Neutral Citation Number: [2022] EWHC 1196 (Admin)

Case No: CO/4256/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2022

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN	**Claimant**
on the application of	
SUSAN SULIMAN	
- and -	
BOURNEMOUTH, CHRISTCHURCH AND POOLE COUNCIL	**Defendant**
ASTER GROUP LIMITED	**Interested Party**

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- -

Sam Fowles (instructed by **Richard Buxton Solicitors**) for the **Claimant**
James Neill (instructed by **Head of Legal Services Bournemouth, Christchurch & Poole Council**) for the **Defendant**
Douglas Edwards QC and Mark O'Brien O'Reilly (instructed by **Foot Anstey LLP**) for the **Interested Party**

Hearing date: 4 May 2022

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Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of the decision of the Defendant ("the Council"), dated 4 November 2021, to grant full planning permission for a substantial mixed use development at Barrack Road, Christchurch, Bournemouth BH23 1PN ("the Site").

2. The Claimant lives in an adjoining street and her property backs on to the Site. She objected to some aspects of the application for planning permission.

3. The Interested Party ("IP") is the developer of the Site and the applicant for planning permission.

4. The Claimant's grounds of challenge may be summarised as follows:

   i) The Council erred in law when officers advised the Planning Committee ("the Committee") that it could not impose a condition requiring that the ecological corridor along the North West boundary of the Site should be "at least 12m in width". The Council's error was to proceed on the basis that it had no power to impose such a condition.

   ii) The Council acted in breach of the Claimant's legitimate expectation by failing to conduct a visit to her property to review the impact of the proposed development on the outlook towards the Site.

5. Permission to apply for judicial review was granted on the papers by Sir Duncan Ouseley, sitting as a Judge of the High Court, on 11 February 2022.

Factual background

6. The Site is currently occupied by the former Police Station and Magistrates Court, and the Goose and Timber public house. Those buildings are to be demolished, together with two houses in Barrack Road. Full planning permission has been granted for the erection at the Site of 130 residential dwellings, 39 units of age restricted sheltered accommodation, 612 sqm of flexible commercial/community space, a new road, new vehicular access, new private and semi-private gardens, public open space, hard and soft landscaping, surface vehicular parking and residential garages.

7. Most of the Site was identified in the Christchurch and East Dorset Local Plan – Part 1 Core Strategy (April 2014) as a Town Centre Strategic Site, and therefore the principle of development has been established.

8. Part of the land along the North West boundary of the Site was not included in the Strategic Site identified in the Local Plan. It was once part of the garden of a Victorian villa at 47 Barrack Road, and it now comprises mature trees, hedges and shrubs which provide a habitat for wildlife. Tree Preservation Orders are in place. It adjoins the rear gardens of properties on one side of Twynham Avenue (including the Claimant's house at no. 9 Twynham Avenue), and it provides an attractive outlook of trees and other greenery for residents of those houses. While the Site lies in a town centre area, the character of Twynham Avenue is "suburban" (Christchurch Character Assessment, 5.21).

9. The IP applied for planning permission for the development in 2018. Following consultation, the First Officer's Report ("OR1"), prepared by the planning officer Ms Mawdsley, was submitted to a meeting of the Committee on 20 February 2020. The Committee visited the Site. In line with the recommendations in OR1, the Committee made a provisional decision to grant permission, subject to conditions. Ms Mawdsley was not present at the meeting, and advice was provided by another planning officer, Mr Hodges.

10. The Claimant challenged the decision in a pre-action letter dated 27 April 2020. One of her grounds of challenge was that the Council had acted unlawfully in taking into account a "Biodiversity Mitigation and Enhancement Plan" ("BMEP") which had not been certified by Dorset Council's Natural Environment Team ("NET").

11. At that time, Policy ME1 of the Council's Local Plan required the Council to apply the Dorset Biodiversity Protocol where development was likely to impact on particular sites, habitats or species. Applicants were required to submit a BMEP for consideration by NET, which would grant a certificate of approval if the BMEP was found to be satisfactory.

12. The IP submitted an initial BMEP to the NET as part of its application in or around 2018. This contained a proposal for an "ecological corridor" running along the North West of the Site, broadly parallel to Twynham Avenue. The IP subsequently submitted a revised BMEP. However, neither version was approved by NET.

13. Following an exchange of correspondence, on 7 July 2020 the Council agreed to withdraw the decision made on 20 April 2020. It undertook to compile a new OR and re-make its decision at a further meeting of the Committee.

14. The Claimant submits that the Council subsequently withdrew from the Dorset Biodiversity Protocol so it was no longer under any obligation to seek a certificate of approval for the BMEP from NET. However, the planning officer explained the position rather differently in the Second Officer's Report ("OR2"):

> "263. Since the Planning Committee in February 2020, there has been a change circumstances with regards to the Dorset Biodiversity Protocol and the Natural Environment Team at Dorset Council. BCP Council are not signed up to the Protocol and have not been since April 2019. The Protocol originally related to Dorset County Council and the District Authorities. The two Unitary Authorities were not signed up and used their own professional Biodiversity Officers. Therefore, with the formation of BCP Council. This Protocol is no longer necessary. However, until recently NET were still providing guidance and would provide Certificates of Approval for Biodiversity and Mitigation Enhancement Plans that were submitted to them by applicants. This service no longer exists and as such BCP Biodiversity Officers will use their expertise to provide responses on biodiversity issues. In this particular case, the BCP Biodiversity Project Officer has assessed the scheme in relation to biodiversity issues and is fully aware of all the consultation responses and representations received regarding this matter."

15. However, the Council remained subject to other biodiversity requirements, as follows:

    i) The Council's statutory duty to have regard to conserving biodiversity, including "restoring or enhancing a population or habitats" under section 40 of the Natural Environment and Rural Communities Act 2006 ("NERC 2006"), in particular, the requirement to have regard to habitats and living organisms listed by the Secretary of State under section 41 which are of "particular importance for conserving diversity". These include stag beetles which are present on the Site.

    ii) A policy requirement under Policy ME1 of the Local Plan to avoid "harm to priority habitats and species" and to aim to achieve a "net gain" in biodiversity.

    iii) The Site lies within the Urban Greening Zone in the Core Strategy, Map 13.4.

    iv) The South East Dorset Green Infrastructure Strategy encourages, *inter alia*, green space, wildlife habitats, and "habitat stepping stones".

16. The Claimant requested Committee Members to undertake a site visit to her property at 9 Twynham Avenue before re-making its decision, to see the potential impact of the proposed development on the outlook from the houses in Twynham Avenue. Committee Members did undertake a further site visit on 25 November 2020, but did not visit 9 Twynham Avenue. According to Mr Henderson, a Director of Savills who were acting for the IP, who attended the site visit, Committee Members viewed the area adjoining the boundary with the gardens of the houses in Twynham Avenue. The IP marked out the position of the proposed units in that area on the ground with spray paint to further assist Members' appreciation of their distance from the boundary. On an earlier occasion, Ms Mawdsley visited the Claimant's house and took photographs of the outlook, which were included in her presentation to Committee Members at their meeting. I will refer in more detail to the site visit and the communications between the parties when considering Ground 2.

17. OR2, which was also prepared by Ms Mawdsley, was submitted to the Committee at its meeting, held remotely, on 26 November 2020.

18. OR2 included a comprehensive account of the consultation responses received on the issue of the ecological corridor.

19. NET's consultation response, in February 2020, was that "the area does provide an island/stepping stone in the urban landscape and as such is an important ecological feature" and the proposed corridor was too narrow to mitigate "the loss of on-site habitat and its long-term ecological function". The NET recommended that the ecological corridor be expanded.

20. Following its earlier objections, the Dorset Wildlife Trust ("the Wildlife Trust") commented on 20 October 2020 (as summarised in OR2):

> "55. The revised Landscape Plan (dated 5th Feb 2020) illustrates the proposed wildlife area as referenced by the submitted BMEP under sub-section 4.3.1.

