[2017] EWHC 3086 (Admin)

CLAIM NO: CO/3187/2017

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
PLANNING COURT

In the matter of a judicial review of the St Annes-on-the-Sea Neighbourhood Development Plan

Before:

MR JUSTICE KERR

B E T W E E N:

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	THE QUEEN (ON THE APPLICATION OF OYSTON ESTATES LIMITED)	**Claimant**
	-and-	
	FYLDE BOROUGH COUNCIL	**Defendant**
	-and-	
	ST ANNE'S-ON-THE-SEA TOWN COUNCIL	**Interested Party**

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MS ESTELLE DEHON appeared on behalf of the Claimant
MR JONATHAN EASTON appeared on behalf of the Defendant

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JUDGMENT APPROVED1. **MR JUSTICE KERR**: This is the hearing of a preliminary issue ordered by Mrs Justice Lang to determine whether or not the claimant's application for judicial review has been brought in time or out of time. Mrs

Justice Lang made an order on the papers on 4 September 2017 that the matter be listed for determination of that issue. She observed that in her view the claimant had raised arguable grounds of challenge meriting full consideration but that "[i]f the defendant's preliminary point on time limits is correct, the claim is unlikely to proceed beyond permission stage … ".

2. I agree with the judge that the grounds are arguable on their merits, and that subject to the time point, permission to proceed should be granted. I therefore consider the time limit point. The claimant brought its challenge on 5 July 2017. The challenge is to the decision made by the defendant (the local planning authority) published on 26 May 2017 to make the St-Annes-on-Sea neighbourhood plan, a statutory Neighbourhood Development Plan (the NDP).

3. The concept of an NDP was introduced into the law by provisions in The Localism Act 2011, inserting the relevant provisions into the Planning and Compulsory Purchase Act 2004 (the 2004 Act) and the Town and Country Planning Act 1990 (the 1990 Act). The making of the NDP was initiated by the interested party (the town council) as long ago as April 2013 under section 38A(1) of the 2004 Act.

4. The claimant is the owner of a site at Lytham Moss (the site) which, the examiner in this case subsequently concluded, should be included within the settlement boundary for the purposes of the NDP, in order to meet a legal requirement by offering flexibility for local housing needs to be addressed over the ensuing 15 years.

5. The claimant is a mixed farming business with land holdings in the Fylde peninsula. It owns the site, which is a parcel of undeveloped urban fringe land currently used for grazing. On the southern boundary of the site is a residential estate. On the western boundary is a site known as Queensway, which has planning permission for 1,150 dwellings (the Queensway Development).

6. Further land on the northern boundary of the site is intended to be redeveloped into a nature park and playing fields to provide "mitigation" for the Queensway

Development. Yet further, for the benefit of overwintering birds, particularly pink-footed geese, land to the north and north-east has been allocated as a "farmland conservation area", also by way of mitigation for the Queensway Development. The site, the two other sites adjacent to it, and the Queensway Development site, are all part of a larger Biological Heritage Site (BHS). That is the background.

7. After the town council had initiated the process for making of the NDP, the local planning authority designated the town council's area for the purposes of preparing an NDP. That was in 2013. Over the following three years, public consultation took place. In March 2016, the local planning authority appointed a Mr John Slater as the independent examiner. After a hearing in June 2016, the examiner produced his report on 10 August 2016.

8. In that report, as the legislation requires, he considered whether the then version of the draft NDP complied with the statutory "basic conditions". The examiner recommended that the site, together with two other sites, should be included within the settlement boundary for the purposes of the NDP.

9. After that, from September to November 2016 a complex controversy developed, the details of which do not matter for present purposes. It involved comments by Natural England on environmental and habitat issues raised by the examiner's report. Consultants were appointed and further consultation took place.

10. In early March 2017, the local planning authority published its decision statement. The document appears to be undated, so the exact date of the publication is not clear, but it appears to have been 2 March 2017 which is, certainly, as is common ground, considerably more than six weeks before the issue of the present claim in July 2017.

11. In the decision statement, the local planning authority noted that the law permitted it to come to different views from those in the examiner's report and stated that accepting the examiner's recommendations in full and extending the St Annes-on-Sea settlement boundary to include the land in question would mean that the plan would not meet the

statutory basic conditions.

12. In the same decision statement, the local planning authority rejected the examiner's recommendation that certain land be deleted and that the other land in question, which I have mentioned, be included within the settlement boundary. That, according to the decision statement, was considered by the local planning authority not to be compliant with the basic conditions in that it "breaches EU obligations".

