



Neutral Citation Number: [2025] EWHC 3191 (Admin)

Case No: AC-2024-CDF-000142

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**WALES DISTRICT REGISTRY**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 04/12/2025

**Before :**

**THE HONOURABLE MR JUSTICE MOULD**

**Between :**

**SAVE BRISTOL GARDENS ALLIANCE LIMITED**

**Claimant**

**- and -**

**BRISTOL CITY COUNCIL**

**Defendant**

**-and-**

**BRISTOL, CLIFTON AND WEST OF ENGLAND  
ZOOLOGICAL SOCIETY**

**Interested  
Party**

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**Paul Brown KC and Leon Glenister** (instructed by **Leigh Day**) for the **Claimant**  
**Michael Bedford KC and Robert Williams** (instructed by **Bristol City Council Legal  
Services**) for the **Defendant**  
**Peter Goatley KC and Sioned Davies** (instructed by **DAC Beachcroft LLP**) for the  
**Interested Party**

Hearing dates: 7<sup>th</sup> and 8<sup>th</sup> May 2025  
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## **Approved Judgment**

This judgment was handed down remotely at 3pm on Thursday 4 December 2025 by  
circulation to the parties or their representatives by e-mail and by release to the National  
Archives.

.....  
**MR JUSTICE MOULD**

## MR JUSTICE MOULD :

### Introduction

1. This is a claim for judicial review of planning permission granted on 28 June 2024 [**“the planning permission”**] for the redevelopment of Bristol Zoological Gardens, Guthrie Road, Bristol [**“the site”**]. The development authorised by the planning permission [**“the development”**] was described in the decision notice as redevelopment of the site to include 196 residential units (Class C3), the provision of community floorspace (Class E, F1 and F2), and open space with associated landscaping, play space, parking, accesses (pedestrian, cycle and vehicular), infrastructure, works to listed buildings and selective demolition of buildings. The planning permission was granted subject to 72 conditions. An agreement made between the Defendant, the Interested Party and HSBC UK Bank plc under section 106 of the Town and Country Planning Act 1990 [**“the 1990 Act”**] created planning obligations on the part of the Interested Party in relation to the development.
2. The planning permission was granted by the Defendant acting as local planning authority on a planning application made by the Interested Party [**“the application”**]. The application was considered by the Defendant’s Development Control Committee A [**“the Committee”**] at their meeting held on 26 April 2023. The Committee had before them a 140 page report on the application [**“the report”**] which had been prepared by the Defendant’s planning officer. In the report, the planning officer identified and addressed 13 key issues in relation to the application. The planning officer recommended the grant of planning permission subject to conditions and the completion of a section 106 agreement.
3. The Claimant is a registered Community Benefit Society whose members have a particular interest in the future of the site. The Claimant made representations to the Defendant objecting to the application on a number of grounds. Those grounds included concerns over the ecological impact of the development, its sustainability and its impact on public open space. The planning officer summarised the Claimant’s objections to the planning application in the report. Objections were also raised by the Bristol Tree Forum [**“BTF”**], who pursued a particular concern over the reliability of the assessment of the biodiversity net gain which the Interested Party claimed for the development. Another particular point of concern raised by public objection related to the claimed performance of the development against energy and sustainability standards.
4. The present claim arises out of the Defendant’s consideration of three of the key issues identified and addressed by the planning officer in the report. The issues in question are –
  - (1) The principle of development, particularly the assessment of the development under national planning policy for the protection of existing areas of open space.
  - (2) Sustainability, in particular the assessment of development’s performance against planning policy requirements for renewable energy use and carbon reduction in design.

- (3) Ecology, in particular the assessment of the development's contribution to achieving biodiversity net gain.

### **The grounds of challenge**

5. The Claimant advances three grounds of challenge in support of the claim for judicial review –
  - (1) The Defendant acted unlawfully in adopting the planning officer's advice and recommendation that the development's contribution to biodiversity net gain should be measured by applying Natural England's "Biodiversity Metric 3.0" published on 7 July 2021 [**"Metric 3.0"**].
  - (2) The Defendant acted unlawfully in adopting out of date criteria to measure the development's projected carbon dioxide emissions.
  - (3) The Defendant acted unlawfully in that the planning officer failed to advise whether the development would lead to a quantitative loss of open space, with the result that the Defendant was not in a position properly to apply national planning policy in accordance with the approach stated in R(Brommell) v Reading Borough Council [2018] EWHC 3529 (Admin) [**"Brommell"**].
6. Permission was granted on the papers by His Honour Judge Jarman KC (sitting as a judge of the High Court) on 28 October 2024.

### **Legal principles**

7. As local planning authority the Defendant has the function of determining applications for planning permission to develop land situated within its administrative area.
8. Section 70(1) of the 1990 Act empowers a local planning authority to grant planning permission on a planning application with or without imposing conditions, or to refuse planning permission. By virtue of section 70(2) –

*"In dealing with an application for planning permission ... the authority shall have regard to (a) the provisions of the development plan, so far as material to the application ...; and (c) any other material considerations"*.
9. Section 38(6) of the Planning and Compulsory Purchase Act 2004 [**"the 2004 Act"**] provides:

*"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise"*.
10. Section 38(6) of the 2004 Act requires the local planning authority determining a planning application to recognise the priority to be given to the development plan. It does not affect the fundamental principle that it is for the local planning authority to evaluate the considerations which are material to its decision whether or not to grant planning permission: see City of Edinburgh Council v Scottish Secretary [1997] 1 WLR 1447, 1458G-H.

11. In this case, the Defendant's decision to grant the planning permission was essentially founded upon the advice and recommendation of the planning officer in the report. The principles upon which the court acts when faced with an allegation that a planning committee has been misled by advice provided by officers are well known. They are summarised by Lindblom LJ in R (Mansell) v Tonbridge and Malling BC [2019] PTSR 1452 [**"Mansell"**] at [42] (omitting some cross references to other cases) –

*"The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:*

*(1) The essential principles are as stated by the Court of Appeal in R. v Selby District Council, ex parte Oxtou Farms [1997] EGCS 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in R. (on the application of Siraj) v Kirklees Metropolitan Borough Council [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance ....*

*(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge .... Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave .... The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.*

*(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact ... or has plainly misdirected the members as to the meaning of a relevant policy .... There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law .... But unless there is some distinct and material defect in the officer's advice, the court will not interfere".*

## Ground 1 – Biodiversity Net Gain

### *The policy background*

12. This ground of challenge arises in the context of the policy requirement stated in the National Planning Policy Framework (2021) [**"the Framework"**] that development should contribute to and enhance the natural environment. Paragraph 174 of the Framework included the following policy –

*“174. Planning policies and decisions should contribute to and enhance the natural and local environment by...*

*d) minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures...”.*

13. Paragraph 180 of the Framework stated the following policy principles for local planning authorities in making decisions on applications for planning permission –

*“180. When determining planning applications, local planning authorities should apply the following principles:*

*a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused...*

*d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to improve biodiversity in and around developments should be integrated as part of their design, especially where this can secure measurable net gains for biodiversity or enhance public access to nature where this is appropriate...”.*

14. The Ministry of Housing, Communities and Local Government has published planning practice guidance [**“PPG”**] on biodiversity net gain. Paragraph 001 gives the following explanation of that concept –

*“Biodiversity net gain is a way of creating and improving biodiversity by requiring development to have a positive impact (“net gain”) on biodiversity”.*

15. At the time of preparation and submission of the application, paragraph 025 of the PPG advised that –

*“[u]sing a metric is a pragmatic way to calculate the impact of development and the net gain that can be achieved. The biodiversity metric can be used to demonstrate whether or not biodiversity net gain would be achieved. It enables calculation of losses and gains by assessing habitat distinctiveness (whether the type of habitat is of high, medium or low value to wildlife), condition (whether the habitat is a good example of its type) and extent (the area that the habitat occupies). The information needed to populate this metric is taken from habitat surveys of the site before development and any related habitat clearance or management, and for the habitats proposed within the development as well as any additional habitat improvement off-site. The metric translates habitat distinctiveness, condition and extent into a score which is presented in biodiversity units. It also uses multipliers to account for risks in delivering habitat creation or enhancement. To achieve net gain, a development must have a sufficiently higher biodiversity unit score after development than before development”.*

#### *Biodiversity metrics: Metric 3.0*

16. Natural England [**“NE”**] is the statutory body responsible for the conservation and enhancement of the natural environment, including the diversity of species of flora and fauna in England.

17. In July 2021 NE published Metric 3.0 with an accompanying User Guide. NE said that Metric 3.0 was *“the culmination of more than 14 years’ work to develop a practical metric to measure gains and losses of biodiversity in England”*.
18. At paragraph 1.11 of the User Guide, NE said that when used with appropriate professional advice and ecological knowledge, Metric 3.0 enabled biodiversity to be measured in a consistent and robust way. It could be used to inform and improve planning, design, land management and decision-making. In paragraph 1.13, NE said –  
  
*“The metric can be used throughout all stages of a project or scheme, from site selection and options assessment through to detailed design. The earlier it is applied the greater the opportunities for: optimising the design to deliver net gains within the project area; determining whether the project is suitable for application of this metric; and testing whether the outcomes are as expected”*.
19. In the User Guide, NE explained how Metric 3.0 worked, the process of data collection and preparation and how to use the calculation tool. NE gave a detailed description of the metric. Chapter 7 of the User Guide gave guidance on calculating biodiversity units for urban trees, including street trees. For that purpose, urban trees included individual street trees, lines of street trees and blocks of trees within the urban setting. Categories of urban tree were defined. NE said that the size and species of trees (native or non-native) together with the intensity and type of management to which they were subject would determine their biodiversity value. Guidance was given on distinctiveness.
20. The User Guide said that for the purposes of assessing the condition of urban trees, they were split into size categories (small, medium and large) and assessed using a condition matrix which scored trees as in poor, moderate or good condition. It was important that both size and condition were recorded for each tree. Trees of the same size and condition could then be grouped together before entry into the *“Urban tree helper”* to generate an area equivalent for each condition category. The number of small, medium and large trees was then automatically converted into a total area equivalent value which could be used in the metric calculation. Box 7-1 of the User Guide set out a method for accounting for variations in the condition of urban trees when obtaining area equivalent values using the Urban tree helper.
21. Paragraph 7.12 of the User Guide explained the method for calculating areas –  
  
*“The area calculation for Urban trees is worked out using a Root Protection Area (RPA) formula. The Urban tree helper uses the RPA to generate an area equivalent value. (See table 7-2)”*.  
  
A footnote directed the reader to British Standard BS 5837: 2012 Trees in relation to design, demolition and construction.
22. Table 7-2 of the Metric 3.0 User Guide set out a method for calculating the area equivalent for urban trees by reference to the tree’s size by girth. For that purpose, trees were categorised as small, medium or large and size measurements specified for each category. Thus, a small tree was categorised as one with a diameter at breast height of 30cm, a stem diameter of 10cm and a root protection area with a radius of 1.2m. The corresponding dimensions for a medium sized tree were 90cm, 30cm and 3.6m; and for

a large tree 150cm, 50cm and 6m. For each category of tree size, an area equivalent value was given in hectares and an equivalent number of trees to an area of 1 hectare.

