

NO5 CHAMBERS

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**Judicial Review of Planning Decisions – Lessons for Councils and Applicants**

**Annual Round-Up of key judgments from the Courts in the past 12 months on the process of securing planning permission at first instance<sup>1</sup>**

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1. There can be few things more frustrating for a successful applicant than to face a claim for judicial review of their hard-won grant of planning permission. Local planning authorities (“LPAs”) are often in a similar position. Most of these claims fail: many are filtered out at the ‘permission’ stage; very few succeed at a substantive hearing. But the mere fact that a claim is threatened or issued can result in weeks or months of delay to much needed development, take up time, and cause additional cost. This paper identifies some common ‘grounds’ on which these claims have been brought in the last year. Its purpose is to identify ‘pitfalls’ for applicants and LPAs alike to avoid, if they can, and offers what we hope is some practical advice by way of **take-outs**. We have divided the paper into topics.

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<sup>1</sup> We are grateful to the authors of many planning ‘blogs’ and ‘updates’ for identifying cases of interest as they are decided and commenting on them. A very good weekly update is provided by Town Legal planning solicitors which can be subscribed to at <https://www.townlegal.com/news-and-resources>.

## Topic 1 – the case officer’s report

2. The officer’s report (“OR”) is an important document. Unless there is evidence to the contrary, the Court will assume the decision followed the reasoning in it.<sup>2</sup> But in order to give grounds for an error of law, the OR but be “seriously misleading” in some material respect.<sup>3</sup> An example of “seriously misleading” advice came up in ***R (Ashchurch Rural Parish Council) v Tewksbury Borough Council [2023] EWCA Civ 101 (7 February 2023)***. The Council decided to grant planning permission for a bridge over a railway in the middle of a field. The bridge was subject to a grant from the government’s Housing Infrastructure Fund which had a spending deadline of 31 March 2022. As a result, its planning application had been brought forward in advance of the Council’s consideration of the neighbouring applications for housing development, which would rely on the bridge. The OR directed the planning committee that the harms of the associated housing developments must not be taken into account. The Court held that this advice fettered the discretion of the decision-maker to take into account something which it might regard was material and was therefore unlawful.

**Take-out:** officers should beware of directing a committee not to take something into account. Better to take it into account and give it no / very little weight (which is lawful)<sup>4</sup>.

3. Another example. In ***R (Kinsey) v London Borough of Lewisham [2022] EWHC 1774 (Admin) (11 July 2022)*** the Council granted planning permission for the demolition of a 1970s housing estate and redevelopment to provide modern residential units. The conservation officer (“CO”) objected but the consultation response was withheld from members and the public and not listed as a “background paper”. The CO’s comments were reported in the OR, but this omitted and changed several elements of the advice as to the extent of harm that

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<sup>2</sup> *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, per Lewison LJ, at paragraph 7.

<sup>3</sup> *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at paragraph 42.

<sup>4</sup> It is well established that a decision-maker may decide to give a material factor no weight: see Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, at 780.

would be caused to heritage assets. The Court held that, as a result, members were materially misled and that their assessment might otherwise have been different. The Court declined to hold that the CO's written comments were a "background paper" for the purposes of the OR and so should have been made public.<sup>5</sup> While the Court suggested it was likely that the CO's comments were indeed a background paper, it cautioned that this decision "is the function of the proper officer [...] and the Court should not supplant his role."

**Take-out:** check that the OR is faithfully reporting consultation responses.

4. And a more cautionary tale. In ***R (Whitley Parish Council) v North Yorkshire County Council [2023] EWCA Civ 92 (3 February 2023)*** the County Council granted permission for the extraction and export of pulverised fuel ash from a site within the Green Belt, together with associated development and improvement works to local roads. The main issue in the appeal was whether the planning committee was led into error by the OR on the weight to be given to a development plan policy. The relevant provision of the development plan stated that proposals to re-work deposited waste would only be permitted where the proposals represented the "Best Practicable Environmental Option". This concept featured in national policy that was in place when the policy was adopted but not when the decision was taken. Consequently, the policy was out-of-date.

The OR advised the planning committee in more than one place that "no weight can be given" to the relevant policy. The appellant, Whitley Parish Council, argued that the OR had misled the planning committee by informing them that they could not give weight to the policy. However, the Court of Appeal held that when read sensibly in context, and without undue benevolence, the relevant passages of the OR clearly embodied the giving of planning advice, informed by planning judgment and that it could not be realistically suggested that the officer was doing anything other than this, or that the members could have thought that she was.

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<sup>5</sup> See s100D of the Local Government Act 1972.

**Take-out:** exercise caution when considering challenging ORs. The Courts will not entertain excessive legalism and the relevant statements must be clearly misleading.

5. The Public Sector Equality Duty (“PSED”). We have some authoritative and practical advice in ***R (Sheakh) v London Borough of Lambeth Council [2022] EWCA Civ 457 (5 April 2022)***. The Court of Appeal dismissed an appeal against the decision of the High Court that the Council had discharged its PSED under s149 of the Equality Act 2010 when making experimental traffic orders for three low traffic neighbourhoods (LTNs). Ms Sheakh was severely physically disabled and lived in close proximity to one of the LTNs and was unable to use public transport, relying entirely on her car for all journeys. The question for the Court was whether the Council had shown “due regard” for the considerations set out in s149.

In dismissing the appeal, the Court held that s149:

- does not require a substantive result;
- does not prescribe a particular procedure for assessment;
- implies a duty of reasonable enquiry on the decision-maker;
- requires a decision-maker to be informed of and to understand the main equality impacts (and not every conceivable impact) of a decision prior to adopting a policy / making a decision; and
- should not be investigated in an unduly legalistic way by the Courts when considering the way in which a local authority has assessed the impact of a decision on the equality needs.

