Neutral Citation Number: [2023] EWHC 3289 (Admin)

Case No: CO/1006/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 December 2023

Before:
Mr Timothy Corner, KC
Sitting as a Deputy High Court Judge

- -

Between:

The King **on the application of**	**Claimant**
Stephen Whiteside	
- and -	
London Borough of Croydon	**Defendant**
-and-	
Excel Construction	**Interested Party**

- -
- -

Michael Fry (instructed by Holmes and Hills solicitors) for the **Claimant**
Matthew Henderson (instructed by Croydon Legal Services) for the **Defendant**
The **Interested Party** was not represented at the hearing and took no part in the proceedings.

Hearing date: 12 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Timothy Corner, KC:

INTRODUCTION

1. The Claimant challenges the decision ("the Approval") of the London Borough of Croydon ("the Defendant") on 2 February 2023 to approve the Interested Party's application ("the Application") for discharge of condition 18 of planning permission 21/0919/FUL ("the Permission"). Permission to apply for judicial review was granted by Lang J on 12 May 2023.

2. The Claimant contends that the Approval was unlawful on the single ground that it was irrational. In summary, the Claimant's case is that by discharging condition 18, the Defendant has made compliance with condition 14 of the Planning Permission impossible and hence failed to discharge its duty of to carry out sufficient inquiry and its duty under the section 149 of the Equality Act 2010.

BACKGROUND

3. The Claimant is a local resident and taxpayer in South Croydon. He was formerly employed as a planning officer by the Defendant. He made representations to the Defendant in respect of both the Permission and the Application.

4. The Permission was granted by the Defendant on 25 February 2022, for:

"Demolition of existing dwelling and garage and erection of two 3-storey dwellings, comprising of 7 dwellings, together with car parking, amenity space, cycle parking, refuse storage and associated landscaping."

5. The Permission was granted subject to conditions. Condition 14 provides:

> "All of the residential units within the development hereby approved shall be constructed and fitted out to comply with the Building Regulations 2010 (as amended) optional requirement M4(2) 'accessible and adaptable', save for at least 10% of the units which shall comply with either the optional requirement M4(3)(2)(a) 'wheelchair adaptable', or the optional requirement M4(3)(2)(b) 'wheelchair accessible'. Such provision shall be reasonably maintained for the lifetime of the development.
>
> Reason: To ensure the adequate provision of accessible and adaptable dwellings and wheelchair adaptable and wheelchair accessible dwellings."

6. Condition 18 provides:

> "Prior to the commencement of any construction, demolition and excavation works, details of the finished land levels of the proposed dwellings and finished levels of the amenity spaces and roots [sic] throughout the sites shall be submitted to and approved in writing by the Local Planning Authority. The

> development shall be carried out in strict accordance with the approved detail.
>
> Reason: To protect the living conditions of occupants of nearby properties and ensure that the development harmonises with neighbouring buildings and the surrounding area in accordance with Section 12 of the National Planning Policy Framework (2019); policies D3, D4 and D8 of the London Plan (2021); policies DM10 and SP4 of the Croydon Local Plan (2018); and Croydon's Suburban Design Guide SPD (2019)."

7. On 6 April 2022, the Claimant brought a claim for judicial review of the decision to grant the Permission. The claim concerned the financial contributions payable by the Interested Party towards sustainable transport improvements. The claim did not allege any unlawfulness in the imposition of conditions on the Permission or about compliance with the Public Sector Equality Duty ("PSED") by the Council. The claim was dismissed on all grounds in December 2022 ([2022] EWHC 3318 (Admin)).

8. By an application form dated 24 October 2022, the Interested Party made the Application to the Council to discharge Condition 18 of the Permission. The application form was accompanied by a single plan showing the proposed levels.

9. The Claimant wrote to the Council on 10 December 2022 objecting to the Application. It was agreed between the parties that his objections could properly be summarised as stating that step-free access would not be available to units 3 and 4, with the consequence that optional requirements M4(2) and (3) (which in the rest of this judgment I will call "the optional requirements") could not be met.

10. By a decision notice dated 23 February 2023 the Council approved the plan and discharged Condition 18. The Approval was made by the Head of Development Management under delegated powers and in accordance with the recommendation in a report prepared by the case officer ("the OR").

