Neutral Citation Number: [2024] EWHC 3076 (Admin)

Case No: AC-2024-LON-001227

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimant**
on the application of	
GEORGINA WALLIS	
- and -	
NORTH NORTHAMPTONSHIRE COUNCIL	**Defendant**
(1) BLOCK INDUSTRIAL CORBY 13 LIMITED **(2) BARMACH LIMITED**	**Interested Parties**

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Richard Harwood OBE KC (instructed by **Goodenough Ring Solicitors**) for the **Claimant**
Philip Coppel KC (instructed by **Legal and Democratic Services**) for the **Defendant**
David Elvin KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented

Hearing dates: 5 & 6 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Claimant applies for permission, out of time, to apply for judicial review of two grants of planning consent by the Defendant ("the Council") for development at the former Weetabix site at Earlstrees Road, Earlstrees Industrial Estate, Corby NN17 4AZ ("the Site"), namely:

    i) on an application by the Second Interested Party ("IP2"), permission for the change of use of the Site from B2 to B8, dated 22 September 2021 ("the 2021 Permission");

    ii) on an application by the First Interested Party ("IP1"), construction of a new building (following demolition of the existing buildings) with Class E industrial (formerly Class B1c processes), Class B2 (general industrial) and Class B8 (storage and distribution) uses, including ancillary offices, landscaping, yards, access, acoustic barriers, parking and associated engineering works, dated 8 September 2022 ("the 2022 Permission").

2. The Claimant lives adjacent to the Site, in Hooke Close. She and the other residents of Hooke Close claim that they are adversely affected by the development because of its overbearing height and scale, and the potential noise from the proposed distribution centre.

3. The claim was not filed until 11 April 2024. The Claimant applies for an extension of time because, owing to an administrative error by the Council, which is the local planning authority, residents of Hooke Close were not sent consultation letters in 2021 or 2022 about the planning applications, prior to the grant of permission. She also claims that the requisite notices to publicise the applications for planning permission were not placed at or near the Site.

4. IP1 and IP2 are property owners and developers. IP1 acquired the Site on 4 February 2022. IP2 has not played any part in these proceedings.

5. On 4 July 2024, I made an order on the papers, adjourning the application for permission and an extension of time to file the claim, to be heard together with the substantive hearing, at an expedited rolled-up hearing.

History

6. The Site is situated on the north side of Earlstrees Road, within the Earlstrees Industrial Estate, which is an Established Industrial Estate as defined within the Part 2 Local Plan for Corby. Policy 9 Part 2 Local Plan relates to employment uses in Established Industrial Estates and states that "proposals for employment use (under Class e.g. B2 and B8) and for modernising and/or enhancing the physical environment and infrastructure will be supported". Other large industrial units are nearby.

7. Until 2019, the Site was occupied by a factory producing Weetabix ("Weetabix 1"). The main building took up most of the width of the Site and there were two further buildings towards the rear of the site. One, used for mixing Alpen muesli ("the Alpen Muesli building") ran close to the northern boundary. There was also a large car park at the front of the Site.

8. Hooke Close is a residential street close to the northern boundary of the Site. The back gardens of the houses on one side of the street adjoin the Site boundary. Pascal Close is a residential street which is situated opposite the Site, south of Earlstrees Road. Rockingham Road is a residential street which runs to the west of the Site.

9. Further to the east, and on the south side of Earlstrees Road, there is another former Weetabix factory site ("Weetabix 2") which was vacated in 2019. It has the same postcode as Weetabix 1, but different Unique Property Reference Numbers ("UPRNs") and co-ordinates. Weetabix 2 is close to the junction with Manton Road and the residential properties on Hubble Road.

10. In May 2021, the Council granted prior approval for demolition of part of the buildings at the Site.

11. On 23 June 2021, IP2 applied to the Council for permission for change of use of the Site and its buildings from B2 (carrying on of an industrial process) to B8 (use as storage or a distribution centre). A delegated officer's report ("OR 21") recommended that permission should be granted and the recommendation was accepted by a senior planning officer who approved the grant of planning permission. The 2021 Permission was granted on 22 September 2021.

12. Notice of the application was duly published in a local newspaper and the Council's website. However, there were a number of errors in the processing of the application by the Council.

13. First, the Council decided to consult neighbouring properties but by mistake, the planning officer sent the consultation letters to 20 residential and commercial properties close to Weetabix 2, not the Site (e.g. Manton Road, Hubble Road, Elstrees Road). The letters were printed on 21 July 2021, and presumably sent shortly thereafter. Residents of properties close to the Site, such as Hooke Close, were not consulted. So the planning officer's statement, in OR 21, that neighbour notification had taken place and no representations were received, was misleading.

14. Second, although it is common ground that there was a site display, attached to a lamp post, there is no evidence that it was on or near the Site.

15. Third, the site description in OR 21 erroneously included a site description of Weetabix 2, not the Site.

16. Fourth, the planning history in OR 21 erroneously included previous applications relating to Weetabix 2 as well as the Site.

17. The Council's internal Fact Finding Investigation report ("Investigation Report"), dated 21 February 2024, found that the planning officer copied the list of properties to be consulted from a list previously created for an application in respect of Weetabix 2, in 2019. Also, that the Council's data systems were mapping applications for both Weetabix 1 and 2 to the same location on the Uniform system, as if they were the same property. This is the probable explanation for the erroneous planning history inserted in OR 21. However, as the Investigation Report correctly observed, a planning officer should check the location as shown on the application, and base the

officer's report and the consultation on a thorough understanding of the application site from visits and site drawings.

18. The senior officer who accepted the recommendation and approved the grant of planning permission did not notice any of these errors.

19. IP1 acquired the Site on 4 February 2022. IP1[1] submitted a pre-application request to the Council, and the Council responded on 17 February 2022. The Council's pre-application advice mistakenly described the Weetabix 2 site in the "Site and Surroundings" section, before then considering potential overbearing impacts on Hooke Close. IP1 did not draw the planning officer's attention to this error. The Investigation Report found that the planning officer copied and pasted the wording of the "Site and Surroundings" section of the report from OR 21, which was described as "poor practice".

20. On 18 February 2022, notice of intended demolition was erected at the Site. On 27 April 2022, the Council advised IP1 that prior approval was not required and demolition work commenced in May 2022.

21. On 20 May 2022, IP1 applied for permission to demolish the existing buildings at the Site and the erection of a new building. The application was accompanied by:

    i) a location plan which showed the Site;

    ii) a Planning Statement which correctly described the location of the Site and noted the presence of residential properties in Hooke Close immediately to the north and south of the site;

    iii) a Design and Access Statement which showed the Site and Hooke Close;

    iv) a Noise Impact Assessment which included an aerial photograph, plans correctly showing the location of the Site, and which correctly recorded that "the site is bordered by residential developments to the north on Hooke Close, and to the south on Pascal Close";

    v) a Townscape and Visual Appraisal, which included an aerial photograph and plans, correctly showing its location, and noted the presence of adjacent residential development, and included a photograph of residential properties "along northern boundary of site from rear garden on Hooke Close".

22. The delegated officer's report ("OR 22") correctly identified the Site and recommended that permission should be granted and the recommendation was accepted by a senior planning officer who approved the grant of planning permission. The 2022 Permission was granted on 8 September 2022.

23. The application and the supporting documents were uploaded on to the Council's website. Notification of the application was also published in a local newspaper, stating that copies of documents could be viewed at the Council's Planning Department.

[1] All references to IP1 include references to agents and consultants acting on its behalf.

