The boundaries of materiality

Ralph Kellas summarises a recent Supreme Court case concerning an onshore community wind turbine and considers the state of the law in light of it

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'It does not follow from the court's judgment that a community fund can never be a material consideration. Clearly, it will depend on particular circumstances.'

In November 2019, the Supreme Court gave judgment in *R (on the application of Wright) v Resilient Energy Severndale Ltd* [2019], a case concerning a decision to grant planning permission for an onshore community wind turbine. The development proposals included a commitment to make annual donations to a community fund, to be spent on unspecified 'community benefits'.

The main issue before the Supreme Court was whether a community fund qualifies as a material consideration which can lawfully be taken into account in deciding whether to grant planning permission. The answer on the facts of this case was an emphatic 'no'. The community fund did not qualify as a material consideration and breached the principle that planning permission cannot be bought or sold.

So where does this leave the state of the law? Despite the court's strict approach, the judgment does not necessarily 'close the door' on community funds. It also has implications for the transparency of the planning process in dealing with schemes involving off-site community benefits. Finally, the scope of decision-makers' discretion in identifying material considerations remains unclear.

The facts

Resilient Energy Severndale Ltd (a company set up by 'social purpose business' the Resilience Centre) submitted an application to Forest of Dean District Council (the council) for the change of use of land from agriculture to the erection of a 500kW electricity-generating wind turbine. Resilient proposed that the development would be erected, owned and run by a community benefit society (CBS), and would be funded by offering shares in the CBS to the local community, with an envisaged 7% return.

Resilient also committed to making an annual donation of 4% of the development's turnover to a community fund 'to address current and future community needs'. A local panel was to be established to administer the fund for this purpose, but there was otherwise no restriction on how the fund may be spent. Another community onshore wind scheme (also promoted by the Resilience Centre) involved a similar fund which had been spent on a variety of community benefits, including a meal at a local pub for members of a lunch club for older people, waterproof clothing for outdoor trips, heaters for the local church, etc.

The proposed development was not in accordance with the development plan. Nevertheless, there was government support for this type of development. Paragraph 97 of the National Planning Policy Framework (2012) (NPPF) provided that local planning authorities (LPAs) should (among other things) '[s]upport community-led initiatives for renewable and low carbon energy'. Guidance published in 2014 by the Department of Energy and Climate Change (DECC) provided that '[c]ommunities hosting renewable energy… should be recognised and rewarded for their contribution'. The guidance encouraged the provision of community benefits, including community benefit funds, though it noted that such benefits are:

> … separate from the planning process and are not relevant to the decision

> as to whether the application for a wind farm should be approved...

The final committee report on the application advised council members that the community fund was a material consideration in favour of the development. The committee treated the community fund as such and resolved to grant planning permission subject to a condition that the development be undertaken by a CBS.

Mr Wright, a local objector, challenged the decision on the grounds that it was unlawful for the council to:

- have taken into account the community fund; and
- impose the condition concerning the CBS.

The High Court quashed the decision and the council and Resilient appealed unsuccessfully to both the Court of Appeal and the Supreme Court. The Secretary of State intervened in the appeal to the Supreme Court, making submissions broadly supportive of those of Resilient.

The law

Why does it matter whether a consideration is material? Section 70(2) of the Town and Country Planning Act 1990 provides that (emphasis added):

> In dealing with [a planning application] the authority shall have regard to... provisions of the development plan, so far as *material* to the application... and... any other *material* considerations.

Decision-makers must therefore take care to consider all considerations that are material and not to consider any considerations that are not material.

Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires applications to be determined in accordance with the development plan 'unless material considerations indicate otherwise'.

As this case demonstrates, it is critical that considerations relied on to justify departures from the development plan are material.

What qualifies as material?

Viscount Dilhorne in *Newbury District Council v Secretary of State for the Environment* [1981] set out the criteria of a valid planning condition. These '*Newbury* criteria' are treated as governing materiality too. For a condition to be valid, or for a consideration to be material, it must:

- be for a planning purpose and not for an ulterior one;
- fairly and reasonably relate to the development permitted; and
- not be so unreasonable that no reasonable planning authority could have imposed it (or have taken it into account).

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The *Newbury* criteria have since been interpreted and supplemented. The House of Lords in *Westminster City Council v Great Portland Estates plc* [1985] tightened the 'for a planning purpose' criterion.