11. At para 4.1 the OR stated:

> "Although consultation was neither required nor undertaken, three (3) representations made by two (2) individuals in objection to the application was [sic.] received. The objections focused on the following areas of concern:
>
> - Accessibility
>
> - It is unclear whether or not the varying land levels across the site would allow step-free access where required. […]
>
> **Consideration of Response**: As ensuring accessibility and M4(2)/M4(3) compliance were not included as reasons for the subject condition, such matters are not material considerations

> in the assessment of the subject application. Furthermore, the provision of finished land levels were requested to ensure suitable adherence with the indicative land levels illustrated on the approved plans so as to protect residential and visual amenities rather than establish the necessity for retaining walls and their resulting impacts on the aforementioned amenities. […]"

12. At para 5.1 the OR stated:

> "The principal considerations relevant for an assessment of the subject application were whether or not the submissions met the requirements of the condition as listed below."

13. The OR addressed this consideration at para 5.3:

> "It is noted that the details on the final site levels across the development site are acceptable in terms of the extent of the requisite excavation/landscaping and resulting impacts on adjoining and visual amenity."

14. The OR set out its conclusion and recommendation at para 6.1:

> "As the application has satisfactorily detailed the site levels of the approved development, so as to protect the living conditions of occupants of nearby properties and ensure that the development harmonises with neighbouring buildings and the surrounding area, it is recommended that the discharge of the condition be **GRANTED**."

15. At para 7.1 the OR states:

"All other planning considerations including equalities have been taken into account."

APPLICABLE GENERAL PRINCIPLES OF LAW

Planning judicial review

16. The authorities on planning judicial review were summarised in R (Christine Wells) v Welwyn Hatfield Borough Council [2022] EWHC 3298 (Admin) (most references to other authorities removed for brevity):

"[23] The law on irrationality/Wednesbury unreasonableness was set out by Leggatt LJ and Carr J in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094:

> The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head off 'irrationality' or, as it more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is to 'so unreasonable and no reasonable authority could ever have come to it': see *Wednesbury.* Another, simpler formulation of the

test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision is reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it-for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning-the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning."

17. In R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74, Sullivan J emphasised the difficulty in challenging planning decisions on the basis of irrationality:

"In any case, where an expert tribunal is the fact-finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments."

Duty to carry out sufficient inquiry

18. The law on the duty to carry sufficient inquiry was set out in R (Plantaganet Alliance) v Secretary of State for Justice and others [2014] EWHC 1662:

"[100]. The following principles can be gleaned from the authorities:

(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

(2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide on the manner and intensity of inquiry to be undertaken.

(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.

(4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they made were sufficient.

(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant,

but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion.

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it."

Interpreting planning conditions

19. In relation to interpreting planning conditions, Lord Hodge stated in Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74:

"[34]. When the court is concerned with the interpretation of words in a condition in a public document […] it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference […] or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

20. Similar statements of principle are contained in Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government [2019] 1 WLR 4317 at [19] and Hillside Parks Ltd v Snowdonia National Park Authority [2022] 1 WLR 5077 at [26]-[27].

Approach to material considerations

21. The following points were agreed as arising from R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2020] PTSR 221 per Lord Carnwath at [29]-[31] and R (Friends of the Earth Ltd) v Secretary of State for Transport [2021] PTSR 190 per Lord Hodge and Lord Sales at [116]-[121]:

i) There are three categories of considerations: first, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had; secondly, those clearly identified by the statute as considerations to which regard must not be had; and thirdly, those considerations to which the decision-maker may have regard if in his judgment and discretion he things it right to do so. See Friends of the Earth at [116], citing R v Somerset County Council, ex p Fewings [1995] 1 WLR 1037, 1049.

ii) In this third category, it is possible to subdivide considerations into two types of case. First, where a decision-maker does not advert at all to a particular consideration, which is only unlawful if the consideration is obviously material according to the Wednesbury irrationality test. Secondly, where a decision-maker turns their mind to a particular consideration but decides to give it no weight; here too, the question is whether the decision-maker acted rationally in

so doing. See Friends of the Earth at [120-121] and Samuel Smith at [30] and [32].

Public Sector Equality Duty

22. The PSED is contained in section 149 of the Equality Act 2010 ("EA 2010") which materially provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations 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 the need 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;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who

> are not disabled include, in particular, steps to take account of disabled persons' disabilities….
>
> (7) The relevant protected characteristics are-
>
> age;
>
> disability;
>
> pregnancy and maternity..”