> DWT note the wildlife area has been extended along the north-western boundary as per our previous comment. However, no indication of the width of this area is provided in either document, only that the area measures 696m² in size (or c ha) in the submitted BMEP. Using the scale provided on the Landscape Plan, it appears that the wildlife area is 10m wide in places but appears much narrower for the most part of its length. DWT therefore seeks clarification on the proposed width of the wildlife area and justification provided on the reasons the area is not at least 10m wide along its full length as recommended.
>
> Furthermore, no indication has been provided regarding the ongoing maintenance of the wildlife area, only that 'The Wildlife Area sits entirely outside of private ownership and will be managed with all other areas of Open Space on site, thereby ensuring its continued presence and quality'. DWT recommend that a detailed management plan is produced outlining the proposed management prescriptions for habitat features within the wildlife area, to ensure these are appropriately maintained for the benefit of biodiversity as suggested by the submitted BMEP.
>
> …..
>
> DWT welcome the mitigation strategy outlined in sub-section 4.2.5 of the submitted BMEP in respect of stag beetles. DWT note the proposal to perform stag beetle walkover surveys prior to vegetation clearance and during construction to safeguard against the killing of any adults or larvae on-site, as recommended in our previous response.
>
> DWT recommend the implementation of the mitigation, compensation and enhancement measures outlined under Section 4.0 of the submitted BMEP are secured through a planning condition."

21. Natural England, which had initially objected, had withdrawn its objections. It was satisfied that the updated BMEP, dated 28 August 2020, if implemented by planning conditions, would meet the legal obligations under section 40 of the NERC 2006 and regulation 9(5) of the Conservation of Habitats and Species Regulations 2010.

22. The Council's Biodiversity Project Officer was satisfied with the proposals for mitigation, compensation and enhancement measures in section 4.0, and advised that they should be secured by condition.

23. The planning officer gave the following advice to the Committee on the biodiversity and ecological considerations:

> "264. The BMEP was updated to reflect the latest comments from NET; however it has now been re-submitted (dated 28 August 2020) in a new format to take account of the fact that BCP are not signed up to the Dorset Biodiversity Protocol. The

main revision to the document is the change in wording from 'ecological corridor' to 'wildlife area'.

265. Concerns from local residents have been raised with regards to the loss of this particular area and the implications for the wildlife using it. No 47 Barrack Road and its garden behind is part of this area and is covered by a Tree Preservation Order. The proposals do result in the loss of some of this substantial garden area and its replacement with built form. This is an acceptable form of development across the Local Plan area where 5,000 dwellings are proposed within the existing urban boundaries.

266. Dorset Wildlife Trust have expressed their opinion that the originally proposed 4m width corridor along the rear of Terraces A and B was insufficient and does not compensate sufficiently for the loss of this space and it was not of an appropriate width to work effectively as a wildlife corridor. It is appreciated that this pocket of undeveloped land does provide potential habitats for foxes, nesting birds, stag beetles and an area for foraging bats; however it does not have any specific designations and there are no specific Dorset Environmental Records Centre (DERC) records for protected species on the site, confirming the relatively low ecological value assessment. Nor does the land form part of any existing or proposed ecological corridor, nor would an ecological corridor on the site link to any of the existing or proposed ecological corridors.

267. The Biodiversity Mitigation and Enhancement Plan covers the survey findings and proposes a number of mitigation and compensation measures and enhancement measures to improve the ecological value of the site. Mitigation measures proposed for bats include the following;

• Hedgerow replacement

• Wildlife area along western side boundary and to include bat boxes within this space.

• Appropriate lighting scheme

268. Mitigation measures for other protected species and their habitats include the following;

• Updated badger survey to be undertaken a maximum of 1 month prior to site clearance works commencing.

• Any active red fox dens will be excluded with one-way gates and closely monitored.

• Demolition to take place outside of the bird nesting season or demolition to be preceded by nesting bird survey.

• Clearance of vegetation undertaken sensitively to ensure protection of any reptiles and any nesting birds (detailed methodology set out in BMEP).

• Protective fencing around all retained trees

• Any excavations be covered nightly or a suitable escape ramp to prevent entrapment.

• Provision of wildlife area (log piles, wildflowers, bird and bat boxes, trees and hedging)

• Tree and hedgerow replacement

• Provision of a Construction Environmental Management Plan (CEMP) – cover all phases of construction to ensure protection of on-site and surrounding environments.

• Provision of a Landscape Environmental Management Plan (LEMP) – management strategy for all on-site landscaped areas to secure long term value.

269. All of the above measures are outlined in the BMEP and this Plan can and will be secured by condition.

270. With regards to stag beetles which are a 'priority species' and the comments from DWT, the BCP Biodiversity Officer has confirmed that stag beetle surveys are difficult as grubs are only found by digging up an area. One option is to dig up tree stumps that they may be associated with and relocate. However, the main way to address this species is by the creation of a new habitat and the BMEP clearly identifies 3 log piles within the proposed wildlife area to provide sheltering, hibernating and foraging opportunities for a range of wildlife including Stag Beetles. Further to this, the BMEP states; 'Due to the legal status of Stag Beetles, immediately prior to the first stage of vegetation clearance commencing a dedicated walkover will be undertaken by a suitably experienced Ecologist. Any accessible deadwood will be identified. During the vegetation clearance in the winter months, this will be left in situ, highlighted by the Ecologist, to prevent any impacts to hibernating wildlife. During the subsequent spring vegetation clearance, deadwood (both above and below ground) will then be carefully collected by/under the full supervision of the Ecologist and relocated to the location of the future Wildlife Area (see Section 4.3.1), due to the usage of deadwood by Stag Beetles for egg laying. This will then be suitably safeguarded with fencing and information signage during construction activities, and incorporated into the proposed log piles within the Wildlife Area upon its creation. This will ensure the protection of any larvae that may be present, which can occupy such habitat for many years prior to

emergence as an adult specimen for breeding. During the pre-commencement survey the Ecologist will also catch, by hand, any adult Stag Beetles identified. These will be placed in a suitable container and released immediately into the retained deadwood area. The supervising Ecologist will then remain vigilant during all subsequent vegetation clearance to ensure all uncovered deadwood and any adult Stag Beetles are similarly protected'.

271. Whilst the habitat loss on the site is being partially mitigated for on site, further off-site compensation is required. This includes;

• Approximately 932 native species whips to be planted at Bernards Mead HIPs site

• Approximately 500m² of land at Berneads Mead HIPs site will be seeded with native wildflower mix

• Grassland currently regularly managed at Berneads Mead will enter into a reduced mow regime

272. Paragraph 170 of the NPPF refers to plans and decisions minimising impacts on and providing net gains for biodiversity. Biodiversity net gain can be achieved on-site, off-site or through a combination of on-site and off-site measures such as habitat creation, enhancing existing habitat networks, street trees, sustainable drainage systems and installing bird and bat boxes. The following enhancement measures have been incorporated into this scheme;

• 10 bat bricks in the new buildings

• 10 swallow nest cups within eaves of properties

• 5 swift bricks in new properties

• A bee brick in each new dwelling

• A bee post within the wildlife area

273. In addition to the on-site enhancement measures, ecological enhancements will be carried out within the HIPs sites (see below). Some of these works are also considered to be part of the compensation measures for the impacts of the scheme on the area along the north western boundary on the application site. These include;

• Currently regularly managed grassland will enter into a 'reduced mow' regime

• Drainage works will increase water inundation of existing reed beds

• Planting of trees

• Native wildflower seeding

274. The proposed wildlife area along the western boundary has been revised in its length and width in response to the consultation responses. It is now 5 metres in width to the rear of properties but now extends fully along the north-west boundary and extends up to 10 metres in certain sections. It will contain bat boxes, log piles for stag beetles, native hedging and bird boxes.

275. In their most recent comments, Dorset Wildlife Trust refer to the updated wildlife area still not being of a sufficient width. However, the updated BMEP has been considered by the BCP Biodiversity Officer and it is considered that this wildlife area is sufficient and this amount of space taken together with the other mitigation and compensation strategies is acceptable.

276. Paragraph 175 of the NPPF states that;

'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;

(c) development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists; and

(d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity…..

