



Neutral Citation Number: [2019] EWHC 1129 (Admin)

Case No: CO/4368/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Sitting at Leeds Combined Court

Judgment handed down at:
Royal Courts of Justice,
Strand, London WC2A 2LL
Date: 09/05/2019

Before :

MR JUSTICE KERR

Between :

THE QUEEN
on the application of
JONATHAN ADAMSON

Claimant

- and -

KIRKLEES METROPOLITAN BOROUGH
COUNCIL

Defendant

- and -

SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT

Interested
Party

The Claimant appeared in person (represented by **FHF Consulting**)
Mr Christopher Knight (instructed by **Kirklees Council**) appeared for the **Defendant**
The Interested party did not appear
Hearing date: 18th March 2019

Approved Judgment

The Hon. Mr Justice Kerr:

Introduction

1. The main issue in this case is whether the defendant local authority (the council) was obliged to obtain the consent of the minister before deciding to dispose of certain land in its area currently in use as allotments by the claimant, Mr Adamson, and others. That depends on whether the council has “appropriated” that land for use as allotments within section 8 of the Allotments Act 1925, as amended. If it has, it may not dispose of the land without the consent of the minister.
2. The council wants to use the land as part of the site of a new primary school it has decided to build. Mr Adamson is in favour of the new primary school but says it should not include the allotment land used by him and 13 others, unless the minister agrees to that. He wishes to put the case to the minister that the primary school site should be differently arranged so as to spare the allotment land. He and his fellow allotment holders are not satisfied with alternative allotment land offered to them by the council.
3. Andrews J granted permission on the papers and directed service on the Secretary of State as an interested party. She commented in her order that the council could ask for his consent if it wished. The council did not do so. The Secretary of State wrote to the court declining to take part in the proceedings, reasoning that since no request for consent had been made, he should not prejudge any future such request. But he did send to the court and the parties a copy of his written policy for dealing with such requests.
4. The council also argues that even if it has “appropriated” the relevant land for use as allotments, the court should refuse any remedy, for two reasons: first, that in view of the written policy, the Secretary of State would be highly likely to bestow his consent if the council were to ask him for it; and second, that Mr Adamson has unduly delayed making his application and the granting of the relief sought would be detrimental to good administration and would cause substantial prejudice to the council and local people.

Facts (including developments in the law)

5. To understand what happened in this case, you have to look at the documents from the last century in their historical and legal context. In the 19th century, there were certain statutory powers to acquire land for statutory purposes. Land could be appropriated for use as allotments under the Inclosure Acts 1845 to 1882. These were managed by allotment wardens.
6. Aside from allotments, there are other 19th century examples of statutory powers to acquire land for statutory purposes. Section 175 of the Public Health Act 1875 (until repealed by the Public Health Act 1936) gave a local authority power to acquire land for the purposes of its functions under the Act of 1875. The Housing of the Working Classes Act 1890, no longer in force, gave local authorities power to acquire lodging houses for the working classes.

7. But there was then no general power to acquire land for the purpose of a local authority's statutory powers and duties. And land acquired under a specific power for a specific purpose could only be used for that purpose. The authority could not permanently divert use of the land to another purpose without statutory authority (*Attorney-General v. Hanwell Urban Council* [1900] 2 Ch 377, per Lord Alverstone MR at 383).
8. In 1908, parliament passed the Small Holdings and Allotments Act of that year (the 1908 Act). Its preamble explained that it was "[a]n Act to consolidate the enactments with respect to small holdings and allotments in England and Wales". It placed certain borough, urban district and parish councils, if they formed the view that there was a demand for allotments, under a duty to provide a sufficient number of allotments to let to persons resident in their area (section 23(1)).
9. Section 24 of the 1908 Act, until repealed by the Local Government Act 1972 (the 1972 Act), placed county councils under a duty to ascertain demand for allotments and provide them if the borough, urban district or parish councils were not doing so. Section 25, as originally enacted, gave the borough, urban district or parish councils power to acquire land by agreement or compulsorily for the purpose of providing allotments. Section 25(1) (twice later amended but not materially) remains in force.
10. Section 31 of the 1908 Act provided, until its repeal by Schedule 3 to the Land Settlement (Facilities) Act 1919, as follows:

31 List of allotments

(1) The council of a borough, urban district, or parish shall cause a list to be kept showing the particulars of the tenancy, acreage, and rent of every allotment let, and of the unlet allotments.

(2) The list shall be open to the inspection of ratepayers in the borough, district, or parish for which the allotments have been provided, in such manner as may be provided by the rules made under this Act by the council, and any ratepayer of such borough, district, or parish, without paying any fee, may take copies of or extracts from the list.
11. After the First World War, much energy was devoted to land reform legislation. In 1919, parliament placed wider duties on local authorities in relation to housing, in the Housing, Town Planning, &c. Act 1919 which amended the Housing of the Working Classes Act 1890, placed a duty on local authorities to prepare housing schemes under the 1890 Act and empowered local authorities to deal with land so acquired for housing.
12. Thus, public powers to appropriate land for specific purposes were steadily expanding, but there was still no general power to appropriate land for the purposes of carrying out local authority powers and duties. And the *Hanwell Urban Council* case continued to prevent diversion of land use without statutory authority away from the statutory purpose for which it had been acquired.
13. The law specifically dealing with allotments and small holdings was also developed further. Part II of the Land Settlement (Facilities) Act 1919 (the 1919 Act) made amendments to the 1908 Act. The 1919 Act received the royal assent on 19 August

1919. The amendments included the repeal of section 31 of the 1908 Act, just mentioned.

14. In place of the duty to keep a list of allotments, a new specific power to appropriate land for use as allotments was enacted in section 22(1) of the 1919 Act, first drawn to my attention by Mr Adamson during his reply. As originally enacted, it provided:

22 Power of appropriation of land

(1) A council of a borough, urban district, or parish may, in a case where no power of appropriation is otherwise provided, with the consent of the Board of Agriculture and Fisheries and the Local Government Board, and subject to such conditions as to the repayment of any loan obtained for the purpose of the acquisition of land or otherwise as the last-mentioned Board may impose,—

(a) appropriate for the purpose of allotments any land held by the council for other purposes of the council; or

(b) appropriate for other purposes of the council land acquired by the council for allotments.

15. Section 22 appears to have remained in that form in England until 1965. It was amended in that year and again in 1980, but in attenuated form is still in force and now provides as follows:

22 Power of appropriation of land.

(1) A council of a borough, urban district, or parish may, in a case where no power of appropriation is otherwise provided, ...

(a) appropriate for the purpose of allotments any land held by the council for other purposes of the council; or

(b) appropriate for other purposes of the council land acquired by the council for allotments.

16. At that time, the town of Huddersfield was governed by the Huddersfield Corporation (the corporation), a statutory local authority. The corporation remained in being until 1 April 1974, when its functions were transferred under the 1972 Act to the council and to the then (since abolished) West Yorkshire Metropolitan County Council.