*Biodiversity metrics: Metric 3.1*

23. In April 2022 NE published Biodiversity Metric 3.1 [**“Metric 3.1”**], again with an accompanying User Guide. NE said that Metric 3.1 *“forms an update to version 3.0”*. NE also published a *“Summary of Changes from Biodiversity Metric 3.0 to Version 3.1”* [**“Metric 3.1 Changes Summary”**] which stated that Metric 3.1 represented –

*“a relatively small-scale change from version 3.0, primarily focusing on clarifications to guidance and revisions to conditions assessments. Except for a very small number of select habitats, the metric 3.1 update is unlikely to have a significant impact on the range of overall outputs generated. This document sets out high level changes to the guidance and metric”*.

24. Paragraph 2.10 of the Metric 3.1 Changes Summary said that chapter 7 of the User Guide had been revised to add clarity on a number of issues raised during user feedback, although the overall approach remained the same. The key points included the following –

*“Following user feedback, a range of tree diameter values has been provided to determine size”*.

25. Paragraphs 7.5 to 7.19 of the Metric 3.1 User Guide set out the approach to accounting for urban trees in that updated biodiversity metric. Paragraphs 7.9 and 7.10 explained the method for area calculation for urban trees. The area calculation was to be worked out using the Root Protection Area [**“RPA”**] formula identified and set out in paragraph 7.9, again by reference to BS 5837: 2012. Reference was made to using the Urban tree helper to generate an area equivalent RPA value where detailed measurements were unavailable. As foreshadowed in the Metric 3.1 Changes Summary, a revised Table 7-2 now categorised urban trees by size classes expressed as ranges, instead of by specified size. Thus, small trees were categorised as those with a diameter at breast of up to 30cm; medium trees were those with a diameter at breast of greater than 30cm and up to 90cm; and large trees were those with a diameter at breast of greater than 90cm. The corresponding size values for RPA radius were also revised to 3.6m, 10.8m and 15.6m respectively. The area equivalents were also revised from those stated in Metric 3.0. Table 7-2 no longer included values for stem diameter or numbers of equivalent trees to one hectare.

26. Page 18 of the Metric 3.1 User Guide stated a series of rules including -

*“Rule 4 - Biodiversity units generated by biodiversity metric 3.1 are unique to this metric and cannot be compared to unit outputs from versions 3.0, 2.0, the original Defra metric, or any other biodiversity metric”*.

27. A release note issued by NE on publication of Metric 3.1 [**“the release note”**] included the following advice to users –

*“Uses of the previous Biodiversity Metric 3.0 should continue to use that metric (unless requested to do otherwise by their client or consenting body) for the duration of the*

*project it is being used for as they may find that certain biodiversity unit values metric 3.1 generates will differ from those generated by Biodiversity Metric 3.0”.*

28. In April 2022 NE also published “Frequently Asked Questions” [**“the FAQs”**] including –

*“Which version of the Biodiversity Metric should I use?*

*You should use the most current published version of the Biodiversity Metric, unless specified otherwise by the consenting body. If a project has already begun using a previous version of the Biodiversity Metric we do not recommend changing metrics mid project, as this may result [in] discrepancies between calculations”.*

#### *Biodiversity metrics: Metric 4.0*

29. In March 2023 NE published Biodiversity Metric 4.0 [**“Metric 4.0”**], again with an accompanying User Guide. NE said that Metric 4.0 *“builds on a series of previous versions of the biodiversity metric which have been published by Natural England”*. Table 8-1 of Metric 4.0 essentially reproduced Table 7-2 of Metric 3.1, categorising urban trees by three size classes expressed by reference to diameter at breast height; and by corresponding RPA radii and area equivalents.

30. NE published a *“Summary of Changes The Biodiversity Metric 3.1 to 4.0”* [**“Metric 4.0 Changes Summary”**] which stated –

*“Metric 4.0 is a substantial update to previous versions of the metric. However, the majority of changes are focused on providing an enhanced user experience and are unlikely to have significant impact on the range of outputs generated”.*

#### *The Biodiversity Net Assessment*

31. In July 2021 the Interested Party commissioned specialist environmental consultants, The Landmark Practice [**“Landmark”**], to carry out an assessment of biodiversity net gain [**“the BNG assessment”**] in relation to the proposed development of the site. On 21 July 2021, Landmark conducted a site survey for the purpose of that assessment. Further survey data was collected on subsequent visits to the site.
32. Landmark prepared a Biodiversity Net Gain Report [**“the BNG Report”**] which set out their BNG assessment. The BNG report was submitted by the Interested Party to the Defendant in support of the application, which was validated by the Defendant on 13 June 2022. The BNG Report was subsequently issued by Landmark on 28 October 2022 in an updated form, which took account of amendments made to the proposed development and feedback from consultees.
33. In the executive summary of the BNG Report, Landmark said that they had undertaken the BNG assessment using Metric 3.0, informed by the site survey carried out in 2021 and the landscape plans which had been finalised in 2022. Describing the scope of the BNG Report, Landmark said that it detailed the BNG assessment process undertaken for the proposed development. It should be read with the full Metric 3.0 spreadsheet which was submitted with the application.
34. Paragraph 3.2 of the BNG Report stated –



*“In line with advice from Natural England, this assessment uses the Defra Biodiversity Metric 3.0 (July 2021), which was the most recent version at the time of the Assessment. The calculation of baseline biodiversity units takes account of all the habitats, or combined habitats, on site larger than 0.01 ha ... prior to development”.*

35. The BNG Report noted the publication in April 2022 of Metric 3.1 as an update to Metric 3.0 and referred to the advice given by NE in the release note which I have set out in paragraph 27 above. In paragraph 3.15 Landmark stated -

*“3.15 Given this assessment commenced in July 2021, the BNG assessment for the scheme has been undertaken using BNG metric version 3.0. This is in line with the advice given by Natural England and has been agreed with Bristol City Council”.*

36. Landmark summarised their conclusion in the light of the BNG assessment in paragraph 1.5 of the BNG Report –

*“The current level of net gain on-site stands at a gain of 4.53 habitat (area) units, which equates to a 39.86% net gain, and a gain of 1.96 hedgerow (linear) units, representing a 376.35% net gain. The gain in habitat area units has been achieved by retaining existing urban trees, planting a large number of new trees, deepening and naturalising the lake and by diversifying the range of habitats on site. The net gain in hedgerow units has been achieved through proposed extensive native hedgerow planting, with the length of hedgerow on site increasing from approximately 130m to over 700m”.*

*BTF’s objection and Landmark’s response*

37. On 29 June 2022, BTF submitted extensive written objections to the Interested Party’s application. BTF raised particular objection to Landmark’s use of Metric 3.0 as the basis for the BNG assessment in relation to urban trees. BTF said that Metric 3.0 was unworkable for the purpose of calculating urban tree habitat. That issue had been remedied by Metric 3.1, which should therefore be used for that calculation. Having made that correction, BTF’s analysis produced a net loss of biodiversity of 22%.

38. BTF said the following in support of that particular objection –

*“Whilst the applicant relies on [Metric] 3.0, this has now been superseded by [Metric 3.1]. Nonetheless, save for the provisions relating to the treatment of Urban tree habitats discussed below, we accept their other [Metric] 3.0 calculations. We set out below our reasons for using [Metric] 3.1 in relation to Urban tree habitats - the correct habitat size calculation and the new treatment of Urban trees under the trading rules.*

*...*

*The applicant relies on [Metric] 3.0, but the basis upon which the areas of the Urban tree habitats are calculated in [Metric] 3.0 is flawed because the table produced at 7-2 of the [Metric] 3.0 User Guide is unusable. This is because it is impossible save where a [Diameter at Breast Height] exactly matches one of the three size categories given - 10 cm, 30cm and 50cm - to allocate any given tree’s [Diameter at Breast Height] to any of the three size categories – Small, Medium Large - that are listed ... This has been rectified with the recent publication of [Metric] 3.1 which now gives... usable guidance for Urban tree habitat calculation...*

*...the applicant's proposals will result in a net loss of biodiversity of 22.24%, not the net gain of 38.66% that they have calculated".*

39. On 24 October 2022 Landmark submitted a technical note responding to BTF's objections. In respect of BTF's approach to interpolating Urban tree calculations based on Metric 3.1, Landmark referred to NE's advice in the release note, rule 4 in the Metric 3.1 User Guide and the FAQs –

*"It is therefore inappropriate to utilise different aspects of the calculation from various versions of the metric – i.e. using [Metric] 3.1 urban trees while the remainder of the calculation remains in [Metric] 3.0. Furthermore, this matter was discussed with the [Defendant] pre-submission and it was agreed to continue with [Metric] 3.0".*

40. Landmark rejected BTF's argument that the method for area calculation for urban trees in Table 7-2 of Metric 3.10 was unworkable –

*"The table produced at 7-2 of the [Metric] 3.0 User Guide is not unusable. We have reasonably assumed that the measurements provided act as thresholds to the next section (which, looking at table 7-2 in Metric 3.1, appears to have been [NE's] intention. Use of Metric 3.0 complies with [NE] guidance".*

41. Landmark summarised their position as being that they stood by the validity of the original BNG assessment, which had been undertaken on the basis of Metric 3.0 in line with NE's guidance. The BNG assessment had been based on the latest information available and the most up-to-date version of the proposed development at the time of that assessment.

42. On 31 March 2023 BTF submitted further comments to the Defendant, which were said to be in response to the publication of Metric 4.0 by NE on 24 March 2023. BTF said that Metric 4.0 had *"revolutionised the way urban trees are valued, making it clearer than ever that they are a very important habitat"*.

43. BTF now contended that Metric 4.0 should be used because it has reverted back to the methodology in Metric 3.0, except that Table 8-1 of Metric 4.0 had resolved the unworkable flaws in Table 7-2 of Metric 3.0. BTF reiterated their previous argument that the method of area calculation for urban trees in Metric 3.0 was unworkable. BTF put forward a revised overall calculation based on Metric 4.0 that the development would result in a net loss in biodiversity of 12.52%.