In reaching its decision, the Court, at paragraphs 56-62, emphasised the importance of “facts and context”:

- how intense the “regard” must be will depend on the circumstances of the decision-making process in which the duty is engaged;

- what is “due regard” in one case will not necessarily be “due regard” in another. It will vary widely according to the circumstances of the case for example, the subject matter of the decision being made, the timing of the decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences and so forth;
- when the decision comes at an early stage in a series of decisions, and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as “due regard” is likely to be less demanding than if the decision is final or permanent especially if the decision is experimental;
- although some of the equality impacts of the LTNs could have been predicted, it is clear that there were cogent reasons for the Council to use the experiment to gather data about the impact of the scheme, good and bad, and to use that information in deciding how to balance those impacts. The displacement and re-routing of traffic might well have unintended consequences for some residents of the borough, which could not at all be predicted with confidence...such effects would emerge during the “trial run”.

**Take-out:** in a planning application context, matters which will arise only at ‘reserve matters’ approval may not require intense scrutiny at the ‘outline’ stage. Gather and consider sufficient information for the decision in hand.

## **Topic 2 – the decision-maker**

### **Delegated decisions**

6. Has the officer exceeded her/his delegated authority? This issue arose in ***R (Romeo Dance Academy Ltd) v Milton Keynes Council [2022] EWHC 475 (Admin) (4 March 2022)*** in which it was claimed that the Council failed to comply with its Scheme of Delegation (‘SoD’) when granting itself planning permission

for the change of use of part of the Old Bus Station from a youth and community centre to a night shelter for the homeless. The SoD indicated that applications should be reported to committee where they were likely to be “controversial”. The Court concluded that there was no reason to infer the Council had misunderstood its SoD and rejected the claimant’s overly forensic dissection of a contemporaneous email disclosed within which the Council officer had purportedly used the “in the public interest” threshold rather than key “controversial” threshold. The Court disagreed with the claimant’s argument that having regard to the source of the bulk of the objections being from the dance studio customers – which may have been sought or encouraged by the claimant – was an irrelevant consideration. It held that the identity, nature and source of objections were key to what the Council had to consider under the SoD which was whether the application was likely to be controversial bearing in mind the level of public interest such that it needed to be referred to committee. This case is a useful application of the well-established principle that a local authority acts unlawfully if it fails to act in accordance with its adopted SoD. <sup>6</sup> **Take-out:** the mere fact that a number of people have objected is not determinative of whether an application was “controversial” – it is a matter for officers to judge.

7. The reasons for the decision – where are they to be found? In ***R (Save Britain's Heritage v Herefordshire Council) [2022] EWHC 2984 (Admin) (25 November 2022)*** the Council gave ‘prior approval’ for the demolition of the Old School located in Garway, Herefordshire (“the School”). After the decision was issued the Council’s solicitor wrote to the claimant’s solicitor purporting to set out the reasons for the decision and the letter contained numerous errors. The Court held that the fact that the letter contradicted the Approval Decision was not relevant. The letter did not contain the reasons for the Approval Decision; these were to be found in the Delegated Report.

**Take-out:** establish where the actual reasons are to be found; don’t rely on an ‘after the event’ explanation.

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<sup>6</sup> (*R (Bridgerow Limited) v Cheshire West and Chester Borough Council* [2014] EWHC 1187 (Admin))

## In Committee

8. Due process. *R (Spitalfields Historic Building Trust) v London Borough of Tower Hamlets* [2022] EWHC 2262 (Admin) (31 August 2022) concerned a judicial review challenge to the grant of planning permission for the redevelopment of the Old Truman Brewery site on Brick Lane. The application was first considered at a meeting of the Development Committee in April, with the OR recommending approval. The Committee deferred the decision to its next meeting. The Council's constitution stated that in such circumstances no further public speaking would be allowed, (although further written representations would). Those who previously made representations were notified of the deferral, but the covering email failed to mention the prohibition of public speaking. Under the Council's Planning Code of Conduct, only those members who attended the original April committee meeting could take part and vote. As it turned out this was only 3 members, who voted in favour of the application 2:1. The Court held:

- it is the right of each committee member to vote on applications. Any restriction on such right to vote requires statutory authority. Schedule 12 of the Local Government Act 1972 allows a local authority to make standing orders for the "regulation of their proceedings and business". This should be interpreted broadly to include the exclusion of voting rights. Accordingly, the LBTH Procedure Rules were lawful;
- there is no absolute requirement to afford members of the public the right to make oral representations. The procedure adopted was fair and lawful and accorded with the LBTH Procedure Rules, which gave the Council discretion in this matter. It was not an unreasonable exercise of discretion to refuse public speaking given the public had already had a right to make oral representations, and a further chance to submit written representations.

**Take-out:** understand and follow the relevant procedure rules and act reasonably!

9. Due process – deferred decisions. In *R (Blacker v Chelmsford City Council (Rev1))* [2023] EWCA Civ 25 (17 January 2023) unusually a local resident challenged the decision of the Council to refuse to grant planning permission for a housing development. The claimant lived close to the development site, which partly comprised "brownfield" land allocated for employment use in the local plan. Part of the site was being used by a waste disposal business in a manner that breached planning control, and a substantial amount of waste had accumulated there. The OR recommended refusal, but at the initial planning committee meeting members were largely in favour of the development and resolved that they were minded to grant permission. A motion was carried to defer the decision to a future committee meeting, in accordance with the Council's constitution and Part 5.2 of its Planning Code, which required that where a planning committee wants to make a decision contrary to the officer's recommendation, "the application should be deferred to the next meeting of the Committee for consideration of appropriate conditions and reasons and the implications of such a decision clearly explained in the report back".