17. In 1920, the corporation negotiated the purchase of an estate in the borough and parish of Honley known as the Ramsden (Huddersfield) Estate (the Estate). On 4 August 1920 the Huddersfield Corporation (Lands) Act 1920 (the 1920 Act) received the royal assent. It empowered the aldermen and burgesses of Huddersfield, i.e. the corporation, to purchase the Estate for £1.36 million, with payment spread over 80 years.

18. Section 4 of the 1920 Act created the power of the corporation to acquire the Estate. By section 4(4), after the acquisition of the Estate:

the same or any part or parts thereof may be appropriated to any undertaking or to any of their powers or duties and when so appropriated a transfer of the outstanding loan in respect thereof shall be effected to the proper account in the books of the Corporation

19. That was followed by a proviso:

Provided that nothing in this sub-section shall authorise the Corporation-

...

(b) To appropriate such lands to any purposes other than purposes for which and subject to the conditions under which they are for the time being authorised to acquire and use lands.

20. The council was therefore empowered, first by section 22(1)(a) of the 1919 Act (at the time, subject to the consent of the Board of Agriculture and Fisheries and the Local Government Board) and, subsequently, by section 4(4) of the 1920 Act, to appropriate land from the Estate for use as allotments. If it did so, section 4(4) of the 1920 Act required that a transfer of the “outstanding loan in respect thereof” must be “effected to the proper account in the books of the Corporation”.

21. Section 5 of the 1920 Act made clear that the corporation was also empowered to grant leases of the Estate or parts of it or to sell it or part of it. The 1920 Act therefore enabled the corporation to sell or grant leases of land forming part of the Estate, either for use as allotment land or for any other use or for no specified use.

22. On 4 August 1922, the Allotments Act 1922 (the 1922 Act) received the royal assent. It described itself simply as “[a]n Act to amend the law relating to allotments”. The interpretation section, section 22 (still in force today), included the following: “[t]he expression “*the Allotments Acts*” means the provisions of the Small Holdings and Allotments Acts, 1908 to 1919, which relate to allotments and this Act; ...”.

23. Section 14 of the 1922 Act created a new duty on local authorities to set up an allotments committee, with non-council representatives on it. Until repealed by the 1972 Act, section 14 provided, in the discursive drafting style of the time:

14 Allotment committees of urban authorities

(1) The council of every borough or urban district with a population of ten thousand or upwards shall, unless exempted by the Minister, after consultation with the Minister of Health, from the provisions of this section, establish an allotments committee, which may be an existing committee of the council or a sub-committee of an existing committee and all matters relating to the exercise and performance by the council of their powers and duties under the Allotments Acts as respects the provision of allotment gardens (except the power of raising a rate or borrowing money) shall stand referred to such committee, and the council before exercising any such powers shall, unless in their opinion the matter is urgent, receive and consider the report of the committee with respect to the matter in question, and the council may delegate to the committee, with or without restrictions, any of their said powers except as aforesaid.

(2) An allotments committee established under this section shall comprise persons, other than members of the council, being persons experienced in the management and cultivation of allotment gardens and representative of the interests of occupiers of allotment gardens in the borough or district, provided that the number of such representative members shall be not more than one-third of the total number of the members of the committee or be less than two or one-fifth of such total number whichever be the larger number.

(3) The accounts of any receipts or payments by or to a committee under powers delegated under this section shall be accounts of the council and made up and audited accordingly.

(4)

24. Such was, in brief, the national and local legal context in which the corporation dealt with allotments in the early 1920s. It was against that background that the Agricultural Committee of the corporation met on 12 February 1923 to consider the new requirement under the 1922 Act to constitute an allotments committee.
25. The Agricultural Committee received a report from the Town Clerk and resolved to recommend that the corporation should appoint the Agricultural Committee to be the statutory allotments committee under section 14(1) of the 1922 Act and that the Agricultural Committee should exercise all the powers and duties in respect of allotments as provided for under the Allotment Acts.
26. As every English lawyer knows, 1925 was a major year for the reform of land and property law generally, with the passing of the Law of Property Act, the Land Registration Act and the Trustee Act, all in that year. Less well known is the Town Planning Act 1925, drawn to my attention by the reference to it in section 3(1) of the Allotments Act 1925. The whole Act was later repealed by the Fifth Schedule to the Town Planning Act 1932.
27. The text of the Town Planning Act 1925 is difficult to find on the usual databases. But it is clear from section 3(1) of the Allotments Act 1925 that under the Town Planning Act 1925, local authorities were empowered to make “a town-planning scheme”. In the same year, the Allotments Act 1925 was passed, receiving the royal assent on 7 August 1925.
28. The Allotments Act 1925 (the 1925 Act) described itself in the preamble as “[a]n Act to facilitate the acquisition and maintenance of allotments, and to make further provision for the security of tenure of tenants of allotments”. It provided by section 3 (in force until amended in 1972 and repealed in 1993):
- (1) Every local authority or joint committee of local authorities preparing a town-planning scheme in pursuance of the Town Planning Act, 1925, shall, in preparing such scheme, consider what provision ought to be included therein for the reservation of land for allotments.

.....

(3) The council of every borough or urban district, any part of whose district is within the area of a town-planning scheme, shall take into consideration from time to time, but at least once in every year, the question whether any and, if so, what lands within the area of the scheme are needed for allotments, whether reserved for the purpose or not, and ought to be acquired under and in accordance with the provisions of the Allotments Acts, 1908 to 1922, as amended by this Act.

(4) In the case of any borough or urban district for which an allotments committee is appointed under the Act of 1922, as amended by this Act, the council of the borough or urban district shall refer to their allotment committee any matter which they are required to consider under subsections (1) and (3) of this section, ... and shall consider the report of the allotments committee thereon.

29. There were then sections 4-7, dealing with financial controls, administration of allotments and terms of letting. These do not concern us directly. Section 8, as originally enacted, then provided:

Where a local authority has purchased land for use as allotments the local authority shall not sell, appropriate, use, or dispose of the land for any purpose other than use for allotments without the consent of the Minister of Agriculture and Fisheries after consultation with the Minister of Health, and such consent shall not be given unless the Minister is satisfied that adequate provision will be made for allotment holders displaced by the action of the local authority or that such provision is unnecessary or not reasonably practicable,

30. Such was the developing state of the law when on 19 December 1929, the corporation's Agricultural (Special) Sub Committee met to consider the subject of "permanent allotments". The brief minute makes reference to the "town planning scheme". I infer that the corporation had made such a scheme in accordance with the then Town Planning Act 1925. The minute then records that the subcommittee:

"marked out certain lands for submission to the Highways Committee as permanent allotments". [*The word 'Highways' appears in manuscript, with the words 'Town Planning' deleted*].

31. The following year, Maugham J (later Viscount Maugham who became a Lord of Appeal in Ordinary and served as the last pre-war Lord Chancellor) decided *Attorney-General v. Manchester Corporation* [1931] 1 Ch 254. His decision confirmed (at 269) that the law remained as in the Court of Appeal's decision in the *Hanwell Urban Council* case, but he distinguished the case on the facts, holding that in the case before him there was statutory authority for Manchester Corporation to build a tuberculosis dispensary and offices on the site of an open space used by the public.