44. On 18 April 2023 Landmark submitted a second technical note responding to BTF's further comments. They said –

*"We consider it unreasonable and disproportionate to undertake the requested numerous updates on each release of subsequent versions, considering current legislative requirements and direct guidance from Defra themselves, who considered the 3.0 Metric robust enough to release, and be used, to inform development across the country at that time. This matter was discussed with the [Defendant] pre-submission and it was agreed to continue with [Metric] 3.0.*

*As previously discussed, we interpreted the tree size table to be providing thresholds between categories. This was confirmed as a correct interpretation on release of Metric*

*3.1. We acknowledge that Defra have subsequently amended their tree calculations during 3.1, then reverted to the 3.0 methodology in 4.0, and that they have changed the weighting. However for the reasons listed above... we do not believe this warrants a re-assessment given the validity of [Metric] 3.0 and associated guidance”.*

*The report: the planning officer’s assessment*

45. In the report, the planning officer stated that the Claimant relied on BTF’s objection –

*“Ecology and Sustainability: The Bristol Tree Forum has already challenged the Zoo’s claim of a 38% increase in biodiversity as it is based on outdated methodology. They estimate the outcome to be a 22% net loss”.*

46. BTF’s challenge to the reliability of Landmark’s BNG assessment was set out in the report –

*“An unworkable version of the metric for Biodiversity Net Gain (BNG) has been used (BNG 3.0) for calculating Urban tree habitat. BNG 3.1 fixes this and should be used instead. This shows that the trees growing on the site account for over 70% of its biodiversity. The calculation of baseline and newly created Urban tree habitat is given without explanation. There is an assumption that only half the urban trees planted will reach full maturity. No explanation is given for this. The wrong Strategic Importance parameter has been used. The location and importance of the site means it has medium strategic importance, not the low importance that the applicant has given it. The BNG calculation fails to account for the likely delay in creating new habitat. In our calculation we have allowed for a three-year gap between the development starting and the new habitats being created. The applicant’s proposals will result in a net 22% loss of biodiversity rather than the 38.6% gain they have stated. BNG submissions should include an inclusive management plan with a guarantee covering a period of thirty years including a financial budget and ecological monitoring.*

*In their final comments, dated 31.03.23, the Bristol Tree Forum provided a Biodiversity Net Gain Assessment using Metric 4.0 (BNG 4.0). These comments are summarised below. The Council should require applicant to adopt BNG 4.0, if not for the whole development, at least for Individual Urban Trees. ... The use of BNG 3.0 methodology for individual trees is infeasible because it is both error strewn and flawed ... the applicant’s proposals will result in a net loss of biodiversity of 12.52%, not the net gain of 36.00% that they have calculated... ”.*

47. The planning officer reported the advice received from the Defendant’s nature conservation officer on the BTF’s contentions –

*“The submitted Biodiversity Net Gain Report (BNGR) (The Landmark Practice, October 2022) shows that a 39.86% gain in habitat units and 376.35% gain in hedgerow units will be achieved through the proposed landscaping scheme (11585-LD-PLN-300 REV B, Land Use Consultants). The proposed urban trees within the BNG metric represent half of the proposed urban trees on site, assuming that only half of all proposed trees will reach full maturity to factor in the various risks to the longevity of trees within the site, including those within private gardens. For transparency Bristol City Council (BCC) and (TLP) agreed that the BNG metric was re-run, removing retained and proposed trees in private gardens as their maintenance to desired*

*condition cannot be guaranteed for 30-years (as required by the Environment Act 2021, schedule 7A, Part 1, paragraph 9). TLP provided re-run BNG calculations removing these trees which resulted in a drop from 39.86% to 36% gain in habitat units. BCC accepts the cautionary approach to inputting urban tree habitat into the BNG metric and acknowledges the minor reduction in the BNG calculation.*

*The first BNG report submitted with this application (dated on planning portal May 2022) states the BNG assessment commenced in July 2021 when metric 3.0 was the most recent version of the metric. The Natural England publication page for BNG metric 3.1 (published on 21st April 2022, link) states:*

*“Users of the previous Biodiversity Metric 3.0 should continue to use that metric (unless requested to do otherwise by their client or consenting body) for the duration of the project it is being used for as they may find that certain biodiversity unit values metric 3.1 generates will differ from those generated by Biodiversity Metric 3.0.”*

*The Natural England guidance on the latest BNG metric (4.0) publication page states: “Projects currently using biodiversity metric 2.0, 3.0 or 3.1, as well as those using the beta test version of the Small Sites Metric, are advised to continue to do so unless requested otherwise by their client or consenting body as the biodiversity units values generated by these metrics can differ from each other and may differ from the more current version 4.0 of the metric.” It is acknowledged that it is for the consenting body, in this case Bristol City Council, to make judgement on this. The BNG metric submitted with this application (metric 3.0) was the most recently published metric by Natural England at the time it was completed, and was completed using user guidance provided by Natural England at that time for that metric. This is consistent with the guidance in place at the time. BCC therefore finds it to be a disproportionate response to require a BNG assessment that was completed in line with the current metric and guidance of its time to be re-assessed at a later stage. Furthermore, the ‘summary of changes’ documents on the 3.1 and 4.0 publication pages state that the changes between the metrics are “unlikely to have a significant impact on the range of overall outputs generated” therefore it would not be considered an appropriate response to request that developers change metrics part way through a project considering the Natural England guidance provided, the professional judgement made, and the fact that the BNG metrics published to date are not yet regulatory requirement until November 2023”.*

48. The planning officer’s assessment of BTF’s objection to the use of Metric 3.0 to assess urban trees was given in the following passages in the report –

*“The Bristol Tree Forum suggests the provided Biodiversity Net Gain Assessment is not reliable as it: does not use the correct metric (they originally suggested 3.1, rather than 3.0); there are errors relating to the baseline and urban tree habitats specifically relating to the use of metric 3.0 rather than 3.1; incorrect assumptions made about the maturity of the trees; the site has medium strategic importance, rather than low; and the calculation does not account for delay in creating new habitat. As such, the Bristol Tree Forum suggested in their original comments that a net loss to biodiversity of 22% would occur as a result of the development. These concerns were then addressed by the Applicant’s ecologist (The Landmark Practice) within a note dated 24.10.22. In response to each issue raised by the Bristol Tree Forum with the submitted Biodiversity Net Gain Assessment, the Landmark Practice’s note addresses each concern,*

*demonstrating that the Biodiversity Net Gain Assessment is suitably robust and in accordance with the relevant guidance. Meeting notes and emails have been submitted by the Bristol Tree Forum following the publication of the Landmark Practice's note, suggesting they still contest the submitted Biodiversity Net Gain Assessment along the same lines as summarised above. Whilst a simplification, the crux of the Bristol Tree Forum's criticism concerns the use of Natural England's Biodiversity Metric 3.0, rather than 3.1 which they suggest is better suited to considering urban trees. Officers have challenged the Applicant on this basis, their response is that the Natural England does not recommend changing metrics mid-project, as this may result in discrepancies between calculations. This is the case for this development, as the planning and preparatory work for this planning application commenced prior to the Biodiversity Metric 3.1 being published, as is explained within paragraphs 3.13-3.15 of the submitted Biodiversity Net Gain Report (Landmark Practice, October 2022).*

...

*In the Bristol Tree Forum's latest comments (March 2023) they reiterate many of their previously stated concerns, including that the development will not achieve a biodiversity net gain, the majority of these concerns are adequately addressed above. However, they also suggest Natural England's latest Metric should be used, which is Metric 4.0 and was published in March 2023. As with Metric 3.1, officers advise it would be unreasonable to require the Applicant to change metrics at this late stage of a planning application for the reasons discussed above. In addition, although Metric 4.0 is substantially updated compared to Metric 3.1, Natural England advises that this is more to do with matters of data presentation than it is to do with the underlying results. In its 'Summary of Changes – The Biodiversity Metric Version 3.1 to 4.0', Natural England advises at paragraph 1.1.1 that "The Biodiversity Metric 4.0 is a substantial update to previous versions of the metric. However, the majority of changes are focused on providing an enhanced user experience and are unlikely to have significant impact on the range of outputs generated." Similarly, when Metric 3.1 was introduced the accompanying guidance in Natural England's 'Summary of Changes from Biodiversity Metric 3.0 to Version 3.1' had stated (in its opening summary) "Metric 3.1 represents a relatively small-scale change from version 3.0, primarily focusing on clarifications to guidance and revisions to the condition assessments. Except for a very small number of select habitats, the metric 3.1 update is unlikely to have a significant impact on the range of overall outputs generated." Officers consider that in the circumstances it would be disproportionate to require the BNG calculation to be re-assessed using the more recent Metric 4.0. Further, in their latest comments the Bristol Tree Forum suggest that if Metric 4.0 is not adopted, it should at least be adopted for individual urban trees. As has been discussed, metrics should not be used interchangeably, and this is made clear at Table 3-1 of Natural England's 'The Biodiversity Metric 4.0 User Guide', at Rule 2, where it advises that "Biodiversity unit outputs are unique to this metric. The results of other metrics, including previous versions of this metric, are not comparable to those of this metric".*

*The Nature Conservation Officer raises no objection to the Biodiversity Net Gain Report (October 2022), which advises that the development will achieve a 39.86% gain in habitat units and 376.35% gain in hedgerow units will be achieved through the proposed landscaping scheme. The proposed urban trees within the Biodiversity Net Gain metric represent half of the proposed urban trees on site, assuming that only half*

*of all proposed trees will reach full maturity to factor in the various risks to the longevity of trees within the site, including those within private gardens. For transparency the Applicant agreed that the Biodiversity Net Gain metric was re-run, removing retained and proposed trees in private gardens as their maintenance to desired condition cannot be guaranteed for 30-years (as required by the Environment Act 2021, schedule 7A, Part 1, paragraph 9). The Applicant provided re-run Biodiversity Net Gain calculations removing these trees which resulted in a drop from 39.86% to 36% gain in habitat units. The Nature Conservation Officer accepts the cautionary approach to inputting urban tree habitat into the Biodiversity Net Gain metric and acknowledges the minor reduction in the Biodiversity Net Gain calculation. The expected biodiversity net gain is significant, going far beyond any expectation included within the NPPF. The proposal's net gain for biodiversity attracts positive weight in the planning balance".*

49. The planning officer's overall conclusion was that the development would not result in significant harm to biodiversity; rather it would facilitate a net gain for biodiversity in accordance with paragraphs 174 and 180 of the Framework.

#### *The Committee meeting*

50. The BTF submitted a statement to the Committee in which they again contended that Landmark's BNG assessment was based upon a "*flawed and outdated version*" of NE's Metric which "*does not work*" when calculating the habitat value of urban trees. They explained why they considered Table 7-2 of Metric 3.0 to be "*unworkable*". BTF said that they had now used the most recent version, Metric 4.0, for calculating the habitat value of urban trees. They accepted the use of Metric 3.0 "*for all the other habitat calculations*". BTF said that the Interested Party had undervalued the urban tree habitat. The development would result in a net loss of biodiversity.
51. The minutes of the Committee's meeting held on 26 April 2023 record the planning officer's advice that officers, including the nature conservation officer, considered the Interested Party's BNG assessment to be in line with guidance. It would be disproportionate to ask the Interested Party to change from Metric 3.0 part way through the application process, notwithstanding the two updates to that metric in April 2022 and March 2023.