23. The approach to the PSED is well established:

i) The PSED is not a duty to achieve a result, but a duty to have due regard to the need to achieve the objectives identified in sections 149(1)(a) – (c) EA 2010: see Hotak v Southwark London Borough Council [2015] UKSC 30, [2016] AC 811 per Lord Neuberger at [74].

ii) The regard that must be had to the different aspects of the duty in sections 149(1)-(3) EA 2010 must be what is appropriate in all the circumstances: ibid.

iii) It is not necessary for the decision-maker to refer in terms to the PSED, provided that he addresses it in substance: see R (Jewish Rights Watch Ltd) v Leicester City Council [2018] EWCA Civ 1551, [2019] PTSR 488 per Sales LJ (as he then was) at [30].

iv) The question of what regard is due will be influenced by a number of factors including, but not limited to, the nature of the decision being taken, the stage of the decision-making process that has been reached and the particular characteristics of the function being exercised: see R (Rights Community Action) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 3073 (Admin), [2021] PTSR 553 per Holgate J at [114].

v) It may be justified in some contexts for a decision-maker not to advert to the matters in sections 149(1) if, at the time of acting, they appear to have nothing to do with the action in question or if it appears positively that they can have no bearing on the decision under consideration: see Jewish Rights Watch per Sales LJ at [32].

vi) The PSED does not require an elaborate structure of secondary decision-making every time a public authority makes any decision which might engage the listed equality needs, however remotely; the court is not concerned with formulaic box ticking: see R (End Violence Against Women Coalition) v DPP [2022] EWCA Civ 350, [2021] 1 WLR 5829 per Lord Burnett CJ at [86].

BUILDING REGULATIONS AND GUIDANCE

24. Pursuant to reg. 4 of the Building Regulations 2010 ("the 2010 Regulations") building work must be carried out so that it complies with the applicable requirements contained in Schedule 1 to the 2010 Regulations.[1] So far as material, reg. 4 provides:

> "(1) Subject to paragraph (2) building work shall be carried out so that—
>
> (a) it complies with the applicable requirements contained in Schedule 1; and
>
> (b) in complying with any such requirement there is no failure to comply with any other such requirement, except as may be provided for in paragraphs (1C) and (1D).
>
> (1A) The applicable requirements contained in Schedule 1 are—
>
> (a) the applicable requirements contained in Schedule 1 that apply in all cases, subject to paragraph (1C); and
>
> (b) any applicable requirement contained in Schedule 1, and described in the first column of that Schedule as an optional requirement, that applies in relation to the building work in question by virtue of paragraphs (1B), (1C) and (1D).
>
> (1B) An optional requirement as described in paragraph (1A) (b) shall apply to building work in any case where the planning permission under which the building work is carried out—
>
> (a) specifies that optional requirement by reference to these Regulations; and
>
> (b) makes it a condition that the requirement must be complied with.
>
> (1C) An optional requirement shall apply in substitution for a requirement of Schedule 1 to the extent that the terms of the optional requirement in the second column of Schedule 1 so provide."

25. Pursuant to reg. 4(1B), the mechanism for requiring compliance with the optional requirements in Schedule 1 to the 2010 Regulations is a condition on the planning permission for the relevant building work.

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[1] For this purpose, pursuant to reg. 3(1)(a) of the 2010 Regulations, '*building work'* includes the erection of a building.

26. Schedule 1 to the 2010 Regulations contains default requirements and additional optional requirements. Pursuant to reg. 4(1C) an optional requirement shall apply in substitution for a default requirement where planning permission under which the building work is carried out specifies that optional requirement by reference to the 2010 Regulations and makes it a condition that the requirement must be complied with.

27. Part M of Schedule 1 to the 2010 Regulations concerns access to and use of buildings. Part M contains various categories.