32. Then in 1931 the Agricultural Land (Utilisation) Act of that year was passed (the 1931 Act). It received the royal assent on 31 July 1931. Among its purposes, expressed in the preamble, was "to amend the law relating to small holdings and allotments" and connected purposes. Section 13 gave the minister power to provide small allotments for unemployed persons.

33. Section 17 of and Schedule 2 to the 1931 Act amended section 8 of the 1925 Act by adding the words in italics below:

Where a local authority has purchased *or appropriated* land for use as allotments the local authority shall not sell, appropriate, use, or dispose of the land for any purpose other than use for allotments without the consent of the Minister of Agriculture and Fisheries after consultation with the Minister of Health, and such consent *may be given unconditionally or subject to such conditions as the Minister thinks fit, but* shall not be given unless the Minister is satisfied that adequate provision will be made for allotment holders displaced by the action of the local authority or that such provision is unnecessary or not reasonably practicable,

34. The words “after consultation with the Minister of Health” were repealed in 1993, but nothing turns on that. I pause to note that the provision as set out above is at the heart of this case. The first question I have to decide is whether the corporation has “appropriated” for use as allotments the land now being used by the claimant and his fellow allotment holders.
35. To find the answer, I return to the narrative. The corporation’s Agricultural Committee convened on 7 December 1931. It included, under the then section 14 of the 1922 Act, non-council representatives, appointed by the minister. The Town Clerk reported on provision of allotments for the unemployed and partially employed, referring to the recently passed Agricultural Land (Utilisation) Act 1931.
36. Under the heading “permanent allotments”, security of tenure was discussed. Two groups of allotments were identified and “made permanent allotments”. The committee clearly equated permanence with security of tenure. It is common ground that what are now the allotments in issue in this case are not mentioned in the minutes. The two allotment groups made “permanent” (Barcroft Road and Clayton Fields) feature later in the documents.
37. The following summer (with royal assent on 12 July 1932) the Town and Country Planning Act 1932 was enacted. I have already mentioned that it repealed the whole of the Town Planning Act 1925. According to the preamble, it was, among other things, an Act “to authorise the making of schemes with respect to the development and planning of land, whether urban or rural, and in that connection to repeal and re-enact with amendments the enactments relating to town planning”.
38. Section 1 authorised the making of a scheme “with respect to any land ... with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience, and of preserving existing buildings or other objects of architectural, historic or artistic interest and places of natural interest or beauty”.
39. The Town and Country Planning Act 1932 was repealed in 1947 but was very much in force in 1933 when the Local Government Act of that year (since repealed by the 1972 Act) was enacted. Section 163 conferred what is thought to be the first general power for local authorities to change the purpose of land acquired for one statutory purpose to a different statutory purpose, thus reversing the effect of the *Hanwell Urban Council* decision.
40. Section 163(1) of the Local Government Act 1933 provided that (subject to certain provisos that do not concern us here):

163. — Power to appropriate land.

(1) Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land ...

The requirement of ministerial consent was later dispensed with by removal of the words “approved by the Minister”.

41. It is clear that in 1935 the corporation adopted “the Town Planning Scheme 1935”, as it was described in later wartime committee minutes. We do not have the scheme itself (the 1935 Scheme) but there is evidence of its preparation and content in the Agricultural Committee minutes of its meeting on 9 December 1935, referring to the 1935 Scheme as the “Town and Country Planning Act, 1932. Huddersfield Town Planning Scheme.”
42. The committee met that day to discuss, among other things, the agenda item “Land for Allotments”. The chairman was the same as in 1929 and 1931 and most of the ministry’s representatives were the same as in 1931. The General Superintendent submitted “particulars shewing the groups of allotments under the control of this Committee and those which were not under the control of this Committee”.
43. The committee inspected “the Town Planning Maps” of the corporation and resolved “[t]hat the land zoned on the maps for use as allotments be approved, subject to the undermentioned additions ...”. Four additional allotment sites were then set out.
44. The minutes state that the first addition, bearing the macabre name Gallows Fields “now zoned ‘Building Land’ be re-zoned for allotments and ... an additional 5 acres adjoining, be also zoned for allotments”. The third addition was that land “comprising the Reinwood Allotments zoned on the map as ‘Building Land’ be re-zoned instead for allotments”. The fourth addition was that “the land comprising the Woodfield Allotments zoned on the map for ‘Housing’ be re-zoned instead for allotments”.
45. The second addition, which I take out of order, was that about eight acres “sloping down from Highfields to St. John’s Church be zoned for allotments”. It is common ground that this land formed part of the Estate and that it includes the site today known as the allotment site at Cemetery Road, which is the allotment land currently occupied by the claimant and the other 13 allotment holders.
46. The concluding part of the committee’s resolution passed on 9 December 1935 was “that this Committee respectfully request the Highways Committee to amend the maps accordingly”.
47. The next document we have is a wartime minute of the corporation’s Estate Committee, which met on 19 May 1941. It recorded briefly the committee’s resolution that the Wood Lane allotments “be transferred to the Agricultural Committee at a rental of £2 per acre”. It seems clear that the Wood Lane allotments

were being placed under the control of the Agricultural Committee and that the latter would have to account to the Estate Committee by making a (presumably annual) payment of £2 per acre.

48. About two and a half years later, still during the war, the Agricultural (Special) Sub-Committee met on 11 November 1943 and discussed an agenda item: “Permanent allotments. Town Planning Scheme.” The minutes record that the General Superintendent submitted a list of allotments “zoned under the Town Planning Scheme 1935” and also a “draft list of additional allotments now under the control of the Agricultural Committee, allotments under the control of the Estate Committee and those privately owned ...”.
49. The discussion was adjourned. The minute strongly suggests that allotments “zoned” under the 1935 Scheme were under the control of the corporation; as, indeed, one would expect. It is unlikely that the corporation would “zone” allotments it did not control. I think it is a reasonable inference that the four “additions” which the Agricultural Committee, back in December 1935, had resolved should be “re-zoned” or, in one case, “zoned” for allotments on the maps, were likewise under the control of the corporation.
50. Over ten years later, on 21 April 1954, the corporation’s Allotments Sub-Committee, as it was by then called, met and discussed “security of tenure of allotments tenants”. The General Superintendent submitted a “schedule” (which we do not have) putting allotment sites in four categories:

“(a) “permanent”; (b) sites “scheduled in the development plan for use as allotments”; (c) “sites ... not scheduled in the development plan for use as allotments”; and (d) certain sites leased direct to allotments societies and managed by the Estate and Property Committee which “will come under the control of the Sub-Committee in 1955.”
51. The subcommittee resolved that the chairman and deputy chairman should consider and report back on means of obtaining greater security of tenure for tenants of allotments in categories (b), (c) and (d).
52. On 20 September 1957, a “Sectional Sub-Committee” was appointed by the Allotments Sub-Committee (as appears from the minutes of the latter’s meeting on 23 October 1957). On 16 October, the Sectional Sub-Committee visited three allotment sites, one of which was “Cemetery Road” (now occupied by Mr Adamson and the 13 other allotment holders) and agreed that the ploholders at the other two sites could be accommodated at Cemetery Road, with a view to security of tenure there. Other proposals for “regrouping” of sites were also discussed.
53. The Sectional Sub-Committee reported back to the Allotments Sub-Committee on 23 October 1957 and the latter resolved in principle that in the proposed regrouping exercise, security of tenure should be obtained by appropriation or purchase of the lands forming the sites of the regrouped allotments. It asked the Sectional Sub-Committee to consider and make recommendations on the question of “regrouping”.