277. Dorset Wildlife Trust, in their comments make reference to ensuring safeguarding is clearly in place for nesting birds in trees to be felled, as well as for roosting bats in the buildings to be demolished. The emergence surveys undertaken on the buildings did not identify any bats; however 4 trees were identified with low potential for roosting bats. The BMEP in paragraph 4.2.6

> states that all mature and part mature trees that require removal will be soft felled as per the best practice guidelines associated with the protection of bats. If evidence of bats is identified during this process, a Phase II Bat Survey will be undertaken and if necessary an EPSL from Natural England would be applied for. In terms of demolition, this should as far as possible be limited to outside of the bird nesting season and if this is not possible, a Phase II Nesting Bird survey must be undertaken prior to demolition. The BMEP now refers to a 5 metre buffer zone around any active nests as suggested by DWT. Vegetation clearance will take place between November and February to avoid the bird nesting season and if this is not all possible, a nesting bird survey would be undertaken prior to any clearance occurring and a 5 metres buffer would be in place until the chicks have fledged and the nest is no longer active.
>
> 278. Further to scrutiny of the proposals by the BCP Biodiversity Project Officer since the previous February 2020 Committee resolution, it is considered that this proposal does not result in having an adverse impact to biodiversity. The scheme incorporates adequate mitigation and compensation measures having regard to the loss of trees, hedgerows and the existing area of garden land within the site. The development does not result in the loss of irreplaceable habitats and biodiversity improvements are integrated into the scheme as outlined in previous paragraphs. With regards to the long term management of the wildlife area and the comments made by Dorset Wildlife Trust in their most recent response, a Landscape Environmental Management Plan will be secured by condition which will provide a management strategy for all on-site landscaped area to secure their long term value. It is considered to be compliant with Policy ME1 of the Core Strategy.
>
> 279. Your BCP Biodiversity Project Officer has carefully looked at this Mitigation and Enhancement Plan and they consider it to be acceptable. It is considered that with the revised BMEP secured through condition, the principles set out in paragraph 175 of the NPPF are met. This BMEP will be secured by condition."

24. OR2 advised the Committee on the impact of the development upon residents in Twynham Road, assessing it as acceptable and policy-compliant. It stated:

> "Residential Amenities
>
> 211. Policy HE2 'Design of New Development' states; '*Development will be permitted if it is compatible with or improves its surroundings in: relationship to nearby properties including minimising general disturbance to amenity*'.

212. Being a town centre brownfield site, the proposed development will create new built relationships with the surrounding residential properties. Twynham Avenue lies to the north west of the site and there is currently a buffer between the rear gardens of these dwellings and the existing car park. As such, the outlook from the rear of properties is enclosed and relatively quiet given their proximity to Bargates and the town centre. This area formed part of the rear gardens of the villas along Barrack Road, No's 43 – 47 and is currently overgrown with shrub and a number of trees but offers a distinct separation between the residential dwellings and the car park and wider former Police Station site.

213. The proposed development will change this relationship and the outlook between the sites. The proposed layout sees two sets of terraced dwellings along this northern boundary and units 9 to 13 at right angles to the boundary with the properties at No 19 and No 21 Twynham Avenue. There is a distance of approximately 27 - 31 metres between the existing properties and the rear of the new dwellings and a 5 to 10 metre ecological landscaped buffer along this boundary. Therefore, notwithstanding the town centre location, the scheme has secured suburban building-to-building distances and thereby retains acceptable privacy to neighbours in Twynham Avenue. The removal of one unit in order to increase the ecological corridor has also improved the relationship between proposed Unit 9 and No 19.

214. This built relationship is considered to be acceptable in this town centre locality and it is noted the properties on the western side of Twynham Avenue have a similar back to back built relationship with those on Stour Road. Units 1 to 8 are 2-storey properties measuring 8.2m and 8.6 in height with standard first floor windows at first floor level on their rear facades. This would result in a typical residential relationship of the rear of the proposed 2-storey dwellings facing the rear of existing single- and 2-storey dwellings on Twynham Avenue over a distance in excess of 20m. This is a common arrangement seen across the town and is acceptable. Bearing in mind the town centre location and the emphasis on increased density for the site in adopted policies, achieving this relationship shown is a significant benefit for neighbouring properties. It is considered that the layout of the development has plainly met the test in Policy HE2 to minimise the impact on residential properties surrounding the site.

215. The redevelopment of this site will result in changes to the nature and levels of activity east of the Twynham Avenue properties' rear boundaries. The additional built form closer to these rear boundaries and the loss of some trees and vegetation

> result in changes to the environment. However, the site is allocated in under Policy CH1 for high density residential development and it is acceptable for residential development to adjoin existing dwellings as this is the pattern of residential development across the town. Ordinary residential occupation of a dwellinghouse is acceptable adjoining an existing dwelling. The proposal has had regard to the resulting relationships and the proposed layout and design of the properties and their separation from existing properties noted is considered to minimise future disturbance to amenity, taking account of this urban town centre location, thereby complying with Policy HE2."

25. The Committee considered the proposed development at its meeting on 26 November 2020, which was held remotely because of the pandemic. Members had received OR2 in advance, which included *inter alia* the consultation responses by Natural England, the Wildlife Trust and NET on the issue of the ecological corridor. The meeting began with a presentation by Ms Mawdsley, which included photographs of the outlook from the Claimant's property. Members of the public were not permitted to speak, but were allowed to submit written representations, for or against the proposal, that were read out by the Clerk. These included a statement by an objector, John Pendrill, which asked the Committee to accept the recommendations of NET and the Wildlife Trust, in preference to those of its Biodiversity Project Officer and planning officer, and impose a condition requiring the ecological corridor to be at least 10m wide along its whole length.

26. The Chair then gave Councillors the opportunity to ask questions of the officers. Mr Hodges advised the Committee as follows:

> "Councillor Hilliard mentioned the references to the remedies suggested in the representations and they [sic] a number of those refer to a 12 m buffer or barrier or wildlife area however described. …it's just to confirm the point that we are presenting our application as shown on the submitted plans and the committee needs to determine that on its merits. The scheme doesn't include a 12 m barrier and buffer and to include a buffer with in fact go through part of the dwellings that you can see on the plans in front of you at this point in time; so in effect that's not the scheme you're looking at and to impose that condition would be contrary to the plan that you're looking at so you have to determine whether the application's either acceptable as it is. You can't have a condition to say there is a 12m buffer because in effect there is a house in the middle of that 12m buffer; so to needs to be determined either way on its merits. Chair, I hope that's clear.
>
> Chair: Absolutely clear thank you Mr Hodges."

27. The Chair then opened the debate. Councillor Hall indicated that he supported the objections to the development and said:

> "I would like to make a proposal Chairman, after the site visit it became clear that the DWT wildlife corridor was needed. I believe this could be incorporated it would mean a reconfiguration of a few houses but it is still very possible. So Mr Chairman, as a local councillor may I make a proposal that we grant planning permission providing a condition requiring the wildlife corridor area to measure at least 12m width throughout in accordance with the Dorset Wildlife recommendations, also to include the planting of mature trees. If this is not acceptable by the developer it should be refused."

28. The Chair responded as follows:

> "….. I am going to refer back to Sophie on this because my understanding is that we are dealing with the application in front of us today as a planning ……to start changing the planning application that is in front of us, the strip that is offered is what we are dealing with us today, if this is not satisfactory to members, then it will be for members to refuse this application. Sophie could you confirm that this is the correct understanding please?"

29. Ms Mawdsley confirmed that the Chair's advice was correct and added:

> "You have to make a decision on what is in front of you and we cannot put conditions on it to make those sorts of changes."

30. In the light of this advice, Councillor Hall then proposed that planning permission for the proposed development be refused. His motion was seconded by Councillor McCormack. Other Councillors expressed support for the development. At the end of the meeting, the Committee voted in favour of granting permission for the proposed development by 9 votes to 1, with 1 abstention.

31. The grant of full planning permission, subject to conditions, was finally issued on 4 November 2021.

Legal principles

Judicial review

32. In a claim for judicial review, the Claimant must establish a public law error on the part of the decision-maker. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. A legal challenge is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin).

The development plan and material considerations

33. Section 70(2) of the Town and Country Planning Act 1990 ("TCPA 1990") provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act ("PCPA 2004") 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."

Conditions

34. A local planning authority is entitled to grant planning permission "subject to such conditions as it thinks fit": section 70(1)(a) TCPA 1990.

35. The legal limitations on the power to impose conditions (the so-called *Newbury* tests), were set out in *Newbury v Secretary of State for the Environment* (1978) 1 WLR 124, per Viscount Dilhorne at 599H:

> "It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223…."

36. In *R (Holborn Studios Limited) v LB Hackney* [2017] EWHC 2823 (Admin), John Howell QC, sitting as a Deputy High Court Judge, considered the circumstances in which planning permission may be granted for a development other than that for which an application was initially made. He said:

> "63. Mr Walton also submitted that there was no requirement to notify Holborn Studios of the amendments to the application. But Holborn Studios was able in any event to make written and oral representations on the amended scheme. The basement was suitable for a wide range of uses including studios. The Report stated that "the applicant had demonstrated that other cultural industries have expressed an interest to occupy the space" and the Sub-Committee concluded that the basement floorspace would be usable as proposed. Mr Brenner had not explained what additional points he would have wanted to have made.
>
> (ii) In what circumstances planning permission may be granted for a development other than that for which an application was initially made and the test or tests which the court should apply when reviewing the legality of the grant of such a permission

64. In my judgment it is necessary to distinguish the substantive and the procedural constraints on the power of a local planning authority to grant planning permission for a development other than that for which an application was originally made.

