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‘Grasping the Nettle’ – the Role of Previous Inconsistent Decisions in Planning

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Overview



- Legal Framework – key decisions prior to *R (Blacker) v Chelmsford CC* (AW)
- *Blacker* – background, decision and effect (JC)
- Implications; issues for the future (AB)

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Legal Framework: Pre-*Blacker* Decisions



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North Wiltshire DC v SOSE
(1993) 65 P & CR 137

Legal Framework: *North Wiltshire DC*



- Developers had proposed to build a house and garage within walled garden to existing property
- Whether within the physical limits of the village (in which case only very limited scope for development in policy terms)
- 1982 appeal – inspector decided the appeal site lay outside physical limits of the village

Legal Framework: *North Wiltshire DC*



- 1990 – Inspector finds site within limits
- Mann LJ:
 - Common ground that previous appeal decisions can be material considerations
 - Indisputable – like cases should be treated alike; consistency important for developers but also important for public confidence

Legal Framework: *North Wiltshire DC*



- However:
 - Judgment!
 - No *obligation* to treat like cases alike
 - But must give *reasons* for departure
- Decision unlawful – no evidence of consideration of 1982/reasons for departing



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St Albans DC v SSCLG

[2015] EWHC 655

Legal Framework: *St Albans DC*



- Council appeals against SOS's grant of permission (14.7.14) for strategic rail freight interchange in the Green Belt
- Whether SOS erred in deciding whether to depart from earlier 2008 inspector's decision
- Inspector states no need to follow earlier decision "provided that there are very good planning reasons"

Legal Framework: *St Albans DC*



- Appeal Ground 1 dismissed – not a legal *test*
- Holgate J:
 - Difference between legal test and practical position
 - Inspector must give reasons for inconsistency
 - Considering previous decision means grasping intellectual nettle of disagreement

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R (Davison) v Elmbridge BC
[2019] EWHC 1409

Legal Framework: *Davison*



- Council approves new football and athletics stadium in the Green Belt (26.4.17)
- Council earlier decided (26.1.16) to approve similar scheme
- In doing so, found development would have an adverse impact on Green Belt but was also appropriate development
- Error of law; quashed on JR by Supperstone J

Legal Framework: *Davison*



- In Decision 2, Council finds no adverse impact
- Thornton J:
 - Consistency a well-established principle
 - Given effect through test of material considerations
 - Linked to reasons/their role in decisions

Legal Framework: *Davison*



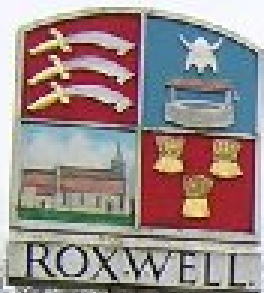
- Quashed decisions have no legal effect
- But consistency still applies re underlying reasoning
- The greater the apparent inconsistency, the more the need for an explanation
- Decision unlawful here:
 - Public confidence rationale heightened
 - Council's earlier reasoning relevant
 - Officer and Committee didn't grasp the nettle



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R (Blacker) v Chelmsford CC
[2021] EWHC 3285 (Admin)



The Facts



- Application for 55 new homes in Roxwell, Essex – outside local plan SB
- Officers recommended refusal in line with plan
- Matter brought before Planning Committee in November 2020



The First Meeting



- Discussion about merits – clear that substantial number of members were not convinced by recommendation
- Motion to defer further consideration once potential conditions provided
- Carried 8-6

The Constitutional Point



5.2.7 DECISIONS CONTRARY TO OFFICER RECOMMENDATION

- 5.2.7.1 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.
- 5.2.7.2 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.

In the Meantime...



ITEM 6



Planning Committee
12th January 2021

Application No	:	19/02123/OUT Outline Application
Location	:	Site At Ash Tree Farm Bishops Stortford Road Roxwell Chelmsford
Proposal	:	Outline application (approval sought for Access). 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.

The Second Meeting



- Differently-constituted: number of members not present
- Discussion about merits – clear that mood of meeting had changed
- Motion to **refuse pp** in line with OR
- **Carried 10-1**



The Challenge: Points to Note



- Brought by “supportive local resident”, not applicant for pp
- **Key proposition:** that the resolution at the first meeting had been *a decision about the merits.*
- **NB: this was not accepted by the LPA**

The Challenge: Grounds



- G1: unconstitutional:
 - The first resolution decided the principle; all that was left was conditions etc.
- G2: failure to grasp the nettle:
 - Alternative to G1 – when changed mind, failed to explain why
- G3: unfair procedure re 3rd party reps
- G4: Pre-determination

The Challenge: Grounds



- G1: unconstitutional:
 - The first resolution decided the principle; all that was left was conditions etc.
- **G2: failure to grasp the nettle:**
 - **Alternative to G1 – when changed mind, failed to explain why**
- G3: unfair procedure re 3rd party reps
- G4: Pre-determination

Grasping the Nettle



- Were the members required to explain their departure from the position reached at the first meeting?
- Was the position reached at the first meeting a 'decision' at all?
- Should the *Davison* principle be extended to this situation?
- NB not alleged they *could not* change their minds – that's G1

Grasping the Nettle: Answers (1)



- On the ‘central dispute’: decision was *only* to defer – so no in-principle decision made.
- ‘Inchoate’
- Note: what mattered was the resolution, not what may have been said before it
- In line with constitution in any event

The Remaining Grounds



Conclusions: Consistency



- No extension of the Davison line – that is the outlier
- Principle of consistency does not apply to ‘inchoate’ decision-making
- Pausing to defer further consideration is NOT a decision on the substance, whatever the underlying reason
- Helpful reminder that **resolution** is what matters here



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Implications

When Does the Duty Arise?



- DLA Delivery [2018] EWCA Civ 1305 at [34]:
 - A decision on the same site; **or**
 - The same or similar development on another site; **or**
 - Concerning interpretation or application of a policy common to both cases; and
 - Disagreement with some “critical aspect” of the reasoning

When Does the Duty Arise?



- The DLA examples non-exhaustive
- Real question is whether earlier decision is “sufficiently closely related to matters in issue”
Barber [1996] JPL 1304

What if there is Disagreement?



- North Wiltshire (1993) 65 P & CR 137:
 - Have regard to the principle of consistency in decision making; and
 - Give reasons for coming to a different view.
 - Not a duty that like cases must be decided alike

What if there is Disagreement?



- Gladman [2019] EWHC 27 (Admin)
 - Significant number of conflicting earlier decisions concerning whether a policy was out of date
 - Inspector still obliged to explain why he was taking a different view to earlier decisions

Summary



- If there is a relevant previous decision, take it expressly into account.
- Give clear reasons why you are not following a critical element of the reasoning.
- No obligation to come to the same decision.
- Acceptable to disagree in short form, especially on impressionistic judgments like aesthetics.



Thank You