54. On 15 November 1957, the Sectional Sub-Committee considered a report on the proposed regrouping of allotments and resolved to make various recommendations. First, it resolved to recommend that the Estate and Property Management Committee be asked to “agree to the appropriation” of numerous named sites, “all ... at present used for allotments”, “to allotments purposes”. The many sites included names already encountered: Gallows Fields, Barcroft Road, part of Reinwood, Clayton Fields and Cemetery Road.
55. Then, it resolved to recommend that other committees (Housing, Welfare, Parks Cemeteries and Allotments, Finance, Estate and Property Management and Education) be asked to agree to the “appropriation” of a smaller number of sites “to allotments purposes” or in some cases to consider other options such as purchase or deferral of any decision. It also recommended “release” – presumably for non-allotment uses – of other sites, some recorded as being privately owned, others under the control of committees, in most cases Estate and Property Management.
56. There are many committee documents from 1958-1959 and into the 1960s. On 21 April 1958, the Estate and Property Management Committee addressed the proposals and made numerous decisions including that “consideration of the application to appropriate allotment sites at ... St John’s and Cemetery Road ... be deferred”. That issue was further deferred on 10 July 1958.
57. On 11 August 1958, the Allotments Subcommittee asked the Estate and Property Management Committee to “come to an early decision” in respect of that and other sites. But when the Estate and Property Management Committee met on 15 September 1958, it decided that certain sites, not including Cemetery Road, should be “appropriated” to allotment use under section 4(4) of the 1920 Act, but that “no action be taken” with respect to other sites.
58. There is no evidence of any further relevant decision regarding the Cemetery Road site thereafter. The Allotments Sub-Committee continued to press for a decision into December 1958, but without success. There the matter rested, though the discussions continued. Probably in or about March 1959, the corporation prepared a three page table of sites headed “Allotments Appropriations (Appropriations agreed up to March 1959)”.
59. It is likely that this document was intended to aid those discussions, which continued into the 1960s without any further decision being taken in respect of the Cemetery Road site. The table refers to numerous sites, including Gallows Fields, Clayton Fields and part of Reinwood, all recorded as having been appropriated to allotment use by a resolution in “1958/59”. The Cemetery Road site does not feature in the table. There is no mention in the table of any pre-war documents or appropriations.
60. After that, the major local government reforms of the early 1970s occurred, with the passing of the 1972 Act and the creation of the defendant council taking over part of the area of the corporation from 1 April 1974. The current general power to appropriate land for a statutory purpose is now contained in section 122 of the 1972 Act, which superseded the power in section 163 of the Local Government Act 1933.

61. In 1977, the council produced a document called “Appropriations” containing a commentary on the general power under section 122 of the 1972 Act. It does not mention allotments but emphasises that where there is an appropriation under section 122, there is a need to ascertain the appropriate valuation date where an “accounting adjustment” is necessary in the case of a “transfer between Committees” of council assets.
62. That document has surfaced in the present case because a lawyer from the council found it in 1993 “[o]n clearing out the Town Hall basement” and provided it to officers responsible for “Allotments Appropriations” in the hope that it could be of assistance to those officers, presumably for the purposes of accounting financially for rent received from allotments holders.
63. Such is the historic law and evidence before me about use of allotments in the Huddersfield area, forming the backdrop to the decision that is challenged in this case. The focus then shifts to the council’s project to build a new primary school on the land used as allotments by Mr Adamson and others.
64. In October 2013, the council’s cabinet authorised officers to develop proposals to create 1,260 new primary school places across Huddersfield, to meet anticipated increased demand resulting from population growth. A site adjacent to Cemetery Road was identified in October 2016 as suitable for a new primary school. An application for outline planning permission was made in March or April 2017. Public consultation on the proposal took place from March to July 2017.
65. Planning permission for the project was granted on 21 November 2017, subject to conditions. According to the plans, the allotments now occupied by Mr Adamson and his fellow allotment holders are to become school playing fields and car parking space on the new site. This is obviously incompatible with their continued use as allotments.
66. There is no condition requiring ministerial consent to appropriation of that allotment land to educational use under section 122 of the 1972 Act. Condition 26 requires that before works to construct the school building commence, “full details (including location) of package of measures to be provided to replace existing allotments for all the displaced plot holders and timescale to implement approved measures shall be submitted to and approved by the [council].”
67. Condition 26 further requires that the package of measures must include replacement plots and there is much detail about what requirements the replacement plots must satisfy. The stated reason is to provide the existing plot holders, i.e. Mr Adamson and the others, with “an equivalent community benefit in the form of replacement plots in accordance with Policy R9 of the Kirklees Unitary Development Plan”.
68. Mr Adamson and the other 13 affected plot holders do not object to the new primary school being built on the site; he told me that they are in favour of the new school but they do not think it necessary or appropriate that the site should include the allotments they currently occupy. They have been offered alternative vacant sites at Cemetery Road, but they are dissatisfied with these.

69. Construction of the first phase of the new school is due to start about now. The potential for disputes with the allotment holders, including judicial review proceedings, was foreseen and has been built into the construction timetable. However, the council's evidence is that delay will result in additional cost being incurred by it, under its building contractor terms.
70. In April 2018, the council was already checking historic documents in response to a request from Mr Adamson's solicitors to look into the issue of whether statutory appropriation of the Cemetery Road site had occurred. At that stage the council emphasised in a letter of 23 April 2018, proceedings would be premature because "no substantive decision" had been made "to appropriate the land in question".
71. On 8 May 2018, Mr Adamson, together with Ms Debby Fulgoni, wrote to the council informing that they had, from their own research, established the existence of the minutes from 1929 and into the 1930s, already mentioned. They maintained at paragraph 10 of that letter that "Cemetery Road Allotments were ... zoned in 1935 as allotments". They sent the letter to Mr Hoyle, of the council's legal department.
72. The same day, the council wrote to Mr Adamson's solicitors suggesting that they should "put this on hold until such time as a challengeable decision has actually been made". Mr Hoyle responded dismissively to Mr Adamson the next day that the minutes relied on "merely talk about the creation of a permanent allotment, not a statutory one".
73. Dr Keith Lomax, Mr Adamson's solicitor, emailed on 13 May 2018 saying he did not anticipate bringing any proceedings until a challengeable decision had been made, and asking to be notified of any such decision without delay. That was the state of the dispute when the matter came before the cabinet on 21 August 2018.
74. Officers explained in their report that a property law specialist had been "unable to find any record of the allotment land having been appropriated for statutory allotment purposes". There was no mention in the report of the minutes on which Mr Adamson and Ms Fulgoni were relying. It was argued in the report that use of the site as allotments had been "classed as temporary" and therefore they could be appropriated for the purposes of the new school under section 122 of the 1972 Act.
75. The council formally decided on 7 September 2018 to appropriate the site for the new school. Six days later, on 13 September, a letter was sent by the council's allotments manager, Mr Faulkner, giving Mr Adamson notice to quit. The letter claimed that Mr Adamson had "agreed to accept a Tenancy Agreement of a new plot(s)" and enclosed a copy for him to sign; but he clearly does not agree to this. I understand similar letters went to the other 13 affected plot holders.
76. Just over two weeks later, on 28 September 2018, Dr Lomax wrote a pre-action protocol letter relying on, among other things, the 1929 and 1930s documents as showing that the site had been appropriated for use as allotments in 1935. He contended that the decision to proceed to appropriate the land for educational use was unlawful.