24. A site display was attached to a lamp post at the eastern end of Earlstrees Road, outside Weetabix 2.

25. Once again, the Council decided to consult neighbouring properties but by mistake, the planning officer sent consultation letters to 20 residential and commercial properties close to Weetabix 2, not the Site (e.g. Manton Road, Hubble Road, Elstrees Road). The letters were printed on 8 June 2022, and presumably sent shortly thereafter. Residents of properties close to the Site, such as Hooke Close, were not consulted. As with the 2021 Permission, the planning officer's statement, in OR 22, that neighbour notification had taken place and no representations were received, was misleading.

26. Following the grant of permission, IP1 submitted applications to discharge the pre-commencement conditions in October 2022. This included the new landscaping and tree planting on the northern boundary to provide all year round screening for the Hooke Close residents.

27. On 25 September 2023, construction work began on Site. From September 2023 onwards, the contractors, ADI Group ("ADI"), sent regular letters to Hooke Close residents informing them of the construction works that were being undertaken. From October 2023 onwards, there were numerous complaints from residents about the noise and vibration.

28. On 7 January 2024, IP1 made a non-material amendment application to vary some elements of the original planning permission. The application was subsequently revised, under cover of a letter dated 16 July 2024. As a result of issues which arose during the construction, the finished floor level as built is 18 cm higher than the approved plans, and the internal haunch height as built is also 18 cm higher than the approved plans. The eaves remain the same height. The Planning Committee has deferred determination of this application until after the conclusion of these proceedings.

29. The Claimant states in her witness statement that she was aware of the demolition works in 2022, and the ground works which commenced in September 2023, but she did not think that any development would affect her property. She had been travelling to and from work in the dark and had not gone out into her garden. It was only on 16 January 2024 that she saw a large metal framework being erected behind her garden and by 19 January 2024 it extended right across the boundary. She was "horrified" and so she went on to the Council's website and found the 2022 Permission. She emailed the planning officer to complain. Councillor Mark Pengelly responded to social media posts and made contact with residents and the Planning Department. The planning officer explained the error that occurred with the consultation letters but maintained that the statutory consultation requirements had been met. That position was maintained by the Council throughout.

30. In February 2024, meetings took place with IP1 and with the Council. Residents were advised to lodge formal complaints, which they did.

31. On 21 February 2024, the Council's internal Investigation Report and Key Findings by the Chief Internal Auditor were issued to the Executive Director of Place and

Economy. They were supplied to the Claimant's solicitor with the pre-action response on 4 April 2024.

32. On 1 March 2024, Councillor Pengelly contacted planning solicitors Goodenough Ring who agreed to meet with residents on 5 March 2024 to discuss a judicial review.

33. Tom Pursglove MP raised the matter with the Council on behalf of the residents. The Leader of the Council responded on 6 March 2024, indicating that IP1 was not willing to pause the works, and that the Council declined the residents' suggestion that the Council should judicially review itself.

34. On 12 March 2024, the Claimant instructed solicitors to file this claim for judicial review. A pre-action protocol letter was sent on 21 March 2024, asking for a response by 28 March 2024. The Council sought an extension of time and responded on 4 April 2024. IP1 responded on 28 March 2024.

35. The claim was issued and served on 11 April 2024.

36. On 25 April 2024, the full Council considered a report by the Deputy Chief Executive and Executive Director of Place & Economy, headed "Planning Improvement Board", which advised Members of the findings of the Investigation Report and proposed the adoption of a Planning Improvement Plan and Planning Improvement Board. In paragraphs 1.12 and 7.2 of the report, the Deputy Chief Executive and the Monitoring Officer acknowledged that in the processing of the application relating to the Weetabix site there had been non-compliance with the law: see section 5 Local Government and Housing Act 1989 ("LGHA 1989"). Paragraphs 1.12 and 7.2 of the report further stated that the Monitoring Officer was satisfied that the issues pertaining to section 5 LGHA 1989 were addressed by presenting this report to the full Council.

37. The Council approved the establishment of a Planning Improvement Plan and Planning Improvement Board to address the issues identified in the review. In its reasons it recognised its duty to comply with legislation and its own policies in processing planning applications, but did not expressly adopt the finding in the report that there had been non-compliance with the law.

38. Ms Sanjit Sull, Director of Law and Governance and Monitoring Officer, stated in her witness statement dated 21 August 2024, that this report was not made under section 5 LGHA 1989, and no further action was taken under 5 LGHA 1989. Her position was predicated on the basis that the planning permission was valid until such time as the Court ordered otherwise. She added that, in drafting the report, she was aware that the Head of Planning and Enforcement had determined on a review that, even if the application for planning permission was re-considered following a re-consultation, it was highly likely that planning permission would be granted.

39. On 18 October 2024, Mr Bowes, solicitor for IP1, filed an updating witness statement stating that the building is now complete and ready for a tenant to carry out its own fit-out works. The revised landscaping scheme was approved by the Council on 5 September 2024 and landscaping works are due to be carried out imminently. Highway works to tie the development into the public highway are also due to take place.

Grounds of challenge

40. The Claimant contends, in respect of the 2021 Permission, for the change of use of the existing building from B2 to B8:

    i) The Council failed to have regard to a statutory material consideration and made an error of fact by assessing the wrong site, as OR 21 described a different site - Weetabix 2.

    ii) The Council failed to carry out the neighbour consultation which they had decided to do, as they sent the consultation letters to the wrong streets. Therefore the grant of planning permission was unlawful because:

        a) There was an unappreciated failure to comply with the Council's statutory policy that it would consult neighbours where it considered it appropriate to do so.

        b) A legitimate expectation arose that where the Council had decided to consult neighbours on a planning application that it would do so, under its statement of community involvement, from the fact of the decision to consult, and its practice of consulting neighbours.

        c) The Council made an error of fact in believing that it had consulted neighbours when it had not done so.

        d) It was irrational to determine the planning application when the consultation exercise which the Council had decided to carry out had been executed in such an erroneous fashion.

    iii) The Council failed to display a site notice "on or near the land" in breach of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the DMPO"), article 15(4), instead posting it on Causeway Road, which does not border the Site and is half a mile walk from the site.

    iv) The Council imposed a noise condition on the 2021 Permission without any evidence that it was suitable (or any mention of it), failing to have regard to material considerations with the only published comments of the Environmental Health Officer ("EHO") being sceptical of the application, and relying on alleged comments by the EHO which have not been published so relying on immaterial considerations.

41. The Claimant contends, in respect of the 2022 Permission for the demolition of the existing buildings and the erection of a new building with Class E, B2 and B8 uses (industrial)/B2 (general industrial)/B8 (storage or distribution) uses, and ancillary development:

    i) The Council failed to carry out the neighbour consultation which they had decided to do, as they sent the consultation letters to the wrong streets, and so the grant of planning permission was unlawful because:

a) There was an unappreciated failure to comply with the Council's statutory policy that it would consult neighbours where it considered it appropriate to do so.

b) A legitimate expectation arose that where the Council had decided to consult neighbours on a planning application that it would do so, under its statement of community involvement, the fact of the decision to consult, and its practice of consulting neighbours.

c) The Council made an error of fact in believing that it had consulted neighbours when it had not done so.

d) It was irrational to determine the planning application when the consultation exercise which the Council had decided to carry out had been executed in such an erroneous fashion.

ii) The Council failed to display a site notice 'on or near the land' in breach of the DMPO, article 15(4), instead posting it 483 metres from the Site, at the eastern end of Earlstrees Road, outside Weetabix 2.

iii) The Council failed to take into account an obviously material consideration, namely the effect of a building which was much taller, wider and for many houses, closer, than the previous building, on the living conditions of local residents, or provide any reasoning on it.

iv) The Council unlawfully imposed lax noise conditions by:

a) Failing to take into account or control the total noise generation from the site.

b) Imposing a noise limit which was higher than their own EHO's advice, based on an erroneous reliance on an unlawfully granted change of use planning permission.