65. There are three ways in which a planning permission may be granted for such a development: the initial application may itself be amended; permission may be granted only for part of the development applied for; and permission may be granted subject to a condition that modifies the development applied for. Quite apart from any requirements for notification and consultation, there are substantive limitations on the changes that can be effected by such methods. These limitations have been variously described but they are all concerned with whether the result is the grant of permission for a development that is in substance something different from that for which the application was initially made. That is because the legislation only gives power to local planning authorities to determine the application describing the development for which permission is sought which was made to them in the prescribed form and manner: see paragraphs [8]-[12] and [20] above [FN2 See also section 77(1) and (4)(a), and section 79(1) and (4)(a) of the 1990 Act].

66. Although the relevant legislation contains no provision permitting the amendment of an application for planning permission, courts have recognised that amendments to such applications may be made. Initially the Appellate Committee so held in the context of an application for the approval of reserved matters that did not require public consultation: see *Inverclyde District Council v Lord Advocate* (1981) 43 P&CR 375 per Lord Keith at p397. Subsequently it was held that it was also possible to amend an application for planning permission, as it would not be in the public interest to deter developers from being receptive to sensible proposals for change, although the change might be so substantial that it would be impermissible even if there was consultation about it: see *British Telecommunications Plc v Gloucester City Council* [2001] EWHC Admin 1001, [2002] 2 P&CR 33, per Elias J at [33]-[37]. The substantive limitation on the nature of the changes that may be made by an amendment appears to be whether the change proposed is substantial or whether the development proposed is not in substance that which was originally applied for, whether or not others have been consulted about the change: see *British Telecommunications Plc v Gloucester City Council* supra at [38]-[40]; *Breckland District Council v Secretary of State for the Environment* (1993) 65 P&CR 34 at p41.

67. A planning authority also has power to grant planning permission for part of the development applied for under section 70(1)(a) of the 1990 Act and to refuse permission for another

part under section 70(1)(b) where such parts are separate and divisible: see section 70(1) (quoted in paragraph [19] above), *Kent County Council v Secretary of State of State for the Environment* (1977) 33 P&CR 70 at pp76-77. In such a case the development for which permission is granted is the same as that in part of the application but there remains a question (apart from one about consultation about such a partial grant) whether the permission would be for a development that would be substantially or significantly different in its context from that which the application envisaged: cf *Bernard Wheatcroft Limited v Secretary of State for the Environment* supra at p240, *Johnson v Secretary of State for Communities and Local Government* [2007] EWHC 1839 (Admin) at [25].

68. A local planning authority also has power to grant planning permission on an application subject to conditions: see section 70(1)(a) of the 1990 Act (quoted in paragraph [19] above). Such a condition may have the effect of modifying the development applied for, whether by limiting or enlarging it or by changing its nature to some extent. The so-called *Wheatcroft* principle is that the result of imposing such a condition must not be a development which in substance is not that which was applied for: see *Bernard Wheatcroft Limited v Secretary of State for the Environment* supra at pp240-1. Thus on an application for planning permission without complying with conditions subject to which a previous planning permission is granted under section 73 of the 1990 Act, the authority may impose different conditions but only if they are conditions which could lawfully have been imposed on the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application: see *R v Coventry City Council ex p Arrowcroft* [2001] PLCR 7 per Sullivan LJ at [29] and [33]; *R (Wet Finishing Works Limited) v Taunton Deane District Council* supra per Singh J at [42] and [45]-[48].

69. These cases on section 73 of the 1990 Act illustrate the substantive limitation on the extent to which planning permission may be granted other than for the development for which the application for planning permission was initially made. The limitation applies even though applications for planning permission under that section require notification and publicity: see paragraphs [10], [15] and [16] above.

70. There are, however, also procedural constraints on granting planning permission for a development other than that for which an application was originally made. Applications for planning permission have to be notified to owners of the land (other than the applicant) and to be publicised and any representations duly made as a result have to be taken into account when a local planning authority determines an application: see paragraphs

> [13] to [17] and [18]. The application may not be entertained unless the requirements for notification of, and publicity about, the application have been complied with: see paragraphs [17] and [20] above. It is self-evident that any subsequent amendment to an application or the imposition of a condition that has the effect that the permission is granted for a development which is not that for which the application was made may deprive those notified and the public of the opportunity to make representations that the statutory scheme requires them to be given in relation to the application if it is to be entertained and determined."

37. John Howell QC went on to hold, at [71] to [73], that the substantive and the procedural constraints on departing from the application originally made were separate from one another and that Forbes J. had erred when he conflated them in *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1982) 43 P & CR 233. He observed that a liberal approach towards changes to an application may enable planning permission to be granted without the need for a new application to be made and without further delay and costs of the applicant. However, a relaxed approach would subvert the requirements of the necessary notification and consultation procedures.

38. *Wheatcroft* was a case concerning an application for outline rather than full planning permission where the applicant had put forward an alternative proposal at the inquiry for 250 dwellings on 25 acres, the original application having been for 420 dwellings on 35 acres, to be considered only if the scale of the development was deemed critical to determination of the application. Forbes J. held, at 239:

> "….. a condition the effect of which is to allow the development but which amounts to a reduction on that proposed in the application can legitimately be imposed so long as it does not alter the substance of the development for which permission was applied for…."

39. Forbes J. added at 241:

> "….The true test is …is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised…."

40. I have been referred to a number of cases applying the *Wheatcroft* test, including the following cases.

41. In *Breckland District Council v Secretary of State for the Environment and Hill* (1993) 65 P & CR 34, Widdicombe J. applied the *Wheatcroft* test in the context of an application for full planning permission. Applying the *Wednesbury* standard, he found that the decision-maker had acted unreasonably in deciding that a proposed condition would not fundamentally change the application as submitted. This was because the

condition would have increased the size of the proposed development by an additional 50%.

42. In *Secretary of State for Communities and Local Government v Ioannou* [2014] EWCA Civ 1432, Ouseley J. applied the *Wheatcroft* test and concluded that a reduction in the number of flats in a development from five to three, as proposed by the owner, was "an application for a clearly different planning permission in the context of the deemed application" on which more than one view was possible (cited at [15]). However, the Court of Appeal held that, as it was an enforcement case, the *Wheatcroft* test was not applicable.

43. In *R v Rochdale M.B.C, Ex P. Tew and Others* [2000] Env LR 1, Sullivan J., in the context of an application for outline planning permission for a business park, said at [15] that where "the amount of floor space is specified in an application, the imposition of a condition significantly reducing the floor space may well fall foul of the Wheatcroft principle".

44. In *R (Wet Finishing Works Ltd) v Taunton Deane Borough Council and Strongvox Homes* [2017] EWHC 1837 (Admin) [2018] PTSR 26 the Court rejected the claimant's challenge to a Council's decision to grant an application under section 73 TCPA 1990 to amend a planning permission, by creating a new agreement under section 106 TCPA 1990, and increasing the number of dwellings in the development from 84 to 90. Singh J. applied the "fundamental alteration" principle in *R v Coventry CC ex parte Arrowcroft Group plc* [2001] PLCR 7, and noted that it was consistent with the test in *Wheatcroft* (at [45]-[48]). However, in *Finney v Welsh Ministers* [2019] EWCA Civ 1868, the Court of Appeal held that Singh J's approach in *Wet Finishing Works* should not be followed as the *Wheatcroft* principle was not the correct test to apply when determining applications under section 73 TCPA 1990 to amend an existing permission (per Lewison LJ at [41], [46]).

45. In most of the reported cases applying the *Wheatcroft* test, the applicant for planning permission has either agreed to or requested the imposition of the condition. Two authorities have touched on the need for the consent of the applicant:

    i) In *Kent County Council v Secretary of State for the Environment* [1977] 33 P & CR 70, in a case where the Secretary of State suggested granting permission for part of an oil refinery depot, Sir Douglas Frank QC, at 75, held that "it may that the applicant's consent should first be sought" before a condition to achieve such effect was granted but that did not arise on the facts of that case as the applicant had consented to that course;

    ii) In *Granada Hospitality Limited v Secretary of State for the Environment, Transport and the Regions* [2001] PLCR 5, which concerned whether a condition should have been considered which granted planning permission for part of the development only, Collins J. held that although a decision maker may decide to "grant a lesser permission of its own motion", "care must be taken" if that course is considered appropriate and an applicant must be fully consulted (at [72]). *Granada* was concerned with granting permission for part of a development and not with the imposition of a condition to alter a development.