77. The council, through its head of legal services, disputed the proposition that the Cemetery Road site had ever been appropriated for use as allotments. The core of his argument was that the concept of appropriation has a “discrete meaning” and that “zoned” does not mean “appropriated”. He also disputed various other grounds advanced by Dr Lomax, with which I am not now concerned.
78. The claim was then brought on 1 November 2018. Andrews J granted permission on 18 January 2019 and ordered the Secretary of State to be joined as an interested party. The Secretary of State wrote to the court on 31 January 2019, declining to take part on the basis that no request for consent had been received and he should not prejudge any future request, should one be made; but enclosing a copy of his policy published in January 2014 and entitled *Allotment Disposal Guidance: Safeguards and Alternatives*.
79. It was explained in the letter that the criteria in the policy document are applied to all cases but, in the usual way to avoid fettering of discretion, there could be “exceptional cases” where a decision might not reflect whether the criteria were met or no. The policy document itself focussed, as one would expect, on adequacy of alternative provision or whether such alternative provision is unnecessary.
80. Mr Faulkner, in a helpful witness statement made in February 2019, provides figures showing that in the Kirklees area there are 187 vacant sites and a waiting list with 406 names on it, corresponding, he says, to 319 individuals. On the Cemetery Road site, there are, he says, 82 plots of which 34 have been appropriated for the new primary school. 14 plots were vacant in 2018. Some plot holders have more than one plot, including Mr Adamson who has four.
81. Vacant plots at the site were overgrown to the point of being derelict, with heavy growth of brambles and rough vegetation. They have been cleared and improved, with a water supply now available. There are enough vacant plots to accommodate all the 14 displaced plot holders. Four plots have provisionally been allocated to Mr Adamson.
82. The quality and positioning of replacement plots offered depended on “seniority”, i.e. how long the plot holder had been present on the site. The replacement plots, however, slope downwards, unlike the displaced plots which are level, as you would expect given the intended use as playing fields.

Submissions of the parties

83. At the oral hearing submissions were made without reference to section 22(1) of the 1919 Act, which only came to light at the end of Mr Adamson’s reply. Although this was not ideal, in the end it did not matter much because Mr Knight, for the council submitted that the council’s power to appropriate the land for use as allotments was to be found in section 4(4) of the 1920 Act and was specific to the Estate. He did not suggest that this appropriation power required consent from any third party before appropriation for allotment use of Estate land could take place.

84. Mr Knight also accepted (though without reference to section 22 of the 1919 Act) in response to a question from the court that in view of the words “or appropriated” added to section 8 of the 1925 Act by the 1931 Act (in the phrase “[w]here a local authority has purchased *or appropriated* land for use as allotments”), the corporation must have had *vires* to appropriate for use as allotments the land now known as the Cemetery Road site even without section 4(4) of the 1920 Act.
85. Following the discovery of section 22(1) of the 1919 Act, he submitted a short note after the hearing, though without seeking the leave of the court to do so, contending that section 22(1) of the 1919 Act did not alter the position. The council’s position remained that the corporation had not appropriated what is now the Cemetery Road site for use as allotment land at any time.
86. On his own behalf Mr Adamson, representing himself with skill and courtesy (though with his solicitors on the record), made the following main submissions. First, he submitted that the documents from 1929 and into the 1930s showed that the corporation was exercising its function under the then section 3(1) of the 1925 Act, namely considering what provision ought to be included in its town planning scheme for “the reservation of land for allotments”.
87. He pointed out that the land “zoned” for allotments in the 1930s were described at the time as “permanent” allotments, with security of tenure for the occupants. It was clear, he said, that by 1957 that had been forgotten and this explained, for example, why the Barcroft Road site was, unnecessarily, appropriated for allotment use on 15 November 1957 when it had already been so appropriated on 7 December 1931.
88. Mr Adamson argued that at the point where land passed into the control of the committee (or subcommittee) responsible for allotments, statutory appropriation of that land to allotment use occurred. The act of appropriation is the act of the relevant committee taking control of the allotment land. The memorandum dating from 1977 illustrated this point well by explaining the need for an appropriation date (i.e. the transfer date) for the purposes of the council’s accounting processes.
89. The payment of rent within the council, from the committee responsible for allotments to the committee responsible for estates generally, in respect of land designated for allotment use, said Mr Adamson, further demonstrated the appropriation of that land for allotment use. He cited the example of Wood Lane allotments, transferred by the Estate Committee on 19 May 1941 to the Agricultural Committee at a rental of £2 per acre.
90. Mr Adamson pointed to evidence from 2010 to 2017 of payments made by the committee now responsible for allotments to the general estates fund kept by the council, for accounting purposes. He pointed out that no distinction is made in the financial documents between “statutory” and “non-statutory” allotments; and that this point undermines the council’s argument that the allotments that were the subject of decisions in the 1930s and 1940s (including the Cemetery Road site) never ceased to be part of the council’s general estate.