By the time of the second meeting, based on a further objection and further information received, various members had changed their minds, and subsequently a motion to refuse the application was carried with an overwhelming majority. The appellant argued that the committee had approved the application in principle at the first meeting and had breached the principle of consistency by changing its mind without giving proper weight to the in-principle decision. The Court held that the point of the deferral was "plainly to give the decision-maker an opportunity to stand back and think twice about the implications of going behind the recommendations of the OR before committing itself to doing so". Being "minded to grant" the permission was not a decision in itself, and the whole point of a deferral was that a decision had not yet been made – in fact the constitution prevented them from making a decision (contrary to the officers' recommendation) at the initial meeting.

**Take-out:** having the benefit of a minded to grant resolution coupled with a deferral is no guarantee an application will eventually be approved!



## Consistency

10. Absence of a relevant earlier decision. In ***Blacker v Chelmsford*** (above), the importance of consistency in decision-making meant that a previous decision to grant or refuse planning permission in respect of the same site was capable of being a material consideration on a later application. The principle of consistency required that where a decision-maker was minded to depart from a previous decision, it had to engage with the reasons for that decision and explain its departure from them. The appellant argued that the planning committee had failed to do that. However, the principle of consistency was not engaged: there had been no substantive earlier decision (see above).
  
11. Impact of decisions in the wider area. In ***R (Save North St Albans Green Belt) v St Alban's City & District Council [2022] EWHC 2087 (Admin) (4 August 2022)*** the Council granted outline planning permission for a residential development of up to 150 dwellings on land in the Green Belt. The claimants argued that the committee was under a duty to give reasons for its decision to grant permission as to why it had departed from its previous decisions refusing planning permission at the site and the reasons given in the OR were inadequate and insufficient on this issue. The Court did not consider that the Council was under a common law duty to give reasons, but held that, in any case, the lengthy and detailed OR met the standard required. An inspector had recently granted permission on appeal elsewhere in the District based on the “bleak”, “persistent”, “considerable”, “serious”, and “significant” housing land supply shortfall. The judgment contains a useful and concise explanation of the “consistency” principle at paragraphs 34-36 and the common law duty to give reasons at paragraphs 37-41.

**Take-out:** consistency continues to be a favourite ground of challenge. An OR needs to grapple with the point and explain why circumstances have changed or are different in the instant case.

12. Due process – need for a site visit? ***R (Wells) v Welwyn Hatfield Borough Council [2022] EWHC 3298 (Admin) (20 December 2022)*** concerned the retrospective grant of planning permission for the retention of an existing glazed

pool enclosure at a residential property. The claimant (whose property backed onto the garden of the property with the pool enclosure) was notified and consulted on the application. His representations, including from a planning consultant (describing the enclosure as an “aircraft hanger” and inviting a site visit) were fully considered (in line with the Council’s Statement of Community Involvement). The claimant had been told that the case officer would visit the site but the visit did not take place. A previous visit by another officer as part of an enforcement enquiry had been undertaken and the case officer had discussed the matter with him.

The Court held that there was no obligation on the Council to visit the claimant’s property before deciding the planning application. The claimant did not demonstrate (as he was required to do following the judgment in *R (Plantaganet Alliance) v Secretary of State for Justice and Others* [2014] EWHC 1662) that no reasonable decision-maker in the Council’s position could have been satisfied that it possessed the information necessary for its decision without further visiting the claimant’s property.

**Take-out:** what steps the decision-maker takes to inform itself of the facts relevant to an application is a matter on which the Court will interfere only if it has acted irrationally. The case is also useful for a succinct synopsis of the law on the contents of delegated reports, procedural unfairness, legitimate expectation, irrationality, the duty to undertake sufficient inquiry, and mistakes of fact.

13. Errors in advice by officers? In *R (Village Concerns) v Wealden District Council* [2022] EWHC 2039 (Admin) (29 July 2022) the Council granted outline planning permission for the demolition of stables and the change the use of the land to provide “up to” 205 dwellings and associated infrastructure. In committee, members were advised that the number of dwellings “is an up to number ... not fixed at 205. The reserved matters will inform that, and it could be fewer units once you take into account the [environmental] constraints” and that “205 is unlikely to be achieved.”

Dove J. held that committee members were provided with misleading advice in relation to whether the Council could insist in principle on the numbers of units

being reduced to accommodate environmental constraints at the reserved matters stage. The planning permission granted outline consent for “up to” 205 units, and an application for 205 units at reserved matter stage could therefore not be refused simply on the basis that it proposed too much development. It could only be refused if the application was not satisfactory in the sense that it did not provide the most appropriate layout for 205 units of unspecified size.

However, the Judge held that in assessing whether committee members were significantly misled leading to a legal error in their decision, it was important to first consider the written advice they received in the form of the OR and to then approach the transcripts of the committee discussion with realism, noting that these are not as carefully formulated as officer’s reports and reflect a context of debate. In the instant case the OR concluded that there was capacity both in environmental and infrastructural terms to accommodate 205 dwellings. Similarly, the committee’s observations relating to the potential capacity of the site did not conclude the site did not have such capacity, but rather indicated that the reserved matters application would further consider the landscape constraints of the site. Taking the OR as the starting point, and examining the general tenor of the committee’s debate, the Judge concluded that committee members had not been significantly misled.

**Take-out:** this is an important case for two reasons:

- it confirms that an “up to” outline permission means that a LPA is not entitled in principle to refuse to approve a scheme which lies within the “up to” figure. But that does not mean the applicant’s housing mix must be accepted. A site may need to include a significant number of smaller dwellings to satisfactorily deliver the “up to” figure; and
- the starting point for the officer’s advice is the OR. What is said in debate needs to be read in that context. However, it will assist if officers in debate do not contradict what they say in the OR unless they are intending to correct an error in the OR and make that very clear.