13. The decision statement also included the setting of a date for the holding of a local referendum, on 4 May 2017. The referendum was then held on that date and 120 of the 127 people who voted answered yes to the question whether the local planning authority should use the NDP to help it decide planning applications in the neighbourhood's area.

14. Following that result, the local planning authority then made the order for the NDP on 26 May 2017. The challenge in this case was brought, as I have said, on 5 July 2017 and therefore less than six weeks later. The grounds of challenge in briefest summary are:

(1) that the local planning authority failed to act lawfully in refusing to follow the examiner's recommendation as regards the modification of the text of the NDP and failed in particular to comply with relevant requirements of paragraph 8(2) of Schedule 4B to the 1990 Act; and

(2) that the local planning authority acted unlawfully in determining that the modified plan could not progress without what was called "appropriate assessment", but then failed to carry out such an assessment and made the NDP without the modification, again contrary to the examiner's finding that the unmodified plan would not meet the statutory basic conditions.

15. It is not necessary to go into either the facts or the grounds of challenge in more

detail, since I am satisfied, in agreement with Mrs Justice Lang, that the grounds are arguable. Therefore, if the application is made in time, the time and place for evaluation of the arguments in support of the claim would be the substantive hearing of the application for judicial review.

16. As to the question of time limits, the position is as follows: a "Neighbourhood Development Plan" is defined in section 38A(2) of the 2004 Act as, "a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan".

17. Under section 61E and Schedule 4B to the 1990 Act, the process for making an NDP involves, among other things, sequential procedural requirements, which include the process of independent examination; the production of the examiner's report; consideration of that report; a local referendum; and if the result of this is positive, the making of an order for the NDP. The paragraphs in Schedule 4B set out the procedural steps in the decision making process.

18. Section 61N of the 1990 Act, inserted by provisions in the Localism Act 2011 (and as subsequently amended), provides as follows:

> "**61N Legal challenges in relation to neighbourhood development orders**
>
> (1) A court may entertain proceedings for questioning a decision to act under section 61E(4) or (8) only if—
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of 6 weeks beginning with the day after the day on which the decision is published.
>
> (2) A court may entertain proceedings for questioning a decision under paragraph 12 of Schedule 4B (consideration by local planning authority of recommendations made by examiner etc) or paragraph 13B of that Schedule (intervention powers of Secretary of State) only if—
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of 6 weeks beginning

with the day after the day on which the decision is published.

(3) A court may entertain proceedings for questioning anything relating to a referendum under paragraph 14 or 15 of Schedule 4B only if—

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed before the end of] 4 the period of 6 weeks beginning with the day after the day on which the result of the referendum is declared."

19. Ms Dehon, for the claimant, submitted that the claim has been brought within time. She pointed out in her skeleton argument that the provisions of 61N provide for challenge to three different decisions at different stages of the process. In chronological order they are, first, a challenge to the authority's decision, having considered the examiner's report; secondly, challenges related to the holding of a referendum; and thirdly, a challenge to the decision to make an order for a Neighbourhood Development Plan.

20. She submitted that the language of section 61N in its three subsections is permissive in that the court "may" entertain proceedings for questioning each of those three types of decision if the requisite conditions are met, and that there is nothing in the wording of the provisions which precludes a challenge on the basis that it could have been made at an earlier stage in the process and to an earlier decision.

21. She submitted that the separate time limits in respect of each type of decision do not operate to raise separate bars to a challenge, but that those occurring earlier in the time sequence are there merely to prevent a defendant from raising a prematurity argument. It is Ms Dehon's case that if there is a legal flaw at an early stage in the decision making process, that may vitiate and render unlawful a later challengeable decision in the process such as, in the present case, the decision to make the order for the NDP.

22. She accepts that the thrust of her grounds of challenge target the consideration and decision of the local planning authority in March 2017; but submits that that is not fatal

to the claim. She directed my attention to the decision of Mrs Justice Patterson in *R (Stonegate Homes Limited) v Horsham District Council* [2017] Env LR 8. In that case, as in this case, the challenge was to the authority's decision to make an NDP. But again, as in this case, the grounds of challenge focussed on the local authority's assessment at an earlier stage of the process.

23. The claim was brought more than six weeks after the earlier decision of the authority but was not ruled out of time. In paragraph 53 of her judgment, Mrs Justice Patterson did focus on the "timing of the challenge", which she noted was, "important to the overall context". She did not regard that as a bar to the claim proceeding; nor, it is common ground, is there any suggestion in her judgment that any time point was taken in that case.