Planning officers' reports

46. The principles to be applied when considering a challenge to a planning officer's report were summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42]:

> "42. 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 Oxton Farms* [1997] E.G.C.S. 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 (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (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 (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). 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 (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). 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 (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). 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 (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

47. These principles apply equally to oral advice given by planning officers at a Committee meeting.

Ground 1

Submissions

48. The Claimant submitted that the Council erred in deciding that it could not impose the condition proposed by Councillor Hall because it had no power to do so. It had the power to impose a condition which altered the development, subject to *Newbury* tests and the substantive and procedural restrictions set out in *Wheatcroft* and *Holborn Studios*. It was for the Committee to decide whether those restrictions applied.

49. The correct legal position was that the Committee had three options:

i) It could draft a condition there and then, and vote to impose it;

ii) It could postpone its decision to enable officers or the IP to draft a suitable condition, and consider it at the next meeting; and

iii) It could decline to impose the condition, and accept or refuse the proposed development as it stood.

50. The officers led the Committee to believe that only the third option was available to it. This error was material because the officers' advice led Councillor Hall to withdraw his proposal and, instead, propose that permission be refused.

51. Viewed objectively, it seemed clear that the first option was available to the Committee, as on the Council and IP's figures, there would be a loss of 18 dwellings plus associated private outdoor space and parking and three communal parking spaces. This amounted to less than 11% of the total development (not including the commercial space).

52. In any event, the Claimant submitted that these figures were overstated and the condition was more likely to result in a loss of between two and ten houses, and associated private outdoor space and parking, but an increase in communal outdoor space.

53. The Claimant relied upon a report from Mr Barraball, a planning consultant, who accepted that the layout in the IP's application for planning permission could not be fully implemented if a 12m ecological corridor was provided. His evidence was that 3 dwellings would be lost and that there would be increased space between the existing and the new dwellings. He concluded that a revised layout could be provided that would provide satisfactory residential amenity for the occupiers of the new units and significantly reduce the harm to the residential amenity of the properties in Twynham Avenue.

54. Finally, the Claimant submitted that there was no procedural unfairness in imposing the condition since those consultees with an interest in the ecological corridor had all already made representations supporting a wider corridor.

55. In response, the Council submitted that the Chair and the officers correctly advised the Committee that the imposition of this condition in this particular case would be unlawful because it did not meet the *Newbury* tests for the lawfulness of planning conditions. It did not fairly and reasonably relate to the development and it was *Wednesbury* unreasonable. As this was an application for full, not outline permission, the *Wheatcroft* principle was not directly applicable. But, on the assumption that it did apply, it would have been *Wednesbury* unreasonable to determine that the proposed condition would not amount to a fundamental alteration of the development proposed and therefore the advice that the Committee could not lawfully impose this condition was correct.

56. The IP submitted that the advice given by the Chair and the officers reflected a correct application of the *Wheatcroft* test and the irrationality test in *Newbury*, on the facts of this particular case. The IP invited the Court to accept the statement and drawings in the evidence of Mr Henderson and the drawing in the evidence of Ms Mawdsley which demonstrated that the effect of the condition would have been to prevent the development being carried out in accordance with the proposed development, and the layout drawing. As the Chair and the officers had formed the view that it would be unlawful for the Committee to impose the condition proposed by Councillor Hall, it was appropriate for them to advise the Committee accordingly. The correct approach for the Committee, if it was of the view that a 12m corridor was required, was to have refused planning permission and thereby allowed the matter to be resolved at an appeal.

57. The interests of the applicant for planning permission need to be considered under the procedural limb of the *Wheatcroft* test, and the *Newbury* requirement of reasonableness. Only a week before the Committee meeting, on 19 November 2020, the IP made it clear to the Claimant and to the Council that it was not willing to make any further changes to the proposed development, including the layout. To impose this condition without the IP's agreement would be unreasonable.

Conclusions

58. I accept the IP's submission that the starting point is that the statutory process of development control provides that it is an applicant for planning permission who decides the form of development for which it wishes to seek planning consent. The applicant prepares and submits the planning application. It is the responsibility of a local planning authority to determine that application by approving that application (conditionally or otherwise) or refusing that application (see section 70(1) TCPA 1990).

59. It is not the function of a local planning authority to reformulate a development proposal. It can offer advice, but it is a matter for the applicant as to whether to accept that advice and amend the proposals, or to reject it and require the application to be determined.

60. As John Howell QC explained in *Holborn Studios*, at [64], planning permission cannot be granted for a development that is in substance different from that for which the application was initially made because the planning legislation only gives power to local planning authorities to determine an application for planning permission which has been made in the prescribed form and manner, including a description of the development, with relevant plans and drawings. Where an application is made for full planning permission, as opposed to outline planning permission, the proposed layout of the development must be shown in detail on a plan submitted with the application: see Article 7(1)(c) of the Town and Country Planning (Development Management Procedure) (England) Order 2015. Absent any formal amendment to that plan by the applicant for planning permission, any grant of planning permission will require the development to be carried out in accordance with that plan.

61. Unlike many of the reported cases, in this case it was clear to all concerned that the IP did not consent to a further expansion of the ecological corridor. Since the application was first made in 2018, the IP had given extensive consideration to the biodiversity issues, in particular the ecological corridor. In the light of the responses from Natural England, NET and the Wildlife Trust, it had extended the length of the corridor, so it ran along the entire North West boundary, and the width was extended to 5m to 10m throughout. It must have been well aware from OR2 that the Wildlife Trust continued to recommend a corridor with a width of at least 10m throughout (not 12m as Councillor Hall told the Committee) but it had not accepted that recommendation.

62. A week before the Committee meeting, on 19 November 2020, the Claimant emailed the Council asking for the meeting to be deferred so that further discussions could take place with the IP, with a view to a compromise being reached. Mr Henderson replied on behalf of the IP, on the same day, in the following terms:

"• Aster undertook extensive pubic consultation prior to the submission of the application, and there have been three phases of public consultation during the determination period. There has been direct contact between Aster's representatives and Susan Suliman on many occasions over several years.

• Aster has made several significant modifications to the scheme prior to and during the planning application to respond to concerns raised by Susan Suliman and other residents of Twynham Avenue. These include the removal and repositioning of buildings, the inclusion of a substantial landscape buffer adjacent to the intervening boundary, and the removal of a proposed footpath link between the site and Twynham Avenue that residents were concerned would lead to displacement of car parking into their road. It is simply not the case that residents have been ignored. It is evident from the last conversation between Susan Suliman and Aster, and a further email received from Susan Suliman, that the further changes she is seeking (including the removal of 12 further houses from the development), are wholly unrealistic; there is no legitimate planning merit in them, and they would significantly diminish the planning benefits of the development.

• As the committee report acknowledges, the spatial relationship between the development and the homes in Twynham Avenue (a back-to-back separation of between 27 and 31 metres) far exceeds what would normally be required in a suburban setting, and certainly exceeds what would be expected here in the designated Town Centre. Moreover, the benefit of this significant separation between the low-rise properties will be further enhanced by the intervening planting proposed within the scheme. The relationship is beyond reasonable and wholly consistent with local and national planning policy.

• Accordingly, whilst acknowledging that Susan Suliman would prefer not to have development on the land behind her home, Aster does not propose to make any further modifications to the proposal;

• There is thus no reason to defer the determination of the planning application;

• Indeed, a further delay to the determination of this application would be extremely unpalatable to Aster and, I have no doubt, to the hundreds of people who have taken the time to write to the Council in support of the scheme and who wish to see this site developed without further delay.

We hope that Members feel able to support the strong positive recommendation set out in the committee report next week.

….." *(emphasis added)*

63. The passage underlined above related to the potential expansion of the ecological corridor by removal of the proposed dwellings nearest the North West boundary.