### Topic 3 – towards the issuing of the planning permission

14. Waiting for call-in. In ***R (Goesa Ltd) v Eastleigh Borough Council [2022] EWHC 1221 (Admin) (23 May 2022)*** a campaign group challenged the Council's decision to grant planning permission to Southampton International Airport Limited ("SIAL") for a 164-metre extension to a runway and the reconfiguration and enlargement of a long-stay car park. The claimant's first ground was that there it had a legitimate expectation that the permission would not be issued until the Secretary of State ("SoS") had fully had time to decide whether to call-in the application. It relied on the Council's statement that the Planning Casework Unit ("PCU") had received several requests for the SoS to consider calling-in the application and that the PCU had asked the Council not issue the permission until the SoS had decided whether to call it in.

The Court held that this announcement did not contain any clear, unequivocal representation that the decision notice would not be issued until the SoS had decided whether to call in the application irrespective of the length of time that might take. The Court was satisfied that the Council had allowed the SoS time to consider the case when it granted the permission over 7 weeks later, and also that the Council made it plain that it was not agreeing to any further delay beyond May 2021.

**Take-out:** (1) read any assurance from a LPA on this issue very carefully; (2) if you want certainty, get the PCU to give a 'holding direction'.

15. Referring back to committee. ***R (Hardcastle) v Buckinghamshire Council [2022] EWHC 2905 (Admin) (16 November 2022)*** concerned a challenge to the grant of outline planning permission for up to 170 dwellings. In 2019, the committee resolved to grant permission subject to completion of a s106 agreement and the conditions which planning officers considered appropriate. In November 2020, the application was referred back to the committee. The OR stated that work had been progressing on the s106 agreement, work on the local plan had also progressed such that a number of policies within that plan could be given greater weight in decision making but recommended that the application be deferred and delegated to officers for approval subject to certain matters,

which the committee accepted. The local plan was adopted in September 2021 allocating the site for 170 dwellings. The developer submitted a revised biodiversity net gain (BNG) assessment in February 2022, noting that to demonstrate that the proposals could provide a 10% net gain to biodiversity, the development area had been reduced. In March 2022, a planning officer considered that it was not necessary to refer the matter back to the committee as there was no new material which could affect or change its decision, and granted permission under the delegated powers.

The claimant argued that the reduction of developable area resulting from the developer's new BNG proposals was a material consideration as it could result in a reduction in the number of dwellings that could be built on site and the relevant Local Plan policy required the site to be developed for at least 170 dwellings. But the Court held that a material consideration is a consideration which the rational decision-maker would regard as "so obviously material" that it must be taken into account. The changes were not ones that a rational decision-maker would regard as so obviously material that the committee might have reached a different conclusion on the grant of permission if they had known. There was therefore no need to refer the matter back to committee.

**Take-out:** not every change is one which is so material as to require reference back to the committee. It is a matter for officers to judge.

#### **Topic 4 – s106 obligations**

16. In accordance with the resolution? In ***R (Whiteside) v The Council of the London Borough of Croydon [2022] EWHC 3318 (Admin) (21 December 2022)*** the Council granted consent for the erection of three two-storey buildings comprising of seven residential units. The s106 agreement secured a contribution of £10,500 for improvements and enhancements to sustainable transport measures. The s106 Agreement did not require the financial contribution to be applied to the provision of a free three-year membership to a car club scheme, as has been set out in the OR. The claimant challenged the

grant of the permission on the grounds the s106 Agreement did not specify that free car club membership would be provided to occupants. The claim failed on the basis that although the defendant's transport team had recommended the membership of a local car club in their consultation response and the officer's report did refer to the provision of such membership, the resolution made by committee members themselves did not explicitly require it. Such membership was not a policy requirement, unlike other measures that the financial contribution was expressly referred to as being provided for.

**Take-out:** read the resolution carefully!

17. Evidence of how financial contributions have been calculated – an apparently simple case. In ***R (Whiteside)*** (above) the claimant's case was also that there was inadequate evidence as to how the figure of £10,500 towards sustainable transport measures was calculated, and how it was to be spent, in breach of reg122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations"). The OR said they would include, but not be limited to, on-street car clubs and electric charging points. The Judge held that although the claimant was correct that the planning committee had not been informed as to how the £1,500 had been arrived at and how exactly it was to be spent, members of the committee were to be taken as being aware of the sort of contribution being required in similar applications across the Borough and they must simply have been satisfied that such contribution reasonably related in scale and kind to the proposed development of 7 residential units.

**Take-out:** a pragmatic approach by the Judge in the case of a relatively small contribution (£1,500 per unit).

18. Evidence of how financial contributions have been calculated – a much more complicated case. In ***R (University Hospitals of Leicester NHS Trust) v Harborough DC [2023] 263 (Admin) (13 February 2023)*** the NHS Trust ("the NHST") challenged the Council's decision to grant planning permission for up to 2,750 dwellings and associated development on land allocated as a strategic development area in the local plan.

The NHST was responsible for providing acute services to clinical commissioning groups (CCGs) for residents in the area. From the 2020/21 financial year, CCGs paid for the NHST's services under a block contract providing for payment by way of a fixed sum regardless of the number and type of activities undertaken by it. The NHST's block contracts lasted for one year and were re-negotiated at the end of that year. The funding paid by a CCG was based on locally agreed planned activity which was informed by the previous year's activity; if the activity during the year of a block contract was greater than that which was assumed in arriving at the lump sum figures, the NHST was not entitled to a retrospective additional payment.

