

Royal Courts of Justice
Strand, London, WC2A 2LL

**LORD JUSTICE MAURICE KAY
LORD JUSTICE CARNWATH
and
LORD JUSTICE PATTEN**

**THE QUEEN ON THE APPLICATION OF
DRY
- and -
WEST OXFORDSHIRE DISTRICT COUNCIL**

Appellant

Respondent

Hearing date : Monday 20th September, 2010

1. The applicant is a resident of Eynsham in West Oxfordshire and a member of the Eynsham Society. She challenges a planning permission issued by the District Council on 21 October 2009 for development of 100 houses on a site to the east of Eynsham. The principal issue is whether the council dealt lawfully with the issue of flooding.
2. The site has been allocated for housing since the June 2006 local plan. At that time flooding was not seen as an issue, but it became one in 2007, when there was a serious flood on the site. In the meantime, in December 2006, the Government had published new guidance on flooding in the form of Planning Policy Statement 25. That advised that planning authorities should adopt a “sequential approach” in determining planning applications. In other words they were advised to ensure that –

“...there are no reasonably available sites in areas with a lower probability of flooding that would be appropriate to the type of development or land proposed”.

3. Flood maps prepared by the Environment Agency showed relative risks of flooding by reference to three “zones”. Zone 1 represented a low probability of flooding, zone 2 a medium probability, and zone 3 a high probability. In the flood map current in 2006 the bulk of this development site was in zone 1, and the development was to be confined to that part. The 2007 floods caused that position to be reviewed, but it was not until September 2009 (after the consideration of this application but before issue of the permission) that the plans were amended, so as to include most of the site in zone 2. Although inclusion in zone 2 did not rule out residential development, the sequential approach would require it to be shown that there were no suitable sites in zone 1.
4. The planning application was made on 15 August 2008. The Environment Agency initially objected on the grounds of flood risk and a lack of a proper sequential test. The developers responded by commissioning two reports. One a “sequential test report” by planning consultants, and the other a report on flood prevention measures by engineering consultants. By agreement with the council and the Environment Agency, the sequential test was carried out on the basis that the whole site was to be treated as in flood zone 2, and the search area was defined as including Eynsham and Woodstock. Those reports became available in March 2009. The Environment Agency expressed themselves satisfied with the reports and indicated (in a letter dated 23rd April 2009) that their objection on the sequential test was withdrawn. In doing so they asked for confirmation of the council’s view (i) that none of the other sites considered in the report was suitable for this development and (ii) that the area of search (confined to Woodstock and Eynsham, rather than the whole district) was appropriate. The council’s planning consultant replied on 27th April confirming both points.
5. The application was considered at a meeting of the planning committee on 20 July 2009. They had before them a report by the planning officers. The minutes of the meeting show that there was a lively discussion of the application, focussing particularly on the flooding issue. The council committee resolved to grant permission. Their formal “reason for granting permission” said in relation to flooding:

“... although the site has a history of flooding, a number of mitigation measures are proposed and the Environment Agency has raised no objection on flooding grounds.”
6. There was some delay before the issue of the formal notice of permission on 21 October 2009. In the meantime, as I have said, an amended flood plan was issued showing most of the site within zone 2. Before issuing the notice, the Planning Officer wrote to the Environment Agency asking whether this affected their position and received confirmation that it did not and that no further consultation was required.
7. The present proceedings came before Mitting J in June this year as a renewed application for permission to apply for judicial review. He heard full argument as on a substantive application. He granted permission on the sequential testing point, but dismissed the application for judicial review. At the same time he refused permission to apply for judicial review on a separate ground relating to the need for an environment impact assessment. Both issues are now before this court, the first as a full appeal (following permission granted by me), the second as a renewed application for permission to apply for judicial review.

Environmental Impact Assessment

8. I can deal with this issue very shortly. On the 25 August 2008 the council issued a “screening opinion” saying that in their view the proposed development was “not likely to have a significant effect on the environment”, and that therefore it did not fall within the descriptions of development for which an environmental assessment was required. No detailed reasons were given and no mention was made of flooding. Over a year later, following the grant of permission, the authority was asked to give formal reasons for the screening opinion. (It seems that this request was prompted by the applicant or her advisers becoming aware of the decision of the

European Court of Justice in *Mellor v Secretary of State* C-75/08 [2010] Env LR18.) The council gave its reasons in a letter of 8th February 2010. In respect of flooding, the letter said:

“The absorption capacity of the environment was considered in relation to flooding but the Environment Agency had not objected to the allocation of the site in the Local Plan on flooding grounds”

9. Mr Kolinsky submits that this reasoning was materially flawed because it took no account of the 2007 flood. Viewed at the time the screening opinion was given in 2008, the lack of objection to the allocation in the 2006 plan was of no more than historical significance. Accordingly, in concluding that the site was not sensitive to flooding the council left out of account a critical material consideration.
10. The judge rejected this application. He held that, short of irrationality, it was a matter of planning judgement for the council to decide what weight if any to give to the 2007 flooding. I agree. I would add that, even if there were some theoretical merit in this point, it has in practice been overtaken by events. Whether or not the council were justified in taking such a narrow view of the flooding issue in 2008, the issue has in fact been fully considered in accordance with the requirements of the Environment Agency, on the basis of detailed reports prepared by the developers. There is no reason to think that, on that aspect, a formal requirement for an environmental assessment would have made any difference of any practical value to the applicant.

