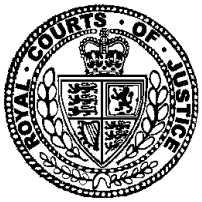

Neutral Citation Number: [2024] EWHC 185 (Admin)

Case No: AC-2023-LON-002676

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 February 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

The KING

on the application of

(1) CHRISTINE PRATT **(2) THE SANDY PARK FARM PARTNERSHIP**	**Claimants**
- and -	
EXETER CITY COUNCIL	**Defendant**
(1) WADDINGTON PARK LIMITED **(2) DEVON COUNTY COUNCIL**	**Interested Parties**

- -
- -

Richard Kimblin KC (instructed by **DLA Piper UK LLP**) for the **Claimants**
Charles Banner KC (instructed by **Ashfords LLP**) for the **First Interested Party**
The Defendant and the Second Interested Party did not appear and were not represented

Hearing date: 16 January 2024

- -

Approved Judgment

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

.....

Mrs Justice Lang :

1. The Claimants seek judicial review of the Defendant's decision, dated 31 July 2023, to grant the First Interested Party ("IP1") outline planning permission for the demolition of existing buildings and structures, and the phased development of up to 350 dwellings, associated infrastructure and open space at St Bridget Nursery, Old Rydon Lane, Exeter, Devon EX2 7JY ("the Site"). All matters were reserved, apart from access.

2. The First Claimant ("Mrs Pratt") jointly owns and resides at Newcourt Lodge, Old Rydon Lane, Exeter, Devon EC2 7JU. The Second Claimant ("the Partnership"), conducts its property management and farming business from Sandy Park Farm, Old Rydon Lane, Exeter. Mrs Pratt is not involved in the Partnership, but she is related to some of the partners. The Partnership has beneficial ownership of land known as 'Wynards and Poultons', which is to the north east of the Site. Potentially it would form part of the alternative access to and from the Site, as envisaged by the Council's Newcourt Masterplan, via an existing spur to the Ikea roundabout on Newcourt Way.

3. In granting planning permission, the Defendant approved IP1's proposed access scheme which included restrictions on the vehicular use of Old Rydon Lane (partial closure and introduction of a one way street heading east which prevents Mrs Pratt from turning left out of her drive) and for traffic to and from the proposed development to travel along Old Rydon Lane.

4. The Second Interested Party ("Devon CC") is the highways authority for the area. The Defendant placed reliance upon Devon CC's consultation response, which assessed IP1's access scheme, and did not raise any objections to it.

5. The grounds of challenge in this claim may be summarised as follows:

   i) **Ground 1**. The Defendant failed to assess the impacts of IP1's access scheme on the existing residents of Old Rydon Lane.

   ii) **Ground 2**. The planning officer gave materially misleading advice to the Defendant's Planning Committee on the feasibility of implementing the Masterplan access scheme, and failed to discharge its *Tameside* duty to investigate whether the Wynards and Poultons land was available for sale, and if so, on what terms.

   iii) **Ground 3.** The planning officer correctly advised that a Traffic Regulation Order ("TRO") "would be required for all the proposed works on Old Rydon Lane, and a condition would be required to ensure for these to be secured prior to commencement on site". However the Defendant failed to secure the essential underpinning to secure this, either in the planning conditions or the section 106 Town and Country Planning Act 1990 ("TCPA 1990") agreement.

   iv) **Ground 4**. In the alternative, if it is found that a TRO was not necessary prior to commencement of development, then the payment of £15,000 by IP1 to Devon CC, as agreed in the section 106 TCPA 1990 agreement, was not for a planning purpose and did not relate fairly and reasonably to the development.

6. The Defendant filed an Acknowledgment of Service stating that it did not intend to contest the claim. In a subsequent consent order, it accepted that "the decision under challenge was unlawful on Grounds 2 and 3 for the reasons set out in the Claimants' Statement of Facts and Grounds …. and consents to judgment on that basis". It did not concede Grounds 1 and 4. It accepted that the grant of planning permission should be quashed.

7. IP1 contests the claim on Grounds 1 and 2. IP1 has cured the defect identified in Ground 3 by entering into a unilateral undertaking by deed, under section 106 TCPA 1990, in which it covenants with the County Council and the City Council not to commence development, or permit the commencement of development until a TRO, in the terms defined, has been made.