64. On my reading of the advice given to the Committee by Ms Mawdsley and the Chair, they were of the view that the 12m corridor proposed by Councillor Hall would make substantial and therefore impermissible changes to the scheme in the planning application which they were required to determine. The same advice had been given to the Committee earlier to the meeting by Mr Hodges, in response to the representations seeking a wider corridor. As he graphically explained to the Committee:

> "The scheme doesn't include a 12 m barrier and buffer and to include a buffer with in fact go through part of the dwellings that you can see on the plans in front of you at this point in time; so in effect that's not the scheme you're looking at and to impose that condition would be contrary to the plan that you're looking at so you have to determine whether the application's either acceptable as it is. You can't have a condition to say there is a 12m buffer because in effect there is a house in the middle of that 12m buffer; so to needs to be determined either way on its merits."

65. Ms Mawdsley and Mr Hodges had been involved with this development proposal for a number of years, and can be assumed to have acquired a detailed knowledge of it. The Chair had also had the benefit of a recent site visit, and seen the North West boundary, and the proposed position of the units, spray painted on the ground. Ms Mawdsley had visited the Claimant's property and taken photographs of the outlook which were included in the presentation pack for the meeting.

66. It is reasonable to assume that, as planning officers, both Ms Mawdsley and Mr Hodges would have been familiar with the well-known *Newbury* and *Wheatcroft* tests, and that their advice was based upon those tests, though not expressed as such.

67. The issue which I have to decide is whether or not their advice was seriously misleading, as the Claimant contends, or whether it was correct, as the Council and the IP contend. The legal principles set out above have to be applied to the facts of this particular case. The Claimant's reliance upon the facts in other cases is of limited assistance, as these cases are highly fact-sensitive.

68. It is clear that the effect of a condition which required the widening of the ecological corridor to "12 m at least" would be that the proposed development could not be carried out in accordance with the IP's scheme for 130 dwellings and the site plan showing the layout. As this was an application for full planning permission, the layout was fixed.

69. Mr Henderson explained the impact of the proposal in detail in his witness statement:

> "10. The effect of such a 12m wildlife area would be to prevent the development being carried out in accordance with the submitted layout drawing. In particular, the requirement for such an area would be to prevent the following elements of the

development, which I have also identified with annotations on Exhibit C, being carried out in accordance with the layout for which planning permission was sought by the IP, namely:

• The building containing the four dwellinghouses marked Units 15, 16, 17 and 18 since the western end of this block would be within the 12m wildlife area;

• The gardens and the cycle storage facilities for Units 15 and 16;

• The car parking space for Unit 15;

• The western end of the access road and the hammerhead turning area;

• Three of the communal car parking bays in front of Units 9 and 10;

• The building containing the five dwellinghouses marked Units 9 -13 as the western end of this block would fall within the 12m wildlife area;

• Part of the garden, and the cycle storage facilities for Unit 9;

• Virtually the entire rear gardens and the cycle storage units for six two bed houses and two three bed houses marked Units 1 to 8; and thereby the ability to implement Units 1 to 8 in accordance with the planning permission; and,

• The two-bay car port located to the south of the plot of Unit 1.

11 What is set out in the above and on the annotated plan at Exhibit C in terms of the alignment and effect of a 12m wildlife area accords with the plan produced as Annex 1 to D's Summary Grounds of Resistance but shows a little more detail as to the effect of the introduction of such a feature on the proposed layout. As can be seen, and in accordance with the advice given to the committee by planning officer David Hodges, two of the proposed dwellings – parts of the blocks comprising Units 9-13 and 15-18 – would fall within the 12m wildlife area. These dwellings each form part of larger buildings containing further dwellings that would be incapable of being constructed in accordance with the submitted and approved plans due to conflict with the proposed condition.

12 The implementation of the dwellings marked Units 1-8 in accordance with the planning permission will involve the construction of the buildings and the supporting car parking, garden and cycle stores. The gardens and cycle stores for these units are shown in Exhibit C to fall within the 12m wildlife area,

> and thus could not be provided in the approved form subject to the condition suggested by Councillor Hall. The imposition of the condition would therefore have prevented the implementation of the dwellings Units 1-8 as shown on the submitted and approved layout plan.
>
> 13 Exhibit C clearly shows, in response to the C's assertion at paragraph 14 of her Reply that the condition "would not lead to the loss of a single dwelling", that in fact the effect of the condition as proposed would be the inability of the IP to implement seventeen of the approved dwellings in accordance with the planning permission, these being units 1-8 (eight dwellings), 9-13 (five dwellings), and 15-18 (four dwellings) inclusive.
>
> 14 I note what is said by C in her reply at paragraph 18 to D's and the IP's Summary Grounds of Resistance. In my view, what is set out by C in that paragraph is inaccurate and underestimates the impact of the 12m wildlife area that Councillor Hall wished to secure by the imposition of the condition on the proposed layout.
>
> 15 As I have demonstrated above and through the annotated drawing I have produced at Exhibit C, the effect of the proposed condition would have been substantially greater than C asserts. The effect of introducing a 12m wildlife area would lead to a significant part of the development as shown on the layout plan not being able to be carried out.
>
> 16 IP has taken considerable care and a very considerable period of time to prepare a scheme including a layout which it considers properly responds to the opportunity presented by the application site including giving rise to an acceptable relationship with neighbouring land. I am aware that the IP had made significant modifications to the scheme prior to the application to respond to matters raised by C and other residents of Twynham Avenue, and during the planning application to address matters raised by ecology consultees. These include the removal and repositioning of buildings, and the inclusion and expansion of a substantial landscape buffer adjacent to the intervening boundary. D's professional officers and its Planning Committee were satisfied that planning permission should be granted for that development including its proposed layout."

70. Both the Claimant and her planning consultant accept that the application for planning permission could not be granted without reducing the number of dwellings and other spaces, and altering the layout. However, the Claimant contends that the Council and the IP have exaggerated the impact of a 12m corridor. I find the evidence of the Council (Ms Maudsley's drawing) and the IP (Mr Henderson's statement and drawings) to be careful and reasonably accurate, whereas the Claimant's representatives and their planning consultant make broad-brush assertions, without any clear evidential

foundation. On the balance of probabilities, I am satisfied that a 12m corridor would have the impact described by Mr Henderson.

71. In my view, on the facts of this case, it was rational for the officers and the Chair to conclude that the result of imposing Councillor Hall's condition would be a development which, in substance, was not that which was applied for, and therefore it would breach the *Wheatcroft* principle. On the facts, I consider that it would have been irrational for the Committee to reach any other conclusion, and so the planning officers were right to advise Members that they could not take this course.

72. Such a condition would also have been *Wednesbury* unreasonable, and so failed to meet the third limb of the *Newbury* test, as it conflicted with the description of the development and the layout plan which the IP was bound to implement if the application for planning permission was granted. I am not satisfied, on the facts, that it would have failed to meet the second limb of the *Newbury* test, as I consider that it did relate to the development.

73. Therefore, if the Council had voted in favour of Councillor Hall's proposed condition, extending the ecological corridor to 12m, it would have breached the substantive limb of the *Wheatcroft* test and it would have been imposing a condition which was *Wednesbury* unreasonable, contrary to the third limb of the *Newbury* test.

74. If the rest of the Committee supported Councillor Hall's proposed condition on its merits, realistically the only lawful option open to Members would have been to refuse the application for planning permission. In this case, there was no point in adjourning the meeting to enable the planning officers to discuss the matter further with the IP, with a view to the IP revising the proposed scheme, as the IP had already made it clear that it was not willing to make such changes. In the event, it appears from the transcript of the debate at the meeting, and the voting, that there was little support for Councillor Hall's proposed condition among other Members.

75. For the reasons set out above, Ground 1 does not succeed.

Ground 2

Submissions

76. The Claimant submitted that the correspondence between the Claimant and the Council generated a legitimate expectation that Members of the Committee would undertake a site visit to her property at 9 Twynham Avenue to view the outlook from her garden towards the adjoining Site. The representation by the Council that Committee Members would undertake such a visit was clear, unambiguous and devoid of relevant qualification. The Claimant relied on that representation to her detriment because, in the belief that Members would visit her property, she did not organise high quality visual aids to demonstrate the impact of the development on the outlook from her house. In breach of its representation, Committee Members only undertook a visit of the Site, not of the Claimant's property.

77. Policy HE2 of the Local Plan requires that new development "minimise general disturbance to amenity". In OR2, Ms Mawdsley accepted that the proposed

development would change the outlook from the properties in Twynham Avenue towards the adjoining Site. Therefore the Committee's assessment of the impact of the proposed development was important in determining the application.

78. The Claimant submitted that this was a breach of her substantive legitimate expectation that she would receive a benefit, namely, a visit to her property by Committee Members. The Council reneged on its promise without giving reasons or giving her an opportunity to argue that it should honour its promise.