91. In relation to the construction of the new primary school, Mr Adamson emphasised that it was no part of his design, or that of the other 13 affected allotment holders, to prejudice the construction of the new school. He explained that he is in favour of its construction; but that the site of the new playing fields and car parking space could easily be relocated to a different part of the new school site.
92. That is the case he wishes to make to the Secretary of State, as well as advancing the complaint that the alternative provision offered is inadequate. He said the court could not know what the Secretary of State's reaction to a request for ministerial consent to the disposal would be, since the council had not made such a request though it could have done so long ago, in early 2018. Presumably, he argued, it would have done so if confident the request would be granted.
93. On the issue of undue delay, he pointed out that the council had persuaded Dr Lomax not to issue proceedings until a challengeable decision had been made. Once it was made on 21 August 2018, it was necessary to go through the pre-action protocol procedure and the claim had been issued on 1 November 2018, nearly three weeks before expiry of three months from the date of the decision.
94. Mr Knight submitted that the council had never appropriated the Cemetery Road site for use as allotment land. Therefore, he submitted, the amended section 8 of the 1925 Act did not apply and ministerial consent was not required to dispose of the site. He relied on the Court of Appeal's decision in *Snelling v. Burstow Parish Council* [2013] EWCA Civ 1411, [2014] 1 WLR 2388 (per Patten LJ at [31]-[32]) for the proposition that section 8 of the 1925 Act is restricted by its opening words and does not apply to every form of allotment.
95. Use of land as an allotment is not the same thing as statutory appropriation, Mr Knight argued; statutory appropriation requires a formal act of some kind amounting to appropriation, which must be a "conscious deliberative process so as to ensure that the statutory powers under which the land is held is clear"; "appropriation from one use to another cannot ... be simply inferred from how the council manages or treats the land" (per Dove J in *R (Goodman) v. Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin), [2016] PTSR 1523, at [22]); see also at [38]).
96. Mr Knight contended that the decisions taken in the 1930s and 1940s were not statutory appropriations of land for use as allotments within the meaning of section 8 (as amended in 1931) of the 1925 Act. The Agricultural Committee and its subcommittee were merely making informal decisions about how the land should be used.
97. In the case of the meeting of 9 December 1935, the decision that certain land should be "re-zoned" should be read as indicating nothing more than a request to the Highways Committee to make amendments to the maps so that the maps reflected the then current use of the sites in question. Those decisions were not acts of statutory appropriation, he submitted.
98. Mr Knight further argued that the council's allotments subcommittee deliberating in the 1950s was best placed to know whether there had already been any relevant

prior statutory appropriations of the sites in question. It is clear from the records of the deliberations and discussions in the 1950s that no one at the corporation thought there had been any prior statutory appropriations. While Mr Knight accepted that it was possible the allotments subcommittee and other corporation bodies could have been mistaken in the 1950s and 1960s, it was unlikely.

99. In the alternative, Mr Knight submitted that the court was obliged to refuse relief in accordance with section 31(2A) of the Senior Courts Act 1981 because it must appear to the court “highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred”.
100. He argued that, in line with the policy document disclosed by the minister with his letter of 31 January 2019, it would be inevitable that he would grant consent to the disposal if asked for it. The alternative provision was plainly adequate for the reasons explained in the council’s written evidence. The site was larger than needed and under-occupied. There was no realistic prospect of the minister withholding consent or granting it only subject to conditions.
101. Finally, Mr Knight argued that even if that was not accepted, the court should withhold relief in the exercise of its discretion, applying section 31(6) of the same Act, since there had been “undue delay” in making the application for judicial review and the grant of relief would cause substantial prejudice and detriment to good administration.
102. In oral argument, he made it clear that the undue delay he relied on was the period of 2 months and 11 days from 21 August 2018 to 1 November 2018 when the claim was brought. He did not complain of delay at any earlier stage, accepting that Dr Lomax was right to agree not to bring a claim until a decision to appropriate the land for educational use had been made.
103. Mr Knight pointed out that experience showed ministerial decisions were not known for their swiftness in such cases and that work on the site is planned to start from September 2019, for completion in March 2020; dates which, if they had to be put back, would result in the council incurring contractor costs estimated at upwards of £7,000 a week from September 2019.
104. It would not be in accordance with the council’s planning obligations, Mr Knight argued, for the school to open without the playing field and car parking facility for which the site is earmarked. The delay could lead to the school opening later than planned, with resulting prejudice to the education of those due to attend it. Applications to amend the planning conditions would have to be made. Approval of the playing field facilities from Sport England is required.

Reasoning and Conclusions

Statutory appropriation of the Cemetery Road site?

105. From 1908, local councils had a duty to ascertain demand for allotments and meet any demand, if necessary by compulsory purchase. They also had to keep a publicly available list of allotments. As early as 1919, councils could instead

appropriate other council land for use as allotments, or appropriate allotment land for other council uses, subject to consents from two government or government related bodies.

106. From 1922, councils were required to set up a special committee to deal with exercise of statutory functions under “the Allotments Acts” passed in the period from 1908 to 1922. From 1925, local authorities preparing a town planning scheme had to “consider what provision ought to be included therein for the reservation of land for allotments”. It would not be surprising if a local authority deciding on “provision for the reservation of land for allotments” were to appropriate that same land for allotment use.
107. The amendment, in 1931, of section 8 of the 1925 Act to add the words “or appropriated” to the phrase “has purchased land for use as allotments” is not of great significance; it merely brought the law up to date, reflecting the point that relevant local authorities had been able since 1919 to appropriate land for use as allotments, as well as purchasing it.
108. In that statutory context, it is no surprise to find that the Agricultural (Special) Sub-Committee in December 1929 “marked out certain lands for submission to the Highways Committee as permanent allotments”. We do not know what those lands were but I think it is probable (albeit I do not need to decide the point) that the lands thus marked out were appropriated as allotment lands under section 22 of the 1919 Act or perhaps, if they formed part of the Estate, under the 1920 Act.
109. When the Agricultural Committee, on 7 December 1931, decided that the groups of allotments at Barcroft Road and Clayton Fields “be made permanent allotments”, it is likely (though again I do not need to decide the point definitely) that the committee was, likewise, making a decision to appropriate the groups of allotments at those two sites as allotment lands under the 1919 Act or perhaps, if they formed part of the Estate, under the 1920 Act.
110. And when, on 9 December 1935, the Agricultural Committee considered “land for allotments” in the context of the 1935 Scheme, the committee having inspected the maps and found that three parcels of allotment land under the committee’s control were, in its opinion, wrongly “zoned” for other uses as housing or building land, the committee resolved that those lands on the maps be “re-zoned for allotments”. In the case of what is now the Cemetery Road site, the committee found no fault with the map but simply resolved that it be “zoned for allotments”.
111. That seems to me a very plain case of a local authority undertaking what Dove J many years later called a “conscious deliberative process”. I reject Mr Knight’s suggestion that the committee was merely indicating informal use of the land as allotments and merely requesting the map makers to indicate on the maps where land was that happened to be in use, informally, as allotment land. That suggestion is consistent neither with the statutory context, nor with the purpose of the 1935 Scheme, nor with the use of the verb “zone”.
112. I drew the parties’ attention at the hearing to the meaning of the verb “zone” in the online Oxford English Dictionary. It is of surprising antiquity; uses are recorded as

early as 1795, one of two being a quote from the Monthly Review of December that year: “[h]er population ... had zoned every hill with vines and with olive-trees”. In the context of town planning, there are interesting usages dating from the times I am concerned with in this case:

“4. Town Planning. To divide (a city, land, etc.) into areas subject to particular planning restrictions; to designate (a specific area) for use or development in this manner. Occasionally intransitive. Also (U.S.) const. out, to forbid (the siting of an enterprise) in a given area. orig. U.S.

1916 N.Y. Times 4 Feb. 17/2 The plan to zone the city and regulate the height of buildings.

1919 Argus (Melbourne) 28 Aug. 6 The question of ‘zoning’ the metropolitan area, or separating the city into districts, in order that regulations may be applied to control the erection of shops and factories near residential sites, has recently been occupying the attention of the Melbourne City Council.

