Neutral Citation Number: [2022] EWHC 3002 (Admin)

Case No: CO/3002/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN MANCHESTER

Friday 25th November 2022

Before:
MR JUSTICE FORDHAM
- -

Between:

THE KING (on the application of MACINTOSH VILLAGE (MANAGEMENT) LIMITED)	**Claimant**
- and -	
MANCHESTER CITY COUNCIL	**Defendant**
-and-	
GMS (PARKING) LIMITED	**Interested Party**

- -
- -

John Hunter (instructed by Keystone Law) for the **Claimant**
Christopher Katkowski KC and **Alan Evans** (instructed by City Solicitor) for the **Defendant**
Paul Tucker KC and **Stephanie Hall** (instructed by Town Legal) for the **Interested party**
- -

Hearing date: 9/11/22
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. With the permission of the Court of Appeal granted on 19 May 2022, the Claimant ("MVML") seeks judicial review of a decision of the Planning and Highways Committee ("the Committee") of the Defendant ("the Council"). The decision was to grant planning permission to the Interested Party ("GMS") for a proposed development on the site of an existing multi-storey car park ("MSCP") between Great Marlborough Street and Hulme Street in Manchester City Centre ("the Site"). The Site is just south of Manchester Oxford Road train station, in the direction of ManCoCo coffee, in an area containing commercial and residential developments as an active frontage to a railway viaduct. The proposal would involve the construction of a 55-storey tower block, comprising 853 units of purpose built student accommodation and 786m2 of incubator workspace for small and medium-sized enterprises, together with ancillary amenity space, public realm and other associated works. Under the proposal, the MSCP will be reconfigured and made smaller. GMS owns part of the Site. The proposal would involve a "construction" phase. During construction, there would be two tower cranes on the Site, one of whose base would be within a space which would continue to operate as a car park. The use of tower cranes means a necessary period of crane "assembly" before the crane starts to be used, and a period of crane "dismantling" after its use has finished. The existing MSCP is on five storeys with a lift. It has 391 spaces including 20 disabled parking spaces. The reconfigured car park would have four storeys of parking with a lift. It would have 101 spaces, including 5% (ie. 5) disabled parking spaces, and 20% of the 101 being fitted with an electric car charging point. There would be a loss of 290 spaces, the partial demolition of the surplus part, modification to height and elevations, and the construction of 5 storey external ramps. I was shown plans which show the existing, transitional and final layout of the car park.

2. A chronological outline of some key steps within the planning process is as follows. GMS's application for planning permission was made on 13 September 2018. An Environmental Statement was prepared. Representations were made concerning the proposal. There were three rounds of neighbour notification. An Officers' Report was prepared for a meeting on 21 January 2021 at which consideration of the application was deferred. An Amended Environmental Statement (the "AES") was provided by GMS on 24 May 2021. There was a fourth-round of neighbour notification. The OR was issued on 21 June 2021 for a meeting scheduled for 1 July 2021. MVML's fourth-round representations ("the July Representations") were provided by it on 1 July 2021 and sent direct that morning to all members of the Committee (the "Members"). The Meeting took place at 3pm that day. The Meeting was recorded on a video, from which a transcript was produced to assist the Court. The planning permission decision notice was issued on 23 July 2021, setting out the permission and its accompanying 44 planning conditions. The planning policies to which I refer in this judgment are published online. Also available online (by searching the Council's website using reference "121252/FO/2018") are key planning documents. That includes the OR and the AES. Where I give apparently extraneous paragraph numbers in this judgment, that is no more than as a navigational aid for the parties and anyone who wants to follow the greater detail by accessing the publicly available sources. Where passages quoted in this judgment contain numbers in square brackets, these have been added by me for ease of later cross-referencing.

3. MVML is described in the grounds for judicial review as "a residents' management company representing nearly 500 leaseholders in Macintosh Village, many of whom have residents' rights to park at the existing car park". These "residents' rights to park" (the "RRPs") are important to understanding this case. They are also important to understanding the proposed development. It is because of the RRPs that the reconfigured MSCP is proposed to be retained at the Site. Moreover, the number of RRPs accounts for the size of the proposed reconfigured MSCP. The following points are all made within the Planning Officers' Report issued on 21 June 2021 ("the OR"). The existing MSCP has 391 spaces. Between 30-40 of the current 391 spaces are in use at any one time. The leasehold arrangements for RRPs are for approximately 90 to 100 spaces. The proposed reconfiguration would reduce the MSCP to 101 spaces, that being "the required number" to be "made available for those with a right to park in the car parking". Because the RRPs are of such significance in this case, I will start this judgment by recording that the OR made two basic points about them (the "Two Basic Points"): [BP1] that all those with RRPs will retain a right to a parking space within the proposed reconfigured MSCP; and [BP2] that these spaces will be kept "operational at all times", during the construction phase for the development, and after its completion. The Two Basic Points [BP1] and [BP2] can be clearly seen from these passages, all taken from the OR:

> ***[I]t is understood that there is a leasehold arrangement for approximately 90 to 100 spaces. The proposal [BP1] would retain the spaces which are subject to the lease arrangement and [BP2] would be kept operational at all times in line with the current provision.***
>
> ***The spaces which are on a long lease hold arrangement to residents who live in Macintosh Village would be retained and would be available [BP2] during construction and [BP1] once the development becomes operational.***
>
> ***It is understood that since the applicant purchased the car park the rights of the residents to park in the car park have been retained. The rights would be maintained should planning permission be granted. The appropriate number of car parking spaces would be retained and made available [BP2] during construction and [BP1] when the redevelopment works have been completed.***

4. There was an Agreed List of Issues and I am going to address each of the Agreed Issues in this judgment, though not in the same sequence as they appeared in the List. I will give each issue a shorthand name. Two ancillary applications were made at the hearing before me. First, there is an application by MVML to rely, as further evidence in these proceedings, on a witness statement of MVML's Mr Halley dated 5 October 2022. Secondly, there is an application by MVML – treated by everyone as an application to amend the grounds for judicial review – to take a new legal point about consultation and the AES. In relation to these ancillary applications, all Counsel sensibly agreed that I should receive all evidence and hear all submissions, to be able to see and understand and reach a view (in legal Latin: "de bene esse"), so as then give my rulings on the ancillary applications within this judgment.

The Cranes Issue

5. I start with this Agreed Issue, which I have labelled the Cranes Issue:

> ***Whether Officers seriously misled the Committee in advising in the OR and/or at the Meeting that access to the car park would only be restricted for very short periods while cranes were***

> ***being assembled and dismantled at the beginning and end of the demolition/construction phase.***

This is ground for judicial review whose focus is on what was said by planning officers (the "Officers") to Members of the Committee, "in the OR" and "at the Meeting".

6. Starting with the OR, under a heading "Construction programme and works", Officers said this to Members:

> ***[OR1] For crane erection, assembly and removal would require some general access road closure on Great Marlborough Street. Access to the car parks on either side of the road, including the MSCP, would be maintained through safe management. Some short term full road closures would be unavoidable, but this is a very common requirement for construction sites in the city centre.***
>
> ***[OR2] During these periods, some intermittent car park entry/exit restrictions would be implemented. These are expected to be short in duration for up to 30 minutes at a time. Any short-term closures would be managed and would only be in place when loads are lifted over the car park during crane assembly/removal.***
>
> ***[OR3] Car park users would be given prior notification of any restrictions. If access is required without prior notice, or in the event of an emergency, the car park areas would be made safe in order to facilitate the request for access at the earliest opportunity. It is envisaged that this would be for short periods during lifting operations.***
>
> ***[OR4] Once the crane has been erected, there would be no other instances during normal construction where loads would be required to pass over the MSCP. General construction exclusions zones would only apply to specific construction areas of the MSCP which include its roof. The car park would remain in use with appropriate protection measures in place to ensure segregation from the construction site. The lifts and main stair core would remain accessible. Any changes to access routes would be communicated in advance and clearly sign posted. Crash decks would be introduced around the development for added safety measure.***

This, as I will explain, is said by MVML to have been materially misleading.

7. At the Meeting, there were these key statements, in the sequence in which they can be found in the transcript. First, the transcript contains this reference to what had been said in the "ante chamber" by Councillor Jeavons (not a Member of the Committee), referring to "access" being "guaranteed":

> ***[M1] Councillor Jeavons informs the Community present the site visit was not well attended, very short and the planning officer warned the committee to put no weight on access to the car park as the officer had been assured by the agent this was not an issue and would be guaranteed.***

Secondly, there is what was said by GMS's agent John Cooper, who told Members:

> ***[M2] Safe access to the car park will be maintained, the only disruption will be during crane assembly and dismantling, which we be minimal and prior notification will be given to local residents.***

Thirdly, there is what was asked by Councillor Stogia (a Member of the Committee):

> ***[M3] [G]iven that this application has been doing the rounds for 4 years now there seems to still be quite a lot of confusion around parking arrangements for residents. Could you clarify what are the arrangements for residents that own a parking space during the construction phase and also what are the arrangements afterwards.***

Fourthly, there is what was said by the Lead Planning Officer David Roscoe, who told Members:

> ***[M4] [R]ight, parking rights, those who have a right to park in the car park that will be protected during the construction phase , so it will be operational and accessible. I think there will be a couple of occasions when it's not fully accessible and that will be when the crane(s) are being erected and when the cranes are being dismantled. There will be some disruption then. And there might be occasional (stresses the word) disruption during the construction period but people will be given advance notice of that but to all intents and purposes , er , the car park remain operational for the duration , for those who have a right to park, throughout the construction period and then their space will be available on an ongoing basis once the scheme is complete.***

Fifthly, there was what was asked by Councillor Davies (a Committee Member):

> ***[M5] I have a few questions about the guarantee, Councillor Jeavons raised the fact there was no written guarantee that parking would be available during the construction period which may well be over 5 years. We have had verbal guarantees but I am wondering where is the written guarantee. What we have heard again today is that they're maybe some times , they're maybe some times undefined and not limited where that guarantee cannot be given. I think there has been a suggestion that alternative provision might be made. Can I point to people who may not be aware , that adding a parking space to an apartment usually adds on average £20,000 pounds to the cost of an apartment in the city centre. That significantly increases the mortgage that people need in order to buy the apartment and people who are concerned about parking and parking safely put a great deal of time and effort in choosing their apartment with regards to parking facilities. So for example a woman who is let's say a medical professional who is often working late hours would think very carefully about where she was able to park, returning home from work or indeed social activity late at night and how she would get back to her flat safely. So this vagueness is not meeting the needs that people thought there were meeting when they purchased their apartment.***

Sixthly, there is what was said in response by Mr Roscoe:

> ***[M6] In terms of the guarantees for the parking spaces, hopefully the construction management plan covers that but we would be very happy to suggest another condition that requires a management strategy for how the car parking spaces are kept available, operational and accessible at all times during the construction/demolition phase. So we could attach an additional condition to the concern, to address the concern raised by councillor Davies.***

As I will explain, of the statements made at the Meeting it is that final statement from Mr Roscoe (at [M6]) which is what MVML says was materially misleading.