The NHST averred that for the first financial year after the proposed development began, any treatment it would provide for a "new resident" would not be accounted for in the funding agreed under the block contract for that year. It indicated that it was already operating at full capacity, and that an increase in residents created by the development would affect overall patient waiting times and have an adverse impact on the health of the community. The NHST accepted that when the block contract comes to be re-negotiated for the next financial year, the baseline population used in arriving at a revised lump sum figure would take into account new residents who have arrived at some point in the previous financial year. The NHST applied for the payment of a contribution of around £914,000 to provide funding for additional staff, drugs, materials and equipment to mitigate that impact. The figure was based on 210 or so new homes in any one year resulting in about 575 additional persons on the site, of whom the NHST said 38.5% would be new to its area, or 221 persons. That figure was about 0.02% of the persons already living within its catchment.

The Council declined to require such a contribution on the grounds that the NHST failed to satisfy the authority that population growth is not, or could not be, taken into account in the negotiations between the Trust and the CCGs each year. It considered that *inter alia* insufficient information had been provided by the Trust to demonstrate the funding gap which was said to give rise to the harmful consequences relied upon by the Trust, so as to justify the contribution sought. This was despite the considerable efforts made by the Council to understand the

NHST's position, which included obtaining advice from two leading counsel, including one with expertise in the NHS and its funding arrangements.

Holgate J. held:

- the claim that the Council had wrongly excluded health services (in contradistinction to physical infrastructure) contributions as a material consideration was rejected;
- the NHST's argument that how it was funded was irrelevant was dismissed as unsustainable;
- the case turned on whether the NHST had shown that there would be a 'funding gap' and if so, how big it would be;
- the Council said it had not provided sufficient information and so it could not be said that a contribution was "necessary" for the purposes of reg 122. These were matters of planning judgment for the Council;
- however, in deference to the other arguments advanced by the NHST, Holgate J. decided (although strictly *obiter*):
  - where, for example, a development would itself cause direct harm to a public facility, so that the three tests in CIL reg122 are satisfied, the local planning authority would be entitled to require the developer to mitigate that harm irrespective of whether the authority responsible for that facility is able to raise taxes or has borrowing powers.
  - the justification advanced by the NHST for a s106 contribution needs to be seen in the context of the statutory framework for the provision of secondary health care services. The contribution would relate to people who are new to the NHST's area. But those people are entitled to such services wherever they may live in the country. They would be so entitled if the development were to be refused planning permission and so they did not move to the NHST's area. The relevant CCG for the area in which they live would remain under a statutory



duty to arrange for the provision of the same treatment as would otherwise be provided by the Trust. The obligation to provide, and financial responsibility for, those services lies with the NHS.

- the question therefore arises how could an applicant for planning permission for a new development be required lawfully by a system of land use planning control to contribute to the funding of treatment within the NHS? It is well established that planning permission cannot be bought and sold, for example, by making a payment for community purposes unrelated to the development authorised. Furthermore, planning legislation does not confer any general power to raise revenue for public purposes (see e.g. *Attorney General v Wilts United Dairies Limited* (1921) 37 TLR 884 ; (1922) 38 TLR 781 ; *McCarthy & Stone (Developments) Limited v Richmond London Borough Council* [1992] 2 AC 48 ).
- ordinarily a resident of the development at East Lutterworth who had moved to the Trust's area would previously have been the responsibility of a CCG elsewhere in the country. So, it has not been suggested that the development would increase the burden on the NHS in England as a whole.
- but what if in a future case a NHS trust could demonstrate that it would suffer a funding gap in relation to its treatment of new residents of a development during the first year of occupation? On one level it would be a matter for the judgment of the local planning authority as to whether the three tests in reg122 are satisfied and whether it would be appropriate to require a financial contribution to be made, after taking into account other requirements and any impact on the viability of the scheme. But all that assumes that there is no legal (or other) objection to a contribution of the kind sought in the present case. The argument in this case does not enable the Court to decide that issue as a legal question. This judgment should not be read as deciding that there would be no legal objection.

- a local funding gap would only arise if funding for the relevant NHS trust did not adequately reflect a projected increase in population and/or the national funding system did not adequately provide for a timely redistribution of resources. Population projections will involve some areas of out-migration as well as areas of net in-migration. It is therefore significant that CCG funding across the country takes into account ONS population projections. Accordingly, in the distribution of national funds there may be increases or decreases in funding for individual CCGs by reference to size of population.

Therefore, the Judge said:

“150. It seems to me that two points follow. First, even if it could be shown in a particular area that there is a funding gap to deal with "new" residents, HDC was entitled to raise the possibility that this is a systemic problem in the way national funding is distributed. Although the Trust criticised HDC for taking it upon themselves to raise this point, it strikes me as being a perceptive contribution to a proper understanding of the issue. If there really is a systemic problem, this may raise the question in other cases whether it is appropriate to require individual development sites across the country to make s106 contributions to address that problem. However, for the purposes of dealing with the present challenge, HDC's decision rested on the Trust's failure to show that there was a funding gap in this case, not any systemic issue.

151. Second, whether there is a lack of funding for a Trust to cope with the effects of a substantial new development is likely to depend not on those effects in isolation, but on wider issues raised by the population projections used as one of the inputs to determine funding for CCGs. The interesting arguments from counsel in this case suggest that these issues merit further consideration as a matter of policy outside the courts and even outside the planning appeal system.”