1934 W. H. Heath in E. Betham House Building 1934–6 xviii. 180 There is practically no area around London that is zoned in a reasonable manner.

1939 H. M. Lewis City Planning xvi. 169 All the frontage of main streets was placed in business zones although..only a small fraction of areas so zoned can ever be used for that purpose.

1967 Boston Sunday Herald 26 Mar. i. 9/4 Planners..are concerned that a community will be thoughtfully zoned overall.

...”

113. In the *Goodman* case, Dove J held that a local authority did not, merely by planting trees on land, appropriate that land for use as an open space after it had previously been formally appropriated for industrial or employment use. His reasoning was appropriation could not be inferred from the manner in which the local authority dealt with or managed the land; appropriation required a conscious deliberative process. There is no “doctrine of inferred appropriation by conduct” (as Dove J put it at [21]). But there is no required formal procedure for appropriation.
114. In my judgment, whether appropriation occurred here is as fact sensitive an evaluation as it was in the cases considered by Dove J, as he observed at [37]. If the corporation in the present case had merely started growing its own vegetables on the lands used as allotments, then I would have accepted that by doing so it no more appropriated the land for use as allotments than did the local authority in the *Goodman* case appropriate the land concerned for use as an open space by planting trees on it.
115. But here, the corporation did not merely itself use the lands “zoned” or “re-zoned” as allotment land. It took a considered and conscious decision, recorded in committee minutes, in the performance of statutory functions: that specific land should be “zoned” or “re-zoned” for use as allotments by tenants. That “zoning”

exercise was begun by other parts of the corporation when they produced the maps in the evolution of the 1935 Scheme.

116. The Agricultural Committee's contribution was to identify four additional sites appropriated for allotment use. I find this to be a very plain case of statutory appropriation of that land for use as allotments. I think the use of the verb "zone" was its current use in town planning parlance: "[t]o divide (a city, land, etc.) into areas subject to particular planning restrictions; to *designate (a specific area) for use or development in this manner*" (my italics).
117. It is then not surprising to find evidence of subsequent continued use of that land, under tenancy agreements, as allotments, into the 1950s and 1960s. Requesting amendment of the maps to accord with the Agricultural Committee's decision was not a mere informal expression of a wish; it was a formal request to ensure that the 1935 Scheme properly reflected the Agricultural Committee's decision.
118. That is sufficient to dispose of the appropriation point that arises in this case. If it were necessary to add to the reasoning, I would also support the contention of Mr Adamson that statutory appropriation occurs where a local authority's allotments committee formally takes control of allotment land from the general estates land owned by the local authority.
119. Depending on the facts, it is also possible in my judgment for statutory appropriation of land for use as allotments to occur by the entering into of a formal lease of allotment land for use as such.
120. There could be cases where the occupancy arrangement is too informal to constitute a statutory appropriation. But where a lease of land specifically and formally confines the tenant's use of the land to use as an allotment – for example, with a covenant against non-allotment use - I do not see why that should not be evidence of a decision resulting from a conscious deliberative process of the type envisaged by Dove J in the *Goodman* case.
121. The use of non-legal terminology such as describing "temporary" or "permanent" allotments may be a pointer to whether there is a statutory appropriation or not. References to "security of tenure" are evidence pointing in the direction of statutory appropriation but are not conclusive. The description of certain allotments as "temporary" when they have been used as such for many decades, may not accurately indicate whether there has been a statutory appropriation or not.
122. It is quite clear to me that the minutes and discussion documents dating from the 1950s and later, are not in point. They overlook the earlier statutory appropriations of allotment land that occurred in the 1930s. Mr Knight correctly conceded in his skeleton argument that the council "cannot absolutely rule out the possibility of a historical appropriation which was not properly recorded or for which records have been lost".
123. The discussions in the 1950s must have taken place without those taking part in them having access to the documents from 1929-1943 which I have seen; otherwise those documents would surely have been mentioned in those minutes and

discussions. Gallows Fields, Reinwood, Barcroft Road and Clayton Fields and the Cemetery Road site did not need to be re-addressed in the 1950s, though they were.

124. The table of sites dating from about March 1959 clearly indicates that the “regrouping” and decision making exercise that took place during the 1950s was undertaken without knowledge of and access to the pre-war and wartime documents which the diligence of the parties has enabled me to see for the purposes of this case.
125. If there were no statutory appropriations prior to the 1950s, as that document indicates, a power on the statute book since 1919 went unexercised for over 40 years. That seems to me wholly unrealistic.
126. For those reasons, I decide the issue of appropriation in favour of Mr Adamson and I come to the second issue.

Section 31(2A) of the Senior Courts Act 1981

127. The question I must consider is whether it appears to me “to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred” (section 31(2A) of the Senior Courts Act 1981). If it does so appear to me, I must refuse relief and have no discretion to grant any.
128. To decide the issue, the court “must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law” (*R (Goring-on-Thames Parish Council) v. South Oxfordshire District Council* [2018] EWCA Civ 860, [2018] 1 WLR 5161, per Sir Terence Etherton MR at [55]).
129. I remind myself that, as Mr Knight pointed out, “[t]he concept of “conduct” in section 31(2A) is a broad one, and apt to include both the making of substantive decisions and the procedural steps taken in the course of decision-making. It is not expressly limited to ‘procedural’ conduct” (*ibid.* at [47]). However, in the present case Mr Adamson makes no criticism of the council’s procedural conduct.
130. His case is that the cabinet was wrongly advised that the Cemetery Road site had not been the subject of a statutory appropriation as allotment land and that the council therefore erred in law by deciding that it was free to appropriate the site for educational use under section 122 of the 1972 Act and to evict him and the other 13 affected allotment holders.
131. What is the conduct complained of here? By section 31(8) “... *the conduct complained of*”, in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief”. It is therefore necessary to identify the conduct which, in this case, Mr Adamson claims justifies the grant of relief.
132. Mr Adamson says the court is justified in granting relief because the council unlawfully exercised or purported to exercise its statutory power of appropriation of

the site. He complains of that decision, the making of which is, in my judgment, “conduct complained of” within section 31(8). He also complains that he was served with an unlawful notice to quit requiring him to vacate his plots at the site. Service of the notice to quit is also “conduct complained of” by him within section 31(8). Mr Adamson seeks the quashing of both decisions, to cure the illegality.