8. The "construction management plan" to which Mr Roscoe referred at the Meeting (at [M6]) was described in proposed Planning Condition No.11 ("PPC11") – included within the OR. It said:

> ***[PPC11] Notwithstanding highways logistics plan stamped as received by the City Council, as Local Planning Authority, on the 24 May 2021, prior to the commencement of development, a detailed construction management plan outlining working practices for the proposed development construction shall be submitted to and approved in writing by the Local Planning Authority. For the avoidance of doubt the construction management plans shall include: [i] Display of an emergency contact number; [ii] Measures to protect the River Medlock from spillages, dust and debris; [iii] Communication strategy with residents; [iv] Tower Crane Strategy; [v] Details of Wheel Washing; [vi] Dust suppression measures; [vii] Compound and hoarding locations where relevant; [viii] Location, removal and recycling of waste; [ix] Routing strategy and swept path analysis; [x] Parking of construction vehicles and staff; and [xi] Sheeting over of construction vehicles. Manchester City Council encourages***

> ***all contractors to be 'considerate contractors' when working in the city by being aware of the needs of neighbours and the environment. Membership of the Considerate Constructors Scheme is highly recommended. The development shall be carried out in accordance with the approved construction management plans for the duration of the demolition and construction parts of the development. Reason: To safeguard the amenities of nearby residents and highway safety, pursuant to policies SP1, EN9, EN19 and DM1 of the Manchester Core Strategy (July 2012).***

In the final version of this Planning Condition No.11 ("FPC11"), the text was the same as PPC11 (set out above) except that there was the following insertion into the list of matters required to be included in the construction management plan:

> ***[FPC11] … [iva] Temporary pedestrian and vehicular access arrangement to the Multi-Storey Car Park (including disabled access); …***

9. So far as concerns an "additional condition" – to which Mr Roscoe referred at the Meeting (at [M6]) – there was in the event this further final Planning Condition No.44 ("FPC44") when planning permission was granted on 23 July 2021:

> ***[FPC44] Prior to the works commencing on the demolition and remodelling of the Multi Storey Car Park (MSCP) and construction works hereby approved, a management strategy to ensure the car park remains operational and available at all times for the duration of the demolition, remodelling and construction works shall be submitted for approval in writing by the City Council, as Local Planning Authority. This strategy shall include temporary vehicle and pedestrian access arrangements (including disabled access) to ensure safe and unimpeded access to the car park at all times together with a communication strategy with car park users to outline any circumstances which may arise which would result in unavoidable restriction of access to the car park, on the grounds of safety only. Restricted access should be kept to an absolute minimum. The management strategy shall be implemented and remain in place for the duration of the demolition, remodelling and construction works. Reason - In the interest of preserving access for the car park users at all times and to ensure a strategy is in place to minimise any restrictions to the car park on the grounds of safety only pursuant to policy DM1 of the Manchester Core Strategy (2012).***

10. As has been seen above, there was a "highways logistics plan" described in the text of PPC11, set out for Members in the OR. On that topic GMS had provided Officers with a "GMS Highways & Logistics Review" (April 2021) which said this about "road closures":

> ***No full road closures will be necessary for extended periods, but there will be intermittent periods of road closures for high risk items of work. i.e. crane erection.***

In fact, that text was repeated in the main body of the OR itself under the heading "Construction programme and works", immediately preceding [OR1]. The Highways & Logistics Review had gone on to say this, under the heading "Tower Crane Strategy – Safety & Operational Considerations":

> ***Live Car Park Access***
> - ***During general operation, full unhindered access will be available for car Park users. During erection we have outlined a safe operation where access is restricted but made available upon request in the event of an emergency or unplanned journey.***
> - ***No loads will be lifted over the car park or access routes whilst it is live, and crash decks will be introduced to areas adjacent to the GMS development as an added safety measure.***
> - ***Experience and learning to be taken from operating cranes in and above a live building on London Leadenhall.***

11. There are two further sources which will feature in the discussion of the Cranes Issue. One is an email dated 8 February 2021 ("the February Email") from GMS, provided to Officers. It had contained GMS's response to certain matters which had been raised by objectors to GMS's application for planning permission. The February Email was not before Members, but it and the Highways & Logistics Review are relevant to whether the OR was materially misleading. Under a heading "Construction Delivery", the February Email told Officers this:

> ***[FE1] By way of further clarification, the contractor has provided additional detail regarding the stages of crane assembly, which is provided below.***
>
> ***[FE2] Components of two tower cranes will arrive to site in pieces and will be assembled in position. The location of the crane towers is identified within the submitted planning drawings. The cranes towers will be hoarded off at all levels of the MSCP and all requisite safety measures will be taken. Furthermore, the crane locations will ensure all required spaces within the MSCP remain safe, accessible and operational throughout the demolition and construction period.***
>
> ***[FE3] During construction, the cranes will be programmed with automated restrictions, thereby ensuring that no oversailing of the operational public highway or private land will occur. Where oversailing occurs (i.e. outside the Applicant's ownership), this will be within the site boundary at all times.***
>
> ***[FE4] Crane erection and assembly will require some general access road closure of Gt Marlborough Street. Despite the general access road closure, access to the car parks on either side of the road will be maintained through safe management. Some short term full road closures will be unavoidable, but this is a very common requirement for construction sites in city centre locations. During these periods, some intermittent car park entry / exit restrictions will be required, but these would only be expected to only last a maximum of 30 minutes at a time. Any short-term closures will be managed and would only be in place when loads are lifted over the car park. The remaining days for crane assembly are to rope, test and commission.***
>
> ***[FE5] All surrounding residents and businesses will be given advance warning of the crane assembly and dismantle periods, and an on-site management team will be available throughout.***
>
> ***[FE6] The LPA and Highways Authority have also been consulted on the construction methodology and have raised no concerns.***

12. The final source is a witness statement in these proceedings from GMS's Edward Cade (13 October 2022). Obviously, this document was not before Officers or Members. It is before this Court. In it, Mr Cade tells me that:

> ***Safe and unimpeded access (including disabled access) to the MSCP will be available to MSCP users at all times apart from during crane erection/removal and infrequently on occasions when loads are lifted over the MSCP at which time restrictions may be necessary for safety reasons. Further details of these infrequent restrictions on access will be included in the management plans.***

13. I turn to the relevant law. There was no dispute as to the following applicable legal principles which feature in the analysis of the Cranes Issue (and will feature later too). As Lindblom LJ explained in R (Mansell) v Tonbridge & Malling BC [2017] EWCA Civ1314 [2019] PTSR 1452 at §42(2)(3): (1) the OR is "to be read … with reasonable benevolence" as a "fair reading" and "as a whole"; (2) there must be an "error" in Officers' "advice" which "has gone uncorrected before the decision was made"; (3) the

question is whether Officers "materially misled the Members on a matter bearing upon their decision", the error being "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"; (4) a "line" has to be 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"; that drawing that line "will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it"; (5) species of misleading error are where a planning officer (a) "has inadvertently led a committee astray by making some significant error of fact", or (b) "has plainly misdirected the members as to the meaning of a relevant policy", or (c) 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"; and (6) "unless there is some distinct and material defect in the officer's advice, the court will not interfere". As to (5)(c) – the species of having "simply failed to deal" by giving "explicit advice" – this is "broader than a duty not actively to mislead" and "includes a positive duty to provide sufficient information and guidance to enable the Members to reach a decision applying the relevant statutory criteria" or "legal test": see R v Durham County Council, ex p Lowther [2001] EWCA Civ 781 at §98. That, then, is the applicable law.

14. I can now turn to the argument. Mr Hunter's argument on this ground for judicial review is as follows. The OR (at [OR2]) was straightforwardly communicating to Members that there would be no "short-term closures" except "during crane assembly/removal". At the Meeting, Mr Roscoe's statement (at [M6]) was, again, straightforwardly communicating that there would be no closure at any time during the construction/demolition phase. At [M6], Mr Roscoe was saying there would be "guarantees" of accessibility "at all times". He was saying this "to address the concern" which Councillor Davies had raised (at [M5]), namely that there "may be some times" where the "guarantee" to which Councillor Jeavons had referred "cannot be given". Members were being told, straightforwardly, that there were no times which would not be covered, by a "guarantee", and that the guarantee of no closure would apply at any and all times. This was "materially misleading", on a point of clear significance. That clear significance is evidenced by the way in which it featured in the discussion at the Meeting at [M1]-[M6]. It links to the Basic Point [BP2]. The fact that it was "materially misleading" can be seen from several sources. First, because the February Email (as seen at [FE4]) was describing some intermittent car park entry/exit restrictions as being required during these periods, with a maximum of 30 minutes, where these periods were not limited to crane "erection and assembly" but included loads being lifted over the car park (ie. lifted by operational cranes). That was misstated in the OR (at [OR2]), through the inclusion by Officers of the additional phrase "during crane assembly/removal". Secondly, because the position has now been confirmed by the witness evidence of Mr Cade for GMS. He speaks of restrictions which may be necessary for safety reasons apart from during crane erection/removal, when loads are lifted (ie. by operational cranes) over the MSCP. Thirdly, because FPC44 is not the "guarantee" of accessibility "at all times" that Members were being promised. Rather, it allows for restriction of access to the car park, at any time, not limited to assembly/removal of a crane. Furthermore, although referable to the management strategy (FPC11), FPC44 ultimately entitles GMS "unilaterally" to impose restrictions on access to the car park. In any event, enforcement of FPC44 is "unrealistic". For all these reasons, the Officers' advice to Members, in the OR and at the Meeting, was

"materially misleading" and vitiates the decision to grant planning permission, in accordance with the relevant legal principles in Mansell and Lowther. That is the essence of the argument for MVML on the Cranes Issue.