Delay and the application for an extension of time

Legal Framework

42. CPR 54.5(5) provides:

> "Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose."

43. The six week period starts from the date of the decision, not from the date on which the Claimant came to know of the decision. See *Croke v Secretary of State for Communities and Local Government* [2019] EWCA Civ 54, [2019] PTSR 1406, at [7].

44. Section 31(6)-(7) of the Senior Courts Act 1981 provides:

> "(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

45. In *R v Dairy Produce Quota Tribunal ex parte Caswell* [1990] 2 AC 738, Lord Goff explained (at 747B-C) that there is "undue delay" within the meaning of section 31(6) Senior Courts Act 1981 where a claimant fails to act promptly or within 3 months. Even where there is good reason for the failure to comply with the time limits in the CPR, the Court retains a discretion under section 31(6) Senior Courts Act 1981 to refuse permission on grounds of delay if it considers that the grant of relief would be likely to cause substantial hardship or prejudice or be detrimental to good administration.

46. It is particularly important for a claimant to act promptly in a challenge to a grant of planning permission, in the interests of certainty. In *R (Thornton Hall Ltd) v Wirral MBC* [2019] PTSR 1794, the Court of Appeal upheld Kerr J.'s decision to grant an extension of time of more than five years from the date of the decision and to quash the decision. The Court of Appeal held:

> "51 For the reasons we have given, the appeal must be dismissed. The opposite conclusion would not meet the justice of this particular case. No precedent is being set here. We stress once again that the court will not lightly grant a lengthy extension of time for a challenge to a planning decision by a claim for judicial review, nor will it lightly grant relief after a long delay. It will insist on promptness in bringing such challenges in all but the most exceptional circumstances. Here the circumstances are most exceptional. They are wholly extraordinary. This is a case where it can truly be said that the exception proves the rule."

47. The Court gave guidance on the approach to be taken by the court, at [21]:

> "(1) When a grant of planning permission is challenged by a claim for judicial review, the importance of the claimant acting promptly is accentuated. The claimant must proceed with the "greatest possible celerity"—because a landowner is entitled to rely on a planning permission granted by a local planning

authority exercising its statutory functions in the public interest: see Simon Brown J in *R v Exeter City Council, Ex p JL Thomas & Co Ltd* [1991] 1 QB 471, 484G; and in *R v Swale Borough Council, Ex p Royal Society for the Protection of Birds* [1991] 1 PLR 6 . In such cases the court will only rarely accede to an application to extend time for a very late challenge to be brought: see Keene LJ in *Finn-Kelcey v Milton Keynes Borough Council* [2009] Env LR 17, paras 22 and 23; Sales LJ in *R (Gerber) v Wiltshire Council* [2016] 1 WLR 2593, paras 46 and 47; Lindblom LJ in *Connors v Secretary of State for Communities and Local Government* [2018] JPL 516, para 87; Schiemann LJ in *Corbett v Restormel Borough Council* [2001] JPL 1415 , paras 14–27; Sedley LJ at paras 29–33; Hobhouse LJ in *R v Bassetlaw District Council, Ex p Oxby* [1998] PLCR 283, 296–301.

(2) When faced with an application to extend time for the bringing of a claim, the court will seek to strike a fair balance between the interests of the developer and the public interest: see Sales LJ in *Gerber's* case [2016] 1 WLR 2593, para 46. Where third parties have had a fair opportunity to become aware of, and object to, a proposed development—as would have been so through the procedure for notification under the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184)—objectors aggrieved by the grant of planning permission may reasonably be expected to move swiftly to challenge its lawfulness before the court. Landowners may be expected to be reasonably alert to proposals for development in the locality that may affect them. When "proper notice" of an application for planning permission has been given, extending time for a legal challenge to be brought "simply because an objector did not notice what was happening" would not be appropriate. To extend time in such a case

> "so that a legal objection could be mounted by someone who happened to remain unaware of what was going on until many months later would unfairly prejudice the interests of a developer who wishes to rely upon a planning permission which appears to have been lawfully granted for the development of his land and who has prudently waited for a period before commencing work to implement the permission to ensure that no legal challenge is likely to be forthcoming …" (See Sales LJ in *Gerber's* case, para 49.)

When planning permission has been granted, prompt legal action will be required if its lawfulness is to be challenged, "unless very special reasons can be shown": *Gerber's* case, para 49."

48. The Claimant referred to *R (Croyde Area Residents Association) v North Devon District Council* [2021] EWHC 646 (Admin), [2021] PTSR 1514 in which an unlawful planning permission was quashed in proceedings brought six years after it was granted.

49. In *R (Gerber) v Wiltshire Council* [2016] 1 WLR 2593, Sales LJ held, at [55]:

> "The developers were entitled to rely upon the planning permission as valid and lawful unless a court ruled otherwise, and none of the other steps taken by Mr Gerber, such as complaining about maladministration, changed that. As Richards J observed in *R(Gavin) v Haringey London Borough Counc*il [2004] 2 P & CR 13, para 69, "Applicants for planning permission are entitled to rely on the local planning authority to discharge the responsibilities placed upon it"; when they are granted planning permission they are entitled to rely upon it as a lawful grant of permission unless it is set aside by a court. What was required to change that position in this case was prompt legal action to challenge the lawfulness of the planning permission, if Mr Gerber wished to stop the development from proceeding."

50. The factors to be considered when determining an application to extend time "include many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest" per Lord Lloyd-Jones in *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5, [2019] 1 WLR 983, at [38].

Claimant's submissions

51. The Claimant accepted that there had been undue delay, but submitted that there was a good excuse for the failure to bring proceedings sooner, namely, the failure to consult her as a neighbour, and to post site notices on or near the Site, as required by law. The Council's errors were egregious and it would undermine the credibility of the planning system if their unlawfulness was not recognised by either quashing orders or declarations.

52. There was no need or warning for the Claimant and other residents to investigate the proposed development prior to the commencement of the construction works. Once the works began, residents did not think that the development would affect them as they were not aware of the application for planning permission. They acted appropriately in seeking to resolve matters with the Council and IP1 once they became aware of the planning permissions. Even if the claim had been brought shortly after the works started, IP1 would still be prejudiced as it had entered into a construction contract and in all likelihood IP1 would have continued with the works until the claim was determined, whenever that was.

53. Section 31(2A) and 3(D) of the Senior Courts Act 1981 did not apply as the Claimant and other neighbours would have made representations about the proposed

development, if they had been aware of it, in particular, addressing the overbearing impact and noise.

54. The Claimant did not accept that the 2021 Permission was now academic as the change of use still applied to the land, even though the buildings have been demolished.

55. The Claimant recognised that IP1 would be prejudiced by a quashing order. However, even once it was aware of the notification errors, it had knowingly undertaken the risk of proceeding with the construction, despite the request for a pause made by the Council and the MP. If declarations were made, instead of quashing orders, there would be no prejudice to IP1.

Council's and IP1's submissions

56. The Council and the IP submitted that the Claimant was years out of time to challenge the grants of planning permission, and there was no good reason for extending time. Any challenge to a grant of planning permission must be brought with "the greatest possible celerity" for the reasons set out in *Thornton Hall*, at [21].