#### *The Claimant's submissions in summary*

52. For the Claimant, Mr Paul Brown KC submitted that the Defendant had accepted that the question whether the Interested Party's application would deliver a measurable net gain in biodiversity should be considered on the basis of an assessment in accordance with a biodiversity metric. The choice of the appropriate metric for that purpose was for the Defendant as local planning authority. However, that discretionary decision must be made on a rational basis. In particular, for that discretion to be exercised lawfully, it was necessary for the Defendant to have understood the planning policy framework and the relevant guidance correctly, to have taken proper account of material considerations and to have avoided serious logical or methodological error.
53. The Defendant had accepted the planning officer's advice to found its decision on the BNG assessment in the BNG Report. That assessment used the methodology for calculations in respect of urban trees set out in the Metric 3.0 User Guide. It was

submitted that the Defendant's reasons for that choice of approach reveal both a misunderstanding of NE's guidance and serious logical and methodological errors which amount to irrationality in the process by which the Defendant reached the decision to grant the planning permission: see R (Law Society) v The Lord Chancellor [2019] 1 WLR 1649 at [98].

54. Firstly, the Committee was given materially erroneous advice that Metric 3.0 was NE's most recently published metric at the time when the BNG Report was completed. That was incorrect. Metric 3.1 had been published by NE on 21 April 2022. The BNG Report was both submitted and later updated after that date. Secondly, and of particular significance, Metric 3.1 had remedied the flawed approach in Table 7-2 of Metric 3.0 which had resulted in Metric 3.0 being unworkable in relation to the assessment of urban trees. In their representations, BTF had emphasised that the results shown in the BNG Report were unreliable because they were derived from the unworkable method set out in Metric 3.0. BTF had produced an assessment which established the true position, using the workable method now included in Metric 3.1. The true position was that the application would deliver a net loss in biodiversity. Either the planning officers and the Defendant failed properly to take that material factor into consideration; or there was a failure of logic in their reasoning.
55. Thirdly, it was submitted, it was unclear on what basis officers had reached the view that requiring the BNG assessment to be revisited in the light of BTF's concerns would be disproportionate. The concern raised by BTF went to the heart of the policy issue as to whether the application would deliver a measurable net gain in biodiversity. Finally, NE's User Guides recognised that there would be cases in which a local planning authority would need to consider requiring an assessment of biodiversity net gain to be carried out again on the basis of a later metric. This was clearly such a case, in the light of BTF's representations, since BTF's argument demonstrated a failure to comply with the policy of the Framework. The Defendant had not considered the need to do so. That was a failure of discretion and irrational.

#### *Discussion and conclusions*

56. This is a case in which the lawfulness of a planning permission is challenged on the basis of alleged errors in the planning officer's report. The approach to judicial review is as stated in *Mansell*. The question for the court is whether, on a fair reading of the report as a whole, the planning officer has materially misled the Committee on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. The report in this case is lengthy and detailed, but the principle that it is to be read fairly and as a whole holds true.
57. Insofar as concerned the issue raised by BTF as to whether the application would deliver biodiversity net gain in compliance with the policy of the Framework, the structure of the report was straightforward. It consisted of three main elements.
58. Firstly, the planning officer gave a detailed summary of BTF's objections. That summary fairly and accurately encapsulated BTF's argument that Landmark's use of Metric 3.0 to carry out the BNG assessment was flawed and unreliable in relation to urban trees, because the method of calculation in Metric 3.0 in respect of urban trees was unworkable. Metric 3.1 should be used to correct that flaw and produce a revised and reliable BNG assessment. Following the publication of Metric 4.0, that current

metric should now form the basis for assessment, at least in relation to urban trees. So assessed, BTF argued, the application produced a net loss in biodiversity.

59. Secondly, the planning officer had consulted the Defendant's nature conservation officer in relation to BTF's representations. In the report, the planning officer provided the Committee with the nature conservation officer's response to that consultation. In particular, reference was made to the BNG Report, which stated that the BNG assessment had begun in July 2021, at which time the most recently published version of NE's biodiversity metric had been Metric 3.0. NE's advice in the release note was set out verbatim in the report. Reference was made to NE's advice to essentially similar effect given on publication of Metric 4.0. The nature conservation officer acknowledged that the Defendant was the consenting body in relation to the application. It was therefore open to the Defendant to request the Interested Party now to carry out an assessment in accordance with Metric 4.0, that metric having by the date of the report replaced Metric 3.1. The nature conservation officer did not consider that was justified.
60. Thirdly, the planning officer set out his own professional assessment of the question whether the application would deliver a measurable net gain in biodiversity and so comply with the relevant policy of the Framework. The planning officer fairly summarised the policy requirement. He then considered the development's performance against that policy requirement, with a particular focus on the objections raised by the BTF.
61. As the planning officer advised, the Defendant's nature conservation officer had considered Landmark's BNG Report and had raised no objection to the BNG assessment within it. Landmark had been asked to re-run the calculation applying a more precautionary assumption about the longevity of urban trees on the site. The result was that the level of biodiversity net gain had reduced to 36%. That level of net gain was, the planning officer reasonably concluded, sufficient to meet the policy requirement of the Framework.
62. The question raised by BTF was whether that was a reliable assessment of the biodiversity net gain which the development would deliver. As the planning officer advised, BTF's case was that it was not, because the BNG assessment was founded upon the incorrect NE metric. In particular, BTF had criticised the use of Metric 3.0 and argued that Metric 3.1 should be used at least for the assessment of urban trees, as it was better suited for that purpose. That was, in my view, a fair encapsulation of BTF's objection to the use of Metric 3.0.
63. The planning officer clearly did not accept that BTF's objection undermined the reliability of the BNG assessment carried out by Landmark. In principle, that was a matter for the planning officer to consider and resolve in the exercise of his planning judgment. The Claimant's case is that the planning officer failed to exercise his planning judgment rationally. It is therefore necessary to understand the key steps in his reasoning.
64. The starting point was that, as stated in the BNG Report, Landmark had begun the BNG assessment on receiving the results of the site survey carried out in July 2021. From that point onwards, they had carried out the BNG assessment using Metric 3.0, that being NE's most recently published biodiversity metric at that date. Notwithstanding the subsequent publication of Metric 3.1 in April 2022, they had completed the BNG



assessment of the development using Metric 3.0, following the advice given by NE in the release note. In their technical note of 24 October 2022, Landmark stated that prior to submission of the application, they had discussed with the Defendant whether they should continue to use Metric 3.0. The Defendant had agreed that Landmark should do so.

65. NE's advice in paragraph 1.13 of the Metric 3.0 User Guide was that the metric could be used throughout "*all stages of a project or scheme, from site selection and options assessment through to detailed design*". There was an issue before me as to whether the site survey carried out in July 2021 and subsequent preparatory work carried out by Landmark was properly to be regarded as a stage in the project or scheme, or as the Claimant contended, preceded the inception of the project in this case. Mr Brown KC submitted that in the context of the User Guide, the first stage of the project or scheme must be taken to be the submission of the planning application. It was at that stage, but not before, that it became unreasonable to hold the developer to a different standard set by a new biodiversity metric, since the project or scheme had been defined by the submission of the application. Conversely, until the project or scheme was "*in planning*" the position remained inchoate; and there was no reason why the developer should not be expected to adjust to a new biodiversity metric prior to finalising the planning application.
66. I do not accept the Claimant's submissions on that issue. They fail to recognise the practicalities of preparing a project or scheme with a view to submitting an application for planning permission. In the case of a large-scale project such as the proposed development in this case, a considerable lead time will be required in order to work up the project from its inception to its state of readiness for submission to the local planning authority under a planning application. NE's advice in paragraph 1.11 of the Metric 3.0 User Guide is founded on that practical reality. *Ex hypothesi*, the process of site selection and options assessment will need to have been completed long before the planning application for a large-scale project is ready for submission. NE expressly encourage the use of the biodiversity metric as early as practicable during that process, since assessment work begun at that early stage will provide opportunities to influence the emerging design, with a view to improving the delivery of biodiversity net gain as part of that design. In other words, the process of assessment using the biodiversity metric is iterative and should be seen as integral to project design from the earliest possible stage. In the case of development of land such as the site, which has significant biodiversity value in its existing state, ecological survey of the site, and early consideration of the results of that survey, are likely to be an important driver of the early stages of project design. I note that the advice in paragraph 1.13 of the Metric 3.0 User Guide is carried through into the User Guides for Metric 3.1 and Metric 4.0.
67. In the light of that analysis, it was reasonably open to the planning officer to proceed as he did, on the basis that the project was in existence and at an early stage of development in July 2021. At that date, the results of the ecological survey of the site became available to enable Landmark to prepare the BNG assessment using the then current NE biodiversity metric, Metric 3.0. Having begun the BNG assessment using that metric, the advice of NE in both the release note and the FAQs was that Landmark should complete the assessment using that metric, unless requested to do otherwise by their client or the Defendant as the consenting body. No such request was forthcoming.

68. Although in their further comments submitted following publication of Metric 4.0 in late March 2023, BTF argued that the BNG assessment should now be repeated using that metric, by that date the application had been submitted and validated. Understandably, the Claimant did not submit before me that the publication of Metric 4.0 was a factor in itself that served to vitiate the planning officer's acceptance of Landmark's BNG assessment.
69. Against that background, it is pertinent to note that in their initial objection it was not BTF's case that Landmark should now carry out the BNG assessment afresh using Metric 3.1. To the contrary, BTF's stated position was that they accepted Landmark's use of Metric 3.0, save for the purposes of assessing urban trees which BTF argued should use the revised method of calculation set out in the more recently published Metric 3.1 User Guide. The basis for BTF's argument was that the method of calculating the equivalent area for urban trees set out in Table 7-2 of the Metric 3.0 User Guide was unusable or unworkable; and that the revised method in Metric 3.1 had overcome that problem.
70. Had BTF's argument been irrefutable or, although debatable, accepted as correct by the Defendant's nature conservation officer or by the planning officer, the decision nevertheless to treat Landmark's BNG assessment as reliable would have been difficult to understand. On the evidence, however, BTF's argument was not irrefutable. In their technical note of 24 October 2022, Landmark had refuted it. Landmark said that Table 7-2 of the Metric 3.0 User Guide was usable. Landmark explained how they had used it. They had assumed that the measurements given in Table 7-2 should be applied as thresholds, in essentially the same way as was later clarified by NE in the revised Table 7-2 published in the Metric 3.1 User Guide.
71. It was in the light of the technical note of 24 October 2022 that the planning officer advised that Landmark had addressed each of BTF's concerns, "*demonstrating that the Biodiversity Net Gain Assessment is suitably robust and in accordance with the relevant guidance*". In my judgment, that was a reasonable response to the evidence before the planning officer. BTF had questioned the reliability of the BNG assessment. Landmark had responded explaining how the problem raised by BTF had been overcome. That explanation was credible, since the problem had been overcome by Landmark essentially by following the revised approach to calculation subsequently promulgated by NE in the revised table in the Metric 3.1 User Guide. The nature conservation officer had not questioned the credibility of Landmark's response. The planning officer clearly accepted it. It was reasonably open to him to do so.
72. In light of that, it is unsurprising that the planning officer saw no good reason to accept BTF's argument and to require Landmark to carry out a further assessment interpolating calculations for urban trees using the method in Table 7-2 in the Metric 3.1 User Guide, or using the recently published Metric 4.0, in relation to the assessment for urban trees. NE's advice was clear. Such an approach was not recommended, as it created the risk of discrepancies between calculations and undermined the self-contained nature of each version of the biodiversity metric. See rule 4 in the Metric 3.1 User Guide and the FAQs which I have quoted in paragraphs 26 and 28 above. In summarising the changes between Metric 3.0 and Metric 3.1, NE said that in response to user feedback, Table 7-2 had been revised to provide a range of tree diameter values to determine size. NE did not say that it now considered Table 7-2 in Metric 3.0 to be unusable or unworkable. NE did not advise those currently using Metric 3.0 for assessments involving urban

trees to refresh their work by interpolating calculations based on Table 7-2 in the Metric 3.1 User Guide. The planning officer acted reasonably in following NE's guidance and advising the Committee that the biodiversity metrics "*should not be used interchangeably*" in this case.