24. On behalf of the local planning authority, Mr Easton submits that the claim falls well out of time and, to be in time, it would have had to have been brought within six weeks of the decision of the local planning authority published in March 2017.

25. He submits that the purpose of the sequential time limits provisions in section 61N of the 1990 Act is to prevent the mischief of invalid administrative action and, in particular, an abortive referendum. At paragraph 9 of his skeleton argument, he submitted that the time limits related to different stages in the process for a reason, which served an important purpose.

26. That purpose, he said, could be expressed as follows:

> "In particular, there is a specific time limit relating to challenges arising out of a local planning authority's consideration of an Examiner's Report: see s.61N(2). This specific time limit would allow a claimant to raise issues as to a local authority's response to such a Report *prior* to the NDP being put to Referendum, thus avoiding a potentially abortive Referendum and making of a NDP. Otherwise, there would be little sense in having different time limits to different stages of the process."

27. Mr Easton pointed out that while the provisions do include use of the permissive word "may", that word is qualified by two preconditions: namely that the claim "may" only be entertained if brought by judicial review and within the six week time limit in each case.

28. In the light of those rival contentions, I come to my reasoning and conclusions. There appears to be no decisive authority on this issue, and it falls to me to decide the point. I do not derive assistance from the *Stonegate Homes* case since there was no argument raised in relation to time limits in that case.

29. I start from the proposition that the time limits are negatively expressed; that is to say, a challenge is barred except when brought within the time limit. Secondly, the time limits are short, a mere six weeks. It is difficult to think of a shorter time limit for a first instance non-appellate challenge.

30. The provisions are different from those in CPR Part 54 dealing with judicial review challenges generally. As is well known, in such cases the claim must be brought promptly and in any event not more than three months after the grounds of challenge first arose. The present six week time limit is shorter.

31. Thirdly, it is well known that the purpose of the short six week period is to promote early certainty and avoid disruption of development projects and plans and prejudice to good administration.

32. Fourth, under the provisions I am considering here, everyone knows when time starts to run, unlike in the case of the CPR time limit, which refers to time running from when the "grounds first arose". Moreover, under these provisions, unlike those in the CPR, it is known for certain when time will run out. In the case of the CPR provisions, that occurs when the obligation of promptness can no longer be fulfilled.

33. As is well known, the generic judicial review time limit provision in CPR Part 54 has

been criticised for being uncertain. No such criticism can be levelled at these provisions. You know when time starts to run, you know when time is going to run out and you know when it has run out.

34. Fifth, the rights of challenge are compartmentalised and segmented. There are four stages: the first is the examiner's report under Schedule 4B, paragraph 10. There is no right to challenge it as such. A judicial review challenge to an examiner's report brought under CPR Part 54 would inevitably be met with an argument that there is a suitable alternative remedy.

35. The second stage is consideration by the local planning authority of the examiner's report, and its decision what action to take. This arises from paragraph 12(2) of Schedule 4B to the 1990 Act. The decision must be published: see paragraph 12(11). It can be challenged, but according to the negative formulation of the time bar, the challenge may not be entertained unless it is brought by judicial review, and is made within six weeks, starting with the day after the decision is published: see section 61N(2).

36. There is an alternative second stage procedure whereby the Secretary of State exercises intervention powers. That occurs, in summary, where the local planning authority has failed to make a decision or the Secretary of State disagrees with the local planning authority's view on what steps to take. In such a case, the Secretary of State in effect steps into the shoes of the local planning authority under paragraph 13B of Schedule 4B.

37. A challenge to the Secretary of State's decision in such a case follows the same path as one where the local planning authority takes the decision. The same analysis applies. The challenge is brought under section 61N(2) and the same time limit applies.

38. The third stage arises if the local planning authority has decided that a referendum must be held, or is directed by the Secretary of State to hold one. Section 61N(3)

applies where a challenge is brought to question "anything relating to a referendum under paragraph 14 or 15 of Schedule 4B". (Paragraph 15 deals with an "additional referendum" and I need not complicate this judgment unnecessarily by dealing with it separately or further).

39. The challenge can only be entertained if brought by judicial review within six weeks, beginning the day after the day the referendum result is declared. Paragraph 14 of Schedule 4B deals with arrangements for the referendum and who is entitled to vote. A challenge could be brought if, for example, persons entitled to vote were not able to do so, such that the referendum result was tainted by impropriety.