57. Even though the Claimant did not receive a neighbour consultation letter, she had other opportunities to find out about the application for planning permission which was publicised by public notices, in the press, and on the Council website. The grant of planning permission was also publicised in the press and on the Council website.

58. The major building works on the Site, from May 2022 onwards, would have alerted the Claimant to the fact that some development was taking place and at any time she could have made enquiries via the Council website to ascertain the nature of the development and its potential impact on her home. From April 2023, there were large marketing boards erected on the Site boundary advertising the Site and showing a computer generated image of the proposed development, with the developer's contact details. Letters were sent to all residents of Hooke Close on a monthly basis from September 2023 by the building contractors to inform them of the progress of the works.

59. The Council and IP1 submitted that there would be very significant prejudice if the claim was allowed to proceed after such a lengthy delay because the grant of planning permission has been implemented and a distribution centre has been constructed at the Site.

60. The Council and IP1 submitted that the grounds of challenge were unmeritorious. Furthermore, the challenge to the 2021 Permission for change of use had become academic. It had been superseded by the demolition of the buildings in 2022 and the 2022 Permission. It was never implemented and so it expired after 3 years, in September 2024.

Conclusions

Summary

61. There has been extreme "undue delay" in filing the claim. The claim was filed on 11 April 2024, more than 2½ years after the September 2021 grant of planning permission, and more than 1½ years after the September 2022 grant of planning permission.

62. As the Court of Appeal held in *Thornton Hall*, at [21], where a grant of planning permission is challenged by a claim for judicial review "the importance of the claimant acting promptly is accentuated" and the claimant must proceed with the "greatest possible celerity" because "a landowner is entitled to rely on a planning permission granted by a local planning authority exercising its statutory functions in the public interest". Although the Court granted an extension of time in that case, it only did so on the basis that the circumstances were "most exceptional" and "wholly extraordinary".

63. In this case, there was good reason for the initial delay, because of the failure to undertake neighbour consultation, but once the works began, and the Claimant received notifications from IP1's contractors, the Claimant's delay in commencing proceedings was unjustified.

64. The grant of an extension of time to enable the Claimant to proceed with her claim would substantially prejudice IP1 who has just completed a major development for a new distribution centre at the Site, in reliance upon the grant of planning permission by the Council, and without any prior knowledge of the defects in the consultation process.

The failure to consult

65. The Claimant did not receive neighbour consultation letters in respect of the 2021 Permission or the 2022 Permission, which would have notified her of the applications, due to errors by the Council. The Council intended to consult neighbouring properties but mistakenly selected the wrong addresses.

66. There was no express representation to the Claimant that she would be consulted, and she was unaware of the Council's decision to consult neighbouring occupiers. The Council's statement of community involvement does not include a requirement or promise that neighbours will be consulted: it merely states that "consultation can take many forms, including letters or emails to neighbours, businesses, agencies or residents groups, site notices and advertisements in newspapers".

67. However, there was clear evidence that it was the Council's practice and policy to carry out neighbour consultations for major applications, which it failed to follow in this case. The Investigation Report confirmed, at section 5, that "the expected process to be applied for major applications in Corby" included consultation of neighbouring properties. The Head of Planning Management and Enforcement confirmed in her witness statement dated 21 August 2024 that there had been breaches of the usual consultation procedure for major applications in this case. The planning officer

informed Councillor Pengelly in an email dated 22 January 2024, that the Council usually carried out neighbour consultations.

68. In my view, the statutory notification requirements in the DMPO were largely complied with. The applications for planning permission were published in the local press, and on the Council's website, as required by article 15(4) and (7) of the DMPO.

69. By Article 15(4) of the DMPO, notice of the applications for planning permission has to be given either by a site display "on or near the land to which the application relates", or "by serving the notice on any adjoining owner or occupier". In either case, newspaper publication is also required.

70. In 2021, although it is common ground that there was a site display, there is a dispute as to where it was located. The Claimant and other local residents believe, based on a comparison of contemporaneous photographs, that it was displayed on a lamp post at a bus stop in Causeway Road which is not near the Site or Weetabix 2. I am not satisfied that the Claimant has correctly identified the location because the lamp post number is not visible on the photograph, and although the surrounding features (road, vegetation, bus stop) are similar, there are no distinctive landmarks. I observe that Causeway Road would be a surprising choice of location for a site notice because the Site and Weetabix 2 are situated in a different street some distance away. The Council does not agree with the Claimant's assessment of the location, but as it has not been able to produce any evidence as to the location of its site display, I consider that compliance by the Council with the site display requirements for the 2021 permission has not been demonstrated.

71. In 2022, the site display was attached to a lamp post at the eastern end of Earlstrees Road outside Weetabix 2. The lamp post number is partially visible on the photograph and so it has been possible to identify it. According to the Council, it is about 350 metres from the nearest point of the Site. According to the Claimant, it is about 483 metres from the Site. I assume that the Claimant has measured from a more distant part of the Site, which is large and has a substantial frontage on Earlstrees Road. I consider that both distances come within the term "near". Furthermore, the Weetabix 2 is the site next but one to the Site, in a straight line. The sites are readily visible from one to the other and are close enough to share the same postcode.

72. The Council submitted, and I accept, that greater latitude of distance is contemplated by the words "near the land" than "adjacent to the land" (see DMPO article 9A(8) and schedule 4 paragraph 1), and effect must be given to that difference: *Re Globespan Airways Ltd* [2012] EWCA Civ 1159, [2013] 1 WLR 1122 at [42].

73. The proposed development was described as at "Weetabix Ltd, Earlstree Road" which could apply to either of the Weetabix sites. As the sign was outside Weetabix 2, passers-by might reasonably assume that the proposed development was on the Weetabix 2 site, not the Site, but, on making enquiries, they would readily ascertain which site it related to.

74. Taking all these considerations into account, I conclude that the 2022 site display did meet the requirements of article 15(4) DMPO, and so it was not necessary to serve the notice on adjoining occupiers as well under the DMPO. Nonetheless, the Council was

also bound to comply with its policy/practice of consulting neighbours on major applications, which it failed to do.

75. As the Council decision-makers were unaware of the error in identifying the relevant neighbours, and did not intentionally decide to proceed without neighbour consultation, I find it difficult to classify their acts and omissions as irrational in the *Wednesbury* sense. In my view, the legal error is more aptly classified as a material error of fact on the part of the Council, as it granted planning permission in the mistaken belief that neighbour consultations had taken place, when they had not. In *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 [2004] QB 1044, Carnwath LJ, at [66], identified the requirements of a material mistake of fact leading to unfairness as (1) there must have been a mistake as to existing fact; (2) the facts must be uncontentious and objectively verifiable; (3) the appellant must not be responsible for the mistake; and (4) the mistake must have played a material, though not necessarily decisive, part in the tribunal's reasoning. I consider those criteria are met in this case.

The delay in issuing the claim

76. Although the 2021 and 2022 applications for planning permission and the grants of permission were publicised in the local press and on the Council's website, and on site displays, there is no evidence that the Claimant was aware of them. A neighbour consultation letter would have alerted her to the applications and enabled her to object within the time limit, if she wished to do so.

77. The Claimant's garden backs on to the northern boundary of the Site and so she would been aware in 2022 that development had commenced on the previously vacant site.