73. It was the planning officer's judgment that, in the circumstances, it would be disproportionate to require the BNG calculation to be re-assessed using Metric 4.0 at that stage of the planning process. By the date of publication of Metric 4.0 on 28 March 2023, the application had been "*in planning*" before the Defendant for ten months. The planning officer had accepted Landmark's response in the technical note of 24 October 2022 to BTF's key point of objection to the use of Metric 3.0. In the light of those factors, his judgment cannot be characterised as irrational. I note that in reaching that judgment, the planning officer attached no significance to the date on which Landmark had completed the BNG assessment. The factual mistake apparently made by the nature conservation officer, that Metric 3.0 was NE's most recently published metric at the time when the BNG Report was completed, was immaterial to the planning officer's own assessment of BTF's objections.
74. For these reasons, I am unable to accept the Claimant's contentions under ground 1. The Claimant has not established that the planning officer misled the Committee in any material way in advising that, notwithstanding BTF's criticisms, the BNG assessment submitted in support of the application was reliable. On the contrary, in my judgment, the planning officer's analysis of those criticisms was supported by NE's guidance and was a reasonable response to the evidence before the Defendant. There is no gap in the planning officer's reasoning. On analysis, it is clearly the case that in the proper and reasonable exercise of his planning judgment, the planning officer did not consider BTF's criticisms of Landmark's BNG assessment to be justified. That was a matter for the planning officer to determine. I have found no reason to impugn the rationality of his advice that the development would deliver biodiversity net gain in compliance with the policy of Framework. Ground 1 is rejected.

## **Ground 2 - Sustainability / Climate Change**

### *The policy background*

75. This ground of challenge arises in the context of policies in the Bristol Local Plan which seek to mitigate the impact of climate change, and adapt to climate change, by requiring new development to include measures to reduce carbon dioxide emissions from energy use.
76. The national planning policy context is set by [157] of the Framework –
- "In determining planning applications, local planning authorities should expect new development to:*
- a) comply with any development plan policies on local requirements for decentralised energy supply unless it can be demonstrated by the applicant, having regard to the type of development involved and its design, that this is not feasible or viable; and*

- b) *take account of landform, layout, building orientation, massing and landscaping to minimise energy consumption”.*

77. Policy BCS13 of the Bristol Core Strategy (2011) states –

*“Development should contribute to both mitigating and adapting to climate change, and to meeting targets to reduce carbon dioxide emissions.*

*Development should mitigate climate change through measures including:*

- *High standards of energy efficiency including optimal levels of thermal insulation, passive ventilation and cooling, passive solar design, and the efficient use of natural resources in new buildings.*
- *The use of decentralised, renewable and low-carbon energy supply systems.*
- *Patterns of development which encourage walking, cycling and the use of public transport instead of journeys by private car.*

*Development should adapt to climate change through measures including:*

- *Site layouts and approaches to design and construction which provide resilience to climate change.*
- *Measures to conserve water supplies and minimise the risk and impact of flooding.*
- *The use of green infrastructure to minimise and mitigate the heating of the urban environment.*
- *Avoiding responses to climate impacts which lead to increases in energy use and carbon dioxide emissions.*

*These measures should be integrated into the design of new development.*

*New development should demonstrate through Sustainability Statements how it would contribute to mitigating and adapting to climate change and to meeting targets to reduce carbon dioxide emissions by means of the above measures”.*

78. A text box headed “Policy Delivery” states –

*“This policy will be delivered through the development management process, by means of the requirement for Sustainability Statements and the implementation of Policy BCS14, Policy BCS15 and Policy BCS16. Further guidance will be offered in a supplementary planning document on mitigating and adapting to climate change”.*

79. Policy BCS14 of the Core Strategy states (in part) –

*“Development in Bristol should include measures to reduce carbon dioxide emissions from energy use in accordance with the following energy hierarchy:*

1. *Minimising energy requirements;*

2. *Incorporating renewable energy sources;*
3. *Incorporating low-carbon energy sources.*

*Consistent with stage two of the above energy hierarchy, development will be expected to provide sufficient renewable energy generation to reduce carbon dioxide emissions from residual energy use in the buildings by at least 20%. An exception will only be made in the case where a development is appropriate and necessary but when it is demonstrated that meeting the required standard would not be feasible or viable.*

*The use of combined heat and power (CHP), combining cooling, heat and power (CCHP) and district heating will be encouraged. Within Heat Priority Areas, major development will be expected to incorporate, where feasible, infrastructure for district heating, and will be expected to connect to existing systems where available”.*

80. Paragraph 4.14.6 of the Core Strategy states –

*“Proposals for development should be accompanied by an energy strategy as part of the Sustainability Statement submitted with the planning application, which should set out measures to reduce CO2 emissions from energy use in accordance with the energy hierarchy. The energy strategy should:*

- Set out the projected annual energy demands for heat and power from the proposed development against the appropriate baseline (2006 Building Regulations Part L standards), along with the associated CO2 emissions.*
- Show how these demands have been reduced via energy efficiency and low carbon energy sources such as CHP and district heating, and set out the CO2 emissions associated with the residual energy demand.*
- Demonstrate how the incorporation of renewable energy sources will offset the CO2 emissions arising from the residual energy demand”.*

81. In July 2020, the Defendant published a Climate Change and Sustainability Practice Note [“CCSPN”]. Section 3.2 of the CCSPN refers to the policy requirement under policy BCS14 for the submission of energy strategies with planning applications, which should form part of the Sustainability Statement required under policy BCS13. Paragraph 3.2.1 says that the energy strategy should show the projected annual energy demand for heat and power from the development together with the associated CO2 emissions using the methodology in the current Building Regulations Part L as a baseline, then demonstrate how the emissions from energy use in the development will be reduced in accordance with the energy hierarchy as set out in the CCSPN. A footnote then explains what was meant by the “current” Building Regulations –

*“The core strategy indicates that the baseline energy demand should be determined on the basis of 2006 Building Regulations Part L standards. The 2006 standard was referenced in the core strategy as these were the regulations current at the time of writing. In determining the baseline energy performance of a development the building regulations that are current at the time of preparing the application should be applied”.*

82. At the date of publication of the CCSPN, the current regulations were the 2013 Building Regulations Part L standards [**“L2013”**].
83. On 15 December 2021, enhanced energy performance standards for new buildings were published through the 2021 Building Regulations Part L standards [**“L2021”**]. L2021 came into force on 15 June 2022.
84. In the context of the building regulations, the Secretary of State for Housing, Communities and Local Government publishes Approved Documents which give practical guidance on common building situations and how to meet the requirements of the 2010 Regulations. The introduction to Building Regulations 2010 Conservation of Fuel and Power, Approved Document L Volume 1 (2021 edition) [**“the Approved Document”**] states –
- “This approved document supports Part L of Schedule 1 to the Building Regulations 2010. This approved document takes effect on 15 June 2022 for use in England. It does not apply to work subject to a building notice, full plans application or initial notice submitted before that date, provided the work for each building is started before 15 June 2023”.*

*The Max Fordham energy statement*

85. The Interested Party commissioned Max Fordham LLP, consulting engineers, to prepare an *“Energy Statement for Planning”* [**“the energy statement”**] in compliance with policies BCS13 and BCS14 of the Core Strategy. The energy statement was drafted in early May 2022 and issued on 20 May 2022 in support of the application submitted on 27 May 2022. Following amendments to the application, the energy statement was updated twice in October 2022, the most recent version being issued on 26 October 2022.
86. In a summary of national policy, the energy statement referred to publication of the Approved Document and said –
- “The 2021 edition of ‘Approved Document L, Conservation of fuel and power’ has now been released. It gives guidance on how to comply with Part L and the energy efficiency requirements for buildings including dwellings. This document is applicable to this project and takes effect from 15 June 2022”.*
87. The energy statement summarised local planning policy, including BCS13 and BCS14 of the Core Strategy. Reference was made to the guidance given in the CCSPN. The energy statement followed the practice guidance given in the CCSPN and used the methodology in L2013 in order to assess the energy performance of the development in accordance with policy BCS14. The results of the assessment were reported to be significant reductions in both residual carbon emissions and energy demand.

*Dr Hogg’s objections*

88. Dr Dominic Hogg is a local resident, an economist and environmental consultant who has significant professional experience in the science and economics of climate change. Following submission of the Interested Party’s application he submitted extensive and detailed objections to the Defendant against the Interested Party’s application. Amongst

Dr Hogg's concerns over the development was the robustness and propriety of the assessment of operational carbon in the energy statement. Dr Hogg argued that the Interested Party had been able to show a policy compliant reduction in both carbon emissions and energy demand for the development only because L2013 carbon emissions factors had been used. Those factors had been updated in L2021. The energy statement acknowledged that L2021 applied to the development, as stated in the Approved Document.

89. Dr Hogg said that in September 2022 the Interested Party had in fact used the updated L2021 carbon emissions factors in an energy and sustainability statement submitted in support of its planning application for development of the West Car Park site. There was no good reason why the Interested Party should not be required to use the L2021 carbon emissions factors for the purposes of assessing the energy performance of the development.
90. Dr Hogg explained that the updated carbon emissions factors in L2021 reflected the decarbonisation of electricity over the decade since L2013. Notwithstanding the Interested Party's use of the updated emissions factors in support of the West Car Park application, and the acknowledgement made in the energy statement that those updated factors would apply to the development, the energy statement had used the L2013 emissions factors. Dr Hogg set out his results of applying the L2021 emissions factors. He calculated that the development was able to show a maximum reduction of 14% in residual CO<sub>2</sub> emissions, which was insufficient for compliance with the local plan policy requirement of a reduction of at least 20%.
91. On 15 December 2022 an officer in the Defendant's Sustainable City Team advised the planning officer that the use of the L2013 carbon emissions factors in the energy statement was considered to be acceptable for the purposes of considering the application's compliance with policy BCS14 of the Core Strategy, since the updated carbon emissions factors in L2021 had not been brought into use at the date of submission of the application. The officer commented on a number of matters arising from the energy statement. On 21 December 2022, Max Fordham responded in writing on those matters. They confirmed that the energy performance of the development had been assessed using L2013 carbon emissions factors.
92. In January 2023 the Defendant published a Climate Change and Sustainability Practice Note Addendum [**"the Addendum"**]. Introducing the Addendum, the Defendant said –
- "As a result of technical changes in Part L 2021 from Part L 2013, Bristol City Council (BCC) has introduced some technical changes to the methodology for meeting local plan policy BCS14 Sustainable Energy, as well as some other related changes. This note provides details on how to meet the requirements of policy BCS14 following the introduction of Part L 2021..."*
93. An appendix to the Addendum stated that the technical changes were being made in response to the coming into force of the energy efficiency requirements of L2021 which came into force in June 2022. L2021 had introduced more stringent regulated CO<sub>2</sub> emissions standards and updated the calculation methodology for demonstrating compliance with Building Regulations. In answer to the question *"When will the new methodology come into use?"*, the Addendum stated that following a transition period

of three months for new submissions, from April 2023 the part L 2021 baseline and new methodology should be used for all applications.