Lord Scarman (relying on the statement by Lord Parker CJ in *East Barnet Urban District Council v British Transport Commission* [1962] which, notably, pre-dates *Newbury*) confirmed that a planning purpose is 'one which relates to the character of the use of the land'.

Closely related to (if not part of) the question of materiality is the principle that planning permission cannot be bought or sold. This principle was enforced by the Supreme Court in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017].

Here, the court held that a restrictive planning obligation, to be lawful, 'must serve a purpose *in relation to the development or use of the burdened site*' (emphasis added). Anything short of that, even if it serves 'a planning purpose in a broad sense, will not suffice'.

Decision

Taken together, the above authorities present a strict approach. In the present case, Lord Sales (with whom the other justices agreed) upheld this approach, finding that the 'community benefits':

- 'were not proposed as a means of pursuing any proper planning purpose but for the ulterior purpose of providing general benefits to the community' and 'did not affect the use of the land';
- 'did not fairly and reasonably relate to the use of the development for which permission was sought'; and
- 'were proffered as a general inducement' and 'constituted a method of seeking to buy the planning permission'.

The court also responded in detail to Resilient's submission that the concept of 'material consideration' is informed by and can change in accordance with changing government policy. Counsel for Resilient pointed to several cases in support of this submission – for example:

- *R (Copeland) v London Borough of Tower Hamlets* [2010], where a planning permission for a fast food outlet near a school was quashed because the LPA had failed to take into account (material) government policy on healthy eating for children.
- *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974], where the Court of Appeal found to be *Wednesbury* unreasonable a condition that homes were to be occupied by persons on the council's waiting list. Resilient pointed out that subsequent national policy has supported the use of conditions to secure affordable housing and that the need for affordable housing is now treated as a material consideration.

The court disagreed with Resilient's interpretation. These judgments answered the question whether the considerations were material, not by reference to national policy but according to whether they related to the use of the land. Indeed, the national policies were significant to the 'separate' matter of whether the decision in question could be justified or to the weight to give to a consideration. It is not clear, in my view, that all the judgments referred to do clearly reflect the distinction between the matter of justification of the decision and that of materiality. Nevertheless, Lord Sales' review of this case law emphasises the importance of the requirement that a consideration, to be material, must relate to the use of the land.

In the present case, the national policies supportive of community-led energy initiatives and community benefits made no difference. The court confirmed that policy cannot make material what would otherwise be immaterial. The concept of 'material consideration' is a legal one which remains stable over time.

Discussion

Implications for the use of community benefits

There were no real constraints on how the community fund in this case might be spent. However, there are likely to be less extreme cases. It does not follow from the court's judgment that a community fund can never be a material consideration. Clearly, it will depend on particular circumstances, but important questions on which judicial guidance would be helpful include:

As this case demonstrates, it is critical that considerations relied on to justify departures from the development plan are material.

- What purposes/benefits can be treated as planning purposes relating to the use of the land?
- How much flexibility as to the use of the fund is allowed?
- Is a restriction on the use of the fund necessary?

Those involved in community-led energy schemes are in a confusing position. Government policy supports the delivery of such schemes and, to that end, the provision of community benefits. On the other hand, such benefits must not be taken into account insofar as they do not qualify as material considerations.

How will this play out in practice? Off-site benefits may continue to be offered. Where the benefits do not meet the materiality criteria, LPAs will need to be careful not to take them into account. However, this does not necessarily mean that such benefits will have no influence on planning decisions. There is a risk that considerations which do influence planning decisions but are not expressly addressed in reaching those decisions will undermine the openness and transparency of the planning system. Alternatively, developers themselves may become less likely to offer community benefits. The absence of such benefits, however, might make such development less welcome in communities. Schemes may then become more difficult to deliver and government policy may be frustrated.

Identifying material considerations: what role for planning judgement?

The Secretary of State argued that the NPPF identified a range of economic, social and environmental purposes which should be regarded as planning purposes, but which do not strictly relate to the character of the use of the land, as *Great Portland Estates* required. These purposes are characteristic of 'modern planning circumstances' manifest in, for example, regeneration schemes, or schemes where the impacts arise some distance from the land. The planning system may, the Secretary of State argued, fail to capture these circumstances if the concept of 'material consideration' excludes considerations that do not conform to the narrow *Great Portland Estates* definition of 'planning purpose'. The Secretary of State invited the court to update the *Newbury* criteria to include a broader concept of 'planning purposes', but the court declined to do so. The *Great Portland Estates* definition of 'planning purpose' prevails.

