Planning Magazine

Judge overturns Jenrick's EIA ruling on 'mad cow disease' housing site due to 'lack of expert evidence'

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A ruling by the housing secretary that no environmental impact assessment (EIA) was required for the building of 20 homes on a site formerly used to bury livestock infected with 'mad cow disease' has been overturned by the High Court after a judge found the minister lacked "expert evidence" in reaching his decision.

London's Royal Courts of Justice

Thruxted Mill, Penny Pot Lane, Godmersham, near Canterbury, Kent, was one of only four sites authorised to dispose of carcasses infected with bovine spongiform encephalopathy (BSE) during the so-called 'mad cow disease' crisis in the late 1990s.

But, in August last year, the housing, communities and local government secretary, Robert Jenrick, decided that no EIA was needed before the 7.16-acre site could be developed for housing.

Ashford Borough Council's planning committee had granted outline permission for the development in November 2018, subject to conditions that required submission and implementation of a detailed site remediation scheme before work could commence.

In a screening opinion, the council said the conditions attached to the permission would address any contamination risk from the site and that remediation works would bring it "up to a standard suitable for residential use".

In ruling that no EIA was required, the secretary of state agreed that the proposed measures would "satisfactorily safeguard and address potential problems of contamination".

But Mrs Justice Lang last week upheld a judicial review challenge to that decision brought by local objector, Camilla Swire.

The judge said: "The difficulty facing the secretary of state in this case was that there was very limited evidence as to the presence and nature of contamination from BSE-infected carcasses at the site; the hazards which any such contamination might present for the homes and gardens to be constructed on the site; and any safe and effective methods of detecting, managing and eliminating any such contamination and hazards.

"The developer commissioned risk assessment and remediation reports which it submitted to the council in support of the application for planning permission.

"None of these reports made any reference to the site's former use for BSE-infected animal carcass disposal from 1998, nor any risk of contamination from such use. The authors of the reports were not even aware of this former use. In my view, the reports were very inadequate in this regard.

"The information was available in the public domain, the BSE crisis had occurred within living memory, and it was well-known in the locality, as demonstrated by the objections made by Ms Swire and others to the planning application.

"The scandal of disease transmission from BSE-infected cattle to humans (in the form of CJD), and the perceived failures by public bodies and government to prevent and control it in time, led to a public inquiry...which reported as recently as 2000.

"During this time, there was substantial media coverage of the disease, the extensive slaughter of cattle and the restrictions on the consumption of beef.

"It was so well known among the public that it acquired a colloquial nickname – 'mad cow disease'."

Only eight trial pits had been dug on the extensive site and, although no BSE contamination was found, that was "far from conclusive," the judge added.

And, if such contamination were detected, it was far from clear whether it would be enough "just to dig out the top layer of soil and replace it".

The secretary of state had not suggested that concerns about BSE contamination could be "discounted" or that the risk to human health was "negligible".

The judge told the court: "Unfortunately, although the secretary of state correctly recognised that the issue of BSE-related contamination required further investigation, assessment, and remediation of any contamination found, he then applied the wrong legal test.

"There was a lack of any expert evidence and risk assessment on the nature of any BSE-related contamination at the site, and any hazards it might present to human health. The measures which might be required to remediate any such contamination and hazards had not been identified.

"Because of the lack of expert evidence, the defendant was simply not in a position to make an 'informed judgment' as to whether, or to what extent, any proposed remedial measures could or would remediate any BSE-related contamination.

"It follows that when the secretary of state concluded that 'he was satisfied that the proposed measures would satisfactorily safeguard and address potential problems of contamination' and that 'the proposed measures would safeguard the health of prospective residents of the

development', he was making an assumption that any measures proposed...would be successful, without sufficient information to support that assumption."

She concluded: "The secretary of state's decision that EIA was not required was vitiated by a legal error. His decision in this case has important consequences – it is not merely a technical or procedural error – and therefore it must be quashed."

Last week, Jenrick suffered another legal setback when the High Court told the secretary of state to go back to the drawing board on his decision to grant consent for the 1,524- home Westferry scheme in London's Docklands, after finding that it was "apparently biased".

R on the Application of Swire v Secretary of State for Housing, Communities and Local Government. Case Number: CO/3653/2019