94. To the question “*What about development proposals already in the planning system?*” the Addendum answered –

*“For schemes currently in planning using the part L2013 methodology this will be retained throughout to the planning process for the application (including any relevant planning conditions attached). The new methodology will not be applied retrospectively”.*

95. In June 2023 the Defendant published an updated Addendum to the CCSPN which confirmed that for schemes currently in planning, the L2013 methodology would continue to be used “*throughout the planning process (including any relevant planning conditions attached)*”. The updated L2021 methodology would not be applied retrospectively.

#### *The report*

96. In his summary of the key points of objection to the application made by members of the local community, under the heading “*Sustainability/Climate Change*” the planning officer reported that -

*“Very detailed comments questioned the figures provided within the submitted Sustainability and Energy Statements, suggesting they were incorrect. Including that the outdated carbon factors have been utilised within the Applicant’s Energy Statement.*

*Criticisms of the proposal in relation to embodied carbon, largely that the proposal includes the demolition too many buildings. Suggestion that the proposal fails the National Model Design Code, the NPPF and policies BCS13, BCS14, and BCS15. The development is inconsistent with the Net Zero Strategy”.*

97. There were two appendices to the report. The planning officer reported that they had been included for information: they included a record of the representations received in response to the application. The planning officer said that due to the limits of the Defendant’s IT System and the number of representations received, the record of consultation responses included in the appendices was not exhaustive –

*“However, officers have reviewed all the representations and are satisfied that all material matters raised have been adequately summarised in the report itself”.*

98. Much of Dr Hogg’s extensive written objection to the application was included in appendix 2 to the report. However, his analysis of the energy performance of the development applying the updated L2021 carbon emissions factors resulting in an asserted maximum reduction of 14% in residual CO2 emissions, was not included in the appendix to the report. Appendix 2 did record the following representations under objection 259 –

*“Carbon factors The Council’s Sustainable City Team have commented: “As SAP 2012 carbon factors were in use for Part L 2013 at the time of the initial submission, the use of these carbon factors has been continued for the revised statement rather than Part L*



*2021. For the purpose of BCS14 calculations we consider this to be acceptable". The same applicant was recently awarded consent on the West Car Park site. That application [ref] was submitted long before this application [ref]. In a September 2022 version to the Energy and Sustainability Statement accompanying the [West Car Park site application], the applicant's consultants, Hydrock, updated the carbon factors using in the calculation of the residual CO2 savings from the proposal from Part L 2013 to Part L 2021. The comment from the Sustainable City Team seems to indicate that the Council would find it acceptable under the newer application to make use of the older carbon factors. The Council's position should be considered in the light of the rather obvious point that it cannot be for the applicant to pick and choose the carbon factors which suit its purpose of seeking to demonstrate compliance with extant policy, still less, for the Council to consent to the wishes of the applicant when it is clear that the basis for the calculation has changed. To put this another way, the Council is sanctioning an approach to the calculation of carbon savings from renewable electricity generation which have not been reflected in the carbon intensity of generation for more than 10 years. It is obviously out of date. It is incredibly disappointing to see a Council that has declared a climate emergency seeking to ease the path of an application based on endorsing the use of carbon factors that are completely divorced from prevailing reality. This view is unacceptable and must be changed".*

99. The planning officer reported the response to consultation by the Defendant's Sustainable City Team which included the following comments in relation to energy performance -

*"Sustainability Team (BCC) – No objection*

*...*

*BCS14 – Energy: Very good U-values and air tightness are proposed with high efficiency LED lighting and MVHR with summer bypass throughout. Fabric improvements and connection to the local heat network are proposed for all existing buildings that are to be refurbished for dwellings. The overall heat strategy is well considered and the use of different heat pump sources to feed a local low temperature network offers a low carbon approach that is supported. In response to concerns regarding the use of electric boilers, further information has been provided, explaining that increasing the number and/or size of the heat pumps to meet the peak demand would add significant building mass and mean the loss of PV and green roof area. The peak demand figure has been calculated using CIBSE heat network code of practice methodology. This is considered acceptable, there are no further objections to the use of electric boilers in this instance given the small proportion of demand and the usage as part of a low carbon site wide heat network. Though heat networks are treated as an energy efficiency measure for the purpose of BCS14, heat pumps are considered a renewable technology. Therefore, although in the energy calculations only PV is counted towards the carbon reduction from renewables, in fact the renewable energy generation on site is greater than is illustrated by this figure. Extensive photovoltaic panels are proposed across the site to further reduce carbon dioxide emissions from residual energy use.*

*...*

*Recommended Conditions: conditions are recommended to secure: energy and sustainability statements, photovoltaic panels, heat pumps, and air tightness”.*

100. Introducing his advice on the key issue of sustainability, the planning officer reported that the Council’s Sustainable City Team had raised no objection to the development, concluding that the application complied with all relevant policies. The Team had reviewed the BREEAM Communities Scoping Assessment prepared by Method Consulting; the energy statement prepared by Max Fordham; and Max Fordham’s response on 21 December 2022 to the Team’s queries.

101. The planning officer’s assessment drew attention to the policy requirement under BCS14 for development to minimise its energy requirements and incorporate renewable and low-carbon energy supplies to reduce its carbon dioxide emissions. New development was expected to provide sufficient renewable energy generation to reduce carbon dioxide emissions from residual energy use in the buildings by at least 20%. The Interested Party estimated a total 44% reduction in carbon dioxide emissions beyond Part L 2013 in line with the energy hierarchy, including a reduction in carbon dioxide emissions below residual emissions by 32% through photo-voltaic sources.

102. The planning officer then referred to representations which had –

*“challenged the Applicant’s use of SAP2012 carbon factors, suggesting that the more recently published SAP10.2 carbon factors and Part L2021 should have been employed. This issue is addressed in the Sustainable City Team’s comments, where they advise that as SAP 2012 carbon factors were in use for Part L 2013 at the time of the initial submission, the use of these carbon factors has been continued for the revised statement (rather than Part L 2021), which for the purpose of policy BCS14 calculations they consider to be acceptable”.*

103. The planning officer then analysed that issue -

*“It is not uncommon for technical guidance to be updated during the consideration of a large-scale planning application and officers consider it is a matter of planning judgment whether the guidance in place at the time the application was submitted should continue to be used or the application should be tested against the more recent guidance. In this instance, officers do not consider that the updated guidance is so significantly different to its predecessor as to make it unreasonable to continue to apply the SAP2012 carbon factors, and it would be disproportionate to require a fresh exercise to be undertaken. This approach is supported by the guidance set out in the Council’s Climate Change and Sustainability Practice Note Addendum (CCSPNA) of January 2023, which gives advice on the evidence needed to satisfy Policy BCS14. The CCSPNA notes the replacement of Part L 2013 by Part L2021 in June 2022. In the FAQs in Appendix 1 of the CCSPNA the guidance states “For schemes currently in planning using the Part L 2013 methodology this will be retained throughout the planning process for the application (including any relevant planning conditions attached). The new methodology will not be applied retrospectively.” The application was submitted in May 2022 and validated in June 2022 (before the new Part L took effect) and was already in the planning process when the CCSPNA was issued in January 2023. Officers therefore consider the approach adopted for the purposes of Policy BCS14 to be acceptable”.*

104. The planning officer's conclusions were as follows -

*"The development therefore accords with the key planning policies concerning sustainable construction and design (policies BCS13, BCS14, BCS15, and BCS16) and indeed in some cases the expectations of these policies will be exceeded, such as the reduction in CO2 emissions from residual energy use in the development. ... The development complies with paragraph 157 of the NPPF, as it meets the development plan's expectations for decentralised energy generation and suitably takes into account existing landform, layout, building orientation, massing and landscaping to minimise energy consumption. ...*

*In summary, the development complies with the development plan and the Government's relevant policies and guidance concerning sustainability, climate change and resilience, and hence in this regard the development is well designed. Conditions are advised in respect of securing: renewable energy generation, building efficiency, embodied carbon/energy, and broadband".*

*The Claimant's submissions in summary*

105. The planning officer, Mr Brown KC submitted, had acknowledged that the Defendant retained the discretion to assess the energy performance of the development against the application of the updated L2021 carbon emissions factors. As the planning officer had correctly advised, it remained a matter for the Defendant's judgment whether the guidance in place at the time of submission of the application should be followed; or the application be tested against the updated methodology in L2021. Policy BCS14 of the Core Strategy states a policy requirement for a reduction in CO2 emissions from residual energy use in buildings by at least 20%. Policy BCS14 does not specify the methodology to be used for the purpose of assessing whether that requirement has been fulfilled.
106. It was submitted that in deciding to assess the development's energy performance and compliance with policy BCS14 solely by reference to the emissions factors in L2013, the Defendant has failed lawfully to exercise its discretion. The principal reason for that decision was that the updated guidance was not so significantly different to its predecessor as to make it unreasonable to continue to apply the SAP 2012 (i.e. L2013) carbon factors; and that it would be disproportionate to require a fresh exercise to be undertaken. That rationale failed to take account of Dr Hogg's analysis, which demonstrated that applying the L2021 updated emissions factors would result in the development failing to achieve the level of reduction in CO2 emissions from energy use which was required to comply with policy BCS14.
107. That difference in outcome when applying L2021 could not rationally be characterised as insignificant. Moreover, the Committee were neither shown Dr Hogg's results, which assessed at the maximum only a 14% reduction in CO2 emissions, nor his explanation for that lesser reduction in comparison to that shown in Max Fordham's energy statement. Dr Hogg's analysis was highly material to the question whether there was compliance with policy BCS14. The Defendant had failed to take that analysis into consideration.
108. For essentially the same reasons, the Defendant had failed in its duty of reasonable inquiry under the principle stated in Secretary of State for Education v Tameside

Metropolitan Borough Council [1977] AC 1014, 1065A-B [“**Tameside**”]. The Defendant had failed to take reasonable steps to acquaint itself with the relevant information to enable it properly to decide whether it should test the application using the updated L2021 methodology. Had the Committee been made aware of Dr Hogg’s assessment leading to only an estimated 14% reduction in CO2 emissions, it might reasonably have led them to make further inquiries before deciding that it was appropriate to confine themselves to assessment on the basis of L2013.