78. On 18 February 2022, notice of intended demolition was erected at the Site, and demolition commenced in May 2022. Due to the substantial nature of the buildings on site, with concrete reinforcement, very large pneumatic demolition machinery was used to dismantle the buildings from May to October 2022. According to Mr Wright, a Director of Pembury Real Estate Ltd, who was managing the project on behalf of IP1, the demolition would have been obvious to anyone living in the vicinity of the Site because of the noise. Indeed, it prompted an email from a resident in Hooke Close to the Council complaining about dust emissions and noise disturbance. The email was forwarded to IP1 on 19 May 2022 and IP1's contractors confirmed that the Site Manager would visit the resident.

79. On 16 September 2022, a resident of Hooke Close sent an online message to IP1's website enquiring about the nature of the proposed development and expressing concern about the impact of 24/7 operations on local residents. Mr Wright replied on 20 September 2022 giving details of the planning permission granted, the likely use, and the measures taken to manage noise emanating from the Site. He explained:

> "The planning permission obtained on the site is for an open industrial warehousing use and the proposal is for a single building….

> The planning permission does allow for 24-7 operation and it is likely that the building may be operated on that basis."

80. Large trees were removed from the Site in early 2023. Then in April 2023, IP1 erected two large marketing boards in prominent locations at the front of the Site which remained in place throughout. They included a computer-generated image of the new buildings and the orientation of the yards which gave residents an accurate indication of what was to be built, including its scale, location and relationship to Hooke Close. They also included the developer's contact details.

81. In September 2023, a letter was circulated by Mr M. Keating, of ADI, who were IP1's building contractors, by hand to the residents of Hooke Close, including the Claimant. Mr Keating introduced himself as the project manager "of the new build industrial scheme within the former Weetabix site on Earlstrees Road NN17 4AZ" and stated that works were due to commence on 25 September 2023 and would last around 47 weeks. It also included the following information:

> "As an overview, the works comprise the construction of one single storey warehouse/production unit complete with office accommodation. External site works include access roads, hard standings with lorry parking, trailers, and car parking spaces together with associated landscaping and drainage.
>
> The aim of this letter is to offer my reassurance that during the construction phase, I will be doing my utmost to ensure that the planned works do not impact on the neighbouring residential and business premises.
>
> As on all construction sites, the new development will inevitably bring a slight increase in traffic and noise, however, we have been liaising closely with the local authority amongst others post demolition and will be monitoring this daily on site to ensure any increase remains within the permitted parameters as agreed with the local authority.
>
> …
>
> As the scheme progresses over the coming months, I intend to circulate a regular letter drop to keep everybody in the surrounding area fully up to speed with our progress."

82. Mr Keating also provided his contact details in case there were any queries or concerns. It would have been straightforward for the Claimant to contact him to find out details of the new development.

83. Further letters were circulated by ADI to local residents to update them on the progress of works in October, November and December 2023. Each letter gave contact details as before and each referred in opening to "the new build industrial scheme within the former Weetabix site on Earlstrees Road NN17 4AZ".

84. The October 2023 letter referred to the facts that works to date have "mainly consisted of earthworks, RIC (Rapid Impact Compaction), RDC (Rolled Dynamic Compaction) and ground stabilization and we remain on program to complete in September 2024."

85. That letter also referred to "several complaints from the residents who've raised their concerns over the levels of vibration they're experiencing coming from the works on site" and explained that the cause was "the RIC machine which in essence is a large hammer dropped from height that compacts and strengthens the ground prior to construction works commencing". There was further explanation of the steps there were being taken including the sharing of monitoring results with "the Senior Environmental Health and Planning Officers who're involved with the scheme."

86. The November 2023 letter also referred to complaints and concerns raised:

> "During the period, I've received several complaints from the residents who've raised their concerns over the levels of vibration they're experiencing coming from the works on site and I wanted to address this within.
>
> The activity that is causing the vibration is generated from the RIC machine which in essence is a large hammer dropped from height that compacts and strengthens the ground prior to construction works commencing.
>
> Several concerns have been raised around the impact this could potentially have on a property. As a bit of background, we undertook some trial testing with the machine prior to works commencing to establish the level of noise and vibration the works would be likely to generate, and we established that the proposal we had in place would've exceeded the permitted parameters which we're governed by. The compaction methods were then redesigned to bring us way below those parameters. We continue to monitor the noise and vibration levels daily and, in the period, have placed the equipment directly outside of concerned residents' properties to offer some reassurance. The monitoring results have been shared with the Senior Environmental Health and Planning Officers who're involved with the scheme. Whilst I understand the works may be disruptive and will naturally generate concern, the data has been reviewed by the relevant authorities who've confirmed that the monitoring data is acceptable, and the works pose no threat to the structural integrity of the properties adjacent to the site."

87. On 17 November 2023, the local newspaper published a news article about the commencement of the construction work, which included the computer-generated image displayed on the marketing boards.

88. The December 2023 letter referred to the fact that the works:

> "mainly consisted of earthworks, RIC (Rapid Impact Compaction), RDC (Rolled Dynamic Compaction) and ground stabilization across the building footprint and we remain on program to complete in September 2024."

89. It also added:

> "In the last period, I received several concerns from residents regarding the levels of vibration they'd experienced coming from the works on site which hopefully I addressed in my previous update and further communications.
>
> You'll be pleased to learn that the work with the RIC machine is drawing to a close and we're on target to complete in the run up to Christmas. Again, please accept my apologies for any inconvenience this may have caused.
>
> To make you all aware, the next stage of the build is the erection of the steel frame which is due to commence prior to Christmas and may run into March 2024."

90. The letter circulated in February 2024 updated residents that:

> "In the period, the construction works consisted of earthworks, RIC (Rapid Impact Compaction), RDC (Rolled Dynamic Compaction) and ground stabilization across the building footprint.
>
> Precast retaining walls, internal lift shaft and staircases have been erected in the office mezzanine area on the western side of the site to facilitate the installation of the floor decks which will take place over the next couple of weeks.
>
> The steel frame erection has progressed at pace and will be complete in early February to facilitate the roofing and cladding of the frame which is likely to take circa 10 weeks.
>
> The groundwork and drainage is scheduled to commence in early February and we remain on programme to complete in September 2024".

91. The letter circulated in March 2024 informed residents:

> "In the period, the earth works which have consisted of RIC (Rapid Impact Compaction), RDC (Rolled Dynamic Compaction) and ground stabilization across the site footprint have now completed and our subcontractor DGS are in the process of demobilizing from site.
>
> The floor decks to the office mezzanines have been installed and we're aiming to pour the concrete floors this month.

> The steel frame erection progressed at pace and is now complete. The roofing and cladding panels are in the process of being installed which is likely to take circa 12 weeks.
>
> The groundwork and drainage connections commenced mid-February and we remain on programme to complete the scheme in September 2024."

92. Numerous complaints were received from residents about the noise and vibration from the construction works from October to December 2023 and residents also contacted the Council's planning enforcement team in October 2023 with regard to those complaints. Complaints were also received via the "Considerate Contractor's Scheme" to which ADI subscribed.