**Take-out:**

- whether there is a “funding gap” is a matter of planning judgment for the LPA based on the evidence submitted by an NHST. Whether the evidence is sufficient to justify (a) any contribution, or (b) the particular contribution sought is also a matter of planning judgment for the LPA;
- any “funding gap” can only arise locally. There is no “gap” for the NHS nationally. If there is a ‘systemic’ problem in national funding of the NHS in respect of the ‘model’ adopted, it will be open in other cases to decide whether it is appropriate to require individual development sites across the country to make s106 contributions to address that problem, including the wider issues raised by the population projections used as one of the inputs to determine funding for CCGs. These issues merit further consideration as a matter of policy outside the Courts and even outside the planning appeal system;
- in any event, it is also open to an LPA to decide, in its planning judgment, whether it would be appropriate to require a financial contribution towards any accepted ‘funding gap’ to be made after taking into account other requirements for s106 contributions and any impact on the viability of the scheme;
- watch this space! There is a further case in the pipeline – ***Worcestershire Acute Hospitals NHS Trust v Malvern Hills DC & ors, CO/4577/2022*** – in which some of the undecided issues arise.

## Topic 5 – substantive issues

### Interpretation vs application of policy

19. Interpretation of “immediately adjacent” in a development plan policy. In ***Corbett v Cornwall Council [2022] EWCA Civ 1069 (27 July 2022)***, the Court of Appeal considered whether the Council misinterpreted and misapplied a development plan policy and in particular the concept of development “immediately adjoining” a settlement. Sir Keith Lindblom SPT, in his judgment with which the rest of the Court agreed, said that the words “immediately adjoining” in the context of the

policy should not be given an unduly prescriptive meaning. He said that the words did not necessarily mean “contiguous”, or “next to”, or “very near” and allowed the decision-maker to judge, on the facts of a particular application, whether the site and proposed development could be regarded as sufficiently close to the settlement in question so as to be “immediately adjoining” it. This, the Judge said, is what the Council did.

Sir Keith Lindblom SPT further observed that the policy was permissive towards certain kinds of housing development that had a specific physical and functional relationship a settlement and that the expression “immediately adjoining” had to be understood in this context. The extent of the existing settlement, and how the site and proposal related to it, he said, were quintessentially matters of fact and judgment for the decision-maker. He further said that the broader meaning attributed to the words “immediately adjoining” was further supported by the context in the policy as well as other policies within the development plan. Consequently, there had been no error of law.

**Take-out:** In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, Lord Hoffmann said (at p.780) that many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. The use of the words “immediately adjacent” in the relevant policy in ***Corbett*** provides such an example. Further, it is important to note that the Court of Appeal considered the meaning of these words within a particular policy context. While they might have the same meaning in another policy context, they might not.

20. Interpretation of tree protection development plan policy. In ***R (Plant) v Lambeth London Borough Council*** [2022] EWHC 3079 (Admin) (02 December 2022), the High Court considered the meaning of a development plan policy concerned with the account that should be taken of trees when considering development proposals. The policy included a cascading series of requirements and exceptions. Paragraph (C) of the policy required the retention of significant trees, but paragraph (G) stated: “Where it is imperative to remove trees, adequate replacement planting will be secured.” The claimant argued that the Council had misunderstood paragraph G as meaning that the policy allowed the removal of

any tree for a development provided that its value was replaced and that the policy still required that significant trees be retained. The use of the word “imperative”, the claimant argued, simply required consideration of whether a development required the removal of a particular tree and not invite a balancing exercise where the importance of the scheme was weighed against the value of the tree.

The Judge, Timothy Corner KC, sitting as a Judge of the High Court, said that the claimant’s interpretation was unrealistic and that there was no justification within the policy for an approach whereby the only relevant consideration for deciding whether removal was “imperative” was whether a tree was “in the way”. He further said that the use of the emphatic word “imperative” reinforced his view that wider considerations could indeed be relevant.

**Take-out:** This case concerns the interpretation of a particular policy in a particular development plan. Of particular note, however, is the judge’s view that the claimant’s interpretation was “unrealistic”. Policies are not academic treatises, but utilitarian texts designed for practical application.

## **Nutrient neutrality**

21. Role of LPA in making evaluative judgment when carrying out and appropriate assessment. ***R (Wyatt) v Fareham Borough Council (Rev1) [2022] EWCA Civ 983 (15 July 2022)*** was concerned with a challenge to the Council’s application of Natural England’s (“NE’s”) nutrient neutrality advice for the Solent when deciding to grant outline planning permission for the construction of eight new houses. The site was near to the River Hamble and the Solent and Southampton Special Protection Area (“the SPA”), a European protected site.

As well as being the relevant local planning authority, the Council was the “competent authority” for the purposes of reg7 of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”). In its role as competent authority, the Council was required by reg63 of the Habitats

Regulations (“regulation 63”) to undertake an “appropriate assessment” to ensure that the development would not adversely affect the integrity of the protected site.

In carrying out the appropriate assessment, the Council had regard to guidance published by NE concerning “nutrient neutrality” under s4 of the Natural Environment and Rural Communities Act 2006. Natural England was consulted as statutory consultee under reg63(3) and had no objection to the Council’s approach.

Mr Wyatt, the Chairperson of a local objectors’ group, did object, though, and challenged the Council’s decision to grant planning permission in the High Court. While the Judge, Jay J, was critical of some aspects of the NE Advice and of the approach taken by the Council, he concluded that it was appropriate to consider the issue on a *Wednesbury* basis and said that it was inappropriate for him to intervene.<sup>7</sup> As to whether the Council had discharged its duty under s38(6) of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) (“the s38(6) duty”), while the Judge was critical of the OR in some respects, he said that the duty had been discharged.