40. The fourth and final stage of the process is that once the referendum result is known, if more than half of those voting have voted in favour of making the order for the NDP, the local planning authority must make the order as soon as reasonably practicable after the referendum is held and in any event, by not later than any date prescribed: see section 61E(4). I interject that no date has been prescribed by regulations.

41. There is an exception to that, by section 61E(8): the duty to make the order does not arise where the local planning authority considers that making it would breach or be incompatible with certain rights arising in EU law or under the European Convention on Human Rights.

42. The decision to act under section 61E(4) or, as the case may be, (8), must be published: see section 61E(11). A challenge to a decision either to make the order or not to make it in reliance on the exception relating to EU obligations or human rights law can be brought, but once again cannot be brought unless the same two conditions are met: it must be brought by judicial review, and it must be brought before expiry of six weeks starting with the day after "the decision" is published: see section 61N(1).

43. It is apparent, therefore, that the legislation dealing with the stages in the decision making process, the method of challenge and the timing of any challenge is meticulous and precise. There is none of the vagueness that has given rise to the criticism of the

timing of provisions in CPR Part 54.

44. In my judgment, the promotion of certainty and avoidance of disruption, which is the rationale for the shorter time limits, and the precision with which they are enacted should not be undermined by a lax approach when interpreting and applying them. I think that observation has all the more force in the case of the provisions I am considering here where, unlike in CPR Part 54, there is no power to extend time.

45. I think the parties involved in this important process of localised and democratic decision making are entitled to know, once the six weeks is up, that the stage in the process that could within that six week period have been challenged, is no longer susceptible to challenge.

46. It follows, in my judgment, that a challenge, say, to the making of an order following a referendum, should not be entertained if the ground of the challenge in truth attacks, say, the rationality of the authority's consideration of the examiner's report and the resulting decision to hold the referendum in the first place.

47. Still less should such a challenge, after the referendum has been held, hark back to the content of the examiner's report, which in turn has informed the authority's decision on how to proceed on the basis of that report.

48. In such a case, the six week period having already expired, the prohibition against entertaining the challenge has come into play and I do not think it can be outflanked by dressing up the challenge as one not to the authority's decision to hold a referendum, but to the subsequent decision to make an order on the strength of the referendum result.

49. I do accept that legal flaws in an examiner's report may be relied on to challenge a decision to hold a referendum, if brought by judicial review within six weeks of that decision. Otherwise, legal flaws in the examiner's report would have to be brought by judicial review outside the scope of the statutory provisions, which is most unlikely

to have been the (objectively ascertained) intention of the legislature.

50. If an examiner's report is legally flawed, the authority's subsequent consideration of the report and decision on how to proceed may, or may not, be infected by the flaw in the examiner's report. If it is, there is no difficulty with the challenge, but it must be brought by judicial review within six weeks of publication of the local planning authority's decision.

51. In the present case, Ms Dehon's challenge is framed as a challenge to the making of the order on 26 May 2017, following the result of the referendum held on 4 May 2017. She does not dispute that both her grounds of challenge relate to the legality of the authority's decision back in March 2017. She does not dispute that the six week period for a challenge to that decision began to run on 3 March 2017 and ended six weeks later in mid-April.

52. The present claim was not brought until 5 July 2017. No separate challenge is made to the propriety of the referendum, nor is any complaint made about the making of the order on 26 May 2017 except that founded on the alleged unlawfulness of what happened back in March 2017.

53. I do not accept Ms Dehon's ingenious submission that the language of section 61N(2) and (3) is permissive in that they permit a challenge to a decision taken at an earlier stage of the process than the final outcome, without falling foul of a prematurity argument, leaving the complainant free, if it prefers, to await the referendum and if the result is positive, to challenge the resultant order. That interpretation offends against good administration on at least three counts.

54. First, it is out of tune with the carefully calibrated decision making process and the step by step rights of challenge built into the provisions. Second, it allows a claimant to “dine à la carte”, without any principled reason why that should be permitted and in the presence of a very clear set menu. Third, it encourages claimants to wait for the results of a referendum that on the claimant's own case is a nullity. That would

promote uncertainty and mean that referenda would have to take place under a legal cloud.

55. For those reasons I prefer the arguments of Mr Easton and the local planning authority. The claim is out of time, and although arguable on its merits, permission must for that reason be refused.

56. Permission to appeal is granted. I will order that the costs of the acknowledgement of service be the defendant's, summarily assessed in the sum of £1,250, to be paid immediately. I would be grateful if counsel could draw up a draft order and email it through for my approval, including the costs figure and the permission to appeal.