15. I cannot accept this argument. I do not accept that a Member would have understood from Mr Roscoe's response at the Meeting (at [M6]) that the reference to "guarantees" and "at all times" meant an absolute and wholly unqualified prohibition on any restriction of access to the car park. That would have meant Mr Roscoe contradicting what he had just said (at [M4]): that there "might" be a need for "occasional" disruption during the "construction period", in addition to occasions where there would not be full access while cranes were being erected and dismantled. FPC44 itself contains the words "ensure" and "at all times". It is designed to secure access to parking spaces in the MSCP for those with RRPs, which access is continuing and at all times. That purpose is not inconsistent with there being some safety-based intermittent interruption, where strictly necessary. It would have defied common sense, and been clearly contrary to the public interest, if a planning condition was to be designed to preclude a restriction of access which was "unavoidable", "on the grounds of safety", and "kept to an absolute minimum". FPC44 contains all of these as express preconditions to restrictions on access. As Mr Tucker KC for GMS pointed out, were it otherwise, Members would have been being told that a planning condition would preclude any restriction on access even if the tower crane had seriously been vandalised and needed urgently to be secured to make access to the car-parking spaces safe. The same would be true if there were otherwise an urgent need to make repairs to the tower crane to protect car park users.

16. That, in my judgment, is sufficient to dispose of this ground for judicial review. Indeed, anything else risks falling in a trap of engaging in an inapt textual analysis, reading documents as if they were statutes. Having said that, I will engage in a wider-ranging consideration of the materials described above, lest it be thought that a further analytical exercise is warranted. I will do so, to see what such an exercise would reveal. I start with the remaining exchanges at the Meeting. The essential vice identified by Councillor Stogia (at [M3]) was the need for clarification, to avoid confusion. The essential vice identified by Councillor Davies (at [M5]) – picking up on the position of Councillor Jeavons (at [M1]) – was about a guarantee being in writing. FPC44 provides that clarity, in writing. It imposes very strict criteria for temporary restricted access, necessitated by safety. There is no reason to think that it would not be enforced in accordance with its terms; nor that a guarantee would be more likely to be enforced in accordance with its terms if it allowed no safety-based qualification at all. Turning to the OR, I do not accept that [OR2] was a material misdescription of the message in the February Email (at [FE4]). That passage was introduced as additional detail regarding stages of crane assembly (see [FE1]). The description of "during these periods" was in a paragraph (ie. [FE4]) which began with the description of what would be required for "crane erection and assembly". But even if in the summary in the OR (at [OR2]) Officers had misread the February Email, because they ought to have appreciated that "loads" could be "lifted over the car park" by the cranes themselves, necessitating intermittent short-term closures, that was the very point which Mr Roscoe explained at the meeting when he said there might be occasional disruption during the construction period (at [M4]). That was a point which Mr Roscoe brought to the attention of Members notwithstanding that GMS's agent Mr Cooper had referred only to disruption during crane assembly and dismantling (see [M2]). Whether all these statements are viewed straightforwardly and read benevolently and as a matter of common sense, or

even if for that matter subjected to close textual scrutiny, the answer is the same. There is nothing here which constitutes materially misleading advice, so as to trigger the vitiating flaw identifiable in the case law.

17. The answer to the Cranes Issue is "no". This ground for judicial review fails. To this, I add the following footnote. In the July Representations MVML put a key objection to the OR in this way:

> ***The car park will be manifestly restricted from access throughout the 5-7 years of construction. The officer has late in the report buried this fact and prefers to use [the phrase] the car park will be operational at all times… During the 5-7 years car park owners will be restricted for up to 30 minutes from entering/exiting the car park when the tower crane is moving. When a tower crane is not moving the construction site is not working…***

The objection being made here is that whenever the tower crane was operational ("moving" and therefore "working"), access to the MSCP would be restricted, which would continue throughout the "5-7 years" of the "construction". The first answer to that is that an operational tower crane is not to be equated with "loads" being lifted by the crane "over" the car park. Mr Tucker KC showed me the diagrams which clearly depict the reach of the tower crane boom (the arm), over the construction site beyond the MSCP. These show clearly how the tower crane would operate – "moving" and "working" – by lifting loads over the construction site and not the car park. The second answer is that nothing was "buried" in the OR or by Officers. The February email – and the Highways & Logistics Review – were clearly intended to be being fairly and accurately summarised (at [OR1] to [OR4]). And Mr Roscoe explained the point about "occasional disruption during the construction period" at the Meeting (at [M4]). The third answer is that the planning condition which was discussed and then imposed (FPC44) by means of its strict criteria, with the focus on the minimum necessary interference to secure safety, demonstrates that the spectre of restricted access portrayed by MVML in the July Representations does not reflect the reality as appreciated by Members when this topic was being discussed and addressed. It was, of course, directly linked to Basic Point [BP2] which I identified at the start of this judgment.

The Dust Issue

18. I turn next to this Agreed Issue, which I have labelled the Dust Issue:

> ***Whether the AES was legally inadequate due to a failure to consider the risk to the health of car park users during the demolition/construction phase from exposure to known carcinogens such as mercury, asbestos and polycyclic aromatic hydrocarbons (PAHs) (and whether any such failure was remedied by the contents of the OR).***

As can be seen, the particular focus for the purposes of this ground for judicial review is on the AES.

19. In legal terms there are three key reference points. First, there are the Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571 (the "2017 Regulations"). They are applicable to this case. They require that an environmental statement describe direct and indirect significant effect of the proposed development on the human health of the population: see regulation 18(3)(b)(c)(f), Schedule 4 §4 and regulation 4(2)(a). They also require that the environmental information – including the legally adequate environmental statement – must be examined by the decision-maker

to arrive at a reasoned conclusion on significant effects, integrated into the planning permission decision: see regulation 26(1). Secondly there are the governing legal principles regarding legally inadequate environmental statements which vitiate a planning decision. These was identified by Sullivan J in R (Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin) at §§40-41. It is for the planning authority to consider whether the environmental statement has failed to identify any particular environmental impact, or has wrongly dismissed it is unlikely or not significant; and to consider whether mitigation measures are inadequate or insufficiently detailed (Blewett at §40). The 2017 Regulations should be interpreted as a whole and in a common sense way with the purpose of ensuring the planning decisions are made on the basis of full information, but without unrealistic expectations, the question for the judicial review Court being whether "the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations" (Blewett at §41). Thirdly, there is a principle exemplified by Gillespie v First Secretary of State [2003] EWCA Civ 400 [2003] Env LR 30, that duties under the 2017 Regulations cannot unlawfully be deferred or abdicated. Gillespie is a case about 'screening' decisions (decisions about whether to insist on an environmental statement) and deferral of environmental assessments to be addressed through the implementation of planning conditions. Gillespie reflects the importance of contemporaneous insistence on – and consideration of – legally adequate environmental statements, at the time of the planning decision. It does not detract from the Blewett principles.

20. MVML's arguments focus in particular on the assessment in the AES of potential risk to relevant "receptors" (AES §14.6); where those receptors for received dose of carcinogens during the construction phase were identified as being "on-site workers" and "off-site receptors", the latter including "off-site residents" (AES §§14.45-14.46); and where "specific mitigation measures" were identified "to address potential adverse impacts to demolition/ construction personnel from contaminated soil and ground gas… during the site works", including appropriate PPE (gloves and overalls), monitoring of gas and oxygen concentrations and so on (AES §14.60). This, in a context where it is common ground that "car park users were not identified as potential receptors", as was expressly accepted in the Mr Katkowski KC's skeleton argument on behalf of the Council. Also relevant are PPC11 and FPC11 the terms of which, as has been seen, would require a Construction Management Plan which deals with "dust suppression measures".

21. The essence of the argument advanced by Mr Hunter is as follows. The identification of "receptors" ignored the important category of "on-site residents" (or, put another way, "on-site non-workers"). Assessment of the health impacts on car park users was vital. It could not be deferred to a later stage, through the later identification and implementation of a Construction Management Plan and dust suppression measures within PPC11 (which became PFC11). The AES needed to be legally adequate and comprehensive, so as to comply with the 2017 Regulations and achieve the statutory purposes of prior consultative assessment. Local residents who are car park users were assessed as "receptors" when present "off site" in the living rooms of their neighbouring homes, but not when entering the Site as users of the car park. That was an important blindspot in the AES, on a health issue of clear and obvious significance. Given the absence of an assessment, and given the statutory consultative role played by an environmental statement, this serious deficiency could not in principle be cured by

anything said by Officers in the OR or at the Meeting. Nor indeed was the blind spot even purportedly filled by Officers in the OR or at the Meeting. The materiality of the issue is reinforced by Basic Point [BP2] and by the fact that the central purpose of issuing the AES was to deal with health impacts, and in particular dust and contaminants, from exposure to known carcinogens during the demolition/construction phase. The Blewett principles were infringed in the circumstances of the present case, by the blindspot relating to car park users as unidentified and unassessed "receptors".

22. I cannot accept these submissions. The answer lies in reading the AES straightforwardly and as a whole. There was no blind spot. The AES describes the construction phase Environmental Management Plan as outlining "measures to be implemented to mitigate potential environmental impacts on site operatives" but also on "the local community" to ensure "acceptable and safe levels" (AES §4.32). The phrase "the local community" is clearly intended to, and does, extend to all those locals who stand to be affected, but are not "site operatives". Moreover, the AES refers (AES §4.33) to appropriate measures which will be taken "to suppress dust and reduce potential risk of contamination effects to negligible in line with best practice". That is in the context of protecting both "site operatives" and "the local community". The AES contains a table (AES Table 14.1) which addresses "potential contaminant linkages for baseline, construction and operational phases". There are separate rows within that table for mercury impacts, PAH impacts, and asbestos impacts. Within that table, the receptors identified and assessed include "current site users", described as "site visitors and commercial workers". Plainly, "commercial workers" is referable to "on-site workers". But equally plainly, "site visitors" therefore includes on-site non workers. That would include a "visitor" who came to inspect the base of the tower crane in the car park, or to mend an electrical charging point. It would include a local resident who came to and from a parked car. It would not be restricted to local residents when located in their homes. It is in that context that, for the construction phase, the "mitigation measures" described in the AES involve "specific measures to mitigate the potential for dust" provided in the air-quality chapter of the AES and recommending the "site-specific dust management plan" to be developed for the Site, to provide protection from generation of dust with contaminants that may pose a risk to human health (AES §14.55). That "dust management plan" is a specific "mitigation measure" which is general in its effect and includes the protection of car park users. By contrast, there are the specific mitigation measures (AES §14.60) to address potential adverse impacts to "demolition/ construction personnel" during the "site works". Those specific mitigation measures are described as including PPE (gloves and overalls), the monitoring of gas and oxygen concentrations in excavations, site rules about washing hands before eating, clear signage of contaminated land, and adequate site security to prevent trespassers. Those specific mitigation measures are plainly concerned with construction personnel gaining access to the "construction site" area within the Site. But even in that context, visitors are addressed by reference to preventing their gaining access (as trespassers). This does not cover car park users for the simple and straightforward reason that they will not be located within the demolition/construction site to which the demolition/construction personnel have access, still less will they be handling contaminated soil or being exposed ground gas within that demolition/construction area. The mitigation for the broader risks for visitors to the broader site have already been addressed through the "site-specific dust management plan" referred to elsewhere in the AES. Then there is a table concerned with "residual effects" (AES Table 17.2). This summarises residual effects in respect of each health related topic, both during construction and operation.