79. Alternatively, the Claimant submitted that this was a breach of her procedural legitimate expectation, as the agreed site visit to 9 Twynham Avenue was part of the Committee's overall decision-making process, and the Committee instead conducted a different and inferior process.

80. In response, the Council and the IP submitted that, on the facts, there was no clear, unambiguous representation that Committee Members would undertake a site visit to 9 Twynham Avenue, and so no legitimate expectation arose.

Legal principles

81. The requirement to meet the legitimate expectations of the public flows from the general public law duty of fairness (*Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149).

82. A legitimate expectation, whether procedural or substantive, may arise from an express promise or representation made by a public body. In order to found a claim of legitimate expectation, the promise or representation relied upon must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G.

83. Bingham LJ's classic test has been widely approved and applied. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453, Lord Hoffmann said, at [60]:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

84. The onus of establishing a clear, unambiguous and unqualified representation rests on the Claimant (*Re Finucane's Application for Judicial Review* [2019] UKSC 7, at [64]).

85. The Courts have given guidance on how Bingham LJ's test in *MFK* is to be applied. In *Paponette and Ors v Attorney General of Trinidad and Tobago* [2010] UKPC 32, Lord Dyson JSC, giving the judgment of the majority of the Board, said, at [30]:

> "As regards whether the representations were "clear, unambiguous and devoid of relevant qualification", the Board refers to what Dyson LJ said when giving the judgment of the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 56: the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made."

86. In *R (Patel) v General Medical Council* [2013] EWCA Civ 327, the court considered whether a statement made by the General Medical Council to the appellant was sufficiently clear, unambiguous and unqualified to give rise to a legitimate expectation.

87. Lloyd-Jones LJ (with whose judgment the Master of the Rolls and Lloyd LJ agreed), confirmed that the test was one of "objective intention" (at [43]). Lloyd-Jones LJ then went on to say:

> "44. The question for consideration is how, on a fair reading of the statement, it would have been reasonably understood by those to whom it was made. (See *The Association of British Civilian Internees – Far Eastern Region v. Secretary of State for Defence* [2003] QB 1397 per Dyson L.J. para. 56.) In the present context the question is whether it would reasonably be understood as an assurance that the qualification would be recognised in the case of this appellant if he obtained it in a reasonable time.
>
> 45. The statement has to be considered in the context in which it was made ……."

Conclusions

88. The relevant evidence is set out in the contemporaneous email correspondence and the witness statements of the Claimant and the Council's Senior Solicitor, Ms Coulter.

89. On 21 August 2020, the Claimant sent an email to Councillor Kelsey of the Council (Chair of the Planning Committee), and copied to other Councillors. The subject line read "Request for site visit to 9 Twynham Avenue, Christchurch". She stated:

> "……. The reason for my email is to request a site visit to Twynham Avenue. Prior to this development going to the 20 February 2020 Planning Committee meeting, I requested a site visit – such visit to include viewing the site from my back garden in Twynham Avenue. I felt that way, the committee members would be able to get a good overall sense of the development from all aspects and the challenges it presented in terms of

residential amenity for certain adjoining residents and from an ecology and biodiversity perspective. I was informed that whilst a site visit would take place, David Hodges did not feel it necessary to include Twynham Ave. Yet the impact on Twynham Avenue residents and ecology were high on the list of topics in a significant number of objections from the public and experts. Why? Due to planning policy simply being ignored.

The site visit did take place on 20 February. It was raining on the day and, being mid-winter, the trees and bushes were void of foliage. Human nature being what it is, and combined with the fact that the committee members did not see the site from the 'outside looking in' (in other words David Hodges didn't think it necessary to include taking in the view from the perspective of significantly affected residential properties) it is conceivable that the committee members who made the site visit that day were not shown enough to enable them to have a well-informed, well balanced view of the site.

I am respectfully requesting please, that prior to the planning application being resubmitted to the Planning Committee, the committee conduct a visit to my residence, 9 Twynham Avenue. This should be done as soon as possible whilst the trees, bushes and shrubs are in leaf and the wildlife more abundant because of the season – in other words before October. And preferably on a day when it is not raining. That way the committee members will have the opportunity to assess things from a far more balance perspective. They will also see first-hand how it ties in with key elements of our claim. (We appreciate that Covid 19 will limit the visit to the garden but if it is possible at the time to facilitate viewing from upstairs, we are happy to work with you. If necessary we can show a video of the view from upstairs via laptop and tablet.)

I have also attached two aerial view images of the location. In image 1, one can see that there is not much in the way of green or trees in the area; Druitt gardens being the only green area in the town centre. Shockingly there is very little in the way of tree lined streets and limited garden trees. During the pandemic, a lot of drone images have been used on TV and the comparison with Christchurch and other towns/cities is stark. In image 2, it can be clearly seen that over half of the site is green with significant tree cover (mostly TPO trees) and this was highlighted by the Council's Tree and Landscape Officer as well as expert consultees. If the greenery and tree canopy on the proposed site is cleared, an important green lung will be lost forever. Dorset Natural Environment Team and Dorset Wildlife Trust view the area under threat as ecologically important for a variety of reasons, including being a vital stepping stone for wildlife from one habitat to another ie the banks of the River Avon (top right

> corner of image) to the Recreation Ground and Druitt Gardens (bottom left of the image) to the River Stour. This is also a commuting area for bats. Destroying this corridor will have devastating consequences for wildlife. The ecology on the site cannot be considered in isolation; it must be in the context of the surrounding area and other habitats. These important facts were omitted by the case officer and the site was presented as a derelict, overgrown 'eyesore' in need of total clearance. It was stated several times at the Planning Committee by the land owner that the gardens were neglected but it is the land owner who has neglected the gardens for the last 4-5 years.
>
> As part of a balanced and fair process, I hope you will see the merit in arranging a site visit to enable viewing the site from the back garden of my property, 9 Twynham Ave.
>
> Thank you. I trust you will consider my request favourably and I look forward to hearing from you soon"

90. Councillor Kelsey did not reply and so the Claimant sent a further email to him on 8 September 2020, with the same subject line as before, and copied to Councillor McCormack. She asked "what the latest is regarding my request for a site visit".

91. Councillor Kelsey replied by email on 8 September 2020 as follows:

> "Sorry for not responding earlier, yes I did get the email regarding a site visit and I have requested both legal and head of planning to look into this, as you know we will be looking at the application again so we will be going through the process again and the actual premises that we go to will be decided nearer the time".

92. Councillor Kelsey held a Chair's briefing meeting with officers on 1 September 2022 at which the Site Visit Protocol was considered. The Chair decided that a further site visit by the Committee to the Site was necessary, because there were new members on the Committee who had not visited the Site on the last occasion, but that it was not necessary for the Committee to visit 9 Twynham Avenue as the planning officer, Ms Mawdsley, had already done so. This was an internal meeting which was not open to the public and no minutes were published. As the Claimant was not aware of it, it did not form part of the Council's representation to her.

93. Ms Coulter sent an email to the Claimant (copied to the legal representatives and Mr Pendrill) on 17 September 2020 as follows:

> "I write further to your letter, and our subsequent correspondence.
>
> I am now in a position to formally respond to your letter, and additionally to provide an update on your request sent to the Chairman of the Planning Committee for a Site Visit when the application returns to the Committee.

> …..
>
> In regard to the request for a Site Visit, I can confirm that this is agreed to be appropriate and the Chairman and relevant officers are in agreement with this. The precise details will be confirmed in due course.
>
> I trust that this deals with matters of procedure. I can assure you that you will be advised as soon as the proposed date for consideration by the Committee is confirmed."

94. The Claimant replied by email on 21 September 2020 materially as follows:

> "It is noted that your email confirms there will be a site visit. A full site visit was not what was requested as this has already taken place. The request was to visit 9 Twynham Ave. Please confirm that the visit is to Twynham Ave only. As there was no information about organising this visit, I have emailed Cllr Kelsey and David Hodges to agree the date/time and the arrangements for access?"

95. On 5 October 2002, the Claimant emailed Ms Coulter again as follows:

> "Please could you provide answers to the questions I raised in my email of 21 September, that is:
>
> 1. Regarding your revised temporary arrangements for committee meetings, …..
>
> 2. It is noted that your email confirms there will be a site visit. A full site visit was not what was requested as this has already taken place. The request was to visit 9 Twynham Ave. Please confirm that the visit is to Twynham Ave only."

