Supreme Court ruling confirms community benefits breach of land use planning legal principles

In a landmark, but perhaps not altogether surprising decision, the Supreme Court has passed judgement that community benefits offered with new development proposals, including community ownership, do not qualify as material considerations for the purposes of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. EIA practitioners now have confirmation that such benefits should not comprise an element in socio-economic assessments incorporated into EIAs.

The case of *R (on the application of Wright) (Respondent) v Resilient Energy Severndale Ltd and Forest of Dean District Council (Appellants)* (November 2019) was brought by a local resident against the decision of Forest of Dean District Council to grant permission to a 500kW wind turbine at a farm in Tidenham, Gloucestershire in 2016. A challenge to the decision was originally upheld by the High Court in 2016, which quashed the permission. The Court of Appeal subsequently ruled in January 2019 that the planning authority had wrongly treated a pledge by operator Resilient Energy Severndale to give £600,000 plus four per cent of expected turnover to the local community as a material consideration, and this judgement has now been reinforced by the highest court in the UK, the Supreme Court.

The Supreme Court judges ruled that the consideration of community benefits in making the decision was a breach of the "Newbury criteria", outlined in a 1981 House of Lords judgement, and that the Council acted unlawfully.

The Newbury criteria held that decisions on new planning applications should be based solely upon materially relevant planning considerations, principally those within the local development plan and national planning policy guidance. Therefore, even where additional considerations may lead to a greater public good, if they are not included in the development plan and where they do not meet the legal tests of materiality, they should be disregarded. This arose despite the intervention of the Secretary of State for Housing, Communities and Local Government in support of the Defendant, who made submissions inviting the Court to "update Newbury to a modern and expanded understanding of planning purposes", but such an intervention was not accepted by the Court. The Court found it was for Parliament alone to consider whether to expand the range of factors which could be treated as material.

As we are aware, a material consideration is a matter that should be taken into account in deciding a planning application or on an appeal against a planning decision. Material issues may include loss of light or overshadowing, highway safety or nature conservation, among many. However, issues such as loss of view, or negative effects on the value of properties, and community benefits are not material considerations.

It is presumed that Resilient Energy sought the Supreme Court ruling on the basis of the provision of part (c) of section 70(2) of the 1990 Act, which states:
70 (2) In dealing with an application for planning permission or permission in principle the authority shall have regard to—

(a) the provisions of the development plan, so far as material to the application,

(aa) any considerations relating to the use of the Welsh language, so far as material to the application;

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations.

The defendants no doubt sought to make a case that community benefits should be deemed material considerations and would fairly and reasonably be related to the development, and particularly under circumstances where Government policy was actively encouraging and supporting community-led renewable energy developments. This presumably led to the confusion that whilst Government policy was supportive of community renewables, planning policy itself did not deem such support as a material consideration. In this respect, Lord Sales for the Supreme Court explained that the community benefits did not meet the three principle planning tests: (1) to be for a planning purpose and not for any ulterior purpose; (2) fairly and reasonably relate to the development; and (3) must not be so unreasonable that no reasonable planning authority could have imposed them. The Court decision also reinforced the fundamental principle of the planning system that planning permission cannot be bought or sold, and that the purposes of the benefits offered by Resilient Energy were not proposed to pursue a proper planning purpose.

Pivotal to the understanding of the Supreme Court decision on materiality is the necessity for applicants, agents and EIA practitioners to comprehend that any proposed benefits have to be sufficiently connected to proposed use of the land in order to be a material consideration. The decision affirmed that the benefits in this case did not fairly and reasonably relate to the development for which permission was sought, and that they would not affect the use of the land.


References

1 Newbury District Council v Secretary of State for the Environment, 1981.