It covers contaminated dust including PAH and asbestos and air-quality (PM10 emissions and so on). The "mitigation measures" to address those effects is the implementation of the "CEMP" including the "dust suppression measures" and "air-quality monitoring". This is a reference to the dust suppression measures included within the Construction Management Plan required to be submitted and approved by FPC11, the text of which was before Members as PPC11.

23. I do not accept that there is any 'blindspot' regarding car park users within the analysis in the AES, still less one which meets the legal test in Blewett for vitiating consequence and intervention by the judicial review Court. There is therefore no question of any deferral or abdication of the assessment and appraisal, unlike Gillespie where the prospect of future consideration of appropriate planning conditions had erroneously been regarded as being a reason for not insisting on any environmental statement at all. There is no question of the OR 'curing' some legal breach embodied in the AES. What the OR demonstrates is the evaluative judgment of the adequacy of the AES, as recognisably a question for Officer and Members, under Blewett. The OR presented for Members the AES and referenced its substantive topic areas including human health. The OR recorded Officer's conclusion on adequacy: "It is considered that the environmental statement has provided the Local Planning Authority with sufficient information to understand the likely environmental effects of the proposals and any required mitigation". That was the Blewett 'judgment call', addressed for Members and put before Members, by Planning Officers. It was a lawful 'judgment call' for Officers to make and Members to accept, as they did. Elsewhere in the OR, evaluative conclusions were reached, by reference to dust and impacts of the development on air-quality, that the proposal would comply with relevant policies relating to air-quality. That conclusion was unimpeachable and is rightly not impugned.

24. The answer to the Dust Issue is "no". The AES was not legally inadequate. There is this footnote to the Dust Issue. In the July Representations, MVML said this: "There is no mitigation proposed for nor consideration of car park [users] during [the demolition and construction] phase beyond reporting". The answer is that this is not correct. There was "consideration" of car park users, when the AES is read fairly and as a whole. And there is very clearly "mitigation proposed" to protect them, namely the "site-specific dust management plan" described in the AES, under the heading "mitigation measures" and "construction phase" (AES §14.55).

The Disabled Car Park Users Issue

25. I turn to this Agreed Issue:

Whether the [Council] failed to comply with the Public Sector Equality Duty.

I have labelled this the Disabled Car Park Users Issue, because this is a ground for judicial review whose focus is very squarely on the question of disabled parking spaces and disabled access within the reconfigured car park proposed within the development. Mr Hunter relied on the reduced number – 5 – of disabled parking bays. He criticised their lack of proximity to the lift, as depicted on the plans. He submitted that planning condition 31 ("FPC 31") which was placed before Members in draft ("PPC31"), and the new planning condition FPC44 (which I have set out already) requiring the management strategy to ensure that the MSCP remains operational at all times, with vehicle and pedestrian access arrangements "including disabled access", are

insufficient. That is because they defer to a later stage the statutory public sector equality duty ("PSED"), of "due regard", required to be discharged contemporaneously and proactively.

26. Section 149(1) and (3) of the Equality Act 2010 provide that:

> ***(1) A public authority must, in the exercise of its functions , have due regard to the need to … (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it …. (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to: (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it.***

27. As with other Issues, the relevant legal principles are not in dispute. The PSED was described in the following way by Lord Neuberger in Hotak v Southwark LBC [2015] UKSC 30 [2016] AC 811 at §75: the duty must be exercised in substance, with rigour and with an open mind; it is for the decision-maker to determine how much weight to give to the duty; the question for the Court is whether it can be satisfied that there has been a rigorous consideration of the duty, with a proper and conscientious focus on the statutory criteria; if there has been, the Court cannot interfere simply because it would have given greater weight to the equality implications of the decision. As the Divisional Court explained in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) at §91: the due regard duty must be fulfilled before and at the time that a particular decision that will or might affect disabled people is being considered by the relevant public authority; it involves a conscious approach in state of mind; and it will not be discharged by attempts to justify a decision has been consistent with the exercise of the duty when the duty was not in fact considered before the decision was taken. As the Court of Appeal explained in Gathercole v Suffolk County Council [2020] EWCA Civ 1179 at §23: the duty is a continuing one.

28. In my judgment, the answer to the Disabled Car Park Users Issue is "no". The Council did not fail to comply with the PSED. I am satisfied that there was a rigorous consideration of the duty, with a proper and conscientious focus on the statutory criteria. The starting point is that Officers and Members had the PSED and its content well in mind. It had been accurately summarised for Members, as a relevant "legal duty", in the OR. The section of the OR headed "other legislative requirements' told Members this:

> ***S149 (Public Sector Equality Duty) of the Equality Act 2010 requires due regard to the need to: Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. The Equality Duty does not impose a legal requirement to conduct an Equality Impact Assessment. Compliance with the Equality Duty involves consciously thinking about the aims of the Equality Duty as part of the process of decision-making.***

The PSED was also explicitly referenced by the lead Planning Officer at the meeting in his opening remarks where he drew attention to the July Representations received from MVML on the day of the Meeting. Members were told: "Issues have been raised in relation to… the Public Sector Equality Duty. We have looked at these and are satisfied that the issues are adequately covered in the report".

29. So far as the substantive arrangements are concerned, no concern or complaint has been made in MVML's arguments on the PSED, in relation to any aspect of the proposal other than disabled parking within the reconfigured MSCP. But before turning to that topic, it is worth recording that the planning documents reflect careful consideration of wheelchair users throughout. By way of example, the OR described the proposal for the purpose built student accommodation units, emphasising that "9% of the development would be adaptable and suitable for wheelchair users". The OR also recorded that: "Highway Services recommend the provision of an on street car clubs/ disabled bay to service the development, which would require the conversion on one of the on street parking bays)". That was a recommendation made during the decision-making process. It was accepted. The OR makes repeated reference to the car parking "on street bays for disabled people", describing the site as "car free", "except for disabled and servicing provision". That is a clear reference to the disabled parking bay recommended by Highway Services, with disabled parking within the MSCP being addressed in the next sentence. So far as that is concerned, the OR identifies that of the 101 car parking spaces, 5% would be disabled accessible. That is a reduced number, but it is not a reduced percentage, in the context of an overall reduction from 391 to 101 spaces. That was an entirely sensible and appropriate percentage, and no higher percentage is put forward as appropriate. Nor has it been suggested by MVML that there are more than 5 local residents with LRRPs. That point would have been very easy to make in the representations made about the proposal. As to the appropriateness of the configuration of disabled parking spaces compared to the location of the lift, that is a 'judgment call'. As was pointed out, a not dissimilar configuration applies in the existing car park.

30. It is no deferral or abdication of the PSED for appropriate planning conditions to be proposed and adopted. FPC31 was adopted, referring to the need for approved final details of disabled access and number and location of disabled parking bays. It states:

> ***[FPC31]: Prior to the first use of the modified multi storey car park hereby approved, final details of the layout of the car park, pedestrian and vehicular access (including disabled access) and security measures shall be submitted for approval in writing by the City Council, as Local Planning Authority. This shall include dimensions of the parking bays, details of measures to segregate vehicles from pedestrians (at the entrance to the car park and within the car park itself), number and location of disabled parking bays, location of a minimum of 20% 7kw electric vehicle charging points, details of CCTV provision and any other security measures. Reason - In order to ensure that the car layout and function of the car park is acceptable pursuant to policies SP1 and DM1 of the Manchester Core Strategy (2012).***

As has been seen, FPC44 requires an approved management strategy prior to any works commencing which will ensure access including temporary vehicle and pedestrian access arrangements are "including disabled access". The reference to "temporary vehicle and pedestrian access arrangements" as "including disabled access" so as to "ensure safe and unimpeded access to the car park at all times" plainly encompasses "disabled access" from the street to the car park. Moreover, PPC11 was amended in FPC11 to insert as required content of the construction management plan: "Temporary pedestrian and vehicular access arrangement to the Multi-Storey Car Park (including disabled access)". None of this is abdication or deferral of a duty. Rather, it is the adoption of appropriate protective mechanisms to ensure that the desired and envisaged impact as to disabled access is followed through to practical implementation, with sufficient flexibility, in the context of an important and continuing duty.

The Consultation Issue

31. I turn to this Agreed Issue:

> ***Whether the Defendant failed to carry out lawful consultation on the amendments to the ES in accordance with regulation 25 and the Sedley principles and/or failed to take into account relevant environmental information contrary to regulation 26 of the EIA Regulations.***

32. Once again, the applicable legal principles were not in dispute. The "Sedley principles" are the basic essential requirements of a lawful consultation process at common law, including "that the product of consultation must be conscientiously taken into account": see R (Moseley) v Haringey LBC [2014] UKSC 56 [2014] 1 WLR 3947 at §25. Regulations 25 and 26 of the 2017 Regulations contains consultative duties, making provision to the following effect. Where an environmental statement is supplemented with "additional information" (regulation 25(1)) certain notification requirements arise including a prescribed 30-day period for response (regulation 25(3)(h)(l)). There is a prohibition on the planning application being determined until the expiry of the prescribed 30-day period (regulation 25(7)). The planning authority is statutorily required to "examine" (regulation 26(1)(a)) the "environmental information", which includes any "representations duly made" by any person about the environmental effects of the development (regulation 2(1)). A separate regulatory scheme requires that an officers report be issued a clear "five working days" before the meeting to which it relates.