96. On 8 October 2020, Ms Coulter sent an email to the Claimant (copying in the planning officers and Councillor Kelsey), as follows:

> "…….
>
> In regard to the request for a site visit, the proposal was as you have stated for a site visit in the same manner as the previous site visit. I understand that photographs of the views from your property have been taken and the officer dealing with the application undertook a visit to your property during her assessment of the application.
>
> Notwithstanding this proposal, you will be aware of the changes in legislation relating to gatherings which have now come into force and which limit gatherings of over six other than in exempt circumstances. The Council is considering the implications of the legislation and in addition its duties to ensure the health and safety of the members of staff and committee, some of whom

> will fall into vulnerable groups, in light of the changing picture relating to the number of infections of Covid 19.
>
> I will update you and others in respect of this particular matter in due course."

97. On 8 October 2020, the Claimant sent an email to Ms Coulter (copying in the planning officers and Councillor Kelsey), as follows:

> "….With regard to the site visit, my request was for a visit to Twynham Ave, not the site that is to be developed. The site was visited on 20 February 2020 but Twynham Ave excluded, despite my request. I am expecting a site visit to Twynham Ave only and I understood that was what had been agreed.
>
> The Planning Officer did visit my home but my request was for the Councillors on the Planning Committee to visit Twynham Ave to ensure they are fully informed regarding the impact for neighbouring residents and ecology/biodiversity.
>
> I appreciate that the picture regarding Covid has changed since my request was made in August. (The intention was for the visit to occur in the summer not mid winter). We will have to work together on the Rule of 6 and travel for Councillors and Officers. It may be that there has to be three groups who take it in turns to enter the garden.
>
> My profession and the health of others who live in the house, means that I am sensitive to being careful.
>
> I look forward to ….. hearing from Mr Hodges about visiting Twynham Ave asap."

98. Ms Coulter sent a holding email on 9 October 2020.

99. On 18 November 2020, the Claimant sent an email to Ms Coulter (copied to the planning officers, some Councillors, Mr Pendrill and her barrister) as follows:

> "…..
>
> Again despite what was stated in the last point of your email (point 8), no one has anyone been in touch about the site visit. The request for a site visit to 9 Twynham Ave was agreed, so am I to take it that this decision has been reversed? Please can you explain why I have not been contacted and what the is situation with the site visit?
>
> …..
>
> I would appreciate your response by return."

100. On 20 November 2020, Ms Coulter sent an email reply as follows:

> "Thank you for your email below.
>
> I am sure you will appreciate that there has been a need to consider the changing situation in regard to gatherings and meetings when reviewing the options in respect of a site visit.
>
> You make reference to a proposed visit to your property as having been agreed. For clarification, this has not been agreed previously. What was agreed is to review the need for a site visit by the current members of planning committee, as was undertaken on the previous occasion by the members of the committee.
>
> Following consideration of the current regulations to ascertain whether a site visit is possible, it has been agreed that there will be a site visit by all members of the committee before the meeting next week. This will be a visit to various locations around and adjacent to the site and the purpose of the visit is to enable members of the committee to be familiar with the site and context. This has been agreed having regard to the protocol the committee has adopted relating to site visits and the current regulations affecting gatherings. The site visit will not be an opportunity for discussion or debate. It will be carefully managed to ensure the health and wellbeing of members and respect the social distancing and restrictions in place.
>
> The planning officer has previously visited your property, which does not happen as a matter of routine but in this case was agreed. She has viewed the site from your premises and has photographs from your garden of the site.
>
> I trust that this clarifies matters."

101. Ms Coulter's witness statement exhibits the Council's Site Visit Protocol, which states that site visits by the Committee are exceptional. The Chair, in consultation with officers, will decide, at the Chairman's briefing meeting whether or not a site visit is necessary or whether further visual information can be provided by officers instead. She gave an account of the briefing meeting which took place on 1 September 2020. She also exhibited an email she sent to Ms Mawdsley soon afterwards in which she confirmed that at the Chair's briefing meeting it was decided that it "was not necessary to use Mrs Suliman's garden as part of the site visit".

102. The Claimant, in her witness statement, described why she considered that a visit to her property by the Committee was important, and she set out the history of her attempts to obtain a visit. She said that her email of 21 August 2020 to Councillor Kelsey was explicit that she was seeking a visit to her property, not to the development site (paragraph 13). She referred to Ms Coulter's email of 17 September 2020, in which she stated "In regard to the request for a Site Visit, I can confirm that this is agreed to be appropriate and the Chairman and relevant officers are in agreement with this" (paragraph 14).

103. At paragraph 15, the Claimant described her response to Ms Coulter's email of 17 September 2020 as follows:

> "I sought clarification that she was referring to visiting 9 Twynham Avenue." *(emphasis added)*

104. Paragraph 15 then summarises the following email exchanges, saying:

> "Ms Coulter appeared to back track and talk about Covid restrictions limiting matters and that the Case Officer had visited my home previously, thereby implying that they would not be visiting my home. And yet in her email she stated that my request had been agreed. I stated that Covid restrictions were not a problem as we could have groups of 6 at a time in the garden and this would comply with the restrictions."

105. In his submissions, Mr Fowles explained that the Claimant's case was that Ms Coulter's emails of 8 October and 20 November 2020 were resiling from the representation she had previously made, in the email of 17 September 2020. As the correspondence shows, the Claimant was irritated by the Council's handling of the planning application in a number of respects, not just the site visit.

106. Following a careful consideration of the evidence, I have concluded that the Council and the IP are correct in submitting that the evidence relied upon by the Claimant does not establish that the Council made a representation to the Claimant that was sufficiently clear, unambiguous and devoid of relevant qualification, so as to found a legitimate expectation that the Committee would visit 9 Twynham Avenue.

107. The Claimant relies in particular upon the email from Ms Coulter on 17 September 2020, where she stated "[i]n regard to the request for a Site Visit, I can confirm that this is agreed to be appropriate and the Chairman and relevant officers are in agreement with this. The precise details will be confirmed in due course." The Claimant submits that Ms Coulter was representing to her that her request for a site visit to 9 Twynham Avenue had been agreed.

108. In my judgment, Ms Coulter's email lacked clarity. It could reasonably be understood as an agreement in principle to a site visit, with the details to be confirmed at a later date. It was not sufficiently clear or explicit that the Council had agreed to visit the Claimant's property at 9 Twynham Avenue, as well as, or instead of, the development site. Indeed, the Claimant clearly thought that Ms Coulter either was or might be referring to a visit to the development site, rather than a visit to 9 Twynham Avenue, as she sought further "clarification" (witness statement, paragraph 15) from Ms Coulter in her emails of 21 September and 5 October 2020 saying:

> "It is noted that your email confirms there will be a site visit. A full site visit was not what was requested as this has already taken place. The request was to visit 9 Twynham Ave. Please confirm that the visit is to Twynham Ave only."

109. Ms Coulter then confirmed in her response of 8 October 2020 that the Committee was proposing a visit to the development site, as on the previous occasion, not a visit to 9 Twynham Avenue:

> "In regard to the request for a site visit, the proposal was as you have stated for a site visit in the same manner as the previous site visit. I understand that photographs of the views from your property have been taken and the officer dealing with the application undertook a visit to your property during her assessment of the application."

The wording of this email could have been clearer, but I accept that the reference to "as you have stated" in Ms Coulter's email must have been referring to the Claimant's e-mails of 21 September and 5 October 2020 in which she stated "a full site visit was not what was requested as this has already taken place". According to Ms Coulter, this was indeed what she meant (witness statement, paragraph 11).

110. The Claimant then reiterated her request for a visit to 9 Twynham Avenue in her email of 8 October 2020, saying that she "understood that was what had been agreed". This was plainly inconsistent with her emails of 21 September and 8 October 2020 where she was requesting clarification because the position was unclear. I remind myself that the test is "how on a fair reading of the promise it would have been reasonably understood by the person to those to whom it was made", and that this is a test of "objective intention". I do not consider that there was any basis upon which the Claimant could reasonably have concluded that the Committee had agreed to visit 9 Twynham Avenue. Ms Coulter's emails referred to a site visit, i.e. a visit to the development site, not a visit to 9 Twynham Avenue.

111. Therefore, I consider that the Claimant has failed to establish that the Council made a clear, unambiguous and unqualified representation that the Committee would visit 9 Twynham Avenue, and so no basis for a legitimate expectation arose.

112. For these reasons, Ground 2 does not succeed.

Final conclusion

113. The claim for judicial review is dismissed.