8. Devon CC has stated by letter that it does not wish to participate in the judicial review proceedings.

9. The effect of the concessions made by the Defendant and IP1 is that Grounds 3 and 4 have fallen away, and only Grounds 1 and 2 need to be determined by this Court.

10. I granted permission to apply for judicial review on the papers on 27 October 2023. Mr Justice Holgate designated the claim as significant.

Planning history

11. The Site is a 13.2 ha parcel of land in the Newcourt area of Exeter. It has been used for horticulture and as a garden centre.

12. The Site is part of the Newcourt Strategic Allocation. It was allocated under Policy KP8 in the Local Plan First Review (2005) and Policy CP19 of the Core Strategy. The history is set out in the witness statement of Mr Rupert Pratt on behalf of the Partnership, which demonstrates that for about 30 years the Defendant's approach has consistently been that development of the Newcourt area was to be accessed from the A379 and Topsham Road, to the north of the Site.

13. The Newcourt Masterplan, dated November 2010, was adopted by the Defendant as a development management document to guide the development of 3,500 dwellings, and 16 hectares of employment land. The Masterplan stated:

> "The primary highway access to the Newcourt Masterplan area will be the new spine road that links the A379 with Topsham Road …. Old Rydon Road will be managed with the aim of avoiding additional traffic using this route to access the Masterplan area and to ensure that it does not become attractive as a through route for private vehicle traffic …"

14. The Partnership agreed with a developer, Dukeminster, to develop part of the land known as Wynards and Poultons, together with another stakeholder's land which would generate approximately 750 dwellings. It was also agreed that the spine road (i.e. Newcourt Way) would be constructed over Wynards and Poultons land, together with a roundabout (now known as the Ikea roundabout). An application for planning

permission for the highway development was approved in October 2007. It was designed, at the request of the Defendant and Devon CC, specifically to accommodate the future traffic from allocated sites in the Newcourt area (including this Site) by widening Newcourt Way from the Ikea roundabout to the A379 junction, and providing a spur for future access to the Ikea roundabout for development from the west, including this Site. The Partnership retained ownership of a portion of Wynards and Poultons land over which the access to the Site would be built. The highway development was funded and constructed by Dukeminster, the Partnership and the other stakeholder.

15. On 25 May 2021, IP1 submitted a scoping report to Devon CC which referred to the Masterplan and its intention that traffic would be routed via Newcourt Way. It asserted that there had been significant changes since then, and due to third party land (i.e. the Wynards and Poultons land), the connection to the Ikea roundabout was not available. Evidence of the exchanges between IP1 and Devon CC indicates that an access route via Old Rydon Road was preferred because it would "remove any ransom" (i.e. a sum payable for the Wynards and Poultons land).

16. On 7 April 2022, IP1's application for planning permission was registered by the Defendant. It was accompanied by a Transport Assessment ("TA") dated 31 January 2022. It addressed existing conditions, policy, travel demand, impact on the network and mitigation measures. It concluded that the proposed development would not have a severe impact on the local highway network. The access scheme was via Old Rydon Lane, and included closure of the highway and introduction of a one way system, as well as a cycle lane. The TA did not address the impact of these significant changes on the existing residents of Old Rydon Lane. Currently, the only restriction in Old Rydon Lane is at the eastern end, where there is no entry from Newcourt Way and two way traffic is prohibited over a short distance.

17. The Claimants objected to IP1's proposed access scheme, through their planning agent, McMurdo Land Planning & Development Ltd ("McMurdo"). On behalf of Mrs Pratt, it was submitted that there would be unacceptable adverse impacts on her amenity. She would no longer be able to turn left out of her drive and travel west along Old Rydon Lane and there would be significant increases in vehicles, pedestrians and cyclists passing her driveway.

18. On behalf of both Claimants, McMurdo pointed out that IP1's statement in the scoping report was incorrect as significant changes had not taken place. The Masterplan had been implemented by delivery of the spine road connecting Topsham Road to the A379. Furthermore, no contact had been made by IP1 or the landowners of the Site to the Partnership to discuss the availability of the Wynards and Poultons land. McMurdo set out numerous reasons why the Masterplan access scheme was preferable to IP1's access scheme.