33. The focus of this ground for judicial review is on the combined effect of three actions on the part of Officers. The first was the action on Monday 21 June 2021 of issuing the OR for the scheduled Meeting on Thursday 1 July 2021, three days before the Thursday 24 June 2021 deadline for representations within the prescribed 30-days in response to the AES of 24 May 2021. The second was the action, being aware that MVML wished to make "late" representations, of sending an email on Friday 25 June 2021 stating that "any late comments … will be presented verbally in accordance with our normal procedures". The third was the action, at the Meeting itself, of not giving a verbal presentation summarising the July Representations, insofar as they responded to the AES. The third action was embodied in this statement by the lead planning office to Members at the Meeting:

> ***We have received a late representation this morning, which we believe has been circulated to you Chair and all committee members. We have been asked to read to read it verbatim but on the basis that all members have received it we do not consider this to be necessary. Issues have been raised in relation to Human Rights and the Public Sector Equality Duty. We have looked at these and are satisfied that the issues are adequately covered in the report. Chair, the vast majority of the issues that have been raised have been addressed in the report and previously in the printed report. Thanks Chair.***

34. Mr Hunter submits, in essence, as follows. The first of those actions (issuing the OR ahead of the AES consultation deadline) indicated a "predetermination" and "closed mind", at least so far as Officers and "appearances" are concerned. Responses to the AES had not been awaited, so that they could be considered and addressed. Councillor Davies encapsulated this prejudicial procedural flaw when he protested at the Meeting in these terms:

> ***Firstly I just want to make the point about the issue about the consultation date and the report. The consultation date ended according to our website on the 24th June (close of day) and I***

> ***was sent a copy of the report on the 23rd June. Now I know this was the fourth round of consultation but I believe this last round of consultation, which in fact caused the deferral of the consideration of this application was I believe at the request of the applicant because there was some technical issues with the environmental report which had been submitted by an expert team on behalf of the applicant. I believe those technical issues were in fact errors , which then had to be corrected. So it is not unreasonable to assume there may well have been some considerable alterations in what the objectors and the community were going to be saying. I am not happy with the idea that a report is issued and sent to committee before the deadline has expired. I know we accept late representations but when councillors have given so much time to reading the reports, we really, really do want to be assured that those reports have been written after considerations of any representations made within the standard deadline. I am not going to labour the point any more I just want to take this opportunity to make my view known for the record.***

That first action, moreover, had the prejudicial effect of leading in the MVML to conclude that it was wasting its time by submitting the detailed representations which at that stage it had prepared in draft, prior to the 24 June 2021 deadline. This is explained in the further evidence of MVML's Mr Halley dated 5 October 2022. Further, the Sedley requirements were engaged by reason of the second action (the email of 25 June 2021) which communicated that late representations would be considered. As to the third action (what was said to Members at the Meeting), it was wrong and unjustified for Officers to tell Members that the "issues" which had been "raised" in the July Representations – or the "vast majority" – had been addressed in the OR. New points were raised, albeit in the context of existing topics, and it was wrong and unjustified not to summarise these verbally. Especially given what had been said in the email of 25 June 2021. The important new points raised are exemplified by a point about the AES not addressing the health implications of dust on car park users, and by a point about the AES having being based on outdated air quality data. There was a material deviation from the consultative duties identified in the 2017 Regulations. It matters. Indeed, the high threshold for legal test for substantive challenge to a defective environmental statement in Blewett – seen above in discussing the Dust Issue – is borne out of a latitude afforded to the judgment of those who have adhered to the consultative duties, being deliberately linked to the importance of the public consultation whose purpose is to allow inaccuracies, inadequacies or incompleteness in an environmental statement to be pointed out as deficiencies by those being consulted: see Blewett §39. In all these circumstances and for these reasons, the Council failed to carry out lawful consultation on the AES in accordance with regulation 25 of the 2017 Regulations, breached the Sedley principles, and failed to take into account relevant "environmental information contrary to regulation 26 of the EIA Regulations.

35. I cannot accept those submissions. In my judgment the answer to the Consultation Issue is "no". The first point is that there cannot be any breach of the Council's duties under regulation 25 or regulation 26 of the 2017 Regulations, arising out of the way in which Officers dealt with the July Representations responding to the AES. The Council had clearly communicated to MVML that the 30-day prescribed deadline for response to the AES was 24 June 2021. MVML knew full well what the deadline was. It did not file its July Representations, including its response to the AES, by that deadline. It decided instead to wait and provide a composite response – to the AES and to the OR – in the form of the July Representations, provided to Members on the morning of the Meeting. It does not assist that Mr Halley's evidence attributes this decision to the receipt of the OR ahead of the deadline for response to the AES. He describes MVML as having been ready to throw in the towel. But the fact is that MVML knew and missed

the deadline under the 2017 Regulations. As Mr Hunter accepted in his oral submissions, the failure by MVML to meet the 30 day prescribed deadline within regulation 25(3) must, as a matter of proper interpretation of regulation 2(1), mean that the representations were not "duly made", from which it follows that there was no statutory duty under regulation 26(1)(a) to "examine" that information. That alone is fatal to the invocation of the 2017 Regulations under this ground for judicial review.

36. Even leaving that problem to one side, it is in my judgment impossible to characterise the Officers' decision to proceed to issue the OR on 21 June 2021 as reflecting a real or perceived "predetermination", or "closed mind" so far as any representations responding to the AES were concerned. It is common ground that there were applicable requirements imposing obligations to issue the OR five clear working days before the Meeting. Given the date scheduled for the Meeting, that requirement would have been breached if Officers had waited for the deadline and then finalised the OR. There was no legal duty to reschedule the Meeting for a later date, in light of the combined effect of the requirements relating to the OR and responses to the AES. These are in separate regulatory frameworks, whose drafters could easily have imposed a prohibition on the issuing of a report until after considering responses received within a consultation period. There is no such prohibition. It is not unlawful – and not unfamiliar – for officer reports to be prepared and issued for a meeting, notwithstanding it being known or expected that there are to be representations which will be considered. There may be a supplementary report or verbal update, as appropriate. What steps to take is a 'judgment call'. But none of this, in principle or in the present case, constitutes an actual or apparent predetermination or closed mind by Officers, still less by Members.

37. Next, nothing in the email of 25 June 2021 committed Officers to presenting comments verbally at the Meeting. There was no clear and unambiguous representation to that effect. The email stated was that were any comments received would be presented verbally "in accordance with our normal proceedings". That was not a promise to summarise verbally any representations, independently of their content. The "normal" position would apply, with Officers exercising a judgment as to what course was appropriate. Officers were not required either to read out the July representations as they had evidently been invited by MVML to do, nor to offer a summary or highlights package, in circumstances where the 'judgment call' was that matters were adequately dealt with in the OR and that Officers did not need to say more, in circumstances where – as the Lead Planning Officer pointed out to Members – the July Representations had been sent to and received by each of the Members. The Lead Planning Officer did draw attention to two legal points raised in the July Representations, namely the PSED and the Human Rights Act. When I examine the points used by Mr Hunter as his best illustrations of new matters calling for verbal summary on the part of Officers, the picture is very clear. So far as concerns the first point, about harm to car park users, what MVML was saying was plainly linked to the same point which it had previously made in the third round of notification and consultation. That was summarised in the OR under the topic of "contamination", where MVML was recorded as calling for details of the "containment strategy and safety" by way of "mitigation". The July Representations maintained that there was "no mitigation" and "no consideration" of car park users – see my footnote to the Dust Issue – but this was not a new issue or topic. It was dealt with in the AES: see the Dust Issue above. Secondly, so far as concerns air quality and data, the July Representations themselves emphasised that what MVML was saying was part of the same "long-standing" issue, referring to the

heavy focus in all of the rounds of consultations from the community on contaminated dust and concrete dust emissions to the air.

38. There was no lack of conscientious consideration, whether on the part of Officers or on the part of Members. The fact that the Lead Planning Officer was telling members that issues had been raised within the July Representations in relation to human rights and the PSED demonstrates that the July Representations had been read and considered. So does the assessment that the "vast majority" of the issues had been raised and addressed in the OR. That was an assessment plainly open to Planning Officers, acting reasonably. The assessment that it was not necessary in all the circumstances to say more about the contents of the July Representations, in circumstances where all members had received those representations, was not unfair or a procedural impropriety, but was reasonably open to Officers. Finally, all of this was in a context where MVML's chair had – and took – the opportunity of addressing Members orally, identifying any headline points.

39. There are footnotes to this ground for judicial review. First, I record that ultimately neither Mr Katkowski KC nor Mr Tucker KC resisted the Court considering the new witness of Mr Halley for the purpose of his placing before the court his explanation of the circumstances and thinking which led MVML to 'hold back' the representations in response to the AES beyond the given deadline of 24 June 2021 and provide them only on 1 July 2021. That was the only issue on which reliance was ultimately placed by Mr Hunter on that witness statement: Mr Hunter dealt by way of oral submissions with best examples of new points said to have been raised in the July Representations. I will formally grant MVML permission, for the purpose and to the extent indicated, to adduce that evidence. But this ground for judicial review fails for the reasons which I have explained.

The Send-A-Copy Issue

40. I turn to this Agreed Issue, which I am labelling as "Send-A-Copy":

> ***Whether MVML should be permitted to rely on the additional argument that the Defendant breached the EIA Regulations as a result of failing to send a copy of the amendments to the AES to those it was required to under regulation 25.***

There are three aspects: whether MVML should be permitted to rely on this argument (process); whether the argument is right as to breach (substance). In order to be a successful ground for judicial review, the breach would need to be such as to vitiate the decision to grant planning permission.

41. So far as substance is concerned, the applicable law is found in the 2017 Regulations. In the context of supplementing an environmental statement with "additional information", regulation 25(3) makes provision for notification of the fact that additional information has been received, together with notification of details of how that additional information can be accessed, so that members of the public can make representations within the prescribed 30-day period. Regulation 25(4) makes distinct provision, in the case of those who are listed as having a statutory entitlement to be notified of an environmental statement. I will call these "special consultees". In the case of special consultees to whom an environmental statement was previously sent, what regulation 25(4) provides is that the Council must "send a copy" of the further information to each such person.

42. So far as the process point is concerned, MVML asks for permission to rely on the new ground for judicial review on the following basis. MVML and its representatives say that they only became aware very recently – on 13 October 2022 – that notification letters sent to the relevant list of special consultees had not included "a copy" of the AES, but had instead provided a website link for where it (and other documents) could be accessed. In those circumstances, the new ground of challenge was identified and promptly put forward in MVML's skeleton argument dated 18 October 2022. The point that is raised is a straightforward legal point. It admits of no need for any further evidence. It was raised promptly and well before the substantive hearing on 8 November 2022. In all those circumstances, in my judgment, Mr Katkowski KC and Mr Tucker KC – who identified no prejudice – were wise to focus their attention not so much on the lateness of the point, but on whether there was anything of substance in it.