93. In her witness statement, the Claimant explained her position as follows:

> "12. I was aware that the old warehouse was being demolished in the spring of 2022 but I had assumed that an application for new housing would be made at some point later down the line because Corby has a surplus of warehousing as it is; one had recently burnt down in the area. I had not heard anything about the development so I didn't think that any replacement would have an adverse effect on my property.
>
> 13. I was aware of the ground works commencing in late September 2023 and the noise and vibrations affecting my property. Again, I did not think that any development would be affecting my property as I wasn't aware of any notice of a planning application and I hadn't been consulted about any development proposals.
>
> 14. I had been going to work and coming back in the dark and hadn't been going into my garden because it was cold and dark. It was only on 16 January 2024 that I came back from work to see a large framework being erected directly on to the back of my garden. I started posting on Facebook asking whether anybody knew anything about what was going on. Other residents responded saying they hadn't heard anything about the development.
>
> 15. By 18 January it was clearer that a large building was being constructed and by the morning of 19 January the steel structure had been erected right across the length of my garden boundary. Horrified, I went onto the Council's website and found the 2022 planning permission…. I straightaway emailed Farjana Mazumder at the Council …. "

94. Ms Mazumder, the Council's Interim Principal Planning Officer, replied promptly and explained the Council's error in failing to consult the neighbours in her email of 22 January 2024 to Councillor Pengelly, which was copied to the Claimant and others, including the local MP.

95. Councillor Pengelly, who held a meeting with residents on 18 January 2024, emailed IP1 on 29 January 2024 asking for a meeting to discuss the development. A meeting took place in the Claimant's house on 6 February 2024 with residents, Councillor Pengelly and Mr Wright for IP1 in which issues concerning the development were discussed. A public meeting was held on 2 March 2024, where a legal challenge was discussed.

96. Tom Pursglove MP took the matter up with the Council on behalf of the residents. In a lengthy letter dated 6 March 2024, the Leader of the Council referred to the Investigation Report which was due to be presented to the Council on 25 April 2024 and the planning enforcement work in the light of the complaints from residents about the impact of the works. The Leader stated:

> "In relation to your fifth query, you raised whether the council has asked the developer to pause their works on site, whilst any planning enforcement activity is assessed, and if required, acted upon, or whilst the council reviews its position around legal advice on next steps. I can confirm that discussions have taken place with the developers and architects as recently as last Friday in which they were asked to pause the works for a period of time. They stated that whilst they were aware of the concerns being raised there were no plans to pause the works.
>
> Finally, you raised that residents overwhelmingly expressed the view that North Northamptonshire Council ought to call a judicial review on itself to allow for a proper judicial process to decide as to whether a safe and legal planning decision has been made on this site. We have sought legal advice on our options and have carefully considered what action we should take. With the limitations of a Judicial Review, as well as our desire to find the underlying cause of this issue, we do not believe a Judicial Review is the best course of action. As Leader, I am keen to see step change in the service we deliver which having received advice a Judicial Review will not provide. "

97. The Claimant instructed solicitors on 12 March 2024, but the claim was not issued for another month, on 11 April 2024, after pre-action protocol letters were exchanged. The Claimant did not apply for urgent consideration or expedition in the claim form.

98. By her own admission, the Claimant was well aware of the demolition works in 2022 and the ground work for the new building which began in September 2023. She does not mention the letters from the ADI Project Manager, from September 2023 onwards, which were delivered to all the residents in Hooke Close, and which described the development as a new industrial building. Nor does she mention the large signs which have been at the front of the Site since April 2023, advertising the development for letting as distribution centre, with a computer-generated image of the new building, extending back to Hooke Close. The image shows that the proposed new building is clearly larger than the Weetabix factory buildings. On the balance of probabilities, I consider that she was aware of the letters and the signs.

99. The Claimant is a competent professional person (a senior recruitment consultant) and, as she demonstrated in January 2024, she was capable of looking at the Council's website to check the details of the proposed development and contacting the planning officer to complain. Her reason for not doing so sooner was that she did not anticipate that the new building, constructed in place of the previous factory building behind her garden, would affect her, and it would probably be housing. However, there was no basis for that assumption, and she took a considerable risk by not checking the details of the development sooner. She was living next to an Established Industrial Estate, which is designated for employment use, not housing. There is a very large warehouse at the eastern end of Hooke Close, and another one nearby. Therefore it was likely that the new development would also be a sizeable industrial building.

100. In *Thornton Hall*, the Court held that a claimant challenging a grant of planning permission must proceed with the "greatest possible celerity" (at [21]). In my judgment, the Claimant has not done so. I consider that, by October 2023 at the latest, the Claimant could and should reasonably have taken the steps which she eventually took in January 2024 to check the Council website and contact the Planning Department and IP1, and then to instruct solicitors and file her claim. With a direction for expedition, the claim could have been determined before the end of 2023.

101. Even once the Claimant was aware of the details of the planning permission, on or about 16 January 2024, she unreasonably delayed for nearly 3 months before filing her claim for judicial review. Understandably, the residents and the local Councillor and MP were hoping that IP1 and/or the Council would offer a remedy or compensation, but the Claimant could and should have filed a claim on a protective basis, whilst continuing their negotiations with IP1 and the Council. Furthermore she did not apply to the Court for expedition.

The prospects of success in the claim

102. The prospects of success in the claim are a factor to take into account on an application for an extension of time: see *Maharaj*, at [38].

The 2021 Permission

103. Permission to apply for judicial review will generally not be granted for academic challenges: *R v Home Secretary ex p. Salem* [1999] 1 AC 450, per Lord Slynn at 456-7 and *R (L) v Devon CC* [2021] ELR 420, per Elisabeth Laing LJ at [38], [50] and [64].

104. I accept the submission of the Council and IP1 that the challenge to the 2021 Permission for change of use is academic and permission to apply for judicial review should be refused, even if an extension of time were to be granted. In practical terms, it was superseded by the demolition of the buildings in 2022 and the 2022 Permission. It was never implemented and so it expired after 3 years, in September 2024.

The 2022 Permission

Grounds (i) and (ii)

105. On Grounds (i) and (ii), I have found that, although the Council complied with the requirements of article 15(4) DMPO, it was in breach of its policy/practice of consulting neighbours on major applications (Judgment/74). Also, the Council made a material error of fact as it granted planning permission in the mistaken belief that neighbour consultation had taken place, when it had not (Judgment/75).

Ground (iii)

106. The Claimant submitted in Ground (iii) that the Council failed to take into account an obviously material consideration, namely, the effect of a building which was much taller, wider and for many houses, closer than the previous building, on the living conditions of local residents, or provide any reasoning on it.

107. Ms Hannah Bizoumis, IP1's Planning Consultant, summarised in her witness statement the proposals that were set out in the Planning Statement submitted to the Council:

> "2.14
>
> a) The Site is located within the Earlstrees Industrial Estate which is identified within the Part 2 Local Plan as an Established Industrial Estate;
>
> b) Development at the Site would fulfil the economic role of sustainable development in accordance with the NPPF (Paras 8 and 11) and would contribute to building a strong, responsive and competitive economy, by helping to ensure that sufficient land is available to support growth in accordance with the strategic vision and objectives of the Local Plan;
>
> c) Policy 9 Part 2 Local Plan relates to employment uses in Established Industrial Estates and states that "proposals for employment use (under Class …. B2 and B8) and for modernising and/or enhancing the physical environment and infrastructure will be supported'';
>
> d) Policy 22 of the Joint Core Strategy seeks to safeguard existing and committed employment sites. Enhancements are sought through refurbishment and regeneration of previously developed land;
>
> a) Policy 24 of the JCS relates to logistics and states that proposals for large scale strategic distribution will be supported where they facilitate the delivery of a mix of jobs and are of the highest viable standards of design and sustainability;

b) The proposals would wholly accord with the criteria of Policy 24 on the following grounds:

i. 'Medium-sized' sites, such as the application Site, are better suited to meet the specification needs of larger buildings because they make a more efficient use of the land available;

ii. The Site has good access to the strategic road network;

iii. As forming part of an Established Industrial Estate and given the former use of the Site, it retains good access to local labour supply and is accessible to the local workforce through a variety of transport modes;

iv. The proposals will achieve the highest possible standards of design and environmental performance;

v. The previous occupiers of the Site operated on an unrestricted 24-hour basis. The acceptability of the Site to operate on a 24-hour basis in this location has already therefore been accepted in principle by virtue of the previous occupiers;

vi. The application would be supported by a Transport Assessment to demonstrate that there will be no detrimental impact on the surrounding highway network;

vii. The proposed service yard area will fully meet the operational requirements of the building and requirements of the HGV's that would utilise the yard area.