19. Devon CC was a statutory consultee, in its capacity as highways authority, and its consultation response was dated 2 November 2022. It assessed "Trip Generation", "Vehicular Access" and "Traffic Regulation Orders". Its focus was on the questions posed in paragraph 111 of the National Planning Policy Framework ("the Framework"), namely, whether the residual cumulative impacts on the road network would be severe, or have an unacceptable impact on highway safety. It accepted IP1's assessment and concluded that "the access for the proposed development would not represent a severe highway safety concern as outlined within the NPPF, ergo it would be unreasonable for

the Highway Authority to raise an objection to the planning application". However, it did not consider the impacts of the proposed access scheme on the existing residents of Old Rydon Lane.

20. In the consultation response, Devon CC referred to its proposed TROs, introducing *inter alia* a one way street and a contraflow cycle lane in a section of Old Rydon Lane, in support of a different planning application (Holland Park), in January 2022. Following objections, the proposed TROs have not been made by Devon CC, and they expired on 20 January 2024. In the event, planning permission was granted for the Holland Park development without the need for the traffic measures proposed in the TROs. Devon CC observed that if planning permission was granted for this application, the TROs would have to be re-visited.

21. The Officer's Report ("OR") for the Planning Committee's meeting on 8 February 2023, summarised the "Access and Impact on Local Highways" as follows:

> "It is proposed to create a new main road through the development, closing off part of Old Rydon Lane for through traffic. Access will be from the west adjacent to Rydon Lane, with egress on the west and through a one-way highway to the east. There will be a number of secondary roads to access Old Rydon Lane and existing dwellings.
>
> The submitted Transport Assessment confirms that the level of vehicle movements can be accommodated on the existing road network. The Local Highway Authority confirmed that the proposed access points will not generate significant safety concerns and are acceptable.
>
> There is the potential for a future connection through third-party land to the north-east and this will be a requirement of the final design, alongside a number of cycle and pedestrian links to the north of the site to ensure suitable permeability for all modes of transport.
>
> Overall, the access is considered acceptable and does not generate any in-principle objections."

22. IP1's TA was considered. It indicated a total of 158 and 153 two way trips in the AM and PM peak hours respectively. It estimated that there would be an additional 137 and 88 two way trips in the AM and PM peak, which would average one additional vehicle movement every 30 seconds in the AM peak.

23. The OR summarised the 67 objections in a list which included the concerns raised by residents and the Claimants, but the impact on the amenity of the residents was not assessed. The OR stated:

> "Public comments also raised that a connection to the north-east would be preferred, linking to the roundabout to the west of Ikea. This roundabout is in situ and has a junction head already installed. Whilst this additional connection would be welcomed,

> there is third-party land between the connecting points, with this land intended for employment use as set out in the Newcourt Masterplan.
>
> Comments have been submitted on the lack of contact with the third-party landowner, however, this would fall outside the matters considered with this planning application. Comments from the public also referenced a 2021 meeting in which DCC Highways commented that this proposal was 'crying out' for a link to the north-east. In relation to this, the submitted scheme with access via Old Rydon Lane is found to be acceptable to the Highway Authority. It is therefore considered that the lack of a connection point to the north-east is not a suitable reason for refusal of this proposal, with suitable access provided….."

24. On receipt of the OR, the Partnership, through McMurdo, submitted a letter dated 6 February 2023 which stated that the "third party land" referred to in the report for connecting the site to the Newcourt Way roundabout is our client's and it is certainly available. They would like to negotiate but no one has contacted them. The letter concluded that Devon CC "has been bending over backwards to squeeze traffic into Old Rydon Lane … simply to help the developer to avoid the costs of the proper connection".

25. At the Planning Committee meeting on 8 February 2023, individual Members raised concerns about the access via Old Rydon Lane rather than onto the A379 at the Ikea roundabout. A motion to defer the application for a review of options for the highway network was passed.

26. On 14 February 2023, IP1 sent a letter to the Defendant alleging that the Partnership was using the Wynards and Poultons land to "impose a ransom burden on the development proposed (i.e. one third of the development value of the land)". It considered that there was no prospect of the development being implemented if access had to be via the Ikea roundabout. Alternatively, the cost of the ransom would "significantly reduce the level of S106 benefits that are sought", for example, affordable housing provision.

27. Neither IP1 nor the planning officer discussed with the Partnership whether the Wynards and Poultons land was in fact available, and if so, its likely cost.