*Discussion and conclusions*

109. When a developer and their team of professional consultants begin the process of preparing a planning application for submission to the local planning authority, a principal source of guidance, to which they will refer and upon which they will rely in planning the project, will be the relevant policies of the statutory development plan and any associated supplementary planning guidance. They will be well advised to proceed in that way, because not only are those policies and that guidance material considerations to which the local planning authority must have regard when it comes to determine the planning application; but also, the local planning authority is required to determine the planning application in accordance with the development plan, unless material considerations indicate otherwise.
110. In Bristol, policy BCS14 of the Core Strategy states a policy requirement that new development should provide sufficient renewable energy generation to reduce carbon dioxide emissions for residual energy use in buildings by at least 20%. Policy BCS13 requires that measures to achieve that policy requirement should be integrated into the design of new development. New development is required to demonstrate through sustainability statements that those policy requirements will be achieved. Delivery of the overarching policy objectives set by policy BCS13 will be through the development management process, through the required sustainability statement and the implementation of a suite of policies including BCS14.
111. From July 2020 onwards, the CCSPN offered advice to developers and their professional consultants on the implementation of those development plan policies. For the purposes of implementing policy BCS14, paragraph 3.2 of the CCSPN advised developers and their consultants that they should submit an energy strategy with their planning application. The energy strategy should include a feasibility study for sustainable energy. It could form part of the sustainability statement required under policy BCS13. A particular requirement of the energy strategy was that it should show the projected annual energy demand for heat and power from the proposed development together with the associated carbon dioxide emissions, using the methodology in the current Building Regulations Part L as a baseline. For the purpose of determining the baseline energy performance of the proposed development, the developer and their consultants were advised to apply the building regulations that were current at the time of preparing the planning application.
112. In the present case, the Interested Party and its consultants carried out the process of preparing the application for the development in the context of policies BCS13 and BCS14 and the CCSPN. The methodology in the Building Regulations Part L which was current during that process was L2013. As was set out in the energy statement, the design of the development and the buildings proposed for the site, and the proposed arrangements for providing energy from renewable sources, were guided by the need

to present an energy strategy which demonstrated compliance with policy BCS14, using L2013 in accordance with the guidance given in the CCSPN.

113. The Claimant accepted that the time when the Interested Party was preparing the application for submission to the Defendant, the then current building regulations for the purposes of applying the practice guidance given in the CCSPN were L2013. There was no reason for the planning officer or the Committee to doubt that the energy statement submitted in support of the application in late May 2022 had followed the guidance given in the CCSPN. The advice of the Defendant's Sustainable City Team was the application complied with all relevant policies. On the basis of applying L2013, the energy statement estimated a reduction in residual carbon emissions greater than 20%, in compliance with policy BCS14.
114. In short, the Interested Party had submitted an application for planning permission which, at the time of its submission in late May 2022 and validation on 13 June 2022, had been prepared in accordance with the supplementary planning guidance issued by the local planning authority and proposed development which was in accordance with the relevant policies of the development plan.
115. L2021 came into force on 15 June 2022, two days after the Defendant had validated the application. The advice which the planning officer received from the Sustainable City Team was that the application had been submitted in line with the CCSPN which guided the Interested Party and Max Fordham to prepare the energy statement using L2013; and it was therefore acceptable for them to continue to use L2013 as the basis for the updated energy statement submitted in late October 2022.
116. By the date of preparation of the report, the local planning authority had issued the Addendum in January 2023 which confirmed that approach as the Defendant's stated policy. The position clearly stated in the Addendum was that development proposals already in the planning system and using the L2013 methodology should retain that methodology throughout the planning process. L2021 would not be applied retrospectively. In updating the energy statement in late October 2022 Max Fordham had, in effect, anticipated that approach. In any event, as matters stood when the planning officer came to write the report in April 2023, the energy statement had been prepared in accordance with the CCSPN and had been updated in accordance with the Addendum.
117. That was the factual context set out in the report against which the planning officer turned to consider how he should approach representations which challenged the Interested Party's use of the carbon emissions factors in L2013 and argued that the updated emissions factors in L2021 should have been used to update the energy statement and as the basis for deciding whether the development complied with policy BCS14.
118. As the Claimant submits, the planning officer saw that as a question of discretion: a matter for his planning judgment. His planning judgment was that the Interested Party should not be required to submit a fresh energy statement based on applying L2021 carbon emissions values. That judgment was founded on the following considerations. Firstly, it was not uncommon for technical guidance to be updated whilst an application for large scale development is in planning. Secondly, officers did not consider the updated guidance to be so significantly different to its predecessor as to make it

unreasonable to continue to apply the L2013 carbon factors. Thirdly, it would be disproportionate to require the Interested Party now to carry out a fresh assessment using the L2021 methodology. Fourthly, the Addendum supported the approach taken in the updated energy statement, since the Interested Party's application had been submitted in May 2022, validated in June 2022 and already in planning by January 2023.

119. The Claimant's submissions focus on the rationality of the second and third of those reasons. It is important to be clear on the planning officer's reasoning. The planning officer did not advise that the changes between L2013 and L2021 were insignificant. He advised that L2021 was not so significantly different from L2013 as to make it unreasonable to continue to apply the L2013 carbon emissions factors. In other words, the planning officer recognised that there were significant differences between L2013 and L2021. The question was whether the differences were of such significance to make it unreasonable for the application and the development to continue to be assessed and determined against the L2013 factors, in accordance with the guidance given in the CCSPN.
120. The explanation given in the Addendum for updating the policy BCS14 methodology recognised that L2021 had made significant changes -  
  
*"A new version of the energy efficiency requirements of Building Regulations (Part L 2021) came into force in June 2022. This introduces more stringent regulated CO2 emission standards (on average a 27% reduction on Part L 2013) and updates the calculation methodology for demonstrating compliance with Building Regulations".*
121. Notwithstanding those changes, the guidance given in the Addendum was clear. Development schemes currently in planning and already using the L2013 methodology should continue to do so. The updated L2021 methodology would not be applied retrospectively to such development schemes.
122. In giving that guidance in relation to development schemes already in planning, the Defendant was effectively relieving such a scheme from the risk that assessment against L2021's more stringent regulated carbon emissions standards, and applying L2021's updated calculation methodology for demonstrating compliance with Building Regulations, might result in a level of reduced CO2 emissions which was below the required threshold in policy BCS14. That was a policy choice made by the Defendant, no doubt influenced by the need to draw the balance between, on the one hand, the objective of achieving better energy performance in new built development through application of L2021 for the purposes of policy BCS14; and on the other hand, the objective of avoiding a disproportionate regulatory and financial burden on developers who had properly applied L2013, in accordance with the CCSPN, in fixing the design of their schemes and submitting their planning applications.
123. The Claimant did not submit that the Addendum was in any way legally unsound. The planning officer's approach and reasoning is consistent with the balance struck as a matter of policy in the Addendum. His judgment was, in substance, that it would be disproportionate to depart from the careful balance struck by the Addendum and to apply the L2021 methodology retrospectively in this case. In the light of the approach promulgated by the Defendant in the Addendum, the planning officer's judgment cannot be impugned as irrational. On the contrary, the planning officer did no more

than to decide that the Defendant was not justified in departing from that approach in determining the application. That was a judgment that was reasonably open to him.

124. The planning officer reported that all the representations made had been reviewed; and that he was satisfied that all material matters raised had been adequately summarised in the report. The gist of Dr Hogg's objection to the use of L2013 to assess the energy performance of the development was before the Committee in the appendix under objection 259. I am by no means persuaded that the absence of specific reference in the report to Dr Hogg's calculations indicates that the substance of his objection was unknown to the Committee.
125. In any event, however, in light of my analysis of the planning officer's advice and reasoning, I accept as well-founded Mr Bedford KC's submission that Dr Hogg's calculations using the L2021 carbon emissions factors were not a consideration which the Defendant acting reasonably was obliged to take into account: see Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2020] PTSR 221. It was open to the planning officer acting reasonably to advise, and the Committee acting reasonably to decide, that the development should continue to be assessed and the application be determined on the basis of the approach stated in the Addendum. Neither the planning officer nor the Committee was under an obligation to consider what the outcome might be were the development to be assessed in the alternative, using the L2021 methodology. Dr Hogg's calculations were not so obviously material as to require the Committee's direct consideration. That was because the planning officer had reached the reasonable judgment that although significant, the methodological changes in L2021 did not justify imposing the burden and the risk on the Interested Party, at this stage in the planning process, of assessing the application retrospectively using L2021.
126. The Claimant contended that because Dr Hogg's calculations using L2021 produced a lesser reduction in carbon dioxide emissions than policy BSC14 required, that was a material consideration which the Defendant could not reasonably ignore. In my view, the Claimant fails to recognise the context against which the planning officer was exercising his judgment. Once that context is understood, particularly the policy approach taken by the Defendant in the Addendum, it is clear that the Addendum is founded on the prospect that a scheme would not or might not be found to be policy compliant if assessed using L2021. That is a given. It follows that evidence showing that a scheme is not or might not be compliant with policy BCS14 if now assessed using L2021 is not so obviously material to require direct consideration. If regard was not had by the planning officer to Dr Hogg's calculations, neither he nor the Committee acted unlawfully in consequence. The Defendant was not obliged also to examine whether the development, although properly assessed as policy compliant on submission of the application and in October 2022, was now in breach of policy. It was a reasonable judgment for the planning officer to find that to be disproportionate.
127. In light of those conclusions, the Claimant's argument that the Defendant failed to discharge its *Tameside* duty cannot be sustained.
128. Finally, the fact that the Interested Party's consultants did base the sustainability statement submitted in support of the West Car Park planning application on L2021 does not provide any basis for impugning the Defendant's acceptance of the energy

statement as the basis for assessment in this case. The CCSPN advised that developers should aim to exceed the requirements of current local plan policy –

*“Where development proposals go beyond the standards required by the current local plan, the benefits of such an approach can be taken into account as a material consideration when planning applications are decided”.*

129. The Interested Party was doing no more than responding to that policy guidance in choosing to apply the L2021 standards in relation to the West Car Park application. It does not follow that the Interested Party was obliged to follow the same approach in relation to the development. Nor could the Defendant properly be said to have acted inconsistently in omitting to require the Interested Party to do so. The Defendant acted consistently with its stated policies in the CCSPN in its approach to both schemes.
130. Ground 2 is rejected. The Defendant did not act unlawfully in proceeding on the basis of the planning officer’s advice that the development’s performance against the policy requirements of BCS14 of the Core Strategy should be assessed on the basis of L2013, in accordance with the guidance given in the CCSPN and the Addendum.

### **Ground 3 – public open space**

#### *The policy background*

131. Policy BCS9 of the Core Strategy states that open spaces which are important for recreation, leisure and community use, townscape and landscape quality and visual amenity will be protected. The site is designated in the development plan as Important Open Space. Policy DM17 of the Bristol Local Plan – Site Allocations and Development Management Policies (2014) states that development on part, or all, of an Important Open Space will not be permitted unless the development is ancillary to the open space use.