c) To the northern boundary the separation distances to the residential properties at the rear of the Site have been increased when compared to the previous buildings. The previous distance between existing buildings at the rear and the residential buildings at its closest point was 10m and furthest point was 26.5m. The proposed building will be positioned 18.2m away from residential properties at its closest and 31.4m at its furthest;

d) By setting the building further away from the northern boundary the proposals are able to introduce a substantial landscape buffer with a mix of evergreen species which will help to screen the building from the rear residential properties. This is an improvement over the existing scenario;

e) An overshadowing exercise has been undertaken. This demonstrates that the gardens at the rear of the Site, being south facing, will continue to have sunlight and the proposal including the landscaping does not impact on the gardens amenity and the scheme does not overshadow or create a towering effect over the properties. The section submitted

within the landscape pack illustrates a view from the residential properties to the building – which shows that the proposed landscaping will provide effective screening and indeed an improved outlook for the residential properties compared to the previous buildings on the Site;

f) The scale and massing of the proposal respond to modern occupier requirements for buildings which are designed specifically for the purpose of accommodating modern industrial processes, and for the storage of goods and products. The proposals will provide a density and volume of development which will enable the efficient operation of the Site, whilst responding to its context and setting;

g) The scale and massing of the proposed building is considered to be appropriate within the local context, evidenced in the Townscape & Visual Impact Assessment. The design and proposed material finish of the building is considered to be acceptable and appropriate given the local context and industrial character of the area to the immediate east. The introduction of new, modern materials and design is expected to be a material enhancement to the local environment;

h) A Townscape and Visual Appraisal (TVA) has been prepared by Mood Landscape which includes a set of verified views from a series of views around the Site. These photographs on which the proposal is shown were taken during winter months. The proposed landscaping is shown on these photographs taken in the summer months, so that it can be clearly seen how the proposed landscaping will look when grown;

i) The TVA sets out a context analysis of the surroundings and confirms that the setting and character of the surroundings is predominantly industrial in nature with pockets of residential to the north and south of the Site. Nine viewpoints have been chosen – the views presented in the TVA show that the setting back of the building from Earlstrees Road and the inclusion of a fully landscaped acoustic fence will create character and interest to this frontage. It offers a significantly improved frontage over and above the existing Site arrangement and can be seen as a benefit of the proposals;

j) The TVA concludes that due to the context of the surroundings, character of the area and nature of the existing industrial Site, the extent of townscape and visual effects of the proposals are considered to be limited. The proposals are consistent with the surrounding character and while the proposals will have an effect, the effect is not considered to be harmful;

> k) The Site forms part of a wider designated industrial estate. The principle of the proposed development to provide new industrial employment uses is considered to be acceptable given the Sites location within an Established Industrial Estate. The Site comprises previously developed land and is in a sustainable location to support the proposed development. The proposals will generate new jobs for the local economy and support economic growth on currently vacant employment land."

108. Mr Wright explained in his witness statement, at paragraph 2.5, that the internal height of the building was crucial to meet modern warehousing functions. The taller the building, the more stock can be stored. A building of approximately 150-200,000 square feet would ideally have 15 metres clear internal height to maximise efficiency, however a lower height of 12.5 metres clear internal is still acceptable. If the building was to have a less than 12.5 metres clear internal height it would fall below industry standards and would be unacceptable to the market.

109. It is apparent from Ms Bizoumis' evidence that the Council was made well aware of the height, size and location of the proposed building, and the likely impact on the properties in Hooke Close. It was significant that the proposed development was located in an Established Industrial Estate. The separation distances to the residential properties in Hooke Close had been increased in comparison to the Weetabix buildings (sub-paragraphs (c) to (e)) and a landscape buffer would be introduced. An overshadowing exercise had been undertaken (sub-paragraph (e)). The scale and massing of the proposal responded to modern occupier requirements (sub-paragraph (f)) and were appropriate in the context of an industrial estate (sub-paragraphs (g), (i) and (j)).

110. The Council had considered the proposed development in a pre-application procedure. Following a site visit, the planning officer expressed concerns about the new building's "overbearing and towering impact along the northern boundary due to the size, massing and height of the proposed building which appears prominent when viewed from the rear gardens of these residential buildings along the northern boundary (Hooke Close)" (see the witness statement of Ms Bizoumis, at paragraph 3.17). Other concerns about the size and design of the building were also raised.

111. As a result of the Council's review of the proposals, the planning application was amended to address the concerns raised. Ms Bizoumis summarised the amendments made, at paragraph 3.21 of her witness statement:

> "b) The overall height of the building was reduced thereby providing an internal haunch height of 12.5 metres to the haunch (reduced from 15 metres). The max building height to the apex was now proposed at 15.75m above the finished floor level;
>
> c) The approximate apex of the building was 2.5 metres lower than presented as part of the pre-application submission;

> d) A full landscape scheme was drawn and provided having consideration to the residential amenity to the rear (north) of the building;
>
> e) A full Townscape Visual Impact Assessment was produced to illustrate the design in the context of its surroundings…."

112. I accept that the planning officer, in OR 22, did not address these issues when she addressed residential amenity in the section headed "landscape and visual impact", and they are not reflected in the formal reasons for the grant of permission. However, Ms Bizoumis's evidence, and the supporting documentation to which she refers demonstrates, beyond argument, that the Council did take into account the impact of the building on the residents of Hooke Close at pre-application stage, and that adjustments were made to the proposals accordingly. Therefore, even if an extension of time were granted, I do not consider that this ground of challenge has a realistic prospect of success.

Ground (iv)

113. The Claimant submitted in Ground (iv) that the Council unlawfully imposed lax noise conditions by (1) failing to take into account or control the total noise generation from the Site; and (2) imposing a noise limit which was higher than the Council's EHO's advice, based on an erroneous reliance on the 2021 Permission for change of use which had been unlawfully granted.

114. Weetabix was permitted to operate its factory at the Site 24/7, with no noise mitigation measures.

115. Condition 3 in the 2021 Permission provided:

> "3. Noise generated by activities and operations on the site shall not exceed +5dB rating level as determined at any noise sensitive receptor in accordance with British Standard 4142:2014 Rating industrial noise affecting mixed residential and industrial areas (or any superseding revision)."

116. The noise conditions in the 2022 Permission were more extensive:

> "5. The cumulative rating level, determined at any noise sensitive receptor, (determined using the guidance of BS 4142:2014 Methods for rating and assessing industrial and commercial sound) (or any amendments or modifications) of noise emitted by activities and operations on the site shall not exceed +5dB above the existing measured background noise level LA90,T during the day and night time period."
>
> "7. Prior to occupation of the development, a scheme for the control of noise and vibration of any fixed plant (including ventilation, refrigeration and air conditioning) or ducting system to be used in pursuance of this permission shall be submitted to and approved in writing by the Local Planning

> Authority. The development shall be carried out in accordance with the approved details. The rating level of the noise emitted from any fixed plant shall be at least 5 dB below existing background noise levels at the nearest sensitive receptor and shall have no significant tonal component within any 1/3 Octave Band Level during the operation of the system. Where any 1/3 octave band level is 5 dB or above the adjacent band levels the tone is deemed to be significant."

