRE Kent. The decision was issued by the Supreme Court in December 2017. Hereafter, the case is referred to as the Dover decision.
- 3.2 The outcome of the case was that a decision by Dover District Council to approve development for 521 dwellings, a hotel and a retirement home part of which was in the Kent Downs AONB was quashed by the Courts following consideration of the reasoning for the decision. The application was subject to consideration in accordance with the EIA Regulations.
- 3.3 Although the case in question related to a development which involved the assessment of the proposal in accordance with the environmental impact assessment regulations, the findings by the Supreme Court apply to all decisions made in respect of applications for planning permission.

- 3.4 The earlier case of *Richardson v N Yorks* had indicated that the duty to give reasons arises after the decision had been made. In practice, this requires reasons only to be attached after a vote has been taken by planning committee whether to approve or refuse an application. Importantly the Dover decision overturned that point. The Court stated that the provision of reasons was an intrinsic part of the procedure and must be given at the making of the decision.
- 3.5 This is a fundamental change and in light of the Dover decision, it is now necessary for reasons to be provided before a decision is taken on a planning application.
- 3.6 In addition to setting out the necessity for reasons to be provided before a vote on an proposal is taken, the reasons themselves need to be of a standard as is applicable to others. In the case of decisions on planning applications, that standard is considered to be the same as that used by the Planning Inspectorate and the Secretary of State.
- 3.7 By statute, reasons are currently required for the following decisions:
- Refusals ;
 - EIA cases ;
 - Delegated officer decisions
- 3.8 Although there is currently no statutory requirement for reasons to be provided in respect of on the grant of planning permission by Planning Committee, Dover changes this. It says:
- “... Typically they will be cases where, as in Oakley and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departure from the development plan, or from other policies of recognised importance (such as the “specific policies” identified in the NPPF – paragraph 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.”*
- 3.9 Public authorities are under no general common law duty to give reasons for their decisions; however it was found to be well-established that fairness may in some circumstances require reasons to be given. This would particularly be the case where the principles of open justice and transparency would not otherwise be satisfied, such as where there was an unexplained disagreement with the recommendation of an officer and where there was significant public interest.
- 3.10 Previous case law has indicated that if there was a material defect in the reasoning behind the decision made, quashing the permission was the appropriate remedy. In the case of Dover, the local authority argued that where there was only a breach of the EIA duty, a declaration of breach was sufficient. The Court found no distinction was to be drawn between the notification of a decision and of the reasoning on which it was based. The defect in reasons went to the heart of the justification for permission; therefore the only appropriate remedy was to quash the permission.

- 3.11 The Dover decision is based on the findings in the Oakley Case. In this matter, Cambridge City Football Club applied for planning permission to erect a 3,000 seater stadium on a historic waste tip south of the town in Sawston, also within the Green Belt. The LPA's officer's report recommended refusal on three grounds:
- Inappropriate development
 - Additional harm re landscape and lack of sustainable access
 - No Very Special Circumstances
- 3.12 Committee granted planning permission against officer's recommendation. The resolution noted that it was a departure from the development plan but neither the officer report, the minutes or contemporaneous notes of the meeting contained a statement of reasons.
- 3.13 The High Court initially agreed, on the basis of planning judgement, but the Court of Appeal disagreed, saying that reasons were required because (i) disagreement with the officers report; (ii) planning permission would be inconsistent with the Local Plan; (iii) involves development in the Green Belt.
- 1.14 The duty to provide reasons was imposed to protect the interests of local people in their local environment and to enable them to determine whether the decision had been lawfully made. It was an aspect of the "duty of fairness" requiring decisions to be transparent.
- 3.15 In Dover, Lord Justice Carnwath referred to the "special circumstances" of Oakley which gave rise to the need for reasons as:
1. Widespread public controversy;
 2. Departure from development plan and Green Belt policies; and
 3. Members disagreement with the officers recommendation
- 3.16 Whilst some of these circumstances are pertinent to the Dover case, two key considerations are forthcoming namely, departure from the development plan which includes the NPPF, the UDP, BCCS and emerging replacement policies and Supplementary Planning Documents (SPD's) and secondly, disagreement with officers recommendations.
- 3.17 Taking the second of these matters first, an officers report provides an overall assessment of the merits of the applications, the consultation comments received, the policy framework within which the decision is made and draws all these matters together before coming to a balanced and reasoned recommendation. Where a decision maker finds agreement with the officer's recommendation, then the reasons for making the decision are likely to be those in the officer's report and a decision may be reached on this basis.
- 3.18 If however, the reasoned decision of the case officer is not supported and a counter decision is considered, it is incumbent on the decision maker to consider all the material matters in the round before coming to a reasoned decision on the merits of the case.