28. The second category of building in Part M is accessible and adaptable buildings. The optional requirement for such buildings is M4(2) which provides:

> "(1) Reasonable provision must be made for people to—
>
> (a) gain access to; and
>
> (b) use, the dwelling and its facilities.
>
> (2) The provision made must be sufficient to—
>
> (a) meet the needs of occupants with differing needs, including some older or disabled people; and
>
> (b) to allow adaptation of the dwelling to meet the changing needs of occupants over time." (emphasis added)

29. The third category of building in Part M is wheelchair user dwellings. The optional requirement for such buildings is M4(3) which provides:

> "(1) Reasonable provision must be made for people to—
>
> (a) gain access to; and
>
> (b) use, the dwelling and its facilities.
>
> (2) The provision made must be sufficient to—
>
> (a) allow simple adaptation of the dwelling to meet the needs of occupants who use wheelchairs; or
>
> (b) meet the needs of occupants who use wheelchairs." (emphasis added)

30. Pursuant to section 6 of the Building Act 1984 ("the 1984 Act") the Secretary of State may approve and issue documents containing practical guidance with respect to the requirements contained in the 2010 Regulations. So far as material, section 6 provides:

> "(1) For the purpose of providing practical guidance with respect to the requirements of any provision of building regulations, the appropriate national authority or a body designated by the appropriate national authority for the purposes of this section may—
>
> (a) approve and issue any document (whether or not prepared by the appropriate national authority or by the body concerned), or
>
> (b) approve any document issued or proposed to be issued otherwise than by the appropriate national authority or by the body concerned,
>
> if in the opinion of the appropriate national authority or, as the case may be, the body concerned the document is suitable for that purpose."

31. In respect of the requirements in Part M of Schedule 1 to the 2010 Regulations, the Secretary of State has issued Approved Document M ("the Guidance"). The Guidance contains the following explanation of its status:

> "The Secretary of State has approved a series of documents that give practical guidance about how to meet the requirements of the Building Regulations 2010 for England. Approved documents give guidance on each of the technical parts of the regulations and on regulation 7 […]
>
> Approved documents set out what, in ordinary circumstances, may be accepted as reasonable provision for compliance with the relevant requirements of the Building Regulations to which they refer. If you follow the guidance in an approved document, there will be a presumption of compliance with the requirements covered by the guidance. However, compliance is not guaranteed; for example, 'normal' guidance may not apply if the particular case is unusual in some way.
>
> Note that there may be other ways to comply with the requirements – there is no obligation to adopt any particular solution contained in an approved document. If you prefer to meet a relevant requirement in some other way than described in an approved document, you should discuss this with the relevant building control body." (emphasis in original)

32. In relation to both the optional requirements, the Guidance emphasises the importance of step-free access to the dwellings.

33. Finally, the 1984 Act provides an enforcement regime to secure compliance with the 2010 Regulations: in particular, section 35 creating a penalty for contravening building regulations, section 36 empowering local authorities to enforce against

building work that does not comply with the building regulations and sections 35B, 35C and 39.

DEVELOPMENT PLAN POLICY

34. London Plan Policy D7 provides that:

> "..residential development **must ensure** that 1) at least 10 per cent of dwellings (which are created via works to which Part M volume 1 of the Building Regulations applies) meet Building Regulation requirement M4(3) 'wheelchair user dwellings' 2) all other dwellings (which are created via works to which Part M volume 1 of the Building Regulations applies) meet Building Regulation requirement M4(2) 'accessible and adaptable dwellings." (emphasis added)

35. In the Committee Report in relation to the Permission it was stated at para 8.26:

> "London Plan policy D7 states that 10% of new build housing should meet Building Regulation requirement M4(3) 'Wheelchair User Dwellings'. Unit 4 on the ground floor (2-bed) is a wheelchair user dwellings, with the appropriate turning circles and adjustments shown on plan. The remaining 90% meet Building Regulation Requirement M4(2) 'Accessible and Adaptable Dwellings' which requires step free access to all units and the facilities of the site. There is level access up to the **front entrance** to each of the dwellings within the two blocks. Step-free access to the amenity space is provided from the units. The proposal complies with the accessibility requirements." (emphasis added)

36. The Committee Report concluded at para 8.29:

> "The proposal would provide good quality accommodation for future occupiers internally and externally in accordance with Local Plan Policies SP2 and DM10 and the London Plan Policies D6 and D7."

THE PARTIES' SUBMISSIONS

The Claimant

37. The Claimant submitted that the Defendant's error was simple. The Interested Party made the Application to discharge condition 18, but the discharge of condition 18 made compliance with condition 14 impossible and made what the Planning Committee was told in the Committee Report relating to the Permission untrue, thus calling into question the planning balance applied to the grant of the Permission.