117. In my view, the complaint that the Council failed to take into account or control the total noise generation is contrary to the evidence. IP1 submitted a Noise Impact Assessment prepared by Venta Acoustics. Its purpose was to assess "the potential noise impact of these proposals on the surrounding residential dwellings...". It concluded that "noise from activities on site are expected to have a low to marginal impact, with suitable mitigation measures in place". The planning officer in OR 22 referred to the EHO's review of Venta's report. OR 22 also referred to Venta's response of 15 July 2022. Venta provided a supplementary note dated 7 September 2022 setting out the reasons why a reduction of the noise limit in draft condition 5 was unworkable.

118. I accept the Council's submission that the fact that the Council imposed a noise limit (+5dB above background noise level) in preference to the noise limit advised by the EHO (+3dB above background noise level) did not mean the Council failed to take the EHO's advice into account or that it reached an irrational decision or that it had no evidence for its decision. The Council decided to impose Conditions 5 and 8, in the exercise of its planning judgment, and the Claimant's complaint is essentially a merits challenge. Furthermore, the Council was entitled to take into account the conditions attached to the 2021 Permission, and it would have been wrong for the Council to treat it as unlawful as it had not been revoked or quashed. Therefore, even if an extension of time were granted, I do not consider that this ground of challenge has a realistic prospect of success.

119. Therefore I consider that the Claimant's prospects of success in this claim are generally poor, but she has a good prospect of success on Ground (i) in respect of the 2022 Permission (failure to consult).

Prejudice to IP1

120. After purchasing the Site in February 2022, IP1 entered into a contract with ADI for the demolition of the Weetabix buildings in 2022. IP1 initially entered into a construction contract with ADI under a letter of intent dated 30 August 2023. IP1 entered into the full contract for the construction of the development on 8 November 2023. The contractual completion date was 9 September 2024. By the date of the hearing before me, the development was very close to completion, with only some landscaping and highway access works outstanding.

121. IP1 submits that, if it had been aware of the Claimant's claim prior to 8 November 2023, it could have postponed entering into the full contract while the matter was investigated.

122. By March 2024, when the Council asked the IP1 to pause construction, and the Claimant sent her pre-action letter, the construction was well-advanced (see the letters from ADI to residents in February and March 2024 at Judgment/90 - 91 above). To have paused the carrying out of works under the contract with ADI would have exposed IP1 to financial claims from ADI. ADI could have terminated the contract which would have meant that IP1 would have to reprocure the design and construction of the property, and incurred significant losses.

123. In *R (Gavin) v LB Haringey* [2003] EWHC 2591 (Admin), [2003] 1 WLR 2389, Richards J. declined to quash a planning permission, pursuant to section 31(6) Senior Courts Act 1981, because of the prejudice to a contractor faced with a £2 million loss for work carried out in pursuance of an apparently valid planning permission. Instead, he granted declaratory relief. He said, at [59]:

> "….. I take the view that it was reasonable for Wolseley not to stop the works, even though it can be characterised as having taken a calculated commercial risk in proceeding as it did. It had an apparently valid planning permission. The time limit for a legal challenge to that permission had expired well over two years previously. It had had one false start in August 2002 with the contractor which went into liquidation. It had then entered into a legal commitment with Brennan on April 1, 2003 which, whatever its precise analysis, would expose it to a substantial claim if the works were stopped. In those circumstances I do not think that a complaint about the validity of the permission or the threat of proceedings to challenge it were sufficient to make it unreasonable to continue with the works. No doubt contractors are faced not infrequently with complaints about developments that do not mature into actual challenges. In the present case, moreover, the claimant's own explanation for the time spent in April and May before a claim for judicial review was lodged is that, especially in view of the lapse of time since the grant of planning permission, it was necessary to carry out detailed investigations and give careful consideration to whether a claim was justified. Wolseley cannot fairly be criticised for carrying on with the works while the claimant was considering his position."

124. Similar considerations apply in this case. IP1 was placed in an unenviable position, through no fault of its own, with a choice between being sued by its contractors if it ceased work, or continuing work with the risk that the planning permission might be quashed if the Claimant succeeded in its claim for judicial review. In my view, it was not unreasonable for IP1 to decide to proceed with the works, in all the circumstances.

125. IP1 will be prejudiced by the grant of an extension of time, followed by a grant of permission to apply for judicial review, as it will be exposed to the risk of a successful claim by the Claimant to quash the planning permission, leaving it with a development built in breach of planning controls, and liable to demolition unless there is a retrospective grant of planning permission by the Council. The Claimant relies on the fact that declaratory relief would not prejudice IP1, but nonetheless the Claimant still pursues a quashing order as the primary relief sought.

Prejudice to the Claimant

126. If an extension of time is refused, the claim cannot proceed, and the Claimant will be unable to apply to quash the grant of planning permission or obtain declaratory relief. The non-material amendment application, which seeks permission for a small increase in the floor and height of the building, will be determined by the Council after these proceedings are completed. The Claimant will be left feeling aggrieved by the failure to consult her about the significant increase in size of the industrial building at the end of her garden.

127. The Claimant has a remedy through the Local Government and Social Care Ombudsman whose website confirms that a failure to correctly consult neighbours is a matter upon which it may adjudicate. The Claimant would be able to rely upon the Council's Investigation Report setting out the failings in the consultation procedures. The Ombudsman Service would also carry out its own investigation.

Public interest

128. There is a strong public interest in the competent and lawful processing of planning applications by local planning authorities. This Council has fallen well below the standard to be expected. However, its willingness to investigate its failings thoroughly in an Investigation Report, and its decision to introduce root and branch changes to its Planning Department, are encouraging. If the Claimant and other residents make complaints to the Ombudsman, further recommendations for improving the performance of the Council's Planning Department may be made.

129. Although planning decisions affect the property rights of individuals, a planning decision-maker must also consider the rights and interests of the public, as expressed in planning policy. As Lord Hoffmann explained in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, at [69] and [74], "[i]t is the exercise of a power delegated by the people as a whole to decide what the public interest requires".

130. In this case, I consider that there is a public interest in realising the public benefits to the local economy which IP1's development will provide, and in redeveloping an industrial site which has been empty since 2019.

Final conclusions

131. In my judgment, the Claimant has a good reason for the initial delay in commencing proceedings because of the Council's failure to send neighbour consultation letters to her. However, she has not demonstrated a good reason for her subsequent delay, after the ground works commenced in September 2023 and the Project Manager for IP1's contractors began to write to the residents. A reasonable landowner would have checked the Council website for details of the proposed development, or asked the Project Manager for more information, by October 2023 at the latest. In this case, the Claimant failed to act with "the greatest possible celerity" (*Thornton Hall* at [21]). Even once the Claimant was aware of the details of the proposed development, she unreasonably delayed for nearly 3 months before filing her claim for judicial review.

132. In deciding whether there is good reason to extend time, I have also taken into account the factors identified in *Maharaj* at [38], namely the importance of the issues, the prospects of success in the claim, the prejudice to the parties, and the public interest. Overall, my conclusion is that the Claimant has not succeeded in showing good reason to extend time. Therefore the application to extend time is refused and the application for permission to apply for judicial review is refused.

133. In my judgment, the Claimant is liable to pay the Defendant's costs (subject to the costs limit of £5,000) as the Defendant has successfully resisted the application for an extension of time and for permission to apply for judicial review.