However, the boundary between land use and non-land use is increasingly obscure and there is growing pressure on the planning system to support the pursuit of a range of objectives. For example, in 2019 the Climate Change Act 2008 was amended to include a 'net carbon zero' target, Parliament and several local authorities declared a climate emergency, and the government announced support for tree-planting to draw down CO_2 (see Field, D 'The Planning System Plays Catch-Up', EG, 2 November 2019; Defra Press Release, 'Government launches new scheme to boost tree-planting', 4 November 2019). Indeed, the fulfilment of these objectives will depend on the planning system. The extent of decision-makers' discretion to identify considerations arising out of these broader issues remains unclear.

The law does not specify *particular* material considerations and, as such, does not specify considerations that must, always, be taken into account. Section 70(2) specifies particular considerations (eg the development plan) which are to be taken into account, but only 'so far as material to the application'. However, crucially, s70(2) also refers to the more open concept of 'any other material considerations'.

Whether a consideration is material depends on the particular circumstances of each case, subject to the common law criteria of materiality. These criteria have the effect of prohibiting some considerations from being material, including, as the present case demonstrates, off-site benefits which do not serve a planning purpose relating to the use of the land. However, the criteria also create an indefinite range of considerations that are *capable* of being material. For example, a decision-maker may have regard to evidence showing that certain kinds of uses (eg payday loan shops, fast food outlets, etc) are having socially negative effects within a given area. The decision-maker may consider that the concentration of such uses within that area should be limited. The law does not necessarily require that such evidence or limitation be material, but the decision-maker may nevertheless be entitled to treat it as such.

If a consideration is capable of being material, then the question arises whether it should be taken into account in a particular case. One line of case law holds that this is a decision for the courts (see, eg, *Bolton MBC v Secretary of State for the Environment* [1991]).

Another line of case law holds that it is a decision for the decision-maker exercising planning judgement, subject to court supervision on *Wednesbury* grounds (see Cooke J's judgment in *CREEDNZ Inc v Governor General* [1981], approved by Lord Scarman in *In Re Findlay* [1985] and applied to planning cases by, eg, *R v Secretary of State for Transport ex p. Richmond-upon-Thames LBC* [1994]. For a fuller discussion on this issue, see: Williams, R, 'From *CREEDNZ* to *Cumberlege*: a review of the law on material considerations', *JPL* 2017, 12 1358-1365).

If the former line of case law is correct, then the courts have extensive jurisdiction (arguably extending into matters of planning judgement). If the latter line of case law is correct, then decision-makers have greater freedom (or less potential interference from the courts) in identifying material considerations, including determining whether a consideration serves a planning purpose related to the character and the use of the land and is fairly and reasonably related to the land.

This matter was not directly in issue in the present case, and the Supreme Court did not explore it. However, the court's insistence that 'what qualifies as a "material consideration" is a question of law' arguably suggests a narrower role for planning judgement in dealing with considerations capable of being material. If that is the position, then the planning system may find it difficult to respond effectively to changing economic, social and environmental circumstances.

Conclusion

Developers and LPAs will need to approach off-site benefits carefully, even if there is policy support for those benefits or they are presented as an important feature of a 'community-led' scheme. However, such benefits are not necessarily excluded from the scope of material considerations. Much will depend on showing that a benefit pursues a planning purpose *relating to the use of the land*. While this criterion is tougher than a planning purpose *per se*, there may still be room for broad interpretation, especially in relation to considerations that do not represent off-site payments/benefits. Unless new legislation provides clarification, we will need more judicial consideration of the criteria of materiality to better understand what must/can and cannot be taken into account. ■

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Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd
[2017] UKSC 66

Bolton MBC v Secretary of State for the Environment
(1991) 61 P&CR 343

CREEDNZ Inc v Governor General
[1981] 1 NZLR 172

East Barnet Urban District Council v British Transport Commission
[1962] 2 QB 484

In Re Findlay
[1985] AC 318

Newbury District Council v Secretary of State for the Environment
[1981] AC 578

R v Hillingdon London Borough Council, ex p Royco Homes Ltd
[1974] QB 720

R v Secretary of State for Transport ex p Richmond-upon-Thames LBC
[1994] 1 WLR 74

R (Copeland) v London Borough of Tower Hamlets
[2010] EWHC 1845 (Admin)

R (on the application of Wright) v Resilient Energy Severndale Ltd & anor
[2019] UKSC 53

Westminster City Council v Great Portland Estates plc
[1985] AC 661