The Court of Appeal held that the Council did not fail to perform its duty under reg63. It said that the duty required the Council to make an “evaluative judgment” as “competent authority” and that the conclusion it had reached as a matter of evaluative judgment was legally sound. In his judgment, with which the rest of the Court agreed, Sir Keith Lindblom SPT did not fault the approach taken by the Judge in the High Court below and confirmed that the duty of the Court was to ensure that the Council’s evaluative judgment was lawfully exercised. He further said that while the officer’s assessment in the OR “may, in part, be infelicitously

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<sup>7</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Lord Green MR gave three conditions on which it were possible for the court to intervene to correct an administrative decision, which included (at p.230) that the decision was “so unreasonable that no reasonable authority could ever have come to it.”

expressed”, he did not accept that it was unlawful and said that there was no failure to comply with the s38(6) duty. Consequently, the appeal was dismissed.

**Take-out:** In relation to the reg. 63 duty, the NE Guidance that was considered in this case no longer applies as NE has issued further guidance on nutrient neutrality. However, the way in which the Court approached the issue remains relevant. Sir Keith Lindblom SPT emphasised in his judgment that the role of the Court was not to perform the authority’s evaluative judgment, but to determine whether that judgment was lawfully exercised deploying the *Wednesbury* standard of review. Further, the judgment serves as a reminder that guidance is not statute and that an LPA can (and sometimes should) depart from it where there is good reason for doing so.

As to the criticism of the OR, this judgment again demonstrates the reasonable benevolence with which the Courts will read such reports (see above). Both the High Court and the Court of Appeal were critical of aspects of the OR, but ultimately the challenge failed.

## Noise

22. Assessing a fallback position where a statutory nuisance exists. In ***R (James) v Dover District Council [2022] EWHC 961 (Admin) (28 April 2022)*** the claimant, Ms James, sought judicial review of the decision of the defendant LPA to grant planning permission for the interested party to develop its race circuit in an Area of Outstanding Natural Beauty (“AONB”). There had been concerns about noise and the Council had taken action under the Environmental Protection Act 1990 (“EPA 1990”) including serving a noise abatement notice (which was then revised in a further notice) on the basis that noise levels constituted a statutory nuisance.

The claimant’s primary ground of challenge was that the Council had erred in law by considering the existing level of noise as a fallback position against which to judge the application despite being aware that the abatement notice had failed

adequately to control the noise or abate the nuisance. She argued that the Council should have instead taken enforcement action to control the nuisance.

In the High Court, Lang J considered the purpose of paragraph 183 of the NPPF 2019 (now paragraph 188) and said that it was to avoid needless duplication between the two schemes of statutory control where the pollution control regimes operate parallel to the planning regime. The Judge said that regardless of whether there had been any proceedings under the pollution control regime, the planning decision-maker should assume that the regime would operate effectively in the future. However, she said that where proceedings had taken place under the pollution control regime, these will be a material consideration which the planning decision-maker had to consider and take into account. Thus, the Judge said, the Council had been correct to take the view that the proceedings under the EPA 1990 and the abatement notices were a material planning consideration which the Council had to consider.

As to the Council's consideration of the existing use as a fallback position, Lang J held that it had been entitled to do so. She said that the planning officer had correctly identified the fallback position as the position which existed currently under the existing planning permission and the existing revised abatement notice. Consequently, the Judge rejected the claimant's argument that the officer should have considered what was necessary to abate the nuisance. Such an approach, she said would not have been a fallback position, nor would it have been consistent with paragraph 183 of the NPPF (2019).

Finally, in considering a further ground which was concerned with noise impacts on the AONB, the Lang J confirmed that paragraph 172 of the NPPF (2019) – now paragraph 176 of the NPPF – which affords protection to AONBs, did not require permission to be granted only for development that reduces noise impacts to levels that are not a statutory nuisance, or below Significant Observed Adverse Effect Levels, let alone to zero.

**Take-out:** Where a statutory nuisance is alleged to exist on a site, it may be convenient to both the LPA and the owners to resolve the issue by the granting of a further planning permission that resolves the issue through the imposition of



new planning conditions. Nevertheless, **James** demonstrates that it is important not to confuse the separate statutory processes. An LPA is entitled to consider the existing situation as a fallback position and is not required to consider what might abate the nuisance in the future.

### **Schemes under conditions**

23. Considering reasonableness when interpreting conditions. In ***R (Cathie) v Cheshire West and Chester Borough Council* [2022] EWHC 2148 (Admin) (12 August 2022)** the claimant, Mrs Cathie, lived with her husband in a dwelling which was formally part of a farm owned by the interested parties. The defendant LPA had granted retrospective conditional planning permission for a reception pit and slatted yard at the farm. Condition 2 to that permission required the submission of an odour management plan (“OMP”). The interested parties submitted an OMP and the Council discharged the condition. The claimant then challenged the Council’s decision to do so.

Of particular interest, is the approach taken by the Judge on the interpretation of Condition 2. He referred to the “six tests” set out in the Government’s Planning Practice Guidance concerning the imposition of conditions and concluded that the condition should be read so as to impose no more than “reasonable” obligations on the interested parties. As a consequence, the Judge held that the Council was not only entitled but required to interpret the condition so that it did not impose a disproportionate or unjustifiable financial burden on the interested parties and that it did not therefore consider immaterial considerations by taking into account the interested parties’ business model and financial circumstances.

**Take-out:** The interpretation of planning conditions has been considered more than once in the past few years by the Supreme Court. This application of the concept of reasonableness and could have implications beyond the discharge of planning conditions. For instance, the authorities suggest that a Court is entitled to consider the validity of a planning condition in a prosecution brought under s.187A for the breach of a breach of condition notice. In this context, the

implication of **Cathie** would appear to be that a Court could consider not only whether the condition itself was reasonable, but to consider reasonableness when interpreting it.