28. The planning officer submitted a further OR to the Planning Committee at its meeting on 28 March 2023. He summarised IP1's letter dated 14 February 2023, and then made the following "observations":

> "The statement regarding the use of third party land sets out clearly that the proposed access strategy utilising Old Rydon Lane is considered to be suitable by the Highway Authority and access to the north-east is not required to provide acceptable access. A connection point will be created to the site boundary, however it is not possible to place conditions requiring use of third party land outside their ownership. The cost of the third party land was noted as being a third of the development value

> of the land, although exact financial details of this have not been provided to the Council. This cost would limit the ability of the developer to provide the S106 contributions (e.g. affordable housing, medical or educational contributions) and this should be given weight when making a decision on this development.
>
> In conclusion, it is considered that as the proposed access has been through a Road Safety Audit and found acceptable by the Highway Authority the access matters are acceptable. Whilst the use of third party land for a connection would be beneficial it is not possible [to] require this through the planning system and measures are being provided to the site boundary should the third party land come forward for development.
>
> On balance, it is considered that the development in its current form is acceptable in relation to the access matters raised in the deferral and is therefore recommended for conditional approval, subject to the S106 agreement."

29. In the light of this report, the Planning Committee voted in favour of the recommendation to grant outline planning permission.

30. Planning permission was granted on 31 July 2023.

Legal framework

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

The development plan and material considerations

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

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Decision making

33. In *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at [99] – 100], Hallett LJ considered the scope of the duty to carry out a sufficient inquiry, as follows:

> "**Duty to carry out sufficient inquiry/Tameside duty**
>
> 99. A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, where he said (at page 1065B): "*The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*".
>
> 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 upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).
>
> 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 (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).
>
> 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 had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R(Khatun) v Newham LBC* (*supra*) at paragraph [35]).
>
> 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 (*per* Laws LJ in (*R (London Borough of Southwark) v Secretary of State for Education* (*supra*) at page 323D).
>
> 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 *(R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)."

34. The public law requirement to take into account material considerations was considered by the Supreme Court in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52, per Lord Hodge and Lord Sales, at [116] – [122]. A decision-maker is required to take into account those considerations which are expressly or impliedly identified by statute, or considerations which are "obviously material" to a particular decision that a failure to take them into account would not be in accordance with the intention of the legislation, notwithstanding the silence of the statute. The test whether a consideration is "so obviously material" that it must be taken into account is the *Wednesbury* irrationality test.

35. The test for irrationality was described by the Divisional Court (Leggatt LJ and Carr J.) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649:

> "98. …. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is 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 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233–234. 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: see e.g. *Boddington v British Transport Police* [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was 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."

Challenges to a planning officer's report

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

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's

> decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

37. Where a local planning authority resolves to approve the recommendation of an officer's report, it can be assumed that they accepted the reasoning of that report (*R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061; [2017] 1 WLR 411 per Lewison LJ at [7]).

Ground 1

Claimants' submissions

38. The effect of the access scheme on the amenities of existing residents was a matter to which the Defendant had to have regard under the development plan, and it was an obviously material consideration. The Defendant ought to have appraised and assessed the likely impacts of IP1's access scheme on Mrs Pratt and other residents in Old Rydon Lane, and weighed them in the planning balance, but it failed to do so.

39. Devon CC failed to discharge its statutory duty under section 122 of the Road Traffic Regulation Act 1984 ("RTRA 1984") to have regard to the desirability of securing and maintaining reasonable access to premises and expeditious and convenient movement of traffic. It provides:

> "122(1) It shall be the duty of every strategic highways company and local authority upon whom functions are conferred

> by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway ……
>
> (2) The matters referred to in subsection (1) above as being specified in this subsection are—
>
> (a) the desirability of securing and maintaining reasonable access to premises;
>
> (b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run; …."

40. This statutory duty prompts questions as to the amenity of those whose accesses are affected, particularly as to the convenience of such use of the public highway as remains. It also prompts questions as to the effects on locational sustainability.

41. IP1's TA was also inadequate because it did not assess the effects of its access scheme on existing residents.

42. Given the absence of advice on the impact of the access scheme on existing residents, from Devon CC and IP1, the Defendant ought to have discharged its *Tameside* duty to investigate the likely impacts of IP1's access scheme on Mrs Pratt and other residents in Old Rydon Lane before making its decision.

43. The OR failed to grapple adequately or at all with the impacts of the proposed access scheme on Mrs Pratt and other residents, and failed to give any or any adequate reasons as to why such impacts were acceptable. The OR was, therefore, materially misleading by omission.