- 3.19 It is therefore possible that a decision maker may feel greater or lesser weight should be applied to a matter under consideration. This consideration though needs to be balanced against the other factors under consideration and these may carry such weight that despite concern arising over one aspect of the development, it may be insufficient to offset the weight to be applied to the other matters.
- 3.20 In reaching a reasoned decision, consideration needs to be given to paragraph 7 of the NPPF which sets out the three aspects of sustainable development namely economic, social and environment which the NPPF expects to be met in terms of delivering sustainable development.
- 3.21 Taking these considerations into account, a departure from the development plan policies needs to be undertaken in a reasoned manner.
- 3.22 When considering what constitutes adequate reasons, attention is given the comments of Mr Justice Rogers Lang in respect of *South Bucks DC v Porter (no. 2) [2004]*. In this case, the Judge held that a different standard applies when considering the adequacy of an officer's report to the adequacy of the reasons given where the duty to give reasons applies. Reasons need to reach the Porter standard which are set out as follows:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute not to every material consideration. They should, enable disappointed developers to assess their prospects of obtaining some alternative development permission, or , as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced, A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision".

- 3.23 In light of the Dover decision therefore, officers are mindful of the risk of legal challenge to decisions made by the Council. Officers have already been alerted to this requirement and delegated decisions now make specific mention to the reasoned analysis of the material considerations taken into account in the determination of applications.

- 3.24 To protect the Council's position with regard to decision making and in an attempt to limit the basis upon which permissions issued might be challenged by aggrieved third parties, emphasis on securing a reasoned decision that meets the tests of the Oakley and Dover decisions will be sought at all times.

4.0 COUNCIL PRIORITIES

- 4.1 The Corporate Plan 2017-2020 sets out the four priorities for the Council to 2020 which are:

- Pursue inclusive economic growth
- Make a positive difference to the lives of Walsall people
- Children are safe from harm, happy and learning well with self-belief, aspiration and support to be their best
- Safe, resilient and prospering communities.

- 4.2 In its role as the Local Planning Authority, the Council considers in excess of 1,800 planning applications on average each year. Across all of these applications, proposals are put forward for development schemes which impinge on one or more of the four priorities.

5.0 RISK MANAGEMENT

- 5.1 Failure to give appropriate consideration to the findings of the Dover decision may result in the planning decisions of the Council being quashed through the Courts if appropriate reasons are not given. This in turn may delay or restrict the Authority determining applications thus prejudicing delivery of the four corporate priorities identified above..

6.0 FINANCIAL IMPLICATIONS

- 6.1 In addition to the staffing implications of defending a legal challenge to a planning decision where the reasons are missing or unclear/inadequate, the greater cost to the Council could come from damages sought by an applicant if their planning consent is later quashed by the Courts due to a failure by the Local Planning Authority to correctly undertake its duty to determine planning applications in a manner in accordance with relevant legislation, the development plan and other material planning considerations.

7.0 LEGAL IMPLICATIONS

- 7.1 Failure to provide reasons where necessary may result in an application being quashed at Court if successfully challenged. If this were to happen, a fresh application would need to be submitted at the applicant's cost to the Local Planning Authority. The Authority would then be required to consider the matter afresh and make a balanced judgement on the merits of the case in light of the development plan policies and other material considerations. That decision may be the same as the earlier decision, it may differ from that issued earlier, or may be subject to new controls through conditions or legal agreements if consent is granted.
- 7.2 Compliance with the findings of the Dover case would not raise any new legal risks for the Council.

8.0 EQUALITY IMPLICATIONS

8.1 Equalities have been assessed and no issues identified

9.0 ENVIRONMENTAL IMPACT

9.1 The requirements of the Dover decision affect all planning applications. Environmental considerations and the environmental impact of development will need to be balanced against economic and social material considerations which together are the three dimensions to sustainable development as set out in paragraph 7 of the National Planning Policy Framework (NPPF)

10.0 WARD(S) AFFECTED

10.1 All

11.0 CONSULTEES

11.1 Consultation has been undertaken with the following:

- Legal Services

12.0 CONTACT OFFICERS

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13.0 BACKGROUND PAPER

JUDGMENT

Dover District Council (Appellant) v CPRE Kent (Respondent) [2017] UKSC 79 (CPRE Kent (Respondent) v China Gateway: [2017])

Oakley v South Cambridgeshire District Council [2017] [EWCA Civ 71](#)