The sequential test

11. I turn to the principal issue on which permission to appeal was granted.
12. Mr Kolinsky concentrates on part of the planning officers’ report, which he says offers the only “articulated” justification for the council’s decision on the sequential test point. In a section headed “Flooding”, the report referred to the then current Flood Map (showing most of the site in Zone 1), to the local residents’ evidence relating to the 2007 flooding, to the results of Sequential Test report showing “no sequentially preferable sites”, and to the flood risk assessment amended to meet the Environment Agency’s requirements. It continued:

“Having regard to the fact that no residential development or roads would be within Zone 2 or 3 on the site, your officers are satisfied that the Sequential Test report demonstrates that there are no reasonably available sites that are preferable in terms of flood risk (Zones 1 and 2).

Following detailed examination of reports submitted by the applicant the Environment Agency has withdrawn its objection on flooding grounds.

In the light of this examination it is concluded that the development is acceptable in terms of flooding...”

13. Mr Kolinsky’s case, in short, is that the first sentence, while strictly correct at the time of the resolution in July 2009, was not correct at the time the permission was issued in October. By then the revised Flood Map had been issued showing most of the site in Zone 2. It was therefore incumbent on the officers to refer the matter back to the committee to take account of that material change.
14. He relies on the guidance on this topic given by this court in *Kides v South Cambridgeshire District Council* [2003] JPL 431. Jonathan Parker LJ said:

“In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a ‘material consideration’ for the purposes of section 70(2), it must be a counsel of prudence for

the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision.” (para 126)

15. He submits that (c) in particular was not satisfied. Having in their advice to committee led it to rely on the zoning allocations in the earlier plan, the officers could not be satisfied that the same decision would have been reached if they had been made aware of the new plan. The confirmation of the Environment Agency’s lack of objection was not sufficient, since the application of the sequential test was a matter for the planning authority.
16. Without seeking to detract from the authority of the guidance in *Kides*, I would emphasise that it is only guidance as to what is advisable, “erring on the side of caution”. Furthermore, in that case there had been a gap of five years between the resolution and the issue of the permission. The guidance must be applied with common sense, and with regard to the facts of the particular case.
17. The main problem is that the passage of the officer’s report, on which Mr Kolinsky relies, does not really make sense. While the description of the zoning in the current Flood Map was strictly correct, it was a non-sequitur to link that to the conclusion from the sequential test report that there were no more suitable sites. That was an entirely separate exercise, conducted on the basis that the site should be treated as within zone 2. It looks as if something may have been left out in the grammar, although there was no evidence of this. In my view, a fair reading should take this sentence in the context of the earlier paragraphs describing the background of the Agency’s involvement, and the subsequent paragraph referring to the withdrawal of its objection. Those are all parts of the “examination” which is said, in the final paragraph to support the view that the development is “acceptable in terms of flooding”.
18. In any event, even if the officer’s reasoning is regarded as flawed, I do not accept Mr Kolinsky’s submission that it must necessarily be attributed to the committee, as their treatment of the sequential test issue. I have already referred to the committee’s adopted reasons for granting permission. They were in fact somewhat fuller than those proposed in the officer’s report. They relied specifically on the withdrawal of the Agency’s objection. That can properly be read in the context of the circumstances of that withdrawal as described in the officer’s report, which included reference to the sequential test report. There is also evidence (from the planning officer) that the committee were specifically told that the current Flood Map was inaccurate, and that a revised map was about to be issued.
19. Mr Kolinsky sought to question some aspects of the sequential test report. For example, he referred to a significant site to the East of Woodstock, which was shown in the report as within zone 1, and might (he suggested) have been considered preferable by the Committee had they been referred to it. However, the notes to the report show that there were other objections which made that site unsuitable for development in the short term. The exchange with the Agency in April 2009 (see para 4 above) shows that the overall conclusion of the sequential test exercise was accepted on behalf of the council. There is no legal challenge to that judgement.
20. When the revised Flood Map was produced in September, the only possible question was whether it contained anything new which had not been taken into account by the Agency in its earlier consideration. Once the Agency had confirmed that it did not, it would have been pointless to refer the matter back to the committee. There was nothing new, and no reason for a rational planning committee to change its mind.
21. For these reasons, I would hold that the judge reached the correct conclusion, and I would dismiss the appeal.

PATTEN LJ :

22. I agree.

MAURICE KAY LJ :

23. I also agree.