IP1's submissions

44. The Claimants' complaint that Devon CC's consultation response failed to give effect to its duty under section 122 RTRA 1984, and that this error infected the Defendant's decision-making, was an impermissible collateral challenge to the acts or omissions of Devon CC. The Claimants could and should have commenced a judicial review claim against Devon CC if they wanted to rely on this point. A local highways authority's consultation response is amenable to judicial review; see *R (Swainsthorpe Parish Council v Norfolk County Council* [2021] EWHC 1014 (Admin).

45. Absent such challenge, the Defendant was entitled to proceed on the basis that Devon CC had complied with its legal obligations: see *R (Noble Organisation Ltd) v Thanet DC* [2005] EWCA Civ 782, [2006] 1 P & CR 13. It is not open to the Claimants to use

this judicial review claim to advance a collateral challenge to acts or omissions of Devon CC.

46. Section 122 RTRA 1984 is a highways provision which was not engaged by the Defendant's grant of planning permission under the planning legislation. However, section 122 RTRA 1984 will be engaged by Devon CC's function of making a TRO, to give effect to IP1's access scheme. It was rational and lawful for the Defendant to leave consideration of the factors in section 122(2) RTRA 1984 - the desirability of securing and maintaining reasonable access to premises and the effect on the amenities – to Devon CC in the course of the TRO process, which includes consultation.

47. Alternatively, section 31(2A) of the Senior Courts Act 1981 is engaged. Even if the OR had considered the amenity of existing residents, it is highly likely that the decision would have been the same, namely, that planning permission would have been granted subject to the completion of a TRO in respect of IP1's access scheme.

Conclusions

48. Although this was an application for outline planning permission, IP1 also applied for the highway access scheme for the proposed development to be determined at this stage. It was not a reserved matter to be determined at a later date. In determining the application, the Defendant was required by section 70(2) TCPA 1990 and section 38(6) PCPA 2004, to have regard to the provisions of the development plan which expressly required the Defendant to have regard to detriment to local amenity and the safety and convenience of the local and trunk road network: see Policy H2 of the Local Plan and Policy CP4 of the Core Strategy. Furthermore, in my judgment, the availability of highway access to and from the homes of existing residents of Old Rydon Lane, in particular any loss of amenity, was obviously a material consideration, applying the principles in *Friends of the Earth*. However, the planning officer failed to assess these matters in the ORs, or weigh them in the planning balance.

49. Unfortunately, Devon CC decided not to participate in these proceedings and therefore the Court has no explanation for its undisputed failure to consider the availability of highway access and loss of amenity for the existing residents of Old Rydon Lane in its consultation response. This was a statutory consultation response, in its capacity as the highways authority, and therefore section 122 RTRA 1984, which expressly requires such matters to be considered in the performance of its statutory functions, appears to be engaged. But even if it was not engaged, the availability of highway access and loss of amenity was a relevant consideration for Devon CC to take into account when making its consultation response.

50. It may be that Devon CC did not consider the availability of highway access and loss of amenity for existing residents because it was assessing IP1's TA, which made no mention of these matters.

51. However, the objections made by Mrs Pratt and others put the Defendant on notice that existing residents were very concerned about the impacts of IP1's access scheme, in particular, the partial closure of Old Rydon Lane and the introduction of a one way street. The Defendant was obliged to have regard to these matters under the development plan, and because they were a material consideration. In the absence of

advice from IP1 or Devon CC, the Defendant ought to have discharged its *Tameside* duty to undertake further investigations. The effects of IP1's access scheme on residents ought to have been assessed, for example, increased length and circuitous routes for typical journeys, the degree of inconvenience for residents, and consideration given to ways of mitigating adverse effects. Access arrangements for public services, including emergency services, ought also to have been appraised. In my view, the planning officer could easily have asked IP1 and Devon CC if they could provide further responses addressing these matters. It is common practice for a planning officer to ask applicants for planning permission and statutory consultees for further information. I cannot see any legal foundation for Mr Banner's submission that the Defendant was entitled to assume that Devon CC had complied with its obligations in making its consultation response and so no further enquiry was needed. I accept the Claimants' submission that the Defendant's failure to investigate these matters further was a breach of its *Tameside* duty, as no reasonable planning authority could have been satisfied that it possessed the information necessary to make its decision (see *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at [99] – 100]).