132. Paragraph 99(b) of the Framework states the following policy –

*“Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:*

*...*

*b) the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; ...”.*

133. In *Brommell*, the issue for the court was whether, properly understood, the policy requirement in paragraph 99(b) of the Framework was for equivalent or better provision of open space in terms of both quantity and quality. At [27] Lang J held that was not how the policy should be interpreted –

*“...the Claimant’s interpretation of paragraph [99(b)] is over-mechanistic. The correct interpretation was provided by Mr Buley, on behalf of the Secretary of State, in his skeleton argument as follows:*

*”Para [99(b)] requires that, where open space land is to be built upon, the loss will be replaced by “equivalent or better provision”. Whether or not the provision is equivalent*



*or better must be judged in terms of both quantity and quality. The word “and” simply makes clear that both quality and quantity are relevant parameters in judging whether provision is “equivalent or better”. So the overall requirement is that the open space land lost must be made up for, and whether or not that requirement is met is a matter of planning judgment, having regard to both the quantity of what is to be provided and the quality, but allowing (in an appropriate case) for one to be set off against the other”.*

*The report*

134. The planning officer reported that the impact of the development on the site as an Important Open Space was the subject of numerous objections to the application, including by the Bristol Civic Society and Dr Hogg.
135. The planning officer advised that the development included many aspects that were consistent with policies BCS9 and DM17. However, the residential proposals were contrary to those policies, primarily because they were not ancillary to the existing use of the site as open space. It was therefore necessary to consider if there were material considerations that indicated that the proposed residential-led development of the site was acceptable, albeit that it was contrary to policies BCS9 and DM17. One such consideration was whether the development complied with paragraph 99(b) of the Framework.
136. The planning officer first considered the qualities of the site as existing open space in comparison with the arrangements for open space proposed in the development. He said that whilst the site was designated as Important Open Space, it was unusual in that it was not free to access by the public. The zoological use of the site had ceased in any active sense, with the result that the use that contributed the most to its value as Important Open Space by providing public access had also ceased. There was a risk that the site would deteriorate if left vacant for an extended period. In the absence of any evidence of alternative uses coming forward in the site's existing state, its redevelopment was a necessary consideration. Accordingly, there was justification for a new use, as there was a need to secure a future use for the site which could provide for long-term management of the open space. The development would meet that need.
137. The planning officer advised that the principal benefit of the development was the provision of free public access to the site and a securable plan for its long-term management. The development would allow access for the public to visit the site and enjoy its retained and proposed open spaces. There would be opportunities for recreation, leisure and community use, as well as enjoyment of the site's visual amenity. He acknowledged that the site's physical features which contributed to townscape, landscape, and visual amenity in the area were still present. Elements of the site's historic landscape and layout would be retained, such as the Grand Terrace and East Lawn, as would other historically important built structures, which the public would continue to enjoy in association with the site's landscape and visual amenity. The development would integrate many of the existing elements which contribute to the site's value as open space.
138. A further benefit would be the increased permeability of the site. At present, the site had a single public entrance. The development proposed a series of new public entrances, giving access to the site from each side. The Interested Party had submitted

a management plan which explained how the public would continue to enjoy the proposed open space arrangements in perpetuity. The plan would be secured through planning obligations under a section 106 agreement. The development also included an outline public art and culture strategy, illustrating how the site might benefit from public art and a programme of cultural events.

139. A large play area was proposed, which included landscape features. The existing lake would be reshaped and retained. A lakeside garden would be provided. Other valued elements to be retained as part of the overall design of the development's open space were the Bird Aviary and the Monkey Temple. The planning officer's overall assessment of the qualitative position was –

*“Generally, the approach to the landscape proposals delivers open space and supports the retention of the site's historic verdant setting, including improved elements of landscaping. The Arboricultural Team supports the general approach to tree retention, removal, and replacement .., Further, the Landscape Design Statements include key principles for ensuring long term management of the landscape post construction. The layout minimises potential harm to the open space by proposing the majority of new built form to the edges of the site where there is greater existing built form”.*

140. In his overall conclusions, the planning officer's judgment was that the development would result in –

*“marked qualitative enhancement in the nature of the open space provision available at the site, in accordance with paragraph 99(b) of the [Framework].”*

141. Turning to the quantity of open space proposed in comparison to the existing position, the planning officer said that the development would result in some areas of open space being built upon. The Interested Party had submitted an Open Space Assessment and Area Comparison Plans which sought to compare the quantity of open space provision proposed in the development with the existing open space at the site. Having considered the area comparison plans and the open space assessment in some detail, the planning officer found some ambiguity in what was considered to be open space in those assessments. His overall judgment on the question of the relative quantum of open space offered by the development was –

*“The Area Comparison Plan of the extent of the existing site where visitors access is denied or restricted is a better indicator of the development's provision for useable and accessible open space, which suggests the proposal will deliver a greater proportion of areas accessible to the public (albeit that some areas are shared use access routes) than the site currently does (existing public space 51%, proposed 56%). Officers do however recognise that many of the areas where the Zoo restricted access were enclosures, some of which contributed positively to the site's recreation, leisure, and community value. It is therefore difficult to conclude that the proposal will result in an increased quantity of open space when compared to the existing site using this indicator, but the development will allow for increased public access to open space at the site, both in terms of permitting free public access to the site and allowing greater unrestricted public access to a larger proportion of the site.”*

142. Having considered both the qualitative and quantitative position, the planning officer stated his conclusions on the development's performance against paragraph 99(b) of the Framework –

*“The development would deliver significant public benefits by delivering freely accessible open space that will enable the site to continue to be a destination where members of the public can visit for recreation and leisure, meet as a community, and enjoy the landscape and townscape value the site provides. This represents an enhancement to the quality of open space provided at the site and a significant benefit, which outweighs the elements of the proposal that do not contribute positively to the provision of open space. The key test in paragraph 99b of the [Framework] is whether any loss of open space will be replaced by "equivalent or better provision" looking at both the "quantity and the quality" of the re-provision. Here, whilst it is questionable whether in overall terms the development will lead to an increase (or even a maintenance) in the amount of existing open space, it is considered that the end result will be better provision of open space at the site because there will be a range of different high quality open spaces, managed and maintained for the longer term, with secured free public access, and increased permeability, so resulting in a marked qualitative enhancement in the nature of open space provision. It is therefore concluded that the application accords with paragraph 99b of the [Framework]”.*

*The claimant's submissions in summary*

143. Mr Brown KC submitted that in order to apply paragraph 99(b) of the Framework properly in accordance with the approach approved in *Brommell*, it was necessary for the planning officer to reach a judgment as to both the quantity and the quality of the open space to be provided by the development in comparison to the site's existing provision. Unless that was done, the planning officer was not in a position rationally to draw the overall balance between the impact of the development in quantitative and qualitative terms.
144. The planning officer had failed to advise or to reach any conclusion as to whether, and to what extent, the development would result in a change in the quantity of open space at the site. The planning officer had in effect advised the Committee that he simply did not know whether the loss resulting from the development would be replaced by equivalent or better provision in terms of quantity. He was, therefore, not in a position rationally to judge whether the overall quantity and quality of open space provided by the development was equivalent or superior to that which existed at the site. He was unable lawfully to apply paragraph 99(b) of the Framework in accordance with the approach approved in *Brommell*. This was a material error, given the site's designation as Important Open Space and the planning officer's finding that the development did not comply with the applicable policies of the development plan.

*Discussion and conclusions*

145. I do not accept the Claimant's contentions. In my view, a fair and accurate encapsulation of the planning officer's advice is as follows. In quantitative terms, the evidence did not justify the conclusion that the development would result in equivalent, let alone better provision of open space in comparison to that which now exists at the site. However, the development would deliver a number of significant benefits which would result in markedly better provision of open space measured in qualitative terms.

As a matter of planning judgment, having regard to both factors, the overall policy requirement of paragraph 99(b) of the Framework was met.

146. In my view, it was not necessary for the planning officer to resolve the residual uncertainty or ambiguity that he had fairly identified as resulting from his consideration of the area comparison plans and the submitted open space assessment. It was not a necessary prerequisite to a proper application of paragraph 99(b) of the Framework that the planning officer make precise findings as to the amount of existing open space lost to the development and the amount of open space provided by way of replacement. It was sufficient for the planning officer to follow what was, in substance, a precautionary approach. He advised that the evidence suggested that the development may deliver a greater amount of publicly accessible open space at the site than currently exists. Nevertheless, he did not feel justified in drawing the positive conclusion that the development would provide even an equivalent amount of replacement open space overall to that which would be lost. He explained why he was unwilling to do so.
147. The Claimant did not draw attention to any evidence before the Defendant at the time of the planning officer's assessment which suggested that the various estimates which he analysed in his report were wide of the mark. In those circumstances, the planning officer can fairly be said to have proceeded on the basis of a reasonable worst case, insofar as he was unwilling positively to find that in quantitative terms, there was even equivalence. The figures which he discussed in the report did not suggest that the deficit, if there was a deficit, was more than marginal in quantitative terms. In contrast, his planning judgment was that in qualitative terms, the development would result in a marked improvement over the existing position. The Claimant did not seek to impugn that judgment. There is no room for any real doubt as to the basis for the planning officer's overall judgment that the policy requirements of paragraph 99(b) of the Framework were satisfied in this case.
148. For these reasons, approaching the issues raised by this ground in accordance with the approach stated in *Mansell*, I am satisfied that the Claimant's contentions are not justified. The planning officer's advice was properly in accordance with the approach approved by Lang J at [28] in *Brommell*. Ground 3 must be rejected.

## **Disposal**

149. I have not found it necessary to refer to the evidence given in the witness statements filed by the parties. The orthodox approach to determining a claim for judicial review of a grant of planning permission, where the local planning authority has essentially founded its decision on the advice and conclusions of its planning officer, is well settled by *Mansell* and other authorities mentioned in that case. This court should focus on the reasoning in the planning officer's report and the evidence which was before the local planning authority at the time of its decision. That has been my approach in this case.
150. In large part, the principal purpose of the witness statements filed by both the Claimant and the Interested Party has been to emphasise that their respective contentions in objecting to the application and responding to those objections were well-founded and correct. It is unsurprising that those parties should seek to advance those contentions, but they essentially reflect the arguments that were before the planning officer when he prepared the report. The other principal topic addressed in the witness statements before the court is whether Dr Hogg's calculation which led him to estimate no more than a

14 % reduction in residual carbon emissions from the development, applying L2021 factors, was itself reliable. For the reasons I have given, that was not an issue that the Defendant was required to resolve in determining the application. Still less is it a matter for this court to determine.

151. I have followed the same approach in considering the brief written submissions which the parties helpfully provided at my request following the hearing, which offered some further analysis of the change in methodology between Metric 3.0 and Metric 3.1 in calculating the size of urban trees and their area equivalent.
152. I am very grateful to counsel and those supporting them for their excellent written and oral submissions. For the reasons I have given, this claim is dismissed.