43. Mr Hunter submits as follows. The 2017 Regulations very deliberately impose an obligation to "send a copy" of the AES to the list of special consultees. It cannot, in principle, be right for the Council to rely as being compliant with the Regulations on the distinct, deliberately and less exacting standard of action required in the case of members of the public, namely alerting them to information and informing them as to where it can be found online: regulation 25(3). The legal duty to "send a copy" under the Regulations is clear, express and important. The category of special consultees is important, which is why they are singled out for the enhanced duty. There is relevant prejudice to the Claimant. Those special consultees who should have been "sen[t] a copy" of the AES would – had that occurred – been in the fully and directly informed and prompted position required by the Regulations. They, or one of them, may very well have made representations against the grant of planning permission. That would, or at least could, have been material to the decision taken by the Committee. Since the AES was never "sen[t]" to the relevant persons, the statutory provision in regulation 25(7)(a) bites. That provision (discussed in the context of the Consultation Issue) provided that determination of the planning application was statutorily prohibited, absent compliance with the Regulations. The Court ought not to speculate as to what the position would have been had there been compliance. Rather the Court should recognise the vitiating flaw involved in the clear breach of the statutory obligation, and the prohibition, and quash the grant of planning permission as a consequence.

44. Beyond the terms of the 2017 Regulations the key legal reference point is R (Champion) v North Norfolk District Council [2015] UKSC 52 [2015] 1 WLR 371. There, the Supreme Court dealt with a case concerning the absence of an environmental statement, which default was said to trigger a prohibition on the grant of planning permission under the regulations (Champion at §8). The Court discussed the discretion to refuse a remedy on judicial review, in the context of a legal defect in the procedure leading to the grant of planning permission. This principle was articulated (at §54): "even where a breach of the EIA regulations is established, the Court retains a discretion to refuse relief if the [claimant] has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice". In that case, the discretion to refuse judicial review was exercised because (§62): "There is no reason to think that a different process would have resulted in a different decision, and [the Claimant's] interests have not been prejudiced". The Court also endorsed (at §64) observations from earlier case law about the environmental impact assessment process being intended to be an "aid to efficient and inclusive decision-making", and "not an obstacle race", and about cases in which it was "difficult to see what practical benefit

other than that of delaying development" would result to a claimant from putting a planning application through a "further procedural hoop". Finally, the Supreme Court emphasised (§66) that the common law based approach to 'materiality' and the discretionary refusal of a remedy on judicial review was freestanding and independent of the new statutory developments of the "highly likely … not substantially different test" inserted into section 31 of the Senior Courts Act 1981.

45. I am refusing permission to amend the grounds for judicial review in respect of the Send-A-Copy ground for judicial review. I do so on the basis that the point does not cross the familiar permission-stage threshold of arguability with a realistic prospect of success. It is right in principle that a contested, post-permission application to amend and add a ground for judicial review should not sidestep that arguability test. In this case, where the substantive hearing has been reached and the argument has been heard in full to see where it leads ("de bene esse"), a ground which is unarguable will fail.

46. As to the Regulations, they do not require the sending to special consultees of a "hard copy" of the additional information. The phrase is "must send a copy", not "must send a hard copy". It would be bizarre, in the context of regulations whose central ethos is environmental protection, for there to be a mandatory printing of lengthy documents, then required to be transported, to arrive onto the desk of a recipient in an envelope. I would accept with little hesitation that an email to a special consultee, to which the AES is a pdf email attachment, would not "breach" the statutory duty. It follows that the copy can lawfully be 'one click away'. It is "sent" by a communication which puts it 'on a plate' for the recipient. But the recipient can read it from the screen. If the 2017 Regulations had intended to impose a duty to send a "hard copy", that is what the drafters would have said. I would also accept that an email containing a "hyperlink" which was a direct "click" to a pdf document hosted on a website, would not be a "breach" of regulation 25(4). The covering letter would no doubt need to be worded so as to present the pdf document to the reader, as an attachment or hyperlinked: 'here it is'. In the present case the letter which I was shown, sent by email did refer to the AES and did contain a hyperlink. That hyperlink was to the relevant planning application page on the Council's website, and the recipient would need to enter the reference number given in the letter in order to access the information. A line has to be drawn somewhere, and there are distinct arrangements for different consultees. I can see that, at least arguably, that did not constitute "sending a copy" of the document.

47. But none of this goes anywhere. This is very clearly a case falling within the principles identified in Champion. Indeed, the passages in Champion could have been written for this case. Here, there is a list of relevant special consultees. Three of them were arms of the Council itself: the planning authority; the environmental health officers; and the highway authority. Mr Katkowski KC tells me, on instructions, that all of those did have a copy of the document. I accept that. Remaining entities on the list were Historic England, the Greater Manchester Archaeological Advisory Service, Transport for Greater Manchester, Manchester Airports Group/NATS, Places Matter, Environment Agency and United Utilities. Mr Katkowski KC tells me – and I accept – that the Secretary of State would also stand as a special consultee and the letter which I was shown was to the Secretary of State. The position is that each of those recipients were told by notifying letter about the AES and its nature. Each was told where they could access the AES. Each was given a hyperlink, and the reference number. Each was told that they had a prescribed timeframe for any response. Each had previously been

notified of this planning application. Each who wished to do so was already engaged in the planning process. Nobody asked to be sent "a copy" of the AES more directly. There is no suggestion that any of them wished to respond and were impeded in doing so. There is, moreover, no suggestion of any link between any of them and any relevant and material point of controversy put forward by MVML as a material controversy arising out of the AES. I am satisfied that no viable point can survive the sensible discipline described in Champion. I would have refused judicial review on this ground. But since the point does not in my judgment cross the threshold of arguability with a realistic prospect of success, I will refuse permission to amend. It follows that the answer to the Send-A-Copy Issue is "no".

The Injunction Issue

48. I turn to this Agreed Issue is this:

> ***Whether the OR seriously misled/misdirected the Committee advising that the private third-party private rights to park in the MSCP [were] not a material planning consideration, including whether the rights would preclude the implementation of the proposal.***

Given the emphasis on "rights" which would "preclude" implementation, and given the focus in the argument on the prospect of holders of RRTPs being entitled to an injunction, I have labelled this the Injunction Issue. The repetition of the word "private" is derived from the OR.

49. This Issue is concerned with the criterion of "deliverability". There are two applicable planning policies, and one passage of explanatory text invoked by MVML as an aid to interpretation. First, there is Policy H12 of the Council's July 2012 "Local Development Framework: Core Strategy". Policy H12 is entitled "Purpose Built Student Accommodation" and is as follows (here the paragraph numbering is in the policy itself):

> ***The provision of new purpose built student accommodation will be supported where the development satisfies the criteria below. Priority will be given to schemes which are part of the universities' redevelopment plans or which are being progressed in partnership with the universities, and which clearly meet Manchester City Council's regeneration priorities.***
>
> ***1. Sites should be in close proximity to the University campuses or to a high frequency public transport route which passes this area.***
>
> ***2. The Regional Centre, including the Oxford Road Corridor, is a strategic area for low and zero carbon decentralised energy infrastructure. Proposed schemes that fall within this area will be expected to take place in the context of the energy proposals plans as required by Policy EN5.***
>
> ***3. High density developments should be sited in locations where this is compatible with existing developments and initiatives, and where retail facilities are within walking distance. Proposals should not lead to an increase in on-street parking in the surrounding area.***
>
> ***4. Proposals that can demonstrate a positive regeneration impact in their own right will be given preference over other schemes. This can be demonstrated for example through impact assessments on district centres and the wider area. Proposals should contribute to providing a mix of uses and support district and local centres, in line with relevant Strategic Regeneration Frameworks, local plans and other masterplans as student accommodation should closely integrate with existing neighbourhoods to contribute in a positive way to their***

> ***vibrancy without increasing pressure on existing neighbourhood services to the detriment of existing residents.***
>
> ***5. Proposals should be designed to be safe and secure for their users, and avoid causing an increase in crime in the surrounding area. Consideration needs to be given to how proposed developments could assist in improving the safety of the surrounding area in terms of increased informal surveillance or other measures to contribute to crime prevention.***
>
> ***6. Consideration should be given to the design and layout of the student accommodation and siting of individual uses within the overall development in relation to adjacent neighbouring uses. The aim is to ensure that there is no unacceptable effect on residential amenity in the surrounding area through increased noise, disturbance or impact on the streetscene either from the proposed development itself or when combined with existing accommodation.***
>
> ***7. Where appropriate proposals should contribute to the re-use of Listed Buildings and other buildings with a particular heritage value.***
>
> ***8. Consideration should be given to provision and management of waste disposal facilities, that will ensure that waste is disposed of in accordance with the waste hierarchy set out in Policy EN19, within the development at an early stage.***
>
> ***9. Developers will be required to demonstrate that there is a need for additional student accommodation or that they have entered into a formal agreement with a University, or another provider of higher education, for the supply of all or some of the bedspaces.***
>
> ***10. Applicants/developers must demonstrate to the Council that their proposals for purpose built student accommodation are deliverable.***

The deliverability criterion is H12 at §10. It is cast in strong terms: "must demonstrate".

50. Secondly, there is Policy EN2 of the same Core Strategy, entitled "Tall Buildings".

> ***[1] Tall buildings are defined as buildings which are substantially taller than their neighbourhoods and/or which significantly change the skyline. Proposals for tall buildings will be supported where it can be demonstrated that they***
>
> ***• Are of excellent design quality,***
>
> ***• Are appropriately located,***
>
> ***• Contribute positively to sustainability,***
>
> ***• Contribute positively to place making, for example as a landmark, by terminating a view, or by signposting a facility of significance, and***
>
> ***• Will bring significant regeneration benefits.***
>
> ***[2] A fundamental design objective will be to ensure that tall buildings complement the City's key existing building assets and make a positive contribution to the evolution of a unique, attractive and distinctive Manchester, including to its skyline and approach views.***
>
> ***[3] Suitable locations will include sites within and immediately adjacent to the City Centre with particular encouragement given to non-conservation areas and sites which can easily be served by public transport nodes.***
>
> ***[4] Elsewhere within Manchester tall building development will only be supported where, in addition to the requirements listed above, it can be shown to play a positive role in a coordinated place-making approach to a wider area. Suitable locations are likely to relate to***

> ***existing district centres. The height of tall buildings in such locations should relate more to the local, rather than the City Centre, urban context.***
>
> ***[5] By their very size tall buildings can have a significant impact on the local environment and its micro-climate. It is therefore expected that this impact be modelled and that submissions for tall buildings also include appropriate measures to create an attractive, pedestrian friendly local environment.***
>
> ***[6] It will be necessary for the applicant/developer to demonstrate that proposals for tall buildings are viable and deliverable.***

The deliverability paragraph is EN2 at [6]. It is cast in strong terms: "necessary … to demonstrate".