52. In the event, neither of the two ORs to the Planning Committee addressed the impact of the proposed access scheme on those who presently use Old Rydon Lane for access to and from their homes. Mrs Pratt's concerns and objections were not addressed in the officer's advice and assessment of the planning merits.

53. I do not accept Mr Banner's submission that the Defendant was not required to consider the adverse impacts of the access scheme on existing residents because, if planning permission was granted, those matters would be considered by Devon CC as part of the TRO process, which would be required to implement the access scheme. As stated above, the Defendant was under a statutory obligation to have regard to those matters as required by the development plan, and because they were a material consideration. Those matters should have been assessed and weighed in the planning balance, as part of the decision-making process, not after the decision has been made. Once the Defendant has decided to grant planning permission, the highway authority cannot lawfully stand in the way of that decision, even if it disagrees with it: see *R v Warwickshire CC ex parte Powergen plc* [1998] 75 P & CR 89, per Simon Brown LJ at 94-95.

54. I am not persuaded by Mr Banner's submissions that this is an impermissible collateral challenge to the acts or omissions of Devon CC. In principle, it was open to the Claimants to make a legal challenge to Devon CC's consultation response after it was issued on 2 November 2022, but it was also open to them to adopt the more sensible approach of communicating their views to the Defendant during the consultation process, and awaiting the Defendant's substantive decision and grant of planning permission in the following year.

55. The Claimants' legal challenge is to the Defendant's failure properly to investigate and assess the adverse impacts of IP1's access scheme on existing residents, in the absence of any advice from Devon CC or IP1. It is not a legal challenge to the acts or omissions of Devon CC. Therefore it is clearly distinguishable from *R (Noble Organisation Ltd) v Thanet DC* in which the Court held that the appellant was seeking to go behind the formal validity of the two outline permissions when the time limit for challenging them had expired.

56. For these reasons, Ground 1 succeeds.

Ground 2

Planning Practice Guidance ("PPG")[1]

57. Both counsel relied upon the following passage from the PPG:

> "Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – ie prohibiting development authorised by the planning permission or other aspects linked to the planning permission (eg occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure). Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission."

Claimants' submissions

58. The Newcourt Masterplan intended access to and from the Site to be via Newcourt Way, and the spur on the Ikea roundabout was built for this purpose. This was an important material consideration in the decision-making process, to which the OR and the Defendant failed to have proper regard.

59. The OR informed the Planning Committee that the Masterplan access scheme was not available other than by payment of a ransom of one third of the value of the Site, which would limit IP1's ability to provide contributions to affordable housing, medical and school contributions under the agreement made pursuant to section 106 TCPA 1990. It was not possible for the Council to impose conditions requiring use of third party land. This advice was materially misleading.

60. The Defendant failed to discharge its *Tameside* duty to investigate whether the Wynards and Poultons land was available for sale, and if so, on what terms.

IP1's submissions

61. The Claimants have mischaracterised the advice given in the OR. The officer's advice was not that "it is not possible to place a Grampian condition" (Statement of Facts and Grounds, paragraph 48). The advice was that "it is not possible to place conditions requiring use of third party land outside their ownership". That is a correct statement

[1] Paragraph 009 Reference ID: 21a)

of the law. Grampian conditions are different as they do not require anything; they are in negative terms. The distinction is summarised in the PPG.

62. The planning officer and the Planning Committee judged IP1's proposed access scheme to be acceptable. Therefore there was no legal obligation to consider alternative access arrangements: see the summary of the case law on alternative sites in *R (Substation Action Save East Suffolk Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 3177 (Admin), per Lang J. at [209] – [214]. Planning permission ought not be refused for an acceptable development on the basis that an alternative could be even more acceptable. Furthermore, planning conditions may only be imposed where they are necessary to make the development acceptable.

63. Alternatively, section 31(2A) of the Senior Courts Act 1981 is engaged. IP1's access scheme had already been found to be acceptable, and therefore it is highly likely that the decision would have been the same, even absent the errors in the OR advice identified by the Claimants.

Conclusions

64. The Defendant has, for many years, proposed and planned for access to the Site from the north via the A379 and Topsham Road (see paragraphs 11 – 14 of my judgment). Most recently, the Newcourt Masterplan provided in 2010:

> "The primary highway access to the Newcourt Masterplan area will be the new spine road that links the A379 with Topsham Road …. Old Rydon Road will be managed with the aim of avoiding additional traffic using this route to access the Masterplan area …."