38. The Claimant said there were six issues (the parties were unable to agree a list of issues):

i) What is the test for discharge of a planning condition and was the Application satisfactory?

ii) In discharging a planning condition how is a condition to be interpreted, is the Defendant only entitled to consider that condition, is compliance with condition 14 relevant to the determination of the Application, and was the Defendant under any duty to consider further the context of the Application?

iii) Does condition 14 exist in order to engage the optional standards in the 2010 Regulations, create a free-standing obligation to comply with the 2010 Regulations, or does it only fall to be enforced under the 1984 Act regime?

iv) Does the Claimant need to demonstrate that it is impossible to comply with condition 14?

v) Was the PSED engaged in relation to the Approval, and if so, did the Defendant discharge its duty?

vi) If there was an error of law, would the outcome be the same?

39. On the first issue, the Claimant submitted that the test for discharge is whether the application is satisfactory, and it does not need to be ideal. The Application was not satisfactory, as it did not satisfy the Council that the approved levels were capable of allowing the discharge of condition 14.

40. On the second issue, the Claimant submitted that there is no authority that in discharging a condition the Council is confined to consideration of that condition only. No reasonable Council would have made a decision which failed to consider the discharge of condition 18 in the context of the Permission as a whole or authorised site levels which made it impossible for the development to comply with condition 14, or failed to carry out any reasonable inquiry into whether the site levels would permit disabled, older and other less mobile people from accessing the development.

41. On the third issue, condition 14 created a free-standing planning requirement to comply with the 2010 Regulations.

42. On the fourth issue, the Claimant maintained that the agreed levels in the Approval made it impossible for the development to comply with condition 14, and it was irrational for the Defendant to grant an Approval which made compliance with another condition impossible.

43. On the fifth issue, the Claimant submitted that the Defendant failed to have any regard to the PSED. The duty is a continuing one, and not one discharged by the Defendant saying simply that it had regard to equalities when the Permission was granted, and the conditions imposed. In any event, it was not in accordance with the PSED for the Defendant to grant an Approval which would result in disabled people being required to access dwellings by the rear door.

44. On the sixth issue, the Claimant submitted that had the Defendant not the made the errors complained of, it was highly unlikely that the decision to grant the Approval would have been the same.

The Defendant

45. The Defendant contended that the Claimant's formulation of the issues did not strike at the determinative matters in the claim. The following issues arose:

    i) Has the Claimant demonstrated that compliance with condition 14 was rendered impossible by the Approval?

    ii) Did the Defendant unlawfully fail to take account of condition 14?

    iii) Did the Defendant fail to have regard to the PSED?

    iv) If there was an error of law, is it highly likely that the result would have been the same?

46. On the first issue, the Defendant submitted that the Claimant had not demonstrated that compliance with condition 14 had been rendered impossible by the Approval. That burden fell on the Claimant because the burden rests on the Claimant to make out his case. In particular, the Claimant had misunderstood the 2010 Regulations and the Guidance. It is not the case that if the Guidance is not complied with then it is impossible to comply with the 2010 Regulations. Also, the approved plans could not be used to demonstrate the impossibility of complying with condition 14, as they were not meant to be scaled. Again, assessment of compliance with the 2010 Regulations could only be definitively determined at the point of completion. Further, the arguments made in the Claimant's evidence as to the impossibility of complying with condition 14 were not accepted by the Defendant.

47. On the second issue, the Defendant did not unlawfully fail to take account of condition 14. The scope of the Council's determination was restricted by the terms of condition 18, which did not require consideration of whether it would be possible to comply with condition 14. The purpose of condition 18 was to ensure protection of occupants of nearby properties and that the development harmonised with the surrounding area. Condition 18, which is a pre-commencement condition, was not concerned with the optional requirements, which can only be determined once the buildings have been constructed and inspected by a Building Inspector. Also, the purpose of condition 14 was not a free-standing obligation to comply with the 2010 Regulations, although condition 14 was perfectly lawful. Again, the principle that a condition must be interpreted in the context of the planning permission as a whole did not mean that other conditions are relevant to the *discharge* of another condition. If condition 14 could not be complied with, the Interested Party would have to seek discharge of condition 18 of different levels; there was nothing to prevent multiple applications for discharge of conditions. In summary, satisfaction of condition 14 was not material to the determination of the Application under condition 18, and even if the Claimant were able to demonstrate the impossibility of complying with condition 14 on the basis of the approved levels, there was no error of law.