133. The council’s position is that if the two decisions were unlawful, and the conduct complained of had not occurred, it is highly likely that the outcome would not have been substantially different for Mr Adamson. Mr Knight argues that the consent of the Secretary of State would have been obtained. He relies on the policy and on what he says is the adequate alternative provision. In oral argument, Mr Knight characterised the conduct complained of by Mr Adamson as appropriating the site for educational use without ministerial consent.
134. I do not agree with that description. Mr Adamson makes no complaint about the council’s omission to obtain ministerial consent. He is content that the council has not sought that consent; he points out that the council’s failure even to ask for consent precludes it from being obtained, even if, in the event it were sought, it would be granted. I do not think it right to include within the “conduct complained of” the omission to seek ministerial consent.
135. But if I were wrong about that, and assuming in the council’s favour (without deciding) that “conduct” can include an omission to do something (here, to seek ministerial consent), I would still need persuading that the council would have chosen the path of seeking ministerial consent if it had acknowledged the statutory appropriation of the Cemetery Road site.
136. Necessarily implicit in Mr Knight’s submission is the proposition that the council would have sought ministerial consent had it acknowledged that the site had been appropriated to allotment use. But Mr Knight did not point me to any evidence of any decision or contingent decision by the council to seek ministerial consent. The report to cabinet for its meeting on 21 August 2018 merely stated on this subject (at paragraph 2.32):
- “... They [officers] found no evidence whatsoever that the Cemetery Road Allotments ... had ever been appropriated for allotment purposes and therefore remained classed as temporary allotments, the result being that it was much easier to deal with allocating the allotments to school purposes and the statutory procedure under section 8 of the Allotments Act 1925 to cease their use as allotments (involving, amongst other things, obtaining the Secretary of State’s consent) did not have to be followed.”
137. The potential for judicial review challenge was clearly recognised in the council’s thinking in the run up to the cabinet’s decision. Indeed, the present dispute had already been flagged up in correspondence and the delay attributable to judicial review was taken into account in the timing of building works. I cannot find evidence of any plan to obtain a ministerial decision, a process said to take at least 13 weeks and in some cases a great deal longer.
138. Rather, the report to cabinet at paragraph 3.6 says instead that cabinet should authorise officers:

“to continue to defend the Judicial Review should it occur. This is to ensure that the proposals for the new school can continue and to minimise any delay in being able to do that.”

139. The council did not seek to test the proposition it now advances, either before or after the grant of permission to bring this claim, that consent would inevitably be forthcoming; even when Andrews J, granting permission, reminded the council that it could seek consent if it wished; having remarked earlier in her written observations that Mr Adamson “appears to me to have a real prospect of persuading the court” that the allotments had been appropriated as such by statute.
140. If I did need to consider what the minister’s response to an application for his consent to disposal of the site would be “highly likely” to be, I would need to consider the Secretary of State’s policy document, the case for and against ministerial consent, the eloquence of the likely submissions Mr Adamson and others, the absence of consultation by the council of the National Allotment Society, the force of the case for relocation of the car park and playing fields, the likelihood of an “exceptional circumstances” case being made out even if the criteria for consent set out in the policy document are met and any other relevant factors such as e.g. Mr Adamson’s complaint that fruit trees might not survive replanting elsewhere.
141. I see the force of Mr Knight’s case that this appears to be a case of the type where consent would normally be forthcoming, given the vacant plots on the site and the willingness of the council to provide relocated amenities such as replanting, greenhouses, and so forth. Although the alternative sites proposed for Mr Adamson are on a slope and not on flat land and he is dissatisfied with the quality of the soil and concerned about the viability of his fruit trees, it is likely he and the 13 others would be able to grow produce on the alternative site.
142. The “highly likely” test is not always easy to apply. It expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt); with the complication that the standard must be applied to a hypothetical or “counterfactual” situation that did not occur.
143. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the “conduct complained of” (iii) deciding what on that footing the outcome for the applicant is “highly likely” to have been and/or (iv) deciding whether, for the applicant, the “highly likely” outcome is “substantially different” from the actual outcome.
144. If, which I strongly doubt, I have to include in that exercise consideration of what the minister’s response to a request for consent would have been (on the basis, contrary to my primary view, that omission to seek his consent is part of the conduct complained of and that consent would inexorably have been sought), I would be of the view that ministerial consent would be likely to have been forthcoming, possibly with conditions, but not that the likelihood reaches the higher threshold of “highly likely”.

145. I think there would be a reasonable prospect of some further concessions from the council being required, either voluntarily or by way of conditions; for example in relation to the detailed aspects of relocation such as provision of water supply, greenhouses, topsoil and subsoil, and so forth. It is very difficult to speculate on the course that any proceeding involving the Secretary of State would take, even with the benefit of the policy document.
146. I do not exclude the possibility that the council might decide to pursue a line of lesser resistance, such as altered planning conditions with the playing fields and car park elsewhere on the site. It is not uncommon for the specifications for projects of this kind to change during the planning phase.
147. For those reasons, it does not appear to me to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred and I am therefore not obliged to refuse relief under section 31(2A) of the 1981 Act.

Undue delay, substantial hardship and detriment to good administration; section 31(6) of the Senior Courts Act 1981

148. Mr Knight urges that there was, in the words of section 31(6) of the 1981 Act, “undue delay” in making the application for judicial review; and that I should withhold the relief sought because “the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration”.
149. He referred me, in the usual way, to Lord Goff’s speech in *R v. Dairy Produce Quota Tribunal for England and Wales ex p. Caswell* [1990] 2 AC 738; and also to the recent Privy Council decision (delivered by Lord Lloyd-Jones) in *Maharaj v. National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5. It is clear that the question whether delay was “undue” cannot be divorced from the context and the issues of prejudice and detriment.
150. Mr Knight acknowledges that it was right not to bring the claim until after the cabinet decision on 21 August 2018 but says the “undue delay” occurred from 21 August to 1 November when the claim was brought, over two months after the first decision challenged. He relies on prejudice to the project and to the cause of primary education in Huddersfield, as well as cost to the council, as explained above.
151. I do not accept these submissions. The delay of which the council complains was not “undue” and was not causative of the necessary prejudice and detriment. As to delay, I respectfully agree with and endorse Andrews J’s written observations on this subject:

“I am not persuaded that permission should be refused on grounds of delay. The decision complained of was made on 21 August 2018; the pre-action protocol letter was sent on 25 September and responded to on 12 October, and the claim form was filed on 1 November, within 10 weeks. Although the claim could have been brought more speedily, it appears from the response to the pre-action protocol letter that by 12 October 2018 the Defendant had already taken the decision to restructure the building contract to

accommodate the potential delay caused by the anticipated judicial review proceedings. Thus, the delay between 12 October and 1 November has made no material difference. The prospect of further construction work after the school opens is a good reason for directing expedition ... but it is not a sufficient justification for shutting out an arguable claim.”

152. As to causation of any prejudice, the council could have avoided the prejudice and detriment of which it now complains by asking for the Secretary of State’s consent to the disposal when confronted with the very strong evidence politely drawn to its attention by Mr Adamson and Ms Fulgoni in their 8 May 2018 letter. The council remained in denial about the 1923-1943 documents and clung to the proposition that use of land as allotments was “temporary” despite having endured over many decades.
153. For those reasons, the claim succeeds. I will quash the decision to appropriate the Cemetery Road site for educational use under section 122 of the 1972 act and I will quash the notice to quit served on Mr Adamson. The council accepted that the notices to quit served on the other 13 affected allotment holders must also fall away if I were to quash the notice served on Mr Adamson. I conclude by thanking the parties for their eloquent and helpful submissions.