51. Thirdly, there is §12.15 of the explanatory text to Policy EN2 (Tall Buildings). It states:

> ***12.15 It is crucial that the viability and deliverability of a proposed tall building be proven. Unimplemented planning permissions for tall buildings can have a significant impact on land value and can distort the market in an unacceptable manner. This can hinder the development of the site for other uses and can have an adverse impact on the developability of other sites. This can have a significantly negative impact on the regeneration of an area.***

The key word in §12.15 is "unimplemented", relied on as casting light on what is meant by "deliverability".

52. The focus of this ground for judicial review is on the OR. The key reference point is the following passage under the heading "Issues" and the sub-heading "Principle of the redevelopment of the site and contribution to regeneration":

> ***[1] The existing 391 space MSCP would be partially demolished and reconfigured. The spaces which are on a long lease hold arrangement to kick residents who live in Macintosh Village would be retained and would be available during construction and once the development becomes operational.***
>
> ***[2] Macintosh Village Residents Company, which includes those with a right to park within the MSCP, consider that the any grant of planning permission would interfere with their legal rights to park/rights of way in the MSCP, afforded to them in their 999 year lease.***
>
> ***[3] They have obtained a legal opinion which notes their opposition to the redevelopment of the car park. It states that the redevelopment, insofar as it would reduce the number of spaces available, is not permissible by the lease in or of itself and that the development of the car park (both during the construction phase and upon the completion) would likely result in actiona[ble] interference with the rights of tenants with the benefit of the right of way and the right to park. The legal opinion concludes that the tenants with the benefits of the rights would be able to seek to restrain such interference by injunction.***
>
> ***[4] The private third-party private rights to park in the MSCP are protected and enforced through other legal means and are not a material planning consideration, including whether the rights would preclude the implementation of the proposal. Should they believe that their legal rights would be affected by the implementation of the proposed development, they would need to pursue this separately from the planning process.***
>
> ***[5] Macintosh Village Residents Company disagree with this position and state that the presence of such rights affect the deliverability of the scheme which, they believe, is material to the planning decision.***
>
> ***[6] It is understood that since the applicant purchased the car park the rights of the residents to park in the car park have been retained. The rights would be maintained should planning***

> ***permission be granted. The appropriate number of car parking spaces would be retained and made available during construction and when the redevelopment works have been completed.***
>
> ***[7] Any commercial parking rights at the MSCP have either expired or have been surrendered. A restrictive covenant lies outside of the applicant's ownership and is not affected by this planning application.***
>
> ***[8] The applicant has a track record of delivering student accommodation schemes. It is not material to the determination of this planning application whether the applicant chooses to then sell their interest in a site and all obligations are attached to the land and not the applicant in any event.***

The key statement which is characterised by Mr Hunter as materially misleading is in the first sentence of paragraph [4]. The "legal opinion" referred to at paragraph [3] was a Counsel's Opinion, of which that paragraph is an accurate and fair summary.

53. Mr Hunter's argument, in essence, involves the following steps. First, that deliverability is a material planning consideration. Secondly, that on its objectively correct legal interpretation (reflected in §12.15 of EN2's explanatory text), what deliverability means is that the proposal would be implemented. Thirdly, that it follows that anything which would preclude the implementation of the proposal – including private third-party RRTPs – is in principle itself a material planning consideration. Fourthly, that it follows that the OR was materially misleading in describing the private third-party RRTPs as "not a material planning consideration" even if, as was being contended by MVML, their enforcement by injunction "would preclude the implementation of the proposal". That is the essence of the argument. Mr Tucker KC, for his part, readily accepted the correctness of the first and second steps.

54. Mr Hunter argues as follows. The key is OR at paragraph [4]: "third-party private rights to park in the MSCP … are not a material planning consideration, including whether the rights would preclude the implementation of the proposal". This straightforwardly told Members to put out of their minds – and treat as legally irrelevant – the private third-party RRTPs in the MSCP, including whether the rights would "preclude" the "implementation" of the proposal. But whether the RRTPs "would preclude the implementation" was at the heart of "deliverability", properly interpreted and correctly understood. The point goes further. Members were also told at paragraph [4] why they did not need to worry about the impact on implementation of private RRTPs. That was because these private rights could be "enforced" through "legal means". This was all the wrong way round. The fact of this enforcement through these legal means was precisely why Members did need to worry about the impact of private RRTPs. An injunction would scupper delivery. An injunctable development was not deliverable. The point needed to be addressed, as a material planning consideration, not put to one side. That is the argument.

55. Like the Cranes Issue, this ground for judicial review is about whether Officers gave advice to Members which was "materially misleading". The basic legal principles applicable to that are derived from Mansell and Lowther, and I do not repeat them. However, given the four steps in the argument, there are these further basic legal principles also in play. The "proper interpretation" of a planning policy is a question for the judicial review Court, approached objectively, in accordance with the language used, read in its proper context: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 [2014] PTSR 983 at §18. The explanatory text which accompanies a planning policy

can be "plainly relevant" to the interpretation of the policy: R (Cherkley) v Mole Valley DC [2014] EWCA Civ 567 at §16. Policy statements are not to be interpreted, not as if they were statutory or contractual provisions, remembering that they may involve broad statements of policy and may be framed in language whose "application" to a given set of facts requires the exercise of "judgment" challengeable only on conventional public law unreasonableness grounds: Tesco at §19. A "material planning consideration" will arise from a planning policy which "expressly or impliedly" identifies it as a consideration "required" to be taken into account "as a matter of legal obligation" or as being "so obviously material" as to "require" direct consideration: R (Samuel Smith Old Brewery) v North Yorkshire [2020] UKSC 3 [2020] PTSR 221 at §32.

56. The position in law as to private rights and their enforcement is that these are not, in and of themselves and without more, a "material planning consideration"; but they can, in principle, become one, viewed through the 'prism' of an applicable policy whose contents lead to that consequence. The interface between private law rights and the prism of planning policy was illustrated in several of the cases which I was shown. An example is the way in which the "right to light" and interference with solar panels on a rooftop were a material planning consideration through the 'prism' of a planning policy concerned with climate change: see R (McLellan) v Medway Council [2019] EWHC 1738 (Admin) [2019] PTSR 2025 §§34-36. I was shown Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281 with its statement of principle (at 1294) that any consideration "which relates to the use and development of land" is "capable" of being a planning consideration; and (at 1295) that drawing lines between "public" and "private" interests can be a "false distinction" in a planning context. Reference was made to Fitzpatrick Developments Ltd v Minister of Housing and Local Government (1965) 194 EG 911 where planning permission was capable of becoming unproblematic if private rights to protection against noise were considered enforceable through abatement action. I was shown R (St Modwen Developments Ltd) v Secretary of State for Communities and Local Government [2016] EWHC 968 (Admin) (upheld at [2017] EWCA Civ 164). That judgment includes a discussion of "deliverability" arising from the express terms of national planning policies relating to housing developments, where one such national planning policy (§34) expressly referred to the need for "confidence that there are no legal or ownership problems, such as unresolved multiple ownerships, ransom strips tenancies or operational requirements of landowners", which served as an aid to interpretation of another national planning policy on housing development deliverability (§36). Mr Tucker KC accepted, by way of an example, that if the viability of a project depended on a third party agreeing to sell land, and if there were clear evidence of an unwillingness to sell, that could be an example of private rights being a "material planning consideration", by reason of an applicable policy criterion of "deliverability".

57. I turn to what I made of Mr Hunter's arguments under this ground for judicial review. The starting point is this. I accept his step one: that "deliverability" as described in criterion §10 of Policy H12, and as described in paragraph [6] of Policy EN2, constitutes a "material planning consideration". The wording of the policies has that consequence. I would also accept his step two: that what "deliverability" means, in both Policies H12 and EN2, is 'sufficient prospect of practical implementation'. That is a straightforward idea, remembering the nature of planning policies and the way in which they are to be interpreted. It is the natural and ordinary meaning of the word "deliverable": it is about whether the planning applicant has put forward a proposal

which has the "ability" to be "delivered". It calls for evaluative planning judgments in its "application". It is a practical, real world question; not a theoretical construct. This approach is reflected in EN2's explanatory text at §12.15, which clearly identifies the mischief and purpose as being to avoid "unimplemented" planning permissions, given negative impacts (as described in that paragraph). So far so good for Mr Hunter's argument. It follows that if, for example, Officers told Members that what "deliverability" means is that the design of a building is demonstrably capable in theory of being constructed without falling down, that would be a misappreciation. Similarly, if Officers told Members that "deliverability" means that the developer is a "fit and proper person", that would be a misappreciation. I would therefore go along with Mr Hunter for the first two steps of his argument. So far so good.

58. But steps three and four are where the trail goes cold. In my judgment, the 'hard-edged' questions of right and wrong, answered on a correctness standard within the supervisory jurisdiction of the Planning Court, at that point hand over to questions of evaluative judgment and appreciation for Officers and Members to consider and weigh up. Once "deliverability" is recognised as a "material planning consideration", and once its straightforward meaning has not materially been misunderstood, the evaluative exercises which then arise are in my judgment characterised as questions of "application" of the policies, questions of judgment, questions of nuance and degree. That is not to abdicate the Court's supervisory jurisdiction. Instead, it is to locate its nature within the principle of reasonableness in which an in-built latitude is recognisable at all times. This is Tesco §19.

59. In my judgment the reasoning in the OR – on a fair reading as a whole and with reasonable benevolence – does not fall foul of the Tesco duty to give policy its "proper interpretation", nor the Mansell duty not materially to mislead members. The OR did not materially mislead or misdirect Members. The answer to the Injunction Issue is "no". I will explain why. The first point is that there was, in my judgment, no misdirection anywhere in the OR – still less when read fairly and as a whole – as to the legally correct meaning of "deliverability". Under the heading "policy", the OR identified relevant policies including EN2 ("Tall Building") which it summarised, and H12 ("Purpose Built Student Accommodation") which it set out in full. Members were therefore expressly told by the OR that criterion §10 in Policy H12 was that applicant/developer "must demonstrate" to the Council that their proposals for Purpose Built Student Accommodation are "deliverable". Nowhere in the OR was there any statement that deliverability was irrelevant or immaterial or to be ignored. Nowhere in the OR was there any statement attributing to "deliverability" a meaning other than that connoting the practical prospect of implementation. The OR recorded Officers' planning assessment in the context of H12 that: "The proposals are in accordance with this policy and this is discussed in detail below". The OR went on later to say this:

> ***Finally, policy H12 discusses the importance of deliverability. The applicant is one of the largest student accommodation providers in the UK with extensive experience of developing and managing large student residential schemes with knowledge of the market and type of products students are looking for. They are committed to delivering this proposal and would commence work should permission be granted.***
>
> ***The proposal would comply with the requirements of policy H12 in full and with the detailed criteria in the December 2020 Executive report…***

There is no perceptible material misdirection in this passage. Deliverability is rightly being treated as a material planning consideration. The clear focus, moreover, is on practical implementation.

60. Secondly, the passage which is criticised from OR paragraph [4] needs to be seen in the context of the OR as a whole, but also in the context of paragraphs [1] to [8] in which it appears. On a fair reading of the wider passage, a number of key points were being made. One was the expression of the Officers' view at [4] that private third party RRTPs in the MSCP, which are protectable and enforceable through other legal means, were "not a material planning consideration". Another was the expression of the view also at [4] that whether that protection and enforcement would "preclude the implementation of the proposal" was also "not a material planning consideration". Pausing there, in my judgment, there was no misdirection in law in those statements. There was no error of objective interpretation. "Deliverability" is, of itself, a "material planning consideration". Private third party RRTPs in the MSCP are not, of themselves, a "material planning consideration". The question whether enforcement of those RRTPs would preclude implementation was not, of itself, a "material planning consideration". That is for the reason given by Mr Katkowski KC. It is because these are not matters which policy EN2 or H12 "expressly" identified as considerations "required" to be taken into account by the Council "as a matter of legal obligation"; they are not matters which policy EN2 or H12 "impliedly" identified as considerations "required" to be taken into account by the Council "as a matter of legal obligation"; and they were not matters "so obviously material" as to "require" direct consideration: Samuel Smith §32. I agree with Mr Katkowski KC: it is not the case that every feature which could logically be identified as falling within the ambit of a "material planning consideration" (here, a planning policy criterion) is elevated itself into being a "material planning consideration". This is a classic area of "application" and "evaluation", for Officers and Members to consider.

61. Thirdly – and importantly – on a fair reading of the OR, the point raised by MVML about the planning 'prism' was addressed. Officers expressed the view (at [4]) that whether third party private RRTPs would be protected and enforceable by legal means so as to preclude implementation of the proposal was "not a material planning consideration". Officers communicated to Members the answer to that which was being put forward by MVML. Officers identified the planning policy 'prism' point being made, explaining (at [5]) that MVML "disagree" and were expressing the view that "the presence of such rights" affected the "deliverability" of the scheme which was "material to the planning decision". At that point, Officers could have told Members that this was all nothing to the point. It is of significance that Officers chose not to leave it there. Rather, what followed were three paragraphs [6], [7] and [8] which were responsive, from an evaluative planning perspective, to the point made and recorded at paragraph [5] from MVML. The first responsive point made (at [6]) emphasised to Members the two Basic Points [BP1] and [BP2] identified at the start of this judgment: that the private RRTPs would be maintained should planning permission be granted, with the appropriate number of car parking spaces available, and that that would happen both during construction and after the redevelopment works had been completed. The point being made was that what were – undoubtedly – the primary rights in play, namely the right to park in the MSCP, were being fully protected by the proposed development. The second of the three paragraphs (at [7]) was making a point about the expiry or surrender of any other commercial parking, and the fact that there was a restrictive

covenant but it was not affected by the planning application. That was significant. It meant all private rights to park had been identified and secured; there were no other rights; there was no preclusion by restrictive covenant; and there would be enough spaces. The fact that those with RRTPs would not be competing with others meant that this was not going to be a 'musical chairs' scramble: there would be a parking space for everyone. The third paragraph (at [8]) was emphasising the point made elsewhere, as being relevant to practical implementation, namely the track record which GMS had, of 'delivering' student accommodation schemes. In my judgment, what Officers were making were relevant and proper points to make, as a matter of evaluative planning judgment, to be put alongside the claim being made by MVML about an injunction to secure private rights.

62. Fourthly, it is clear that Officers had read and considered the substantive content of the legal opinion. It was summarised for Members at paragraph [3]. Members' attention was specifically there being drawn to the point made by Counsel about actionable interference with RRTPs from a reduced number of spaces available. Officers also identified correctly (at [3]) that the conclusion of the legal advice of Counsel was that the tenants with the benefit of the rights "would be able to seek to restrain such interference by injunction". The word "seek" is significant. It was the word used by Counsel. Counsel did not express the view that an injunction would be granted. Pausing there, the key point at [3] about a reduced number of spaces available to residents with RRTPs is exactly what was being addressed in the later paragraphs (at [6] and [7]). Officers were identifying for Members that the RRTPs would be "retained" and "maintained", with sufficient spaces, because "the appropriate number" was being retained and made available; that this was so at all times during construction and after completion; and that there would be no competing with others for insufficient spaces. On a fair reading as a whole, all of that was to engage, to a degree considered appropriate as a matter of evaluative judgment, with the thrust of what had been summarised (at [3]).

63. Fifthly, the logic of the argument raises a number of practical questions. What more – in an area of evaluative planning judgment – were Officers and Members required to do, whether as a matter of "obligation", or because it was so "obvious"? It is easy to say that Officers should have 'addressed' whether the private RRTPs would be likely to preclude the practical implementation of the development. But what does that mean? Did Officers have to assess the prospect of a court granting an injunction to halt the development? Did they have to assess the prospect of any litigation being settled, and at what price? Is that what was being required of them by a planning policy which made no reference to private rights or injunctions? These questions provide a helpful cross-check. And it is appropriate to inject a solid dose of perspective and practical realism, in examining the inexorable legal logic of characterising private RRTPs which would or could preclude the implementation of a proposal as a "material planning consideration". A position would presumably need to be taken as to whether it was right or wrong, as a predictive assessment of a court enforcing private law rights and as a predictive assessment of GMS being unable to reach a settlement in litigation of that kind, that the development would be thwarted. Taking a view would become especially important given that the prospect of an injunction was strongly contested by GMS. Mr Hunter very fairly showed me that GMS had adopted the position that there was "no credible basis for an injunction". In my judgment, it is unrealistic to treat the policies as requiring more – as a matter of "obligation" or as being "obvious" – that that Officers

and Members should note the position and identify some headline points about it, as Officers did at [6] to [8]. I do not accept that there was any greater legal obligation.

64. Sixthly, the sense of perspective and realism and the recognition that we are in the sphere of evaluative judgment are reinforced by considering the legal opinion on which reliance was being placed. I have read and considered that opinion, written by Counsel Andrew Skelly. It certainly expresses the view that the proposed redevelopment of MSCP would "likely" result in "actionable interference" with private RRTPs. But I find myself asking what it was that Counsel was being told would be the practical implications for those with private car parking rights of the development going ahead. Counsel was plainly reliant on instructions which came from MVML and its representatives. He said so. He recorded that he had been told that access to and egress from the MSCP would be "denied" at "various" times "throughout" a 6 year period. This sounds a lot like what was said in the July Representations, which I described in the footnote to the Cranes Issue. As has been seen in the discussion of that topic, this would not be a fair description of the position as assessed by Officers, explained to Members and then secured through FPC44. Another problem is that Counsel appeared ultimately to proceed on the basis of a "substantial interference" which "must" arise from competing "with the same number of persons" as in the past for the 391 space car park, in what was now to be a 102 space car park. That sounds a lot like Counsel doubting the adequacy of the number of spaces. This was the point addressed by Officers in the OR at [6] and [7]. I have not been asked to reach a conclusion on whether an injunction would be likely; still less on whether injunction proceedings would be likely to be settled. Nobody says I am in a position, or should seek, to do so. All of this brings into further, sharp focus whether there really was a consideration to be addressed by Officers, as a matter of "obligation" or because it was "obvious".

65. Where the analysis ends up, in my judgment, is squarely in the realms of classic evaluation, involving judgment calls about relevance and weight. It was for Officers to evaluate to make of this and to make such points as they considered helpful. I note that this ground for judicial review is not put on the basis that a planning authority could not reasonably consider the criteria within policy H12 to be met, as Officers assessed that they were. That was reasonable and the approach was lawful. What was ultimately expressed by Officers on deliverability was confidence that, given their track record, GMS demonstrated a sufficiently strong prospect – that sufficiency itself being an evaluative calibration – of practical implementation such that the deliverability criterion was satisfied. I can find no public law error in the OR, remembering the questions of application, evaluation and weighing in the balance, and the identification of relevant matters within a reasoned appraisal are all primarily a function of the judge mental latitude entrusted to the planning authorities. What is said is that a group of people with established RRTPs, each met by Basic Points [BP1] and [BP2], each of whom would retain that right within a car park designed to have a sufficiency of capacity to cater for them all, protected by a continuity of access throughout with the rigours of a safety and necessity-based test for any exceptional intermittent interruption in access, whose health and safety and disability access needs had all been appraised, protected and addressed, and who GMS was saying would benefit from improvements to the MSCP from the proposed reconfiguration, would establish an actionable interference and injunct the proposed development. That is striking. Planning officers did not purport to assess the prospect in court in a private law action, nor the prospect of settlement (and nor have I). They articulated points which were relevant as they saw it (and so, along

the way, have I). For the reasons that I have given the answer to the Injunction Issue is "no" and this ground for judicial review fails.

Conclusion

66. The application for judicial review is dismissed. The contested application to adduce the further evidence is granted in part. The application for permission to amend the grounds is refused. Having circulated this judgment are confidential draft I am able here to deal with any consequential matters. The parties are agreed that the appropriate costs order is that MVML pay the Council's costs in the sum of £10,000. Mr Hunter seeks permission to appeal on the Injunction Issue, arguing in essence that there is a real prospect that the Court of Appeal would find that the OR materially misled Members (1) by telling them that the prospect of an injunction was an "irrelevant" consideration or (2) by failing to tell them that it was a "relevant" consideration (so that, while the Committee did not necessarily have to assess "how likely" an injunction was, they could not "entirely ignore" the matter unless "satisfied" it had "no real prospect"). Mr Evans responds that clear answers lie in the judgment, in particular as to reading the OR as a whole, recognising the evaluative judgment in play, and applying the solid dose of perspective of practical realism. My assessment is that the proposed appeal does not have a real prospect of success and for that reason I will refuse permission to appeal.