48. On the third issue, the Defendant did take account of the PSED and said so in the OR. In any case, access for persons with protected characteristics was secured by condition 14.

49. On the fourth issue, if there was an error of law, it was highly likely that the result would have been the same.

ASSESSMENT

Discharging a planning condition

50. As this challenge is to an approval of the discharge of a planning condition, it is appropriate to begin by considering the test for discharge of a planning condition. It was common ground that the test is whether the application is "satisfactory"; see R (Cathie) v Cheshire West and Chester Borough Council [2022] EWHC 2148 (Admin). Satisfactory does not mean ideal or perfect.

51. In Camden LBC v Secretary of State for the Environment [1993] JPL 466, outline planning permission was granted, reserving various matters including design. The court held that the reservation of design for detailed approval would not allow the Council to refuse to approve reserved matters on grounds other than design, including viability.

52. But was the assessment whether the Application was satisfactory limited to examining the condition itself and the reasoning for its imposition? It was suggested by the Defendant that the Camden case is authority for this proposition, relying on the following passage in Camden at p 470:

> "Thirdly, the power of a planning authority under a planning condition was limited by the terms of that condition, whether it be imposed on an outline or full permission. It was by reason of those principles that a planning authority might refuse to entertain an application for approval of a reserved matter which fell outside the ambit of the permission, but had equally to determine such an application within the terms of the condition which required its submission."

53. In response, the Claimant relied on the sentence, also at p 470, immediately preceding the passage I have just quoted:

> "Secondly, a planning permission, whether conditional or unconditional, was a single entirety which permitted development to be carried out in accordance with it."

54. I do not think that either passage is of much assistance in resolving the issue whether when deciding whether to grant approval of details of levels submitted under condition 18, the Defendant could or should have regard to the likelihood that those levels would affect the ability of the development to comply with condition 14.

55. The facts in Camden are different from those in the present case, and the judge's words have to be read in that different context. It is hardly surprising that in Camden it was decided that a condition reserving design as a reserved matter could not be used to refuse a scheme for reasons that were nothing to do with design. In the present case, the question is different. It is an issue which did not arise in Camden, namely whether in considering discharge of one condition it is material for the decision-maker to consider whether discharging that condition in the manner sought may affect the ability to satisfy *other* conditions.

56. I think it is. After all, the authority is dealing with the planning permission as a whole. The mere fact that a condition was imposed for a particular purpose does not prevent details approved pursuant to that condition affecting whether other conditions on the planning permission can be or are likely to be complied with. If approval of details pursuant to one condition would prejudice compliance with another condition, I think the authority must be entitled to have regard to that matter.

Was condition 14 immaterial to consideration of the details submitted pursuant to condition 18?

57. The Defendant said that there was a further reason for condition 14 being immaterial to the decision whether to grant approval for the details of levels submitted under condition 18. The Defendant argued that in considering the Application, it was entitled to proceed on the basis that the regulatory regime under the 1984 Act would operate effectively: see R. (Frack Free Balcombe Residents Association) v West Sussex CC [2014] EWHC 4108 (Admin) at [100]. The Defendant also relied on the advice in para 8 of the Planning Practice Guidance on Housing: optional technical standards (ref ID: 56-008-20160519):

"Where a local planning authority adopts a policy to provide enhanced accessibility or adaptability they should only do so by reference to Requirement M4(2) and/or M4(3) of the optional requirements in the Building Regulations and should not impose any additional information requirements (for instance provision of furnished layouts) or seek to determine compliance with these requirements, which is the role of the Building Control Body."

58. However, I do not think that either the Frack Free case or the Planning Practice Guidance means that the Defendant *had* to ignore concerns that approval of details under conditions of the planning permission would prejudice compliance with a condition applying the optional requirements, and the Defendant did not suggest that it did. This is not a case of the Defendant determining compliance with the optional requirements; after all, the Defendant strongly submitted that compliance could only be determined on completion of the development. Rather, the Defendant in such a situation is having regard to possible prejudice to compliance with the optional requirements. The matters dealt with in condition 14 are material planning considerations and when dealing with the application for approval of details pursuant to condition 18, the Defendant was in my judgment at least *entitled* to have regard to the likelihood of condition 14 being complied with. After all, Building Control inspection takes place in stages of a development, after building work has been carried out. Building to appropriate standards may be more likely to be achieved if deficient building work is prevented before it happens. Once it has been carried out, it may be difficult to secure full remediation. A balance may need to be drawn between the seriousness of the deficiency and the extent of demolition and rebuilding that would be required in order to put it right.