## CIL

24. Implications of issuing a revised CIL liability notice. In ***R (Braithwaite and Melton Meadows Properties Ltd) v East Suffolk Council*** [2022] EWCA Civ 1716 (21 December 2022), the appellant developer had formally assumed liability for CIL and a CIL liability notice together with a demand notice were issued in June 2020. After the appellant failed to pay the first instalment in time, a revised demand notice was issued including a surcharge for late payment. The appellant appealed against the surcharge to the Secretary of State, whose Inspector allowed the appeal for reasons including that the Council had failed to issue the liability notice as soon as practicable after the day on which planning permission first permitted development as required by reg65(1) of the CIL Regulations. In response, the Council issued further liability and demand notices in September 2021. The appellant attempted to challenge these by means of judicial review, but permission was refused in the High Court. The appellant then appealed to the Court of Appeal.

The appellant's arguments were the same in both the High Court and the Court of Appeal. It argued that a) the liability notice issued in 2021 ("the 2021 liability notice") was not a revised liability notice under reg65(5), but a very late liability notice served some two years and seven months after the relevant planning permission had been granted and that b) in any event, by reg65(8) (which provided that any earlier notice "ceases to have effect") the liability notice issued in 2020 ("the 2020 liability notice") was rendered ineffective when the 2021 liability notice was issued.

The Court of Appeal said that it was trite law that a decision issued by a public authority is legally valid until quashed by the Court. Applying that to the facts of the matter before it, the Court held that the 2020 liability notice, notwithstanding

its defects, remained valid as it was never quashed. This meant, the Court said, the grounds for a claim for judicial review arose when the 2020 liability notice was issued. Further, the Court said that while a liability notice “ceases to have effect” once a revised notice is issued, this does not mean that it became a nullity upon the issuing of the later notice. Thus, the grounds for challenging the 2020 liability notice arose in June 2020 and the Court said that there was no good reason for extending time.

**Take-out:** This case emphasises the general public law principle that a decision is valid unless or until it is challenged. In the planning context this often arises in cases where a permission has been granted in error. The judgment further emphasises the reluctance of the Courts to extend time to bring a judicial review claim. The Court of Appeal noted that, even if there is a good reason for extending time under CPR r.3.1(2)(a), the Court still retains a discretion either to refuse permission to bring the claim or to refuse a remedy under s. 31(6) of the Senior Courts Act 1981.

25. Self-build exemption & retrospective permissions. In ***Gardiner v Hertsmere Borough Council & Anor [2022] EWCA Civ 1162 (16 August 2022)***, the claimant self-builder obtained planning permission for the partial demolition of a bungalow and the construction of an extension to it. As a qualifying self-build development, he was entitled to an exemption for liability for paying CIL. However, the claimant did not build out the development according to the plans and was therefore required to apply for retrospective planning permission. While retrospective planning permission was granted, the Council argued that the claimant was not entitled to the self-build CIL exemption. In the High Court, Thornton J agreed with the Council’s interpretation of the regulations and held that the exemption was not available to the claimant. She further noted the policy advantages that that this might discourage breaches of planning control, but would neither remove nor weaken the incentive for self-build housing development. **Take-out:** If contemplating self-build development there is a clear incentive for obtaining planning permission first!

## Topic 6 – and finally...

26. A niche brand new pitfall: ***Arnold White Estates Ltd v The Forestry Commission*** [2022] EWCA Civ 1304 (6 October 2022). Where a developer had obtained a felling licence subject to a re-stocking condition, the Forestry Commission had not acted unlawfully or irrationally in maintaining and enforcing a notice issued under s24 of the Forestry Act 1967 notwithstanding that the developer had obtained outline planning permission to redevelop the site in a way inconsistent with the requirements of the re-stocking condition. There was nothing in the Forestry Act or the planning legislation to suggest that a subsequent grant of outline planning permission automatically trumped an extant felling licence or the conditions imposed on it, nor was there any provision in the Forestry Act which either compelled or empowered the Commission to amend or withdraw a s24 enforcement notice.

**Take-out:** when applying for a felling licence or in responding to an enforcement notice remember to 'carve out' an exception that will allow a planning permission to take precedence. This is a matter which requires the urgent attention of parliament.

27. Time limits for JR. In ***Arnold White Estates Ltd*** (see above), not only did the Court of Appeal hold that the Forestry Commission had not acted unlawfully, it further held that the judicial review claim was out of time. While it was argued that the claim for judicial review was ostensibly directed at the Forestry Commission's refusal to withdraw the s.24 notice in correspondence, the real grievance of Arnold White Estates Ltd was with the Forestry Commission's earlier decision to issue the s.24 notice.

**Take-out:** when considering bringing a claim for judicial review, it is important to focus on the appropriate decision. As in ***Braithwaite and Melton Meadows Properties Ltd*** (see above), the Court refused to entertain a challenge to a decision when the real grievance was against an earlier decision. It has further already been observed in that other case how difficult it is to persuade a Court to

extend time to bring a judicial review claim. Thus, when a controversial decision is made, it is important to act swiftly to obtain legal advice and then to bring challenge within the relevant time limit, remembering that this is 6 weeks for most planning claims.

28. Discretion: outcome the same? There are some interesting comments on the application of the “highly likely” test under s.31(2A) of the Senior Courts Act 1981 in ***R (Tesco Stores Ltd) v Allerdale Borough Council [2022] EWHC 2827 (Admin) (08 November 2022)***. This test requires that relief be refused ‘if it appears...to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred’. In this case, the Fordham J did not need to apply the test as the claim for judicial review failed. However, he said that he would have found it “quite impossible to have the high degree of confidence needed to dismiss this claim” having regard to the test, noting factors including his inability to exercise planning judgments.

**Take-out:** notwithstanding the successful reliance on this test by defendants, including in cases such as *R (Advearse) v Dorset Council [2020] EWHC 807 (Admin)*, the Judge has provided a reminder that it can be a difficult test to satisfy.