65. The new spine road (Newcourt Way) has since been constructed, together with a roundabout (the Ikea roundabout). It was designed, at the request of the Defendant and Devon CC, specifically to accommodate the future traffic from allocated sites in the Newcourt area (including this Site), by widening Newcourt Way from the Ikea roundabout to the A379 junction, and providing a spur for future access to the Ikea roundabout for development from the west, including this Site.

66. In the light of this history, which meant that, exceptionally, the two local authorities had already identified an appropriate access scheme for the Site, the Newcourt Masterplan was obviously a material consideration when the Defendant was considering IP1's application. Indeed, the OR acknowledged it as a material consideration. Therefore I cannot accept Mr Banner's submission that there was no legal obligation to consider it.

67. IP1's access scheme departed significantly from the Masterplan's access scheme. The partial closure of Old Rydon Lane; the use of Old Rydon Lane for access and egress to and from the Site; and the introduction of a one way system were only to be found in IP1's access scheme. The OR did not consider or explain what weight should be given to these material departures. I agree with the Claimants' submission that the OR, and therefore the Planning Committee did not give proper regard to the substance of the Newcourt Masterplan.

68. Instead, the focus of the OR's advice to the Planning Committee was on the feasibility of implementing the Masterplan's access scheme. In the first OR, public comments in favour of the Masterplan's access scheme were dismissed on the basis that "there is third-party land between the connecting points, with this land intended for employment use". The advice in the second OR is set out in full at paragraph 28 above. In summary, members were given a summary of the statement from IP1, and the planning officer then advised:

    i) "…. it is not possible to place conditions requiring use of third party land outside their ownership";

    ii) "The cost of the third party land was noted as being a third of the development value of the land, although exact financial details of this have not been provided to the Council";

    iii) "This cost would limit the ability of the developer to provide the S106 contributions (e.g. affordable housing, medical or educational contributions) and this should be given weight when making a decision on this development";

    iv) "While the use of third party land would be beneficial it is not possible to require this through the planning system and measures are being provided to the site boundary should the third party land come forward for development."

69. I accept the Claimants' submission that the planning officer's advice to the Planning Committee was seriously misleading, as set out below.

70. **Errors in sub-paragraphs 68 (i) and (iv) above**. Conditions requiring work on third party land often fail the tests on reasonableness and enforceability. However, the OR should have advised Members that a similar result could be achieved using a Grampian condition which prohibits the development until a specified action has been taken, and that the threshold for Grampian conditions is very low (i.e. where there are no prospects at all of the action in question being performed within the time limit). The advice was therefore misleading.

71. **Error in sub-paragraph 68(ii) above**. There was no evidence to support IP1's assertion that the cost of the Wynards and Poultons land would be one third of the development value of the land. In fact, as the Partnership advised the Defendant by letter dated 6 February 2023, the land was available, the rights to use for access were available and the Partnership was willing to negotiate. According to the McMurdo letter of 12 October 2022, since 2010 the Partnership has invited the Site's owners to discuss future development and access but their offers had been politely declined.

72. **Error in sub-paragraph 68(iii) above**. This builds on the misleading statement on the high price of access, and warns of the risk of loss of the significant financial benefits to be gained from the grant of planning permission. Members would understandably have been influenced by this advice.

73. In my view, it is significant that the Defendant has conceded that its planning officer gave seriously misleading advice to its Planning Committee, in the manner alleged by the Claimants.

74. Although the Planning Committee deferred the application on 8 February 2023, at the request of Members, so that the Masterplan access scheme, and the Partnership's offer of the Wynards and Poultons land could be considered, the planning officer appears only to have consulted IP1, not the Partnership. In my judgment, the Defendant failed to discharge its *Tameside* duty and irrationally failed to contact McMurdo or the Partnership to ask if the Wynards and Poultons land was available, and if so, to find out the asking price.

75. For these reasons, Ground 2 succeeds.

Senior Courts Act 1981

76. In my judgment, section 31(2A) of the Senior Courts Act 1981 is not engaged as the Council needs to re-consider the application for planning permission in accordance with the law, and then exercise its judgment on the issue of access. I am not satisfied that that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred.

Final conclusions

77. The Claimants' claim for judicial review succeeds on Grounds 1 and 2. Grounds 3 and 4 were not pursued.