The point raised by the Claimant

59. The point raised by the Claimant in his 10 December 2022 letter was that step-free access would not be possible to units 3 and 4.

60. This was amplified in the Claimant's two witness statements, which related it to specific paragraphs of the Guidance.

61. In response to the Claimant's evidence, Ms Field for the Council produced a witness statement. She said she thought it likely that access to unit 3 could be provided by the rear door, and that with regard to unit 4 the gradient was less steep than the Claimant thought, so that it was not impossible that the optional requirements could be complied with.

62. The Defendant said that on the basis Ms Field's evidence the Claimant had not proved that approval of the levels contained in the Application would make it impossible to comply with the optional requirements. The Defendant supported this contention with further submissions.

63. The Defendant pointed out that if the Guidance is not complied with, it is not necessarily impossible to comply with the 2010 Regulations. Indeed, it is explicitly stated in the Guidance that there may be other ways to comply with requirements of the 2010 Regulations and that there is no obligation to adopt any particular solution contained in an approved document.

64. Also, the Defendant said, and I agree, that de minimis changes could be made to the approved drawings without the development thereby becoming unauthorised; see Hillside Parks Ltd v Snowdonia National Park Authority [2022] UKSC 30 at [69].

65. Further, I agree with the Defendant that assessment of compliance with condition 14 and the 2010 Regulations generally could only be definitively determined at the point of completion.

66. I accept therefore that it has not been demonstrated by the Claimant that compliance with the optional requirements, or even the Guidance, would be impossible.

67. However, it seems to me that the points raised by the Claimant did at least bear on the likelihood that if the submitted details were approved, condition 14 could be complied with and the optional requirements met. It is at least unclear on the basis of the evidence before me that the Guidance can be met on the basis of the submitted levels, and it has not been established by the evidence before me that if the Guidance is not met, the optional requirements can be met in some other way.

The approach taken by the Defendant

68. The Defendant's officers considered that they were unable to take account of the matters raised by the Claimant, because accessibility and compliance with the optional requirements were not included as reasons for condition 18. It will be apparent from the above that in my view they were wrong to think that they were prevented from taking account of the issue raised by the Claimant. Accordingly, they made an error of law.

69. In my view it was irrational for the Defendant not to at least consider whether to investigate the Claimant's concerns. This was a case falling within paras [120-121] of the Friends of the Earth case cited at para 21 of this judgment. I think it is clearly a matter of concern for an authority if levels which it is being asked to approve would

make it unlikely that the Guidance could be complied with. I accept that failure to meet the requirements of the Guidance does not necessarily mean failure to meet the requirements of the 2010 Regulations themselves, but the Guidance at least sets out what is in the Secretary of State's opinion desirable.

70. Was the Defendant's duty limited to considering whether to investigate this matter, and did it have the option of deciding that it would leave the matters in condition 14 to the Building Inspector (as per the Frack Free Balcombe Residents Association case cited above)? It may be that the Defendant had a positive duty to investigate, and that it could not simply leave it to the Building Inspector to deal with. This is because as I have already said it may be better to prevent deficient work from happening, rather than seeking to intervene after it has been carried out. However, I do not need to reach a conclusion on this to decide this case. It is sufficient for the purpose of this decision for me to say that the Defendant should have considered whether to deal with the issue or not. It did not do so, because it wrongly thought that anything pertaining to condition 14 was immaterial. I think it was Wednesbury unreasonable for it not to have considered whether to deal with this issue.

PSED

71. I agree with the Claimant that for the Defendant merely to say as it did in the OR (at 7.1) that "equalities" had been taken into account was not sufficient of itself to show that in substance the PSED had, in fact, been complied with. Indeed, it is clear from what was said in the OR about the immateriality of the Claimant's concerns that least the equality aspects of those concerns had indeed been ignored.

72. However, I do not think the PSED adds to the Claimant's case as I have accepted it in preceding parts of this judgment. Had the Defendant considered whether to investigate the Claimant's concerns, as I think it should have done, that would have been sufficient to comply with the PSED even if in reliance on the Frack Free Balcombe Residents Association case it had decided not to do so and leave the issue to the Building Inspector. As I have said, it may be that the Defendant's duty went beyond considering whether to investigate the Claimant's concerns, but if so, the PSED would not add to what I have already said in relation to that point.

Section 31 (2A) Senior Courts Act 1981; had the error of law not been made, is it highly likely that the outcome for the Claimant would have been the same?

73. Section 31 (2A) of the Senior Courts Act 1981 states that the court must refuse relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

74. The Defendant was entitled to investigate the concerns raised by the Claimant, and I have said that it should (at least) have considered whether to deal with the issue, or to leave compliance with condition 14 to the Building Inspector. Had it considered whether to deal with the issue, it might have decided to deal with it. Certainly, it cannot be said that had it realised it was so entitled, it would *not* have done so.

75. However, had it investigated the Claimant's concerns, would the outcome have been any different?

76. In my judgment, on the evidence before me, the outcome would in all likelihood have been the same. It is highly likely that Defendant would still have granted the Approval under condition 18.

77. If there were evidence that other levels could be put forward within the ambit of the plans approved by the Permission which would have avoided the problems identified by the Claimant, I think the Defendant would most likely have refused to grant the Approval for the submitted levels. The Defendant argued that in this situation it could safely have granted the Approval, because if it became clear that the optional requirements could only be complied with on the basis of different levels, the developer would in due course have had to make a further submission under condition 18 on the basis of those levels. I disagree. To begin with, as I have already said, appropriate standards of building may be more likely to be achieved if deficient work is prevented before it is carried out. Also, as the Defendant said, compliance with the 2010 Regulations is only finally determined on completion. As a responsible authority, I do not think the Defendant would have granted Approval under condition 18 for levels which it knew would be likely to lead to problems of compliance with condition 14 and the optional requirements, in circumstances where the problems could be avoided by specifying different levels.

78. Nevertheless, the Claimant's own evidence was to the effect that on the basis of the scheme as permitted by the parent Permission, step-free access (the nub of his complaint) was simply not possible.

79. In his first statement he said at para 12:

> "The development site is on a hill/slope and I believe that in its permitted form the only way to access some of the proposed dwellings by steps."

80. In his second witness statement he said at para 22:

> "…I believe that a stepped approach would be the only viable option…."

81. Therefore, the Claimant's evidence strongly suggests that step-free access was impossible on the basis of the drawings approved in the Permission. In other words, within the ambit of the Permission, there was *no* alternative set of levels which could have been submitted that met the Claimant's concerns.

82. Mr Fry for the Claimant did not dispute that this was the meaning of what the Claimant had said in his statement. Instead, Mr Fry said that the Claimant was only a layman and that it was for the Council to investigate whether there were indeed other levels that could have satisfied the concerns raised by the Claimant. However, I am not convinced that the Claimant was a layman in relation to the matters he complained of. He clearly has relevant expertise and experience. As stated in para 3 of the Statement of Facts and Grounds, he was a planning officer with the Defendant between 1989 and 2006.

83. I have to proceed on the basis of the evidence before me. There was no evidence from either side that other levels could have satisfied the Claimant's concerns and the Claimant's evidence was that as permitted by the Permission step-free access could

not be achieved. I am therefore driven to the conclusion that even had the Defendant taken account of the Claimant's concerns, it would still have granted the Approval.

84. In his Reply, Mr Fry relied on the fact that in her evidence Ms Field for the Defendant said that she thought it likely that access to unit 3 could be provided by the rear door, and that with regard to unit 4 the gradient was less steep than the Claimant thought, so that it was not impossible that the optional requirements could be complied with.

85. However, those statements by Ms Field were made on the basis of the levels which were submitted and which form the basis of the Approval, so I cannot see how they help the Claimant's case that if it had investigated his concerns the Council might have or would have refused to approve the levels contained in the Interested Party's Application. In fact, Ms Field's evidence only strengthens the likelihood that the Defendant would still have approved the levels as submitted.

86. Overall, it seems to me that the Claimant's real grievance is against the original grant of Permission itself. Having regard to the matters I have set out above, it is highly likely that the Defendant would still have granted the Approval under condition 18, which means that it is highly likely that had the conduct complained of by the Claimant not occurred, the outcome for him would have been the same. I must therefore refuse relief.

CONCLUSION

87. For